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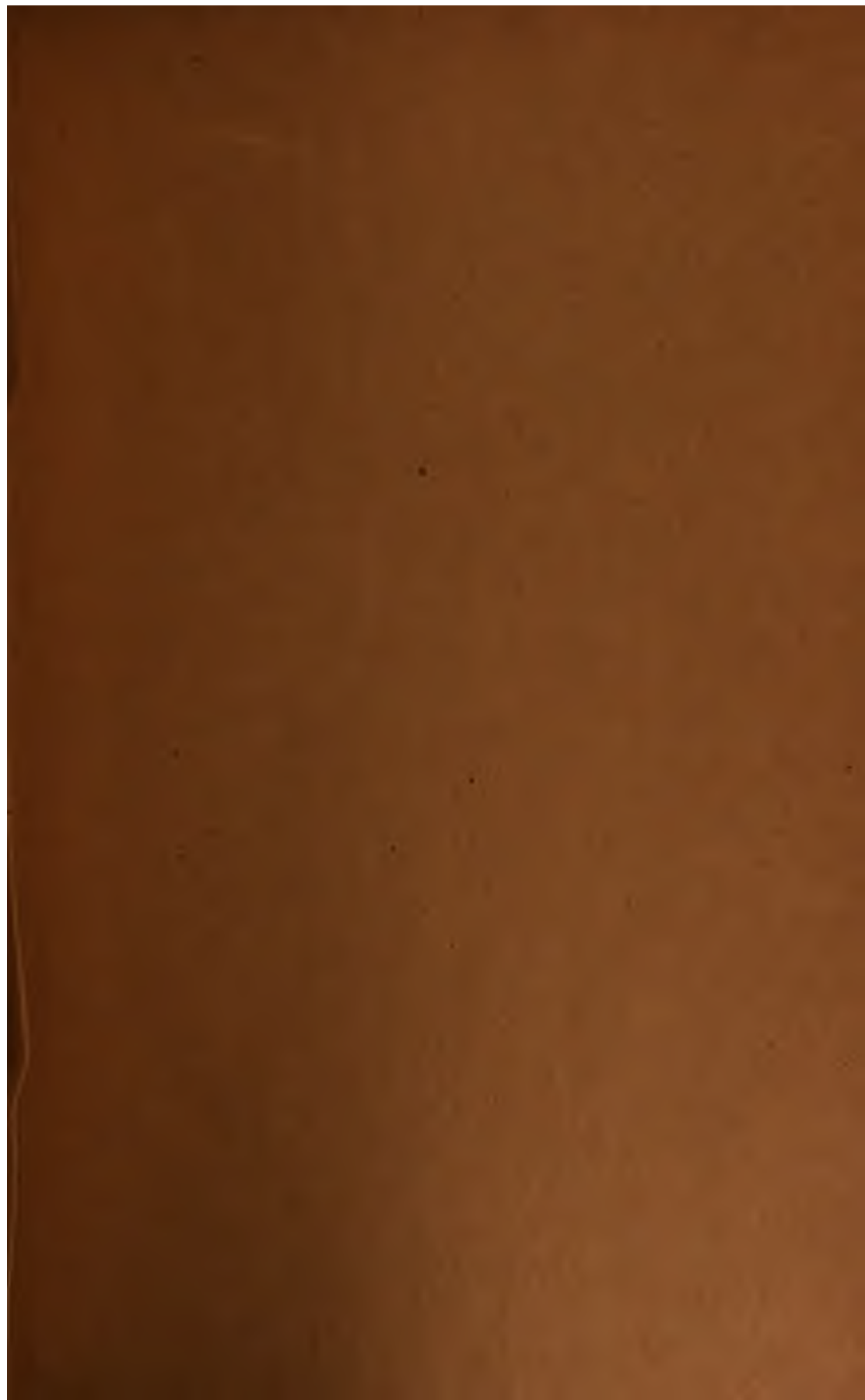


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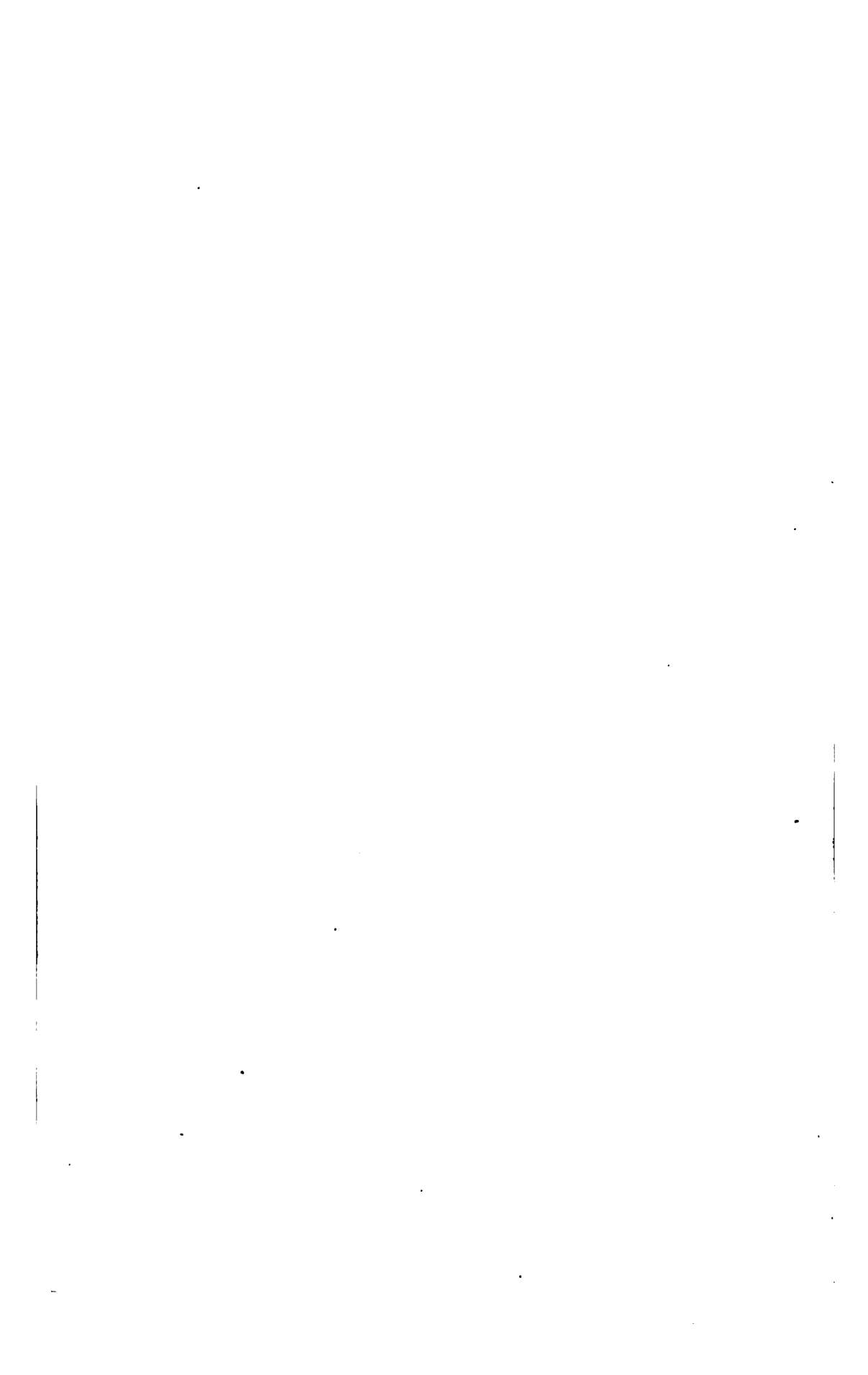
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UNITED STATES

SUPREME COURT REPORTS.

FROM BEGINNING OF VOLUME 131 TO END OF VOLUME 134.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF

THE UNITED STATES,

IN THE

OCTOBER TERMS, 1888, 1889.

COMPLETE EDITION,

WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES,
POINTS AND AUTHORITIES OF COUNSEL, FOOT
NOTES AND PARALLEL REFERENCES,

BY

STEPHEN K. WILLIAMS, LL.D.,

Counselor at Law.

BOOK XXXIII.

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JUSTICES
OF THE
SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,
HON. MELVILLE WESTON FULLER.

ASSOCIATE JUSTICES,

HON. SAMUEL F. MILLER, HON. HORACE GRAY,
HON. STEPHEN J. FIELD, HON. SAMUEL BLATCHFORD,
HON. JOSEPH P. BRADLEY, HON. LUCIUS Q. C. LAMAR.
HON. JOHN M. HARLAN, HON. DAVID J. BREWER.*

ATTORNEY-GENERAL,
HON. WILLIAM HENRY HARRISON MILLER.

SOLICITORS-GENERAL,
HON. GEORGE AUGUSTUS JENKS,†
to May 29, 1889; after that
HON. ORLOW W. CHAPMAN,‡
to Jan. 19, 1890; after that
HON. WILLIAM H. TAFT.¶

CLERK,
JAMES H. MCKENNEY, ESQ.

REPORTER,
J. C. BANCROFT DAVIS, ESQ.

MARSHAL,
JOHN M. WRIGHT, ESQ.

*Commissioned December 16, 1889; sworn in January 6, 1890.

†Resigned.

‡Commissioned May 29, 1889; died January 19, 1890.

¶Commissioned February 4, 1890.

ALLOTMENTS, ETC., OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TERMS OF 1888 AND 1889, TOGETHER WITH THE DATES OF
THEIR COMMISSIONS AND TERMS OF SERVICE, RESPECTIVELY.

(Allotments, May 13, 1889, and March 10, 1890. See Appendix V., Book 32, and Appendix III., herein.)

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM AP- POINTED.	CIRCUITS, 1890.	COMMIS- SIONED.	SWORN IN.
ASSOCIATE JUSTICE HORACE GRAY, Massachusetts.	President ARTHUR.	FIRST. ME., N. H., MASS., RHODE ISLAND.	1881. (Dec. 20.)	1882. (Jan. 9.)
ASSOCIATE JUSTICE SAMUEL BLATCHFORD, New York.	President ARTHUR.	SECOND. VERMONT, CONN., NEW YORK.	1882. (Mar. 22.)	1882. (April 8.)
ASSOCIATE JUSTICE JOSEPH P. BRADLEY, New Jersey.	President GRANT.	THIRD. NEW JERSEY, PENN., DEL.	1870. (Mar. 21.)	1870. (Mar. 23.)
CHIEF JUSTICE MELVILLE W. FULLER, Illinois.	President CLEVELAND.	FOURTH. MD., VA., N. C., W. VA., S. C.	1888. (July 20.)	1888. (Oct. 8.)
ASSOCIATE JUSTICE LUCIUS Q. C. LAMAR, Mississippi.	President CLEVELAND.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1888. (Jan. 16.)	1888. (Jan. 18.)
ASSOCIATE JUSTICE DAVID J. BREWER, Nebraska.	President HARRISON.	SIXTH.* KY., TENN., OHIO, MICH.	1889. (Dec. 18.)	1890. (Jan. 6.)
ASSOCIATE JUSTICE JOHN M. HARLAN,* Kentucky.	President HAYES.	SEVENTH.* IND., ILL., WIS.	1877. (Nov. 29.)	1877. (Dec. 10.)
ASSOCIATE JUSTICE SAMUEL F. MILLER, Iowa.	President LINCOLN.	EIGHTH. MINN., IOWA, MO. KAN., ARK., NEB., COLORADO.	1862. (July 16.)	1862. (Dec. 1.)
ASSOCIATE JUSTICE STEPHEN J. FIELD, California.	President LINCOLN.	NINTH. CALIFORNIA, ORE- GON, NEVADA.	1863. (Mar. 10.)	1863. (Dec. 7.)

*See Appendix V., Book 32, Allotment of May 13, 1889, which stood until March 10, 1890.

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Change the page figures "631" on page opposite page 600 to "601."

Change the page figures "673" on page opposite page 636 to "637."

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1. The first part of the paper is devoted to a discussion of the general principles of the theory of the structure of the atom. It is shown that the structure of the atom is determined by the laws of quantum mechanics, which are based on the principle of the uncertainty of the position and momentum of the particles. The structure of the atom is therefore not a fixed one, but a probabilistic one, which can be described by the wave function.

2. The second part of the paper is devoted to a discussion of the structure of the nucleus. It is shown that the structure of the nucleus is determined by the laws of quantum mechanics, which are based on the principle of the uncertainty of the position and momentum of the particles. The structure of the nucleus is therefore not a fixed one, but a probabilistic one, which can be described by the wave function.

3. The third part of the paper is devoted to a discussion of the structure of the molecule. It is shown that the structure of the molecule is determined by the laws of quantum mechanics, which are based on the principle of the uncertainty of the position and momentum of the particles. The structure of the molecule is therefore not a fixed one, but a probabilistic one, which can be described by the wave function.

4. The fourth part of the paper is devoted to a discussion of the structure of the crystal. It is shown that the structure of the crystal is determined by the laws of quantum mechanics, which are based on the principle of the uncertainty of the position and momentum of the particles. The structure of the crystal is therefore not a fixed one, but a probabilistic one, which can be described by the wave function.

5. The fifth part of the paper is devoted to a discussion of the structure of the solid. It is shown that the structure of the solid is determined by the laws of quantum mechanics, which are based on the principle of the uncertainty of the position and momentum of the particles. The structure of the solid is therefore not a fixed one, but a probabilistic one, which can be described by the wave function.

6. The sixth part of the paper is devoted to a discussion of the structure of the liquid. It is shown that the structure of the liquid is determined by the laws of quantum mechanics, which are based on the principle of the uncertainty of the position and momentum of the particles. The structure of the liquid is therefore not a fixed one, but a probabilistic one, which can be described by the wave function.

7. The seventh part of the paper is devoted to a discussion of the structure of the gas. It is shown that the structure of the gas is determined by the laws of quantum mechanics, which are based on the principle of the uncertainty of the position and momentum of the particles. The structure of the gas is therefore not a fixed one, but a probabilistic one, which can be described by the wave function.

8. The eighth part of the paper is devoted to a discussion of the structure of the plasma. It is shown that the structure of the plasma is determined by the laws of quantum mechanics, which are based on the principle of the uncertainty of the position and momentum of the particles. The structure of the plasma is therefore not a fixed one, but a probabilistic one, which can be described by the wave function.

9. The ninth part of the paper is devoted to a discussion of the structure of the vacuum. It is shown that the structure of the vacuum is determined by the laws of quantum mechanics, which are based on the principle of the uncertainty of the position and momentum of the particles. The structure of the vacuum is therefore not a fixed one, but a probabilistic one, which can be described by the wave function.

10. The tenth part of the paper is devoted to a discussion of the structure of the universe. It is shown that the structure of the universe is determined by the laws of quantum mechanics, which are based on the principle of the uncertainty of the position and momentum of the particles. The structure of the universe is therefore not a fixed one, but a probabilistic one, which can be described by the wave function.

CASES

ARGUED AND DECIDED

IN THE

S U P R E M E C O U R

OF THE

UNITED STATES

IN

OCTOBER TERM, 1888.

Vol. 131.

U. S., Book 83.

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OCTOBER TERM, 1888,
AND REPORTED HEREIN,
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THE DECISIONS
OF THE
Supreme Court of the United States,
AT
OCTOBER TERM, 1888.

Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

GEORGE ALLMAN, *Appt.*,

v.
UNITED STATES.

(S. C. Reporter's ed. 31-36.)

*Increased mail service—Act of April 7, 1880—
forfeitures for failure to carry the mail.*

The proviso in the Act of April 7, 1880, limits the discretion of the Postmaster-General to expedite the service of carrying the mails to 50 per cent of the rate fixed in the original contract.

The rate of pay established in the contract, as originally let, not the amount of pay expressed therein, is the basis or unit of computation for such increased service.

Forfeitures imposed by the Postmaster-General, for failure of the contractor to carry the mail within the prescribed time, are within the discretion of the Postmaster-General, and are not subject to review by this court.

[No. 214.]

Argued March 19, 1889. Decided May 13, 1889.

APPPEAL from a judgment of the Court of Claims, sustaining a demurrer to a petition for balance due for services for carrying the United States mails. *Reversed.*

Statement by Mr. Justice Lamar:

The appellant, George Allman, on the 31st of January, 1885, filed a petition in the Court of Claims against the United States asking judgment for the sum of \$3,607.18, which he alleged was the balance due for services rendered by him under two contracts for carrying United States mail from July 1, 1878, to July 1, 1882.

It appears from the statements of the petition that the appellant carried the mails for four years over each of two routes, No. 46,210 and No. 46,211, under these contracts entered into with the Postmaster-General, and in conformity with the orders subsequently issued by him. In the services were being rendered, the Postmaster-General, in the exercise of authority expressly reserved in these contracts, by successive orders, increased the number of trips made on both routes; on the first by rais-

ing the number from six to seven trips per week (afterwards reduced back to six), and on the second by raising the number from one to seven trips per week. For this increase he allowed the contractor a *pro rata* increase of compensation; raising the pay on the first route to a rate of \$5,238.83 per annum for increasing the trips from six to seven a week and on the second route \$4,898 for the increase from one to seven trips a week. This increased compensation was paid by the Department, and is not involved in this litigation, except as incidental to another demand hereinafter stated. On both these routes the Postmaster-General increased the rate of speed by shortening the running time between the termini; on the first, from 36 to 28 hours per trip, and on the second, from 34 to 18 hours per trip. In consideration of this increased expedition, additional pay was allowed the contractor on the first route, \$2,619.16 per annum, and on the second route, \$2,446.50 per annum, for the additional stock and carriers thus rendered necessary. This allowance was computed at the rate of 50 per cent of the annual sum paid, in accordance with the contract, for the services expedited, and was less than the proportionate increase of the cost of the service demanded by the changes in the schedule, according to the sworn statements of the contractor.

On the first of August, 1881, the Postmaster-General promulgated an order reducing all the allowances for the increased expedition heretofore recited, and directed that the 50 per cent paid to the contractor for such service should be computed upon the service rendered at the time the contracts were entered into before any additional trips had been ordered on either route, and not upon the service as actually expedited. This order making the reduction did not change the number of trips on either of the routes. The contractor was still required to make daily trips on the second route, and to make these trips upon the expedited schedule. The effect of the order was simply to reduce his compensation in the case of the first route to 50 per cent upon the pay of six trips only, instead of seven per week; and in the case of the second route, its effect was to allow him the compensation at the rate of 50 per cent upon the

pay for one trip per week, although he continued to make daily trips in accordance with the expedited schedule.

The difference between the amounts paid to the claimant under this last order and the amount he would have received under the allowance fixed by the former orders, according to the stipulation of the contracts, constitutes the principal demand in the present suit. A short time after the number of trips was increased on the first route from six to seven per week it was reduced back to six, and one month's extra pay allowed to the contractor as indemnity for the discontinuance. The petition sets up a demand for the fifty per cent thereon, which has been withheld by the Postmaster-General.

Another claim set up in the petition is for the amount deducted, as forfeitures alleged to be wrongfully imposed by the Postmaster-General, for failures by the contractor to cause the mail to be carried within the time prescribed. The petition was demurred to, and this appeal is from the judgment of the court sustaining the demurrer.

Messrs. A. J. Willard and Sam'l M. Lake for appellant.

Mr. Robert A. Howard, Assist. Atty-Gen. for appellee.

Mr. Justice Lamar delivered the opinion of the court:

The contracts in question were made in conformity with the provisions of §§ 3960 and 3961 of the Revised Statutes. Section 3960 is as follows:

"Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service; and when any such additional service is ordered, the sum to be allowed therefor shall be expressed in the order, and entered upon the books of the Department; and no compensation shall be paid for any additional regular service rendered before the issuing of such order."

Section 3961 provides:

"No extra allowance shall be made for any increase of expedition in carrying the mail unless thereby the employment of additional stock and carriers is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution."

All the orders made by the Postmaster-General, subsequent to the execution of these contracts and whilst the service was in course of performance, were made after the Act of Congress of April 7, 1880, which contained this proviso:

"*Provided*, That the Postmaster-General shall not hereafter have the power to expedite the service under any contract either now existing or hereafter given, to a rate of pay exceeding fifty per centum upon the contract as originally let." (21 Stat. at L. 72.)

The Attorney-General, construing the pro-

vision last quoted, in a letter to the Postmaster-General, dated July 20, 1881, held that "The original letting, and not any subsequent increase of service and pay," was made "the standard of limitation." It was in conformity with this opinion that the Postmaster-General withheld from the appellant the 50 per cent on the expedited service under his contract.

We think it is clear that the language of the proviso may be interpreted in accordance with the original orders of the Post Office Department and pursuant to the terms of the contracts sued on. Those orders allowed the contractor, for expedition, 50 per cent additional upon the sum paid, for the service actually performed. These allowances did not exceed 50 per cent of the rate of compensation fixed by the contracts as originally let, though they did exceed 50 per cent of the sum named in those contracts. The proviso in express terms refers to the "rate of pay" established in the contracts as originally let; and it is the rate of pay, not the amount expressed in the first contract, which is manifestly intended to be the unit of computation.

Our construction of this legislation, considered *in pari materia* with the provisions of §§ 3960 and 3961, is this: Section 3960 treats the rate of pay for additional service as definitely fixed by the original contract, and under its provisions the compensation, which the contractor is to receive for each extra trip placed upon his route, is to bear an exact proportion to the additional service performed; that is, it is to be based upon the rate established by the original contract. Section 3961 has direct reference to the compensation to be paid for the expedited service, and expressly provides that, in computing such compensation, the rate of pay fixed in the original contract is to be taken as the standard of limitation, which shall not be exceeded. These two sections left it within the discretion of the Postmaster-General to expedite the service to an indefinite extent, and to allow a *pro rata* compensation therefor. The proviso added in 1880 was clearly intended to limit that discretion by providing that thereafter he should not have authority to expedite the service, under any contract, beyond 50 per cent of the rate fixed in the original contract. The circumstances under which contracts for the transportation of the mails are awarded, we think, sustain this construction. Such awards are made after public advertisement, and upon competitive bids; and it is presumed that the contract price is at as low a rate as can be made consistently with a proper performance of service. In the present case, it appears from the record that the actual cost of the expedition ordered upon the single one of the seven weekly trips upon the second route was more than 50 per cent of the aggregate sum named in the original contract. The interpretation on which the last order is based assumes that Congress intended to leave with the Postmaster-General the power to exact from a contractor seven times the service stipulated in the contract as originally let, and to allow but 50 per cent compensation on the amount named in that contract.

The construction contended for by the appellant is in harmony with the previous legisla-

tion on the subject, and the established policy of the mail service, and is entirely equitable.

As to so much of the demand as is claimed in the petition to be due to the petitioner under the contracts, and as to the 50 per cent of one month's extra pay, we hold and decide that the Court of Claims erred in sustaining the demurrer.

But with regard to the claim for the amount deducted as forfeitures imposed by the Postmaster-General, because the contractor failed to cause the mail to be carried between the termini within the time prescribed, it is considered that these forfeitures were made by virtue of the power conferred upon the Postmaster-General by the statutes, and also recognized by the terms of the contracts to be within his discretion, and are not subject to review by this court. *Chicago M. & St. P. R. Co. v. United States*, 127 U. S. 406, 407 [32: 180]; *Eastern R. Co. v. United States*, 129 U. S. 391, 396 [32: 730, 732].

As far as the claim for the deduction of the amount of these forfeitures is concerned, the demurrer was properly sustained.

The judgment is reversed, and the case remanded for action in accordance with the principles of this decision.

WALLACE DOUGLASS, *Plff. in Err.*,

v.
CHARLES W. LEWIS ET UX.

(See S. C. Reporter's ed. 75-88.)

Covenant in deed—construction of statute—covenants of warranty and seisin.

1. The introduction into a deed of an express covenant of warranty has the effect to deny to the purchaser the benefit of the statutory covenant of seisin under the laws of New Mexico.
2. The words of a deed are to be taken most strongly against the party using them; but statutes, in derogation of common law, are to be construed strictly.
3. The covenant of warranty and that of seisin or of right to convey are not equivalent covenants. Defect of title will sustain an action upon the latter, while disturbance of possession is requisite to recover upon the former.

[No. 226.]

Argued April 3, 1889. Decided May 13, 1889.

IN ERROR to the Supreme Court of the Territory of New Mexico, to review a judgment of the Supreme Court of that Territory reversing the judgment of the District Court for damages for a breach of the covenant of seisin. *Affirmed.*

Statement by Mr. Chief Justice Fuller:

Dougllass brought his action in the District Court of the Second Judicial District of the Territory of New Mexico, September 11, 1883, for the breach of an alleged covenant of seisin in a deed made by Lewis and his wife to him, purporting to convey the title to one hundred and sixty acres of land. The petition averred that the defendants by their deed of May 13, 1882, "did convey and warrant to the plaintiff,

his heirs and assigns, in fee simple, certain real estate," describing it, and then continued, "and the defendants did by their said deed, for themselves, their heirs and personal representatives, covenant with the plaintiff, his heirs and assigns, amongst other things, that at the time of the making, ensembling, and delivery of said deed, and 'at the time of the execution of said conveyance,' they, the said defendants, were lawfully seized of an indefeasible estate, and in possession of a title in fee simple in and to the said property, and then had good right and full power to convey the same. Nevertheless, plaintiff avers that the said tract of land in said deed described, and by said defendants bargained and sold to said plaintiff, was not the property of said defendants, and at the time of the making and delivery of said deed they, the said defendants, were not lawfully seized of an indefeasible estate in fee simple in and to said real estate, nor had they then good right and full power to convey the same, but, on the contrary thereof, the Government of the United States had, at the time of the making and delivery of said deed, and still has, lawful right and title to said real estate; and plaintiff avers that in consideration of the conveyance and sale of said lands in said deed described and set forth, he paid to said defendants the sum of five thousand three hundred and thirty-three dollars and thirty-three cents (\$5,333.33); that he, said plaintiff, has further expended and laid out large sums of money in building houses upon and improving said land, to wit, four thousand dollars (\$4,000); and so the plaintiff says that they, said defendants, have not kept the said covenants according to the true intent and meaning of said deed, and according to the statute in such case made and provided, but have broken the same, to the damage of plaintiff in the sum of ten thousand dollars (\$10,000)."

Profert of the deed was made by the declaration, and defendants filed a demurrer, October 1, 1883, craving oyer of the condition of the said deed and covenant, which being read and heard, they insisted that the declaration and the matters therein contained, etc., were insufficient in law. Pleas were also filed alleging that the deed was not defendants' deed; denying that the defendants covenanted with the plaintiff that they were lawfully seized; and averring that it was not true that they had not kept their covenants. Subsequently, and on the 19th day of October, an amended special demurrer to the declaration was filed, averring "that the said deed upon oyer contains no such covenant as the one alleged in the said declaration of the plaintiff—that is to say, that the said deed having some express covenants therein contained, and among which is not the covenant declared upon in the said plaintiff's declaration, to wit, no covenant of seisin, or 'that the said covenantors were at the time of making the said deed seized of an indefeasible title in fee simple' to the lands conveyed, and inasmuch as the parties have fully expressed their intention and agreements at the time of making the said deed by the express covenants therein contained, there can be none added by construction or otherwise; and, further, defendants say the said declaration alleges no eviction and therefore he, the said plaintiff,

ought not to have and maintain his said action," etc.

This, upon argument, was overruled November 3, 1883, the District Judge filing his opinion thereon January 8, 1884, which thus concludes: "In the case at bar I am of opinion that the express covenant of warranty is independent of the covenant of seisin implied by the statute, and that an action may be maintained upon the latter, and can only be met by plea and proof of good title in the grantor at the time of the execution of the deed."

On the 16th of May, 1884, the defendants filed two pleas, alleging, in the first, that at the time of making the deed the grantors were seised and possessed of the said real estate, with full power and authority to convey according to the effect of the deed; and, in the second, that at the time of making the said deed the grantors "were lawfully seised of an indefeasible estate and in possession of a title in fee simple in and to the said real property, and then had good right and full power to convey the same" according to the form and effect of said deed. The plaintiff demurred to the first of these pleas, the court sustained the demurrer, and the case went to trial on the issue made up on the second plea. Evidence was given on behalf of the plaintiff tending to show that the United States had assumed ownership and control over all the land in controversy and had disposed of a portion of the same, and that the defendants claimed that the land had been granted by Spain or Mexico to one Sandoval, who devised it to one of his relatives, from whom it had descended to the grantor of defendant Lewis, but that the claim of Sandoval had never been presented to any tribunal or officer of the United States for adjudication. All the documentary evidences of title offered on defendants' behalf, except the will of Sandoval and papers relating thereto, bore date in 1879 or subsequent thereto. The oral testimony tended to show that Sandoval and his descendants were in possession of the land for a number of years, probably from the date of the Treaty of Guadalupe Hidalgo.

Plaintiff admitted that he was put into possession of the land and had never been disturbed in the possession, and, in effect, that he had never made demand for restoration of the consideration money or what might have been expended for improvements, nor had any demand been made on him to surrender the land prior to the commencement of the suit, nor had he offered to rescind or to restore the land. The court refused to admit the muniments of title relied on by the defendants, and charged the jury as follows: "There is no question of fact in this case for you to pass upon. There are only questions of law which it is the duty of the court to pass upon, and the entire responsibility of passing upon such questions is with the court. The court instructs the jury that it is their duty, under the law and the evidence in this case, to find a verdict for the plaintiff and assess his damages at the sum of \$5,333.33, being the amount of the money paid by him for the land in question." The jury returned a verdict accordingly, and motions for a new trial and in arrest of judgment were made by the defendants and severally overruled, and judgment rendered on the

verdict." The case was carried by appeal to the supreme court of the Territory, which court reversed the judgment of the district court and dismissed the cause, from which judgment of the supreme court the pending writ of error was prosecuted. The supreme court of the Territory held that the effect of the introduction into the deed of an express covenant of warranty is to deny to the purchaser the benefit of the statutory covenant of seisin and said: "As there is no pretense in this case of an eviction or any claim whatever of a breach of the covenant of warranty, it follows that the action cannot be maintained, and that it was error in the court below to order a verdict for the plaintiff, and in overruling the motion in arrest of judgment."

Messrs. J. H. McGowan and C. W. Holcomb, for plaintiff in error:

The warranty found in the deed does not exclude the statutory covenants, but these must be considered as express covenants, having the same effect as though written in full in the instrument.

Alexander v. Schreiber, 10 Mo. 460; *Browning v. Wright*, 2 Bos. & P. 14; *Howell v. Richards*, 11 East, 638; *Bender v. Fromberger*, 4 U. S. 4 Dall. 436 (1: 898); *Funk v. Voneida*, 11 Serg. & R. 109; *Brown v. Tomlinson*, 2 Greene (Iowa) 525; *Hesse v. Stevenson*, 3 Bos. & P. 565; *Gainsford v. Griffith*, 1 Saund. 59; *Smith v. Compton*, 3 Barn. & Ad. 189; *Roebuck v. Dupuy*, 2 Ala. 585; *Gates v. Caldwell*, 7 Mass. 68; *Carver v. Louthain*, 38 Ind. 530; *Kent v. Cantrall*, 44 Ind. 452; *Bush v. Person*, 59 U. S. 18 How. 82 (15: 273).

The statutory covenant of seisin is a general covenant, unrestricted by words found in the second statutory covenant.

Browning v. Wright, 2 Bos. & P. 13; *Duval v. Craig*, 15 U. S. 2 Wheat. 45 (4: 180); *Peters v. Grubb*, 21 Pa. 460; *Rove v. Heath*, 23 Tex. 619; *Morrison v. Morrison*, 38 Iowa, 73; *Sumner v. Williams*, 8 Mass. 162.

The covenant of seisin is broken, if at all, as soon as it is made.

King v. Gilson, 32 Ill. 343; *Ross v. Turner*, 7 Ark. 182; *Abbott v. Allen*, 14 Johns. 248; *Moore v. Merrill*, 17 N. H. 75; *Logan v. Moulder*, 1 Ark. 313.

The plaintiff, in an action on the covenant of seisin, need only declare the breach, and is not required to aver either eviction or damages.

Pollard v. Dwight, 8 U. S. 4 Cranch, 421 (2: 666); *Mitchell v. Hazen*, 4 Conn. 495; *Hamilton v. Wilson*, 4 Johns. 72; *Lot v. Thomas*, 2 N. J. L. 407; *Pringle v. Witten*, 1 Bay, 256; *Share v. Anderson*, 7 Serg. & R. 43.

Messrs. Samuel Shellabarger and J. M. Wilson, for defendants in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

Assuming that defendants in error failed to sustain their plea that they "were lawfully seised of an indefeasible estate, and in possession of a title in fee simple in and to the said real property, and then had good right and full power to convey the same," counsel for plaintiff in error state their position "in the following propositions: 1. The covenant of warranty which is found written in the deed

does not exclude the statutory covenants; these latter must be considered as express covenants, having the same effect as though written out in full in the instrument of conveyance. 2. The statutory covenant of seisin is a general covenant, unlimited by any restrictive words found in the second statutory covenant. 3. The covenant of seisin is broken, if at all, as soon as it is made. 4. The plaintiff is only required to declare its breach, and need neither aver eviction or damages. 5. The burden of proof is on defendant. 6. The measure of damages is the purchase money and interest."

The defendants in error by their deed entered into a general covenant of warranty, but it is claimed that in virtue of the statute they are to be held in addition to a general covenant of seisin, a limited covenant as to incumbrances, and a general covenant of further assurance.

The statute relied on is as follows:

"The words 'bargained and sold,' or words to the same effect, in all conveyances of hereditary real estate, unless restricted in express terms on the part of the person conveying the same, himself and his heirs, to the person to whom the property is conveyed, his heirs and assignees, shall be limited to the following effect: *First.* That the grantor, at the time of the execution of said conveyance, is possessed of an irrevocable possession in fee simple to the property so conveyed. *Second.* That the said real estate, at the time of the execution of said conveyance, is free from all incumbrance made or suffered to be made by the grantor, or by any person claiming the same under him. *Third.* For the greater security of the person, his heirs and assignees, to whom said real estate is conveyed by the grantor and his heirs, suits may be instituted the same as if the conditions were stipulated in the said conveyance." Compiled Laws, New Mexico, 1884, § 2750, p. 1806.

The language used is somewhat ambiguous, arising, as the Supreme Court of the Territory informs us, from the section having been originally enacted in Spanish from English and then retranslated, but we are content with the view of that court that "hereditary real estate" means real estate of inheritance, and "possessed of an irrevocable possession in fee simple" means seised of an indefeasible estate in fee simple.

At common law, in the transfer of estates of freehold by deed, a warranty was implied from the word of feoffment, *dedi*, and from no other word; and from words of bargain and sale merely no covenant was implied in any case.

In 1707, the Statute of 6 Anne, chap. 35, was enacted, of which the 30th section is as follows:

"In all deeds of bargain and sale hereafter enrolled in pursuance of this Act, whereby any estate of inheritance in fee simple is limited to the bargainee and his heirs, the words 'grant, bargain and sell' shall amount to, and be construed and adjudged in all courts of judicature to be, express covenants to the bargainee and his heirs and assigns, from the bargainor for himself, his heirs, executors and administrators, that the bargainor, notwithstanding any act done by him, was at the time
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of the execution of such deed seised of the hereditaments and premises thereby granted, bargained, and sold, of an indefeasible estate in fee simple, free from all incumbrances (rent and services due to the lord of the fee only excepted), and for quiet enjoyment thereof against the bargainor, his heirs and assigns, and all claiming under him, and also for further assurance thereof to be made by the bargainor, his heirs and assigns, and all claiming under him, unless the same shall be restrained and limited by express particular words contained in such deed; and that the bargainee, his heirs, executors, administrators, and assigns, respectively, shall and may, in any action to be brought, assign a breach or breaches thereupon, as they might do in case such covenants were expressly inserted in such bargain and sale."

And in 1715 an Act was passed by the Colony of Pennsylvania, entitled "An Act for Acknowledging and Recording of Deeds," of which the 6th section declared that:

"All deeds to be recorded in pursuance of this Act, whereby any estate of inheritance in fee simple shall hereafter be limited to the grantee and his heirs, the words *grant, bargain, sell*, shall be adjudged an express covenant to the grantee, his heirs and assigns, to wit, that the grantor was seised of an indefeasible estate in fee simple, freed from incumbrances done or suffered from the grantor (except the rents and services due to the lord of the fee), as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed, and that the grantee, his heirs, executors, administrators, and assigns, may in any action assign breaches as if such covenants were expressly inserted."

In *Gratz v. Ewalt*, 2 Binney, 98, the construction of this statute was carefully considered, and Tilghman, *C. J.*, in delivering the opinion, said: "The meaning is not clearly expressed; but I take it to be a covenant . . . that the estate was indefeasible as to any act of the grantor. For if it was intended that the covenant should be that the grantor was seised of an estate absolutely indefeasible, it was improper to add the subsequent words 'freed from incumbrance done or suffered by him.' . . . The words 'seised of an indefeasible estate in fee simple' are to be considered, therefore, as not standing alone, but in connection with the words next following, 'freed from incumbrances done or suffered from the grantor.' I am the more convinced that this was the intention of the Legislature, by comparing the expressions in this Act with the 30th section of the Statute of 6 Anne, chap. 35, which contains provisions on the same subject, and was evidently in the eye of the persons who framed our law. The British statute makes use of more words, and the intention is more clearly expressed. It declares that the words 'grant, bargain and sell' shall amount to a covenant that the bargainor, notwithstanding any act done by him, was at the time of the execution of the deed seised of an indefeasible estate in fee simple, etc. Our law seems intended to express the substance of the British statute in fewer words, and has fallen into a degree of obscurity, which is often the consequence of
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attempting brevity. I can conceive no good reason why our Legislature should have wished to carry this implied warranty further than the British statute did, because it has had effects to annex to words an arbitrary meaning far more extensive than their usual import, and which must be unknown to all but professional men. It might be very well to guard against secret acts of the grantor with which none but himself and those interested in keeping the secret could be acquainted. As for any further warranty, if it was intended by the parties, it was best to leave them to the usual manner of expressing it in plain terms."

The Statute of Anne, the Pennsylvania Act, and the foregoing extract from the opinion of Chief Justice Tilghman, are given by Mr. Rawle in his admirable work on Covenants for Title (5th ed. §§ 282, 283 *et seq.*), and he states that "the construction thus given has never been departed from in Pennsylvania; and it is said by Chancellor Kent (4 Comm. 474) that 'by the decision in *Gratz v. Ewalt* the words of the statute are divested of all dangerous tendency, and that it will equally apply to the same statutory language in other States.'"

The provision upon this subject in the statutes of Alabama, Arkansas, Illinois and Mississippi is substantially the same as in Pennsylvania, and the same construction has been put upon it by the courts. *Stewart v. Anderson*, 10 Ala. 504; *Winston v. Vaughan*, 22 Ark. 72; *Finley v. Steele*, 23 Ill. 56; *Weems v. McCaughan*, 7 Smedes & M. 427. It is contended, however, that the statute of Missouri so differs from the Statute of Anne and that of Pennsylvania as to require a different construction, which has been given it in *Alexander v. Schreiber*, 10 Mo. 460, and that as the statute of New Mexico was taken from that of Missouri, the construction put upon the latter should be accepted as correct.

The language of the statute of Missouri (Gen. Stat. Mo. p. 444, § 8) is as follows:

"The words 'grant,' 'bargain' and 'sell,' in all conveyances in which any estate of inheritance in fee simple is limited, shall, unless restrained by express terms contained in such conveyances, be construed to be the following express covenants on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns: *First*. That the grantor was, at the time of the execution of such conveyance, seized of an indefeasible estate, in fee simple, in the real estate thereby granted. *Second*. That such real estate was, at the time of the execution of such conveyance, free from incumbrances done or suffered by the grantor, or any person claiming under him. *Third*. For further assurances of such real estate to be made by the grantor and his heirs to the grantee and his heirs and assigns; and may be sued upon in the same manner as if such covenants were expressly inserted in the conveyance."

And the Supreme Court of Missouri, in *Alexander v. Schreiber*, *supra*, after citing many cases holding that where a deed contains a limited covenant that the premises are free from incumbrances, and also a general covenant of warranty, the one does not limit the other, thus proceeds: "It is apparent from these cases, to which we have briefly referred, that whilst it is

conceded that a special covenant will restrain a general one, where the two are absolutely irreconcilable, yet the courts have inclined very much to let both stand. A covenant is to be construed most strongly against the covenantor, and in giving effect to the intention of the parties to an instrument of conveyance, the courts have kept this principle in view. Where the particular covenants and the general covenants are entirely independent of each other, and of a different character, they will all stand. The statute enumerates the three covenants which the words 'grant, bargain and sell' are declared to imply, as distinct and independent covenants. The second may be superfluous, but it does not therefore limit the first, which is independent of and inconsistent with it."

It appears to us, however, that where the question arises, not upon the covenants in a deed, but upon the construction of a statute, which turns certain words of grant into express covenants, the same rule of construction does not apply. In respect to deeds, the words are to be taken most strongly against the party using them, while in respect to statutes, if in derogation of the common law, as that under consideration is, they should be construed strictly. And so construed the statute of New Mexico seems clearly within the conclusion reached in *Gratz v. Ewalt*. The covenant that the grantor is "seised of an indefeasible estate in fee simple" is a covenant for a perfect title, and to couple with it a covenant that the land is free from incumbrances, "made or suffered to be made by the grantor, or by any person claiming the same under him," is incongruous and repugnant, unless the prior covenant is held to mean, "notwithstanding any act done by the grantor."

Apart from this, as the statute invests the words "bargained and sold" with an effect they did not possess at common law, we think it was not intended that those words should so operate where the parties themselves have entered into covenants. In *Weems v. McCaughan*, 7 Smedes & M. 427, it is said: "The covenants raised by law from the use of particular words are only intended to be operative where the parties themselves have omitted to insert covenants. But where the party declares how far he will be bound to warrant, that is the extent of his covenant."

And the same result is reached and announced by the Supreme Court of Illinois in *Finley v. Steele*, 23 Ill. 56, in which case Mr. Justice Walker, speaking for the court, says that "this statutory provision does not create this covenant against the intention of the parties;" that "the employment of any language from which it appears the parties intended that these words should not have such an effect," does away with the statutory covenant; that all statutes in derogation of the common law must be construed strictly; that if there is a doubt whether, where there is a general covenant of warranty in the deed, such a case is embraced within the provisions of the statute, it should not be held as controlling the rights of the parties; that "there is scarcely a court before which this Act has come for a construction, that has not characterized it as a provision of dangerous tendency, calculated to entrap the ignorant and unwary into liability

which they never intended to incur;" that the rule is familiar that "the expression of one thing is the exclusion of another;" and "Where the grantor inserts a covenant of general warranty, and omits all other covenants, that it must have been his intention to bind himself alone by the covenant he has inserted;" that under the statutory covenant "The breach occurs, if at all, upon the delivery of the deed, whilst under the covenant of general warranty a breach only takes place upon an eviction;" and that "if the grantor were to write out this statutory covenant in a deed, and also insert a covenant of general warranty, it would present a very different question, as then it would by that act appear to be his intention that both covenants should be operative. In such a case the court would have to give effect to each, so far as it was not limited by the other."

These views strike us as sensible and just, and we concur with the supreme court of the Territory in its approval of them.

Chancellor Keat pointed out in his Commentaries the danger from importing into a deed express covenants created by statute, "of imposition upon the ignorant and unwary, if any covenant be implied, that is not stipulated in clear and precise terms."

The covenant of warranty and that of seisin or of right to convey are not equivalent covenants. Defect of title will sustain an action upon the one, while disturbance of possession is requisite to recover upon the other. And we cannot hold that Lewis and wife, in covenanting for quiet enjoyment, intended to be bound by a covenant outside of their express agreement, which might impose a liability upon them the instant their deed was executed and delivered. Covenants of seisin and of good right to convey are broken, if at all, when the deed is delivered; and if the grantor is not well seised, or if he has not the power to convey, an action at once accrues.

But as Douglass was in possession when he commenced his action, it does not appear to be material to him whether he stands upon the covenant of general warranty in the deed or of seisin in the statute.

While the Supreme Court of Missouri has held that the covenant created by the statute may be imposed upon a grantor, notwithstanding he has warranted generally in the conveyance, yet the rule is there equally well settled, that the statutory covenant of seisin is merely a covenant for indemnity, and that nominal damages only are recoverable until the estate conveyed is defeated or real injury sustained. *Dickson v. Desire*, 23 Mo. 151; *Gollier v. Gamble*, 10 Mo. 467.

In that view the grantee is protected by the general covenant of warranty substantially to the same extent as by the statutory covenant, and the conclusion is strengthened that where one is expressly inserted in the deed the other ought not to be implied.

Lewis and wife had the right to contract that their grantee should not hold possession of the property and at the same time compel them to return the purchase money; and in either aspect there could be no substantial recovery here.

The judgment of the Supreme Court of the Territory is affirmed.

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WILLIAM P. ABENDROTH, *Pff. in Err.*,

ABRAHAM VAN DOLSEN ET AL.

(See S. C. Reporter's ed. 66-75.)

Adjudication of bankruptcy of a firm—effect of, on special partner—statute—stay of proceedings—New York statute—release in bankruptcy.

1. An adjudication of the bankruptcy of a firm, and of the members in whose name the firm was doing business, in a bankrupt proceeding affecting them alone, to which a special partner was not a party, does not estop a copartnership creditor from setting up the liability of such special partner imposed upon him by the statute for noncompliance with its provisions.
2. The statute in fixing the liability of a special partner, on account of noncompliance with its provisions, does not change his special partnership into a general one, but simply makes him liable as a general partner to creditors.
3. The pendency of proceedings in bankruptcy against a firm is not a good plea in abatement in an action against a special partner of the firm against whom the proceedings are not taken; the latter therefore is not entitled to a stay of proceedings in the action, which the statute gives for the protection of the bankrupt.
4. In an action under the New York statute to render a special partner liable for the firm debts by reason of his failure to comply with the statute in reference to limited partnerships, the action being against all the members of the firm, it is sufficient to charge him, in the complaint, as a general partner and it is not necessary to allege the special omissions which rendered him liable as such.
5. A discharge in bankruptcy does not release any person liable for the same debt with the bankrupt, either as partner, joint contractor, surety or otherwise.

[No. 229.]

Argued April 12, 15, 1889. Decided May 13, 1889.

IN ERROR to the Court of Common Pleas of the City and County of New York, affirming, on appeal, a judgment of the City Court and remitting the judgment to the latter court for enforcement. *Affirmed.*

The facts are stated in the opinion.

Mr. Wm. H. Arnoux for plaintiff in error.

Mr. Carlisle Norwood, Jr., for defendants in error.

Mr. Justice Lamar delivered the opinion of the court:

This writ of error brings before the court for review a judgment of the Court of Common Pleas for the City and County of New York, affirming on appeal, a judgment of the City Court of New York. The former is, under the New York Code of Civil Procedure, the highest court of the State to which a decision of the latter court may, as a matter of right, be carried by appeal for reversal or affirmance. The federal question involved relates to the construction of the Bankrupt Act of March 2, 1867.

On the 18th of June, 1877, the defendants in error filed in the Marine Court of the City of New York, now known as the City Court of New York, a complaint against William P. Abendroth, John Griffith and George W. Wun-

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dram, in which they alleged "that at the times hereinafter mentioned the defendants were copartners in business, carrying on such business in the City of New York under the firm name and style of Griffith & Wundram; that on or about the 7th day of August, 1872, at the City of New York, the said defendants, in and under their said firm name of Griffith & Wundram, made their certain promissory note in writing, bearing date on that day, whereby they promised, three months after the date thereof, to pay to the order of Van Dolsen & Arnott, these plaintiffs, the sum of nine hundred $\frac{1}{100}$ dollars, and thereupon delivered said note to these plaintiffs; that plaintiffs are the holders and owners of said note, and the said note is wholly unpaid; wherefore, plaintiffs demand judgment against the defendants for the sum of nine hundred $\frac{1}{100}$ dollars, with interest from the 10th day of November, 1872, and for the costs of this action."

The defendant Abendroth alone appeared and filed his answer, which, after denying the partnership as alleged in the complaint, set up as a further defense that it was a limited partnership under the name of Griffith & Wundram, of which Griffith and Wundram were the general partners and he a special partner only, and as such special partner entitled, under the statutes of New York, to exemption from liability for engagements of the firm as a general partner.

For a third defense he pleaded, in bar and abatement, that, prior to the commencement of the suit, certain bankruptcy proceedings had been instituted in the District Court of the United States for the Southern District of New York, in bankruptcy, wherein an adjudication of bankruptcy of the said firm of Griffith & Wundram was duly rendered by said court, and wherein it was also declared and adjudged that said John Griffith and George W. Wundram, the bankrupts in said bankruptcy, were the general partners, and the defendant Abendroth was the special partner thereof.

The case was tried before a jury, which, under the direction of the court, found in favor of the plaintiffs for the amount claimed, with interest, and judgment was entered accordingly. Upon appeal the judgment was affirmed. To reverse that affirmation this writ of error was sued out.

From the evidence in this case it appears that, on the 28d of December, 1870, Abendroth, Griffith and Wundram formed a limited partnership under the statutes of New York, under the firm name of Griffith & Wundram, in which Griffith and Wundram were designated the general partners and Abendroth the special partner. All the requirements of the statute, as to the signing and publication of the articles, filing of the certificate and affidavit and publishing the same, were strictly complied with, except that the capital contributed by the special partner was not paid in cash, as stated in the affidavit, but by a post-dated check payable eight days after its execution, and cashed in ten days from its date, the day after the firm went into business. Such misstatement in the affidavit was held by the court of appeals of that State to render the special partner liable as a general partner for the engagements of the firm, under the following provision of the stat-

ute authorizing the formation of limited partnerships:

"And if any false statement be made in such certificate or affidavit all the persons interested in such partnership shall be liable for all the engagements thereof as general partners."

On the 30th of November, 1872, Wundram presented his petition in bankruptcy to the District Court of the United States for the Southern District of New York, setting forth that he was a member of the copartnership consisting of himself and John Griffith, carrying on business under the firm name of Griffith & Wundram within that judicial district; that the members of said copartnership were, jointly and severally, unable to pay their debts; and with the other averments usual in such petitions. The usual schedules were annexed to the petition. No mention was made of Abendroth in the petition, but in the schedule he was stated to be one of the creditors of the firm, as were also the defendants in error here, Van Dolsen & Arnott. Upon this petition an order was issued requiring Griffith to show cause, etc. It contained no reference to Abendroth, and was not directed to him nor served upon him. After due proof of service on Griffith, the adjudication in bankruptcy was made in these words: "It is adjudged that John Griffith and George W. Wundram and the copartnership of Griffith & Wundram became bankrupt . . . before the filing of the petition, and they are therefore declared and adjudged bankrupts accordingly."

It is proper to note here that in this adjudication there is no reference to Abendroth as a partner, either general or special; and no designation of the firm as a limited partnership. The usual warrant of seizure of the estate of the bankrupt, the assignment of assets to the register in bankruptcy, the notice to creditors, and the first meeting of the creditors, all followed in the regular order of such proceedings. Abendroth was chosen by the creditors as assignee in bankruptcy, and accepted the office, with the approval of the judge. Upon the face of the return it appears that Van Dolsen and Arnott did not take any part in the selection of the assignee. At the second meeting of the creditors Joseph McDonald & Co., creditors of the bankrupts, presented a petition to the register in bankruptcy, setting forth that two days before the filing of the petition in bankruptcy certain of the creditors had agreed to sell their claims to Abendroth at twenty-five cents on the dollar, had afterwards proved their debts in bankruptcy, and had then assigned the same to Abendroth. They asked that Abendroth should not receive any dividend upon said assigned claims, and that the proof of them should be expunged, and the claims disallowed.

An order was made for a hearing on the petition before the register, five days' notice being first given to the creditors whose claims were thus opposed. Van Dolsen and Arnott were not among such creditors, and it is not contended that they received the notice above mentioned. The register, having heard the case, made his report to the bankruptcy court, in which he presented the questions that came before him; among others, whether the debts assigned to Abendroth should be disallowed because he was a special partner in the bankrupt-

of firm, the petitioners relying upon a provision of the statutes of New York, in relation to limited partnerships, that no special partner, except in particular cases, therein specified, could be allowed to claim as creditor, in case of the bankruptcy of the partnership, until the claims of all the other creditors of the partnership should be satisfied. The Register reported his opinion to be that, in respect to these assigned claims, Abendroth stood in the shoes of his assignors, and was a creditor as their representative, and in no other character. Upon this report of the Register, the Judge of the District Court adjudged that Abendroth was entitled to receive a dividend on the assigned claims, and that they ought not to be expunged or diminished. It appears that Abendroth and McDonald & Co. had both proved debts, but that Van Dolsen and Arnott were not among the creditors making such proofs.

The counsel for plaintiff in error does not contend that this court should disregard the construction which the courts of New York have given to the statutes of that State authorizing the formation of limited partnerships; nor does he deny that Abendroth incurred, at the formation of the partnership, a statutory liability for the debts of the firm, by the misstatement in the affidavit respecting the time and manner of putting in his capital as a special partner. But he contends that the plaintiffs are estopped from setting up this liability by the proceedings in bankruptcy, above recited, which he claims had the effect of an adjudication binding upon them that no such liability existed. This contention involves two propositions: first, that as Wundram's petition against Griffith alleged that the two, Griffith and Wundram, composed the firm, it clearly meant that they were all of the copartners; and that accordingly the adjudication must be held to have been an adjudication of the fact that Abendroth was not a member of the firm.

We have seen that through the entire proceedings in bankruptcy, from the inception to the adjudication, inclusive, nothing appears affirmatively or negatively with regard to Abendroth's membership of the firm, no reference to him of any kind in the adjudication, and nothing in regard to him, except as a creditor in the schedule annexed to the petition. We concur in the opinion of the court below that the connection of Abendroth with the partnership was not a matter in issue, nor a point in controversy upon the determination of which the adjudication was rendered.

An adjudication in bankruptcy partakes in part of the nature of a judgment *in rem*, and in part of the nature of a judgment *in personam*. With regard to the estate of the bankrupt debtor, which has been by the court's warrant of seizure, or by the surrender of the debtor, brought within the possession and jurisdiction of the court, its orders, decrees, and judgments as to the right and title to the property, or as to the disposition of it among the parties interested, are binding upon all persons and in every court. As a determination of the legal status of the bankrupt, or of the relations of the creditors to both, its judgment is conclusive in all courts where it is pleaded. But as a determination of the legal status of a person not a bankrupt, and who was not a party to the proceeding, and

whose status as a bankrupt has never been a question before the court, it unquestionably is not binding upon any person not a party to such proceeding. In the cases cited by the counsel for plaintiff in error, the adjudication either determined the legal status of the bankrupt debtor or related to the bankrupt estate brought within the jurisdiction of the court. In this case the petition neither asserted nor denied that Abendroth was a member of the bankrupt firm. No process was served upon him to show whether he was or was not such member; nor did he himself voluntarily appear and petition to be declared the one or the other.

In our opinion an adjudication of the bankruptcy of a firm, and of the members in whose name the firm was doing business, in a bankruptcy proceeding affecting them alone, to which a special partner was not a party, does not estop a copartnership creditor from setting up the liability of such special partner imposed upon him by the statute for noncompliance with its provisions.

The second ground involved in the contention of the plaintiff in error is, that there was, in the subsequent proceedings before the Register, an express adjudication that Abendroth was a special partner and not a general partner; and that this adjudication was binding upon all the creditors, including the plaintiffs below in this action. We think this contention untenable. The question before the Register in that proceeding was, whether the proof of the claims referred to should be expunged, and the dividends upon them disallowed to Abendroth. In his report to the court he expresses his opinion to be that neither the fact that Abendroth was the assignee in bankruptcy, nor the fact that he was a special partner in the firm, precluded him from drawing his share of dividends in the claims referred to. This was certainly not an adjudication by the court that he was a special partner. The District Judge in the order made by him did not pass on any question discussed in the report of the Register, except his conclusion that the claims assigned to Abendroth, as aforesaid, ought not to be expunged or diminished, and that he was entitled to the dividends on them; and he so ordered. The order, relating as it did exclusively to a question as to the distribution of the assets of the firm, contained no feature of an adjudication with respect to Abendroth's copartnership. Indeed, it is manifest from an examination of the Register's report that he did not consider that the question as to whether Abendroth was or was not a special partner had any material bearing on the question as to how the money in the hands of the assignee should be distributed among the creditors. In either case he considered that the claim should not be expunged or diminished. But even if, for the sake of argument, we concede that this last order of the Judge was in effect an adjudication that Abendroth was a special partner, there is nothing in the judgment of the court below which denies its validity. The latter judgment also holds Abendroth to be a special partner, and as such liable, under the statute, in the same manner that he would be if he were a general partner. This is shown in the opinion of the court, which very properly holds that the statute, in fixing this liability on account of

noncompliance with its provisions, does not change his special partnership into a general one, but simply makes him liable as a general partner to creditors. All his relations to his copartners, and their obligations growing out of their relation to him as a special partner, remain unimpaired. If before the firm became bankrupt he had been, under his statutory liability, forced to pay a bill or note, or other general debt of the firm, he would have been entitled to indemnity from his partners, and could have recovered back from them the amount, with legal interest thereon. The view presented by the Court of Appeals of New York upon this point, in the case of *Durant v. Abendroth*, 97 N. Y. 182, 144, is clear and satisfactory:

"Notwithstanding the erroneous statement in the affidavit as to the payment of the capital, the partnership was, in form, a limited partnership, and subject to all the rules applicable to such partnerships. If it had undertaken to make an assignment with preferences, such assignment could not have been sustained on the ground of the violation of the statute. That violation could be taken advantage of only by creditors, and its consequence simply was to give them recourse against the special partner personally, as if he had been a general partner."

Another ground relied on for reversal is, that the pendency of the proceedings in bankruptcy is a good plea in abatement of this action. Section 5106 of the Revised Statutes, cited in support of this proposition, formerly section 21 of the Act of March 2, 1867, chap. 176, 14 Stat. at L. 526, provides that "No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge."

It is only necessary to say that Abendroth was in no sense the bankrupt in those proceedings, nor was he endeavoring to obtain his discharge as a bankrupt debtor in any proceedings in bankruptcy pending at the time this action was commenced. He is not entitled, therefore, to any stay of proceedings which the statute, by its own express terms, provides exclusively for the protection of the bankrupt.

The only remaining point relied on by plaintiff in error as a ground for reversal of the judgment below is that the defendants were sued in the action as general partners, and the judgment in favor of the plaintiffs determined that they were general partners; and that the adjudication in bankruptcy of Griffith and Wundram was a judgment against the two partners, which is a bar to any action subsequently brought by the creditor against the two defendants as such general partners. Against this view there is, we think, an insuperable objection. By § 5118 of the Revised Statutes, formerly § 38 of the Act of March 2, 1867, chap. 176, 14 Stat. at L. 583, the rule of the common law, as declared by this court in *Mason v. Eldred*, 73 U. S. 6 Wall. 281 [18: 788], that a judgment against one upon a contract, merely joint, of several persons, bars an action against the others on the same contract, is rendered entire-

ly inapplicable to adjudications in bankruptcy. That section provides: "No discharge shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise."

If the discharge of the two bankrupt partners, which is the final judgment in the proceedings, cannot estop the creditor from afterwards setting up the liability of the third partner for the joint debt, clearly the other and previous adjudication in the course of the proceedings cannot be held to have that effect. Though the action in the court below was brought against the three defendants, the jury was directed by the court to render its verdict against Abendroth alone, and the judgment was entered up against him alone, thus fully recognizing the validity and force of the adjudication of bankruptcy of the other two partners. This form of action for enforcing the liability of a special partner, imposed by the statute of New York, has been decided by the New York Court of Appeals to be the proper one in the cases of *Durant v. Abendroth*, 97 N. Y. 182; *Sharp v. Hutchinson*, 100 N. Y. 533; and *Durant v. Abendroth*, 69 N. Y. 148. We think these decisions are correct.

The judgment of the Court below is affirmed.

Mr. Justice Blatchford took no part in the decision of this case.

THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION, *Plff. in Err.*,

v.

THERESA A. BARRY.

(See S. C. Reporter's ed. 100-128.)

Special verdict—state practice—liability of an accident association on a policy—action at law—recovery of money.

1. The refusal of the court to submit a special verdict in this case, as provided by the rules of practice in the State, was not error.
2. Section 5 of the Act of June 1, 1872, 17 Stat. at L. 197, was not intended to fetter the judge in the personal discharge of his accustomed duties, or to trench upon the common-law powers with which in that respect he is clothed.
3. In an action on an accident policy, *held*, that the court properly instructed the jury that the jumping off the platform was the means by which the injury was caused; that the question was whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; that the term "accidental" was used in the policy in its ordinary, popular sense, as meaning "happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected;" that if, in the act which preceded the injury, something unforeseen, unexpected, or unusual occurred which produced the injury, then the injury resulted through accidental means.
4. A recovery at law could be had on the policy although the contract of the defendant was not to pay any sum absolutely, but only to levy an assessment and pay over the proceeds.
5. Where the policy does not make the payment of any sum contingent on an assessment, or on the

collection of an assessment, but it agrees to pay a principal sum represented by the payment of two dollars for each member in a certain division, within sixty days after the proof of death, and the number of members is proved to be sufficient to pay the loss if an assessment were made, an action at law may be maintained for the amount of the loss; the remedy is not solely in equity for a specific performance of the contract.

[No. 240.]

Argued April 9, 1889. Decided May 13, 1889.

[N ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin, to review a judgment in favor of plaintiff on a policy of accident insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. B. K. Miller, Jr., for plaintiff in error:

There is no proof of an accident. An accident is an event from an unknown cause or an unusual and unexpected event from a known cause.

1 Am. & Eng. Ency. of Law, 83; *Southard v. R. Pass. Assur. Co.* 34 Conn. 574; *McCarthy v. Travelers Ins. Co.* 8 Biss. 384.

No recovery at law was obtainable in this action, certainly not for more than nominal damages.

The contract between the parties is not that the defendant will absolutely pay \$5,000 or any other sum, but that it will levy an assessment and pay over the proceeds thereof. Plaintiff's remedy was clearly in equity for a specific performance; and even if an action at law will lie it would be for a breach of covenant, and the damages would be merely nominal.

Curtis v. Mut. Ben. L. Co. 48 Conn. 98; *Egleston v. Centennial Mut. L. Assn.* 18 Fed. Rep. 14; *Smith v. Covenant Mut. Ben. Assn.* 24 Fed. Rep. 685; *Covenant Mut. Ben. Assn. v. Sears*, 114 Ill. 108; *Re Solidarite Mut. Ben. Assn.* 68 Cal. 392; *Taylor v. Nat. Temp. Relief Union*, 12 West. Rep. 92, 94 Mo. 85, 17 Ins. L. J. 109; *Ball v. Granite State Mut. Aid Assn.* (N. H.) 4 New Eng. Rep. 289; *Rainsbarger v. Union Mut. Aid Assn.* 72 Iowa, 191; *Bailey v. Mut. Ben. Assn.* 71 Iowa, 689; *Newman v. Covenant Mut. Ben. Assn.* 72 Iowa, 242; *Tobin v. Western Mut. Aid Soc.* 72 Iowa, 261.

Messrs. Geo. McWhorter, C. M. Bies and Wm. F. Vilas, for defendant in error:

The deceased received his injury by accidental means.

Southard v. R. Pass. Assur. Co. 34 Conn. 574; *McCarthy v. Travelers Ins. Co.* 8 Biss. 383, 8 Ins. L. J. 206; *North Am. L. & Ac. Ins. Co. v. Burroughs*, 69 Pa. 43; *Martin v. Travellers Ins. Co.* 1 Post. & F. 505; May, Ins. 514; *Whitehouse v. Travelers Ins. Co.* 7 Ins. L. J. 23.

Plaintiff is entitled to recover at law without proving an assessment of the members of defendant corporation.

Re Protection L. Ins. Co. 9 Biss. 198; *Lueders v. Hartford L. & A. Ins. Co.* 12 Fed. Rep. 465.

Mr. Justice Blatchford delivered the opinion of the court:

This is an action at law brought in the County Court of Milwaukee County, in the State of Wisconsin, by Theresa A. Barry, a citizen of Wisconsin, against the United States Mutual Accident Association, a New York corporation, to recover \$5,000, with interest there-

on at seven per cent per annum from July 15th, 1888, on a policy of insurance issued by the defendant on June 23d, 1882. The case, after answer, was removed by the defendant into the Circuit Court of the United States for the Eastern District of Wisconsin. The material parts of the policy are set forth in the margin.

The complaint, after setting forth the terms of the policy and averring that it was delivered by the defendant to John S. Barry, alleged, "that, on or about the 20th day of June, 1883, and while said policy was in full force and effect, at the Town or Village of Iron Mountain, in the State of Michigan, and while the said John S. Barry was attending to the duties of his profession, to wit, that of a physician, and wholly without his fault, it became necessary for him to step or jump from a platform or walk to the ground beneath, about four feet downwards; and, in doing so, and in alighting upon said ground, he unexpectedly received an accidental jar and sudden wrenching of his body, caused by said jump or step downward, and by coming in contact with the said ground beneath, as aforesaid, all of which was unexpected on his part and wholly without his fault or negligence; that the said jarring of his person and wrenching of his body, caused as aforesaid, was the immediate cause of, and directly produced, a stricture of the *duodenum*, from the effects of which the said John S. Barry continued to grow worse until, on the 29th day of June, 1888, he, on account of the same, died."

Issue was joined, and the case was tried by

No. 794.	Division AA.	\$5,000.
The United States Mutual Accident Association of the City of New York.		

This certificate witnesseth. That The United States Mutual Accident Association, in consideration of the warranties and agreements made to them in the application for membership and of the sum of four dollars, do hereby accept John S. Barry, by occupation, profession or employment a physician, residing in Vulcan, State of Michigan, as a member in division AA of said association, subject to all the requirements and entitled to all the benefits thereof. The principal sum represented by the payment of two dollars by each member in division AA of the association, as provided in the by-laws (which sum, however, is not to exceed five thousand dollars), to be paid to Theresa A. Barry (his wife), if surviving (in the event of the prior death of said beneficiaries, or any of them, said sum shall be paid as provided in the by-laws), within sixty days after sufficient proof that said member, at any time within the continuance of membership, shall have sustained bodily injuries effected through external, violent and accidental means, within the intent and meaning of the by-laws of said association and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof. . . . Provided always, That this certificate is issued and accepted subject to all the provisions, conditions, limitations, and exceptions herein contained or referred to. . . . Provided always, That benefits under this certificate shall not extend to hernia, nor to any bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of this certificate, . . . nor to any case except where the injury is the proximate or sole cause of the disability or death. . . . And these benefits shall not be held to extend . . . to any case of death . . . unless the claimant under this certificate shall establish by direct and positive proof that the said death or personal injury was caused by external violence and accidental means, and was not the result of design either on the part of the member or of any other person.

a jury, whose verdict was, that they found the issue in favor of the plaintiff, and assessed the damages to her at the sum of \$5,779.70; and a judgment was entered for her for that amount, and \$189.85 costs, being a total of \$5,969.05. To review this judgment the defendant has brought a writ of error.

At the trial the plaintiff offered in evidence the policy or certificate, to which offer the defendant objected, for the reason that the complaint did not state facts sufficient to constitute a cause of action. The objection was overruled and the defendant excepted. The defendant objected also that the complaint alleged no assessment, and the court received the evidence subject to the objection. The plaintiff then proved, without objection, by the secretary of the defendant, that on the 23d of June, 1882, there were 804 members in division AA in the association, and on the same day in 1883, 4,803 members, and on the same day in 1884, 5,626 members; that during June and July, 1883, the defendant, in case of a death in division AA, could have levied a two-dollar assessment on at least 4,803 members, that number being then insured in that division; that the only members who were exempt from the two-dollar death assessment were those who became members subsequent to the death for which the assessment was made; that, if the defendant had desired to pay the loss occasioned by the death of Barry the amount to be paid would have been \$5,000; that the assessment levied next prior to June 29th, 1883, was levied June 1, 1883; that if, at the time a death was reported, and a claim was proved, there were sufficient funds to the credit of division AA, the loss was paid from those funds, without making a specific assessment; that, if there were not sufficient funds at that time, an assessment was made; and that, on June 29th, 1883, the defendant had on hand, belonging to class AA, \$2,060.15. The witness then produced the by-laws of the defendant for 1882-'83, the material parts of which are set forth in the margin.¹

In the proofs of death furnished to the defendant was the following, in the evidence of the attending physician: "12th. What was the precise nature of the injury and its extent? Inflammation of the *duodenum*, from jarring (jump)."

The plaintiff's husband was a physician 30

¹ Art. 1, sec. 8. The object of this association is to collect and accumulate a fund to be held and used for the mutual benefit and protection of its members (or their beneficiaries), who shall have sustained while members of the association bodily injuries, whether fatal or disabling, effected through external, violent, and accidental means.

Art. 7, sec. 1. Upon sufficient proof that a member of one of the divisions of this association shall have sustained bodily injuries effected through external, violent, and accidental means within the intent and meaning of these by-laws and the conditions named in the certificate of membership, and such injuries alone shall have occasioned death within ninety days from the happening thereof, the board of directors shall immediately order an assessment of two dollars upon each person who was a member of the division to which deceased belonged at the time of such death, and shall pay the amount so collected, according to the following schedule of classification . . . to the person or persons whose name shall, at the time of the death of such member, be found recorded as his last designated beneficiaries, if surviving. To members of division AA not exceeding \$5,000.

years of age at the time of his death. He was, at the time of the injury, strong and robust, weighing from 160 to 175 pounds, about six feet high, and in good health. With two other physicians, Dr. Crowell and Dr. Hirschmann, he visited a patient, on June 20th, 1883, who lived in a house behind a drug store. On coming out of the house they were on a platform which was between four and five feet from the ground, and if they got off from the platform it was but a short distance to the back part of the drug store, where they desired to go. The other two jumped from the platform first, and alighted all right. Dr. Hirschmann testifies: "Just after we had jumped Dr. Barry jumped, and he came down so heavy that it attracted our attention, and we both turned around, and we both remarked that it was a heavy jump, and I asked him, 'Doctor, are you hurt?' and he said, 'No; not much.' I have an indistinct recollection of his leaning against the platform when he jumped, but not sufficiently to state positively. If I were to jump I would jump and strike on my toes, and if I had any distance to jump would allow my knees to give. The way Dr. Barry came down it sounded to us as if he came down solid on his heels, so much so that we both turned around and remarked, 'Doctor, you came down heavily.' And I asked him, 'Are you hurt?' and he said, 'No; not much.' I heard the noise. It was a singular jump and sounded like an inert body. We then went with him to the drug store." Hirschmann drove home with him. He appeared ill on the way, and when he arrived home was distressed in his stomach, and vomited, and from that time on retained nothing on his stomach, and passed nothing but decomposed blood and mucus, and died nine days afterwards. There was much conflicting testimony as to the cause of death, and as to whether it resulted from *duodenitis* or a stricture of the *duodenum*, as alleged in the complaint, and from an injury caused by the jump. The issues presented to the jury sufficiently appear from the charge of the court.

At the close of the evidence on both sides, all of which is set forth in the bill of exceptions, the defendant moved the court to direct a verdict for it, on the ground that there was no evidence to sustain a cause of action. The motion was denied and the defendant excepted.

The plaintiff then, by leave of the court, amended her complaint by alleging that, at the time of Doctor Barry's death, and from that time, and for the balance of the year 1883, and including the time, as provided for in the policy, in which the said insurance was to be paid to the plaintiff herein, there were insured by it in class AA, the same class in which said Doctor Barry was at the time insured, 4,803 members or persons upon whom the defendant could have levied an assessment, under its by-laws and rules, of the two dollars per head, making an amount exceeding the plaintiff's claim of \$5,000. This amendment was objected to, but the defendant took no exceptions.

The defendant then demanded that the court submit a special verdict in the case, as provided by the rules of practice in the State of Wisconsin, and, as a question upon such special verdict, requested the court to submit the following question: "Whether the death of Doctor

Barry was caused by *duodenitis*." The demand was refused and the defendant excepted. The defendant then asked the court to submit, in connection with the general verdict, the special question as to whether the assured died of *duodenitis*. The request was refused and the defendant excepted.

The defendant then requested the court to charge the jury as follows: "It appears from the evidence in this case that by the policy in suit the defendant company accepted John S. Barry as a member of class AA, and in effect agreed to levy an assessment of two dollars upon each member of said class, and to pay the same to the plaintiff if said John S. Barry should die of bodily injuries, effected through external, violent, and accidental means, but in no event to pay more than \$5,000. Before the plaintiff can recover in this case she must show that the defendant, when it received the proof of death, on or about July 15th, 1888, either had cash on hand belonging to class AA, or levied an assessment upon the members, and by that means the defendant received money which belonged to class AA. By the evidence in suit it appears that there were over 4,000 members belonging to class AA during the months of June and July, 1888, who were subject to assessment of two dollars per man, and that, on June 1st, 1888, an assessment was made upon members belonging to class AA, and that on June 29th, 1888, the defendant had on hand \$2,060.15 belonging to class AA, and that an assessment was then pending and in process of collection. This evidence does not show any cash on hand belonging to class AA on July 15th or at any later date; nor is there any other evidence in the case which would show that fact or that any assessment was levied. Therefore the plaintiff cannot recover in this action, and you are instructed to return a verdict for the defendant." The court refused to give this instruction and the defendant excepted.

The defendant then separately requested the court to charge the jury to find for the defendant because no accident within the true intent and meaning of the policy occurred to Doctor Barry; and that he did not die from *duodenitis*; and that they must find for the defendant if he, in jumping, alighted squarely on his feet, or if they found that the jump did not result in the obstruction or occlusion of the *duodenum*; and that there was no evidence of any wrenching, twisting, or straining of the body in the jumping; and that, considering the character of the injury alleged in the case and the difficulty attending its proper investigation, great weight should be given by the jury to the opinion of scientific witnesses accustomed to investigate the causes and effects of injury to the alimentary canal, and a distinction should be made in favor of the opinion of those accustomed to use the most perfect instruments and processes, and who are acquainted with the most recent discoveries in science and the most perfect methods of treatment and investigation.

The court refused to give these instructions severally, and the defendant excepted to each refusal.

The defendant also separately requested the court to charge the jury that their verdict must

be for the defendant, if they found that the alleged injury was not sustained by Doctor Barry, or that the injury was not effected through violent means, or through accidental means, or through external means, or that death occurred directly or indirectly in consequence of disease or bodily infirmity, or partly or wholly from disease, or not from *duodenitis*; and that they were not at liberty to speculate as to what occurred in the jump, but must be governed by the evidence of witnesses on the trial.

The court refused to give these instructions severally, except as contained in its general charge, and the defendant excepted to each refusal. This makes it necessary to set forth the parts of the charge to the jury which are involved in the several requests. They are as follows, and the defendant excepted at the time separately to each part which is contained in brackets:

"By the terms of the certificate it was provided that, to entitle the beneficiary to the sum of five thousand dollars, the death should be occasioned by bodily injuries alone effected through external, violent, and accidental means; also, that the benefits of the insurance should not extend to any injury of which there was no external and visible sign, nor to any injury happening, directly or indirectly, in consequence of disease, nor to any death or disability caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of the certificate, nor to any case except where the injury was the proximate or sole cause of the disability or death.

"The issue between the parties may be briefly stated: It is claimed by the plaintiff that on the occasion mentioned by Dr. Hirschmann, when the deceased was at Iron Mountain, he sustained an injury by jumping from a platform to the ground; that this injury was effected by such means as are mentioned in the certificate; that the deceased, at the time of the alleged accident, was in sound physical condition and in robust health; and that the alleged injury was the proximate and sole cause of death.

"The defendant, on the other hand, denies that the deceased sustained any injury that was effected through accidental means, and also contends that if any injury was sustained, it was one of which there was no external or visible sign, within the meaning of the policy, and that the supposed injury was not the cause of the death of the deceased, but that he died from natural causes. The case, therefore, resolves itself into three points of inquiry:

"First. Did Dr. Barry sustain internal injury by his jump from the platform on the occasion testified to by Dr. Hirschmann?

"Second. If he did sustain injury as alleged, was it effected through external, violent and accidental means, within the sense and meaning of this certificate, and was it an injury of which there was an external and visible sign?

"Third. If he was injured as claimed, was that injury the proximate cause of his death?

"To entitle the plaintiff to a verdict, each and all of these questions must be answered by you in the affirmative, and if, under the testimony, either one of them must be negatively answered, then your verdict must be for the defendant.

["The first question (viz., Was the deceased, Dr. Barry, injured by jumping from the platform?) is so entirely a question of fact, to be determined upon the testimony, that the court must submit it without discussion to your determination. In passing upon the question, you will consider all the circumstances of the occurrence as laid before you in the testimony; the apparent previous physical condition of Dr. Barry; the subsequent occurrences and circumstances tending to show the change in his condition; the relation in time which the first developments of any trouble bore to the time when he jumped from the platform; the nature of his last sickness; and the symptoms disclosed in its progress and termination.]

"Further, you will inquire what evidence, if any, did the post-mortem examination and any and all subsequent examinations of the parts alleged to have been the seat of the supposed injury furnish of an actual physical injury; [what connection, if any, does there or does there not appear to be between the act of jumping from the platform and the subsequent events and circumstances which culminated in death, including the result, as you shall find it to be, of the post-mortem investigations. The question is before you in the light of all proven facts, for determination. The court cannot indicate any opinion upon it without invading your exclusive province; and by your ascertainment of the facts the parties must be bound.]

["There is presented in the case a train of circumstances. Do they or not, so to speak, form a chain connecting the ultimate result with such a previous cause as is alleged? Was the act of jumping from the platform adequate or inadequate to produce an internal injury? Thus you may properly pursue the inquiry, guided by and keeping within the limits of the testimony.]

"If you find that injury was sustained, then the next question is, Was it effected through external, violent, and accidental means? This is a pivotal point in the case, and therefore vitally important. The means must have been external, violent and accidental. Did an accident occur in the means through which the alleged bodily injury was effected?

["The jumping off the platform was the means by which the injury, if any was sustained, was caused.]

["Now, was there anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground?]

["The term 'accidental' is here used in its ordinary, popular sense, and in that sense it means 'happening by chance; unexpectedly taking place; not according to the usual course of things;' or not as expected.]

["In other words, if a result is such as follows from ordinary means voluntarily employed in a not unusual or unexpected way, then, I suppose, it cannot be called a result effected by accidental means.]

["But if in the act which precedes the injury something unforeseen, unexpected, unusual, occurs which produces the injury, then the injury has resulted from the accident or through accidental means.]

["We understand, from the testimony, without question, that the deceased jumped from

the platform with his eyes open, for his own convenience, in the free exercise of his choice, and not from any perilous necessity. He encountered no obstacle in jumping, and he alighted on the ground in an erect posture. So far we proceed without difficulty; but you must go further and inquire, and here is the precise point on which the question turns: Was there or not any unexpected or unforeseen or involuntary movement of the body, from the time Dr. Barry left the platform until he reached the ground, or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self control, in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he or not miscalculate the distance, and was there or not any involuntary turning of the body in the downward movement, or in the act of alighting on the ground? These are points directly pertinent to the question in hand.]

"And I instruct you that if Dr. Barry jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred, changing or affecting the downward movement of his body as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated or would naturally anticipate, then any resulting injury was not effected through any accidental means. [But if, in jumping or alighting on the ground, there occurred, from any cause, any unforeseen or involuntary movement, turn or strain of the body which brought about the alleged injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make, or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted, then the injury would be attributable to accidental means.]

"Of course it is to be presumed that he expected to reach the ground safely and without injury. [Now, to simplify the question and apply to its consideration a common-sense rule, Did anything, by chance or not as expected, happen, in the act of jumping or striking the ground, which caused an accident? This, I think, is the test by which you should be governed in determining whether the alleged injury, if any was sustained, was or was not effected through accidental means.]

"You have the testimony in relation to the occurrence which it is claimed by the plaintiff produced in Dr. Barry a mortal injury. Taking it all into consideration and applying to the facts the instruction of the court, you will determine whether, if any injury was sustained, it was effected through external, violent and accidental means. The defendant claims that if Dr. Barry did sustain injury, it was one of which there was no external and visible sign, within the meaning of the certificate of insurance, and, therefore, that the plaintiff is not entitled to recover. [Counsel are understood to

contend that no recovery could be had under a certificate of insurance in the form and terms of this one, if the injury was wholly internal. In that view the court cannot concur. It is true there must be an external and visible sign of the injury, but it does not necessarily follow from that that the injury must be external. That is not the meaning or construction of the certificate. Such an interpretation of the contract would, in the opinion of the court, sacrifice substance to shadow and convert the contract itself into a snare, an instrument for the destruction of valuable rights. Visible signs of injury, within the meaning of this certificate, are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidence which are visible signs of internal injury. Complaint of pain is not a visible sign because pain you cannot see. Complaint of internal soreness is not such a sign, for that you cannot see; but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting or retching, or bloody or unnatural discharges from the bowels, if, in short, it sends forth to the observation of the eye, in the struggle of nature, any signs of the injury, then those are external and visible signs, provided they are the direct results of the injury; and, with this understanding of the meaning of the certificate of insurance, and upon the evidence, you will say whether, if Dr. Barry was injured as claimed, there were or were not external and visible signs of the injury; and the determination of this point will involve the consideration of the question whether what are claimed here to have been external and visible signs were, in fact, produced by—were the result of—the injury, if any were sustained.]

"The next question is, If Dr. Barry was injured as claimed, was the injury the sole or proximate cause of his death? Interpreting and enforcing the certificate of insurance according to its letter and spirit, it must be held that, if any other cause than the alleged injury produced death, there can be no recovery; so that, to entitle the plaintiff to recover, you must be satisfied that the alleged injury was the proximate cause of death. Whether a cause is proximate or remote does not depend alone upon the closeness in the order of time in which certain things occur. An efficient, adequate cause being found, it must be deemed the true cause, unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result. If, for example, the deceased sustained injury to an internal organ, and that necessarily produced inflammation, and that produced a disordered condition of the injured part, whereby other organs of the body could not perform their natural and usual functions, and in consequence the injured person died, the death could be properly attributed to the original injury. In other words, if these results followed the injury as its necessary consequence, and would not have taken place had it not been for the injury, then I think the injury could be said to be the proximate or sole cause of death; but if an independent disease or disorder supervened upon the injury, if there was an injury—I mean a disease or derangement of the parts not necessarily produced by the injury—or if the alleged

injury merely brought into activity a then existing, but dormant, disorder or disease, and the death of the deceased resulted wholly or in part from such disease, then it could not be said that the injury was the sole or proximate cause of death.

"It is claimed by the plaintiff that the supposed jar or shock said to have been produced by jumping from the platform caused some displacement in the *duodenum*; that it became occluded, to use the expression that has been used by witnesses; that there was constriction and occlusion of that intestine, which was accompanied with consequent inflammation—in short, that the deceased had *duodenitis*, as the direct result of the alleged original injury, and in consequence died. This contention is urged upon all the circumstances of the case, and upon the testimony offered by the plaintiff tending to show the symptoms which accompanied the last sickness, the diagnosis of the case made by attending physicians, and the alleged developments of the autopsy. It is contended in behalf of the defendant, that there was no constriction, occlusion or inflammation of the *duodenum*; that the deceased did not have *duodenitis*; and that no physical injury is shown to have resulted from jumping from the platform. This claim is based upon the contention that the various symptoms manifested in the last sickness of the deceased were consistent with natural causes, with some undiscovered organic trouble not occasioned by violence or sudden injury; that the conclusions of the physicians who made the post-mortem examination were erroneous; and that the microscopic examination of the parts in New York demonstrated such alleged error. Concerning the microscopic test made in New York by Dr. Carpenter, the plaintiff contends that it is not reliable and should not be accepted, for reasons urged in argument and which I need not repeat.

"Now, between these conflicting claims, weighing and giving due consideration to all the testimony, you must judge. If the deceased died of some disease or disorder not necessarily resulting from the original injury, if there was an injury, then the defendant is not liable under this certificate of insurance; but if the deceased received an internal injury which in direct course produced *duodenitis*, and thereby caused his death, then the injury was the proximate cause of death.

"In considering this case you ought not to adopt theories without proof, nor to substitute bare possibility for positive evidence of facts testified to by credible witnesses. Mere possibilities, conjectures, or theories should not be allowed to take the place of evidence; where the weight of credible testimony proves the existence of a fact, it should be accepted as a fact in the case. Where, if at all, proof is wanting and the deficiency remains throughout the case, the allegation of fact should be deemed not established.

"There has been considerable testimony given by physicians, what we call expert testimony, and in the consideration of that testimony it is your province to determine which of these medical witnesses is right in his statement, opinion or judgment. It is purely a question of fact for you, which of these physicians was most competent to form a judgment as to the

cause of Dr. Barry's death. Who has had the best opportunities for forming a judgment as to the cause of death?

"All this is to be taken into consideration by you in weighing and deliberating upon this evidence. . . .

"I am asked to instruct you that, before the plaintiff can recover, she must show that when the defendant received the proofs of death, on or about July 15, 1883, it either had cash on hand belonging to class AA, or that it levied an assessment upon the members, and by that means received money which belonged to class AA. This construction of the certificate is upon the theory that, to entitle the plaintiff to recover, it is essential to show either that it had money on hand with which to meet this loss, or that it has made an assessment from which the loss can be paid.

"This instruction I must decline to give you, for the reason that it appears from the evidence that there were more than a sufficient number of members in class AA to pay the five thousand dollars on this certificate, if an assessment were to be made; and I regard it the duty of the association to make the assessment when the death loss is proved, and where the case is one upon which the association is liable to pay the loss.

"Now, to sum up the case, if you find from the evidence that the deceased, on the 20th day of June, 1883, sustained a bodily injury, and that such injury was effected through external, violent and accidental means, and was one of which there was an external and visible sign, and that the injury was the proximate or sole cause of death, then the plaintiff should have a verdict in her favor.

"If, on the contrary, you find either that the injury was not sustained, or that, if it was sustained, it was not effected through external, violent and accidental means, or was an injury of which there was no external and visible sign, or that it was not the proximate or sole cause of death, then your verdict should be for the defendant.

"If you find the plaintiff entitled to recover you will render a verdict in her favor for the sum of five thousand dollars, with interest at seven per cent, computed from the 15th of September, 1883, to the present time, adding the interest to the principal, so that your verdict will show the gross sum."

After the charge had been given a jurymen inquired: "Is there any evidence showing that the association did make an assessment after receiving proof of Dr. Barry's death?" The court replied: ["There is some proof on that subject. You need not take that into consideration at all, for I have instructed you that if you should find the facts as I have stated them to you the plaintiff is entitled to recover. You need not take into consideration the matter of assessment."] The defendant excepted to the part in brackets.

(1.) When the trial took place, in December, 1885, the following provision of the state statute was in force in Wisconsin (Rev. Stat. of Wisconsin, 1878, § 2858, title 25, chap. 123, p. 760): "The court, in his discretion, may, and when either party, at or before the close of the testimony and before any argument to the jury is made or waived, shall so request, the court

shall direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of questions, in writing, relating only to material issues of fact and admitting a direct answer, to which the jury shall make answer in writing. The court may also direct the jury, if they render a general verdict, to find in writing upon any particular questions of fact, to be stated as aforesaid. In every action for the recovery of money only, or specific real property, the jury may, in their discretion, when not otherwise directed by the court, render a general or a special verdict."

It is contended, for the defendant, that the court erred in refusing its demand to submit a special verdict in the case, as provided by the rules of practice in the State. It is, however, conceded, in the brief of its counsel, that the refusal to submit a special question in connection with the general verdict, was not error, in view of the ruling of this court in *Indianapolis R. R. Co. v. Horst*, 93 U. S. 291, 299 [23: 898, 900]. In that case this court adhered to its views expressed in *Nudd v. Burrows*, 91 U. S. 426, 442 [23: 286, 290], that the personal conduct and administration of the judge in the discharge of his separate functions was neither practice, pleading, nor a form or mode of proceeding, within the meaning of § 5 of the Act of June 1, 1872 (17 Stat. at L. 197), now § 914 of the Revised Statutes, and further said that the statute was not intended to fetter the judge in the personal discharge of his accustomed duties, or to trench upon the common-law powers with which in that respect he is clothed. This principle has been uniformly applied since by this court; and we are of opinion that it covers the demand made in this case that the court should submit a special verdict, as provided by the rules of practice in the State of Wisconsin, and should submit the particular question mentioned in that connection.

(2.) It is also urged as error that the court did not restrict the case to the issue made by the pleadings; that that issue was, that the assured died from "a stricture of the *duodenum*," produced by the accident; and that the issue submitted by the court was accidental death from anything. The court very properly refused to instruct the jury that the assured did not die from *duodenitis*; and its response to the request to instruct them that if they found he did not die from *duodenitis*, their verdict must be for the defendant, was, that it refused to give that instruction "except as contained in the general charge." It is contended, however, for the defendant, that, in the general charge, the jury were charged in effect, that, if the assured sustained internal injury of any kind by his jump, and died therefrom, the plaintiff could recover. But we do not so understand the charge. In a part of it, before set forth, and not excepted to by the defendant, the court distinctly laid before the jury the issue as to the constriction or occlusion of the *duodenum*, and the contentions of the two parties in regard thereto, and told the jury that they must judge between those conflicting claims, weighing and giving due consideration to all the testimony, and that if the deceased received an internal injury which in direct course produced *duodenitis*, and thereby caused his death, then the injury was the proximate cause of death.

(3). It is further urged that there was no evidence to support the verdict because no accident was shown. We do not concur in this view. The two companions of the deceased jumped from the same platform, at the same time and place, and alighted safely. It must be presumed not only that the deceased intended to alight safely, but thought that he would. The jury were, on all the evidence, at liberty to say that it was an accident that he did not. The court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that the question was, whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; that the term "accidental" was used in the policy in its ordinary, popular sense, as meaning "happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected;" that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means. The jury were further told, no exception being taken, that, in considering the case, they ought not to adopt theories without proof, or substitute bare possibility for positive evidence of facts testified to by credible witnesses; that where the weight of credible testimony proved the existence of a fact, it should be accepted as a fact in the case; but that where, if at all, proof was wanting, and the deficiency remained throughout the case, the allegation of fact should not be deemed established.

In *Martin v. Travelers Ins. Co.* 1 Fost. & F. 505, the policy was against any bodily injury resulting from any accident or violence, "provided that the injury should be occasioned by any external or material cause operating on the person of the insured." In the course of his business he lifted a heavy burden and injured his spine. It was objected that he did not sustain bodily injury by reason of an accident. The plaintiff recovered.

In *North American Ins. Co. v. Burroughs*, 69 Pa. 43, the policy was against death "in consequence of accident," and was to be operative only in case the death was caused solely by an "accidental injury." It was held that an accidental strain, resulting in death, was an accidental injury within the meaning of the policy, and that it included death from any unexpected event happening by chance, and not occurring according to the usual course of things.

The case of *Southard v. Railway Passengers Assurance Co.* 34 Conn. 574, is relied on by the defendant. That case, though pending in a state court in Connecticut, was decided by an arbitrator, who was then the learned District Judge of the United States for the District of Connecticut. But if there is anything in that decision inconsistent with the present one, we must dissent from its views.

(4.) It is contended that no recovery at law could be had on this policy, or, at most, only

one for nominal damages, on the ground that the contract of the defendant was not to pay any sum absolutely, but only to levy an assessment and pay over the proceeds; and that the remedy of the plaintiff was solely in equity, for a specific performance of the contract.

The policy says: "The principal sum represented by the payment of two dollars by each member in division AA of the association, as provided in the by-laws," not to exceed \$5,000, "to be paid" to the wife. Although the by-laws state that the object of the association "is to collect and accumulate a fund" for the purpose named, and that, on the requisite proof of bodily injury to, and the death of, a member of a division, the board of directors shall immediately order an assessment of two dollars upon each person who was a member of the division to which the deceased belonged at the time of his death, and pay the amount so collected, according to the prescribed schedule of classification, to the proper beneficiary, the policy does not contract to make an assessment, nor does it make the payment of any sum contingent on an assessment, or on the collection of an assessment. It agrees to pay a principal sum represented by the payment of two dollars for each member in division AA, within sixty days after proof of death. The association always knows the number of members, which is to be multiplied by two. It has sixty days in which to make the assessment and collect what it can, before making any payment, but it takes the risk as to those who do not pay in time or at all. The liability to assessment is all that concerns the beneficiary; not the making or collection of an assessment; and the liability to assessment only measures the amount to be paid under the policy.

In view of the amendment made to the complaint, at the trial, which was not excepted to, and of the testimony of the secretary of the defendant, the charge of the court on the subject of an assessment was proper, and so was the verdict.

In the cases cited by the defendant either the policy was different from the present one, in providing only for levying an assessment and paying the amount collected, or there was no proof of the assessable number of members.

We see no error in any thing excepted to by the defendant, and the judgment is affirmed.

SETH A. FOWLE ET AL., *Appts.*,

v.

JOHN D. PARK ET AL.

(See S. C. Reporter's ed. 88-89.)

Contract not to sell a medicine within a certain territory is valid and enforceable—secret process—useful discoveries.

1. A contract, by which defendants, for a valuable consideration, agreed not to sell a certain me-

NOTE.—Contracts against public policy.

The prohibition in a contract in restraint of trade should not extend any further than will fully protect the party for whose benefit the contract is made in his occupation or business. Long v. Towl, 42 Mo. 545; Pike v. Thomas, 4 Bibb, 436; Grundy v. Edwards, 7 J. J. Marsh. 368; Turner v. Johnson, 7 Dana, 426; Grasselli v. Lowden, 11 Ohio St. 346;

dicinal preparation, within the territory which it was covenanted complainants should occupy exclusively, nor sell to others for sale there, nor promote such sales, is valid.

2. Such a contract, relating to a compound involving a secret in its preparation, based upon a valuable consideration, and limited as to the space within which, though unlimited as to the time for which the restraint is to operate, is reasonable and enforceable.
3. Where one has and transfers property in the secret process of manufacturing an article he has discovered, he and his grantees can claim relief as against breaches of trust in respect to it.
4. The policy of the law is to encourage useful discoveries by securing their fruits to those who make them.

[No. 263.]

Argued April 17, 1889. Decided May 13, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Ohio, dismissing an action for an injunction and an accounting. *Reversed.*

Statement by *Mr. Chief Justice Fuller*:

Seth A. Fowle and Horace S. Fowle, citizens of Massachusetts, filed their bill of complaint against John D. Park, Ambro R. Park and Godfrey F. Park, citizens of Ohio, in the Circuit Court of the United States for the Southern District of Ohio, on the 28th day of March, A. D. 1884, alleging that in 1844 one Lewis Williams, of Philadelphia, "prepared, invented and compounded a certain medicinal preparation of great and substantial value, for certain complaints and diseases, and assigned

and adopted the name thereof of 'Wistar's Balsam of Wild Cherry,' he being then the sole proprietor and alone having knowledge of the nature and ingredients of said preparation;" that in May, 1844, Williams "sold, assigned and transferred for valuable consideration to him paid, to one Isaac Butts of the State of New York, said preparation and a full and true copy of the receipt for preparing the same, under the name of 'Wistar's Balsam of Wild Cherry,' with the sole and exclusive right to manufacture and sell the said medicine under said name or otherwise, in certain enumerated States, counties, etc.; that in March, 1845, said Isaac Butts, "for and in consideration of a large sum of money to him paid by Seth W. Fowle," sold, conveyed and transferred to Fowle, his heirs, assigns and personal representatives, "all his right, title and interest in and to said preparation or medicine, and said receipt with a true copy thereof, with the sole and exclusive right to manufacture, sell and cause to be sold the said medicine in the States, provinces and counties above named, as included in said transfer by Lewis Williams, to the said Isaac Butts;" that at the time of said transfer and as a condition thereof, and part of the consideration therefor, Fowle agreed "that neither he nor his personal representatives or assigns would sell, cause to be sold, nor establish agencies for or be concerned in the sale of said balsam in any part of the United States, except those named in said transfer by Lewis Williams, and that neither he nor they would sell or cause to be sold said balsam anywhere for a less sum than seven dollars and $\frac{20}{100}$ of a dollar (\$7.20)

Chappel v. Brockway, 21 Wend. 157; Gilman v. Dwight, 13 Gray, 356; Cal. Steam Nav. Co. v. Wright, 6 Cal. 253; Dunlop v. Gregory, 10 N.Y. 241; Hubbard v. Miller, 27 Mich. 15; Beard v. Dennis, 6 Ind. 200.

An agreement by the proprietor of a public garden, in consideration of a loan, to buy all his beer of the lender, so long as he should be willing to supply the same at the fair current market price thereof, is not in restraint of trade. Ebling v. Bauer, 17 Week. Dig. 497, Distinguishing Dunlop v. Gregory, 10 N. Y. 241.

Where one partner sells his interest in the business to his copartner and agrees to retire altogether from business, the agreement binds the party selling from engaging in business, only so far as such engagement would injure the business of the party purchasing, and is not void as being in restraint of trade. Boardman v. Wheeler, 15 N. Y. Weekly Dig. 325, 27 Hun, 616.

In Jones v. Lees, 1 Hurlst. & N. 189, a covenant by the defendant, a licensee under a patent, that he would not, during the license, make or sell any slubbing machines unless the invention of the plaintiff applied to them, was held valid.

Contracts in partial restraint of trade, may be valid.

An agreement in general restraint of trade is illegal and void. For a contract in restraint upon trade to be valid it must not be general; the consideration must be adequate, not colorable, and the restriction must be reasonable. Morris Run Coal Co. v. Barclay Coal Co. 88 Pa. 173; Oregon Steam Nav. Co. v. Winsor, 87 U. S. 20 Wall 84 (22 L. ed. 315).

A covenant in a bill of sale of a manufactory, stock, fixtures, trademark and good will of the business of the manufactory and sale of friction matches, that the vendor, whose business was in New York, would not, for ninety-nine years, engage in such manufacture and sale except in the

service of the vendee within any of the United States or Territories, except Nevada and Montana, is valid; and the restraint is partial and not general. Diamond Match Co. v. Roeber, 9 Cent. Rep. 181, 106 N. Y. 473, 85 Hun, 421.

An agreement not to sell marl off the vendor's land was held valid. Brewer v. Marshall, 4 C. E. Green, 537.

And so of an agreement not to manufacture goods in general. Taylor v. Blanchard, 13 Allen, 370.

Where no consideration appears on the face of the instrument, the contract, if in restraint of trade, is void, although it is under seal. Compers v. Rochester, 56 Pa. 184; Palmer v. Stebbins, 3 Pick. 188; Weller v. Hersee, 10 Hun, 431; Mitchell v. Reynolds, 1 P.Wms.181; Mallan v. May, 11 Mees. & W. 665.

A covenant in restraint of trade is valid if it imposes no restriction upon one party, which is not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter therein; and the covenant will be enforced if a disregard thereof by the covenantor will work injury to the covenantee. Hodge v. Sloan, 9 Cent. Rep. 870, 107 N. Y. 244.

Contracts reasonable as to time.

If the contract be good in other respects the mere fact that the restraint is indefinite in point of time does not invalidate it. Bowser v. Biles, 7 Blackf. 344; Goodman v. Henderson, 58 Ga. 567; Cook v. Johnson, 47 Conn. 175; Ward v. Byrne, 5 Mees & W. 548; Mumford v. Gething, 7 Com. B. N. S. 317.

An agreement between a corporation and its stockholders, that the latter should not purchase goods of a certain class, during a limited period, of anyone other than the members of an association with which that corporation had entered into a contract, resulting in benefits to itself and members, is not in restraint of trade. Van Marter v. Babcock, 181 U. S.

net for each and every dozen sold or caused to be sold, except to agents for a whole State or Territory, in which case such agent should not sell below said rate;" that all the rights thus acquired by Fowle passed to the plaintiffs by purchase and inheritance; that Fowle and plaintiffs as successors "have continued to manufacture from said recipe and sell said balsam under said name from the year 1845 in large quantities up to the present time throughout said territory and not elsewhere, except west of the ridge of the Rocky Mountains, as hereinafter stated," but have not sold below the stipulated price, and have expended great sums in establishing and increasing the business, and built up a large trade and good will in connection with the name "Wistar's Balsam of Wild Cherry," by which name their manufacture of said medicine has become largely known, they and the defendants herein being the only manufacturers thereof on the continent, and being the only parties except Lucy A. S. Fowle, widow of said Seth W. Fowle, now having knowledge of the secret of its preparation; that about 1845 Williams disclosed the secret and mode of this preparation to Sanford and Park, and transferred to them a similar right to that given Butts to manufacture and sell said preparation "in certain parts of the then United States lying west of the territory included as aforesaid in said transfer to Seth W. Fowle," they agreeing not to sell on the territory of Butts, and the right so acquired by Sanford and Park subsequently passed to the defendant John D. Park, and the other defendants became interested therein through him; "that between the

years 1849 and 1864, the portion of country between the Rocky Mountains and the Pacific having become largely a part of the United States, the said Seth W. Fowle and the said John D. Park both sold small quantities of said Wistar's Balsam of Wild Cherry for some time in said territory in competition;" "that in 1864 said parties entered into a contract whereby it was agreed that the said Seth W. Fowle should have entire control of such sales in said territory west of the ridge of the Rocky Mountains free of all competition on the part of said John D. Park, the latter being paid a valuable consideration therefor by the said Fowle; that this arrangement continued until after the death of the said Fowle in A. D. 1867, and until on or about 1869, when the same terminated;" that in 1869 John D. Park entered into an agreement with Seth A. Fowle, one of the complainants, and Lucy A. S. Fowle, whereby in consideration of \$5,000, he sold and transferred to them, their legal representatives and assigns, all interest in, or right to, the sale of said medicine west of the Rocky Mountains, and also all interest in or right to the good will of selling said balsam in said territory, and in the trademark on the labels, bottles, wrappers, and packages containing said medicine, and in carrying on the business therein, said Park covenanting "for himself, his assigns and representatives, in said agreement, that the said Seth A. and Lucy A. S. Fowle and their assigns should have and enjoy the sole and exclusive right of selling said medicine within said limits," "free from any competition or interference by him or anyone under him or by his authori-

28 Barb. 633; *Curtis v. Gokey*, 68 N. Y. 304; *Live Stock Assn. of N. Y. v. Levy*, 3 N. Y. State Rep. 514.

An agreement that a steamer should not be used in the waters of a certain State for a fixed period, is legal. *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64 (22 L. ed. 315); *contra*, where no time was fixed. *Wright v. Ryder*, 36 Cal. 342.

A covenant not to be directly or indirectly interested in any voyage to the northwest coast of America, or in any traffic with the natives of that coast, for seven years, was held valid. *Perkins v. Lyman*, 9 Mass. 522.

An agreement not to engage in a particular business in a certain town for five years, is only a partial or limited restraint upon trade. *Washburn v. Doeck*, 68 Wis. 436.

Where a land agent sold his business, with an agreement not to re-engage in the business in the same place for three years, after the expiration of that time he was not debarred from soliciting the agency of the same lands he had in charge when the contract was made. *Hanna v. Andrews*, 50 Iowa, 462.

Contracts, reasonable as to space.

A contract restraining the exercise of a trade within a limited locality, when there is reasonable ground for the restriction, may be valid as to the particular place which is a reasonable limit. *Smith's Appeal*, 5 Cent. Rep. 208, 113 Pa. 579.

In *Whittaker v. Howe*, 3 Beav. 338, a contract made by a solicitor, not to practice as a solicitor in any part of Great Britain, was held valid.

In *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, a general contract not to engage in the sale of champagne, without limit as to space, was enforced as being, under the circumstances, a reasonable contract.

A covenant not to be interested in a certain business within a certain county, nor for five years in 181 U. S.

the United States, was held good as to the county. *Dean v. Emerson*, 102 Mass. 480.

A contract by a dealer in New Jersey not to ship poultry to New York or Washington has been held not to contain an unreasonable restriction. *Richardson v. Peacock*, 33 N. J. Eq. 597.

A contract not to carry on a business within a radius of ten miles of a village, means within a radius of ten miles of the center of such village. *Cook v. Johnson*, 47 Conn. 175.

Before a covenant not to practice medicine in the neighborhood can be enforced, evidence must show the extent of the practice sold. *McNutt v. McEwen*, 10 Phila. 112.

The mere purchase of the "good will" will not prevent the seller from carrying on the same business in the same town. *Porter v. Gorman*, 65 Ga. 11; *Hegeman v. Hegeman*, 8 Daly, 1.

An agreement not to sell milk in the town is not violated by selling to another residing outside the town, merely with knowledge that the purchaser intends to retail the milk within the town. *Smith v. Martin*, 80 Ind. 260.

A covenant in restraint of trade which is unlimited in regard to space, except by the words "so far as the law allows," is not void as being against public policy. *Davies v. Davies*, 56 L. J. Ch. 451; 35 Weekly R. 697.

A covenant not to carry on the business of a manufacturer for a period of five years under a particular name or style is not void, although unlimited in point of space. *Vernon v. Hallam*, 35 W. R. 156; 56 L. J. Ch. 115; but compare *Wiley v. Baumgardner*, 97 Ind. 66; 49 Am. Rep. 427.

But a covenant providing that the covenantor should desist from selling mattresses "in all the territory of the State of New York west of the City of Albany," was held void as embracing too large a territory. *Lawrence v. Kidder*, 10 Barb. 641.

ty, permission, or aid, either directly or indirectly," etc.; that in 1872, complainants acquired all the rights of Lucy A. S. Fowle, in said contract of 1869 with said John D. Park; that the copartners of said John D. Park, defendants herein, "derived all their interest in, and right to, the manufacture and sale of said balsam since the execution of said contract of 1869 from said John D. Park, and with full knowledge and subject thereto;" that the defendants and each of them have failed to comply with the contract between Williams and Sanford and Park in that they have for ten years last past sold and caused to be sold, and sold with knowledge or reason to know that the same was to be resold, said balsam in the territory comprised in the transfer to Butts, in large quantities in competition with complainants' trade, and have sold there and elsewhere at a less price than seven dollars per dozen, and have sold and caused to be sold said balsam in the territory described in the contract of 1869 with John D. Park, and at a lower price than seven dollars; and that complainants had gone to large expense on the faith of that contract and built up a large and valuable trade throughout the entire Pacific coast with which defendants are interfering and injuring and damaging complainants as well as interfering with their business east of the Allegheny Mountains. The bill, waiving an oath, prays for answers, an injunction, and an accounting.

The defendants admit in their answer the invention of the medicinal preparation and its name and the sale by Williams to Butts and by Butts to Seth A. Fowle, and the sale by Will-

iams to Sanford and Park, which the defendants say was made the year before the sale to Fowle; and that John D. Park purchased the rights of Sanford and Park. They call for a production of the agreement in 1864 between Seth W. Fowle and John D. Park; they deny that they have sold any of the balsam in the territory transferred to Butts; they deny the sale of any balsam by them within the territory west of the Rocky Mountains named in the contract with John D. Park; and deny that they ever sold the balsam anywhere at less than seven dollars per dozen. They add to their answer averments, by way of cross bill, in which they state their exclusive right to manufacture and sell the balsam in those parts of the United States lying west of the territory included in the sale from Williams to Butts, as well as those States and counties named in the transfer of Williams to Sanford and Park, and assert that the Fowles, by putting up the medicine in packages containing less than eight liquid ounces, are selling the same for less than one half of \$7.20, and therefore the medicines of Fowle & Sons are sought for by dealers selling medicine in defendants' territory, who buy and resell the same to defendants' injury. They pray for answers, an oath not being waived, and that complainants may be enjoined from putting up for sale said medicine in packages of less size than those in use on the first day of March, 1845, the date of the contract between Butts and Fowle, and from selling packages of said medicine of whatever quantity at a less price than \$7.20 per dozen, and for damages.

Complainants filed a replication to defend-

A contract not to exercise the trade of making printers' rollers and composition in New York City, or within 260 miles thereof, is void. *Bingham v. Maigne*, 20 Jones & S. 90.

The question as to what is a general restraint of trade does not depend upon state lines; and a restraint is not necessarily general which embraces an entire State. Where such contract is made with the purchaser and his assigns, his successor and assignee may maintain an action upon it; and the fact that the purchaser was a foreign corporation is no objection. *Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 108 N. Y. 473.

Competition in trade or business.

A party may legally purchase the trade and business of another for the very purpose of preventing competition, and its validity, if supported by a consideration, depends upon its reasonableness as between the parties. *Diamond Match Co. v. Roeber*, 9 Cent. Rep. 181, 108 N. Y. 473; 35 Hun, 421.

It seems that no contracts are void as being in general restraint of trade when they operate simply to prevent a party from engaging or competing in the same business. *Leslie v. Lorillard*, 1 L. R. A. 466, 110 N. Y. 519.

A contract between an individual and three manufacturers under several patents forming a combination of the parties, with a view to regulate competition between the parties to it in the sale of the particular commodity which they severally make, is a contract for a lawful purpose where it does not refer to an article of prime necessity, to a staple of commerce, or to a merchandise to be bought or sold on the market. *Central Shade Roller Co. v. Cushman*, 3 New Eng. Rep. 505, 143 Mass. 383.

A contract by which a railroad company agreed that an elevator company should, in consideration of the erection of an elevator, have the handling of

all through grain brought by the railroad company to Dubuque, and receive a fixed price therefor, is not repugnant to the commercial power of Congress nor to public policy. *Dubuque & S. C. R. Co. v. Richmond*, 86 U. S. 19 Wall. 584 (22 L. ed. 173.)

Agreements to stifle competition in trade are void.

All agreements, in whatever form, to stifle fair competition are void. *Gardiner v. Morse*, 25 Me. 140; *James v. Fulcrold*, 5 Tex. 512; *Hunt v. Frost*, 4 Cush. 64; *Hook v. Turner*, 22 Mo. 333; *Jones v. Caswell*, 3 Johns. Cas. 23; *Thompson v. Davies*, 13 Johns. 112; *Ingram v. Ingram*, 4 Jones, L. 188; *Martin v. Ranlett*, 5 Rich. L. 541; *Brisbane v. Adams*, 3 N. Y. 129; *Atoheson v. Mallon*, 43 N. Y. 147; *Gibbs v. Smith*, 115 Mass. 582; *Marsh v. Chicago, R. I. & P. R. Co.* (Iowa) 39 N. W. Rep. 643.

A contract entered into by the grain dealers of a town, the true object of which is to form a secret combination which would stifle all competition, control the price of grain, cost of storage and of shipment, is in restraint of trade and void as against public policy. *Craft v. McConoughy*, 79 Ill. 346.

Where one producer enters into a contract with another producer, binding the latter to hold and keep out of the market his supply, the contract is against public policy and void. *Arnot v. Pittston & E. Coal Co.*, 68 N. Y. 558.

If two persons in actual competition intend bidding for an article, then if they agree that one shall abstain from bidding and the profits shall be divided, the courts will not enforce their bargain. *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 3 Johns. 444; *Nat. Bank of Metropolis v. Sprague*, 20 N. J. Eq. 159; *Jenkins v. Frink*, 30 Cal. 539; *Loyd v. Malone*, 23 Ill. 48; *Wooton v. Hinkle*, 20 Mo. 290; *Sharp v. Wright*, 35 Barb. 236; *People v. Stephens*, 71 N. Y. 527; *Singer Mfg. Co. v. Yarger*, 2 McCrary, 583.

It seems where the provisions of corporate agree-

ants' answer, and an answer under oath to their cross bill, denying the assertion of the defendants that they had the exclusive right to manufacture and sell in all the territory of the United States lying west of that included in the sale and transfer from Williams to Butts, and averring that defendants had no right to manufacture or sell in any of the territory west of the ridge of the Rocky Mountains. They say that no size of package was stipulated for in the contract between Fowle and Butts, and that the object of the stipulation was, that the medicine should not be sold at a lower proportional rate than \$7.20 for ten ounces, and that they have never sold at any less rate; that they have used a smaller size of bottle holding only four liquid ounces, but the lowest net price they ever charged for them has been at the rate of nine dollars per dozen bottles of ten ounces; and that no sales thereof have ever been made by them within the territory embraced in the contract between Williams and Sanford and Park, and such sales as have been made were made with full notice to defendants, with description and sample of bottle, and without objection, and they deny all injury to defendants. To this answer replication was duly filed.

The cause having been brought on for hearing, the agreement between Lewis Williams and Benjamin F. Sanford and John D. Park, dated May 1st, 1844; the agreement between Williams and Butts, dated May 20, 1844; the agreement between Butts and Fowle, dated March 1st, 1845; the agreement between Fowle and Park, dated December 16, 1863; the agree-

ment between John D. Park and Seth A. Fowle and Lucy Ann S. Fowle, dated November 17, 1869; the release of Lucy Ann S. Fowle to Seth A. Fowle, January 1st, 1873; as well as various letters of Fowle & Son in 1877 and 1878, to Park & Sons, and a letter from Park & Sons to Fowle & Son, in 1877; sundry invoices, bills, etc., were put in evidence, together with the testimony of several witnesses bearing upon the question of sales by or with the knowledge of Park & Sons in the territory claimed by Fowle & Son.

The court found "that the complainants are not entitled to the relief prayed in their said bill of complaint," and thereupon dismissed complainants' bill at their costs and the cross bill of respondents at their costs, from which decree complainants prosecuted this appeal.

Messrs. Alex. H. McGuffey and Henry A. Morrill, for appellants:

The subject matter of the contract consists of a compound which involves a secret in its preparation; which the law recognizes as property.

The contract does not deprive the public of the benefit of this secret nor is any party, possessing the secret, debarred from its use. They are simply circumscribed as to the territory within which they may sell.

Benwell v. Inns, 24 Beav. 807; *Harms v. Parsons*, 82 Beav. 828; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 845; *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Rennie v. Irvine*, 7 Man. & Gr. 969; *Jones v. Lees*, 1 Hurl. & N. 189; *Alsopp v. Wheatcroft*, L. R. 15 Eq. 59;

ments in restraint of competition tend beyond measures of self protection and threaten the public good in a distinctly appreciable manner, courts, in the exercise of their equitable powers, may interfere, but should not do so unless the apprehension of danger to the public interests rests upon evident grounds. *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519.

Contracts divisible may be sustained.

Agreements in restraint of trade, whether under seal or not, may be divisible. Where one part thereof is void as being in restraint of trade, while the other is not, the court will give effect to the latter, and will not hold the agreement to be altogether void. *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64 (22 L. ed. 215).

Illegality of one provision will not necessarily make the entire contract void. *Western Union Tel. Co. v. Burlington & S. R. Co.* 11 Fed. Rep. 1.

The fact that one of the stipulations in a contract is illegal does not defeat a recovery on the others when the stipulations are divisible and the consideration is not in itself illegal. *Green v. Price*, 13 M. & W. 695; *Price v. Green*, 16 M. & W. 346; *Bank of Australasia v. Brelliat*, 6 Mo. P. C. 152; *Mayfield v. Wadley*, 8 B. & C. 367, 5 D. & R. 228; *Kerrison v. Cole*, 8 East, 221; *McAllen v. Churchill*, 11 Moore, 493; *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 175 (17 L. ed. 520); *Goodwin v. Clark*, 65 Maine, 280; *Carleton v. Woods*, 28 N. H. 290; *Van Dyck v. Van Beuren*, 1 Johns. 362; *Saratoga Co. Bank v. King*, 44 N. Y. 89; *Leavitt v. Palmer*, 3 N. Y. 19; *Hook v. Gray*, 6 Barb. 306; *Tracy v. Talmage*, 14 N. Y. 162; *Leavitt v. Blatchford*, 5 Barb. 2. See *Benj. Sales*, § 506; *Mallan v. May*, 11 M. & W. 653; *Carrigan v. Looming F. Ins. Co.* 88 Vt. 418; *Lange v. Werk*, 2 Ohio St. 519; *Wilde v. Webb*, 20 Ohio St. 431; *Hynds v. Hays*, 25 Ind. 41; *Kimbrough v. Lane*, 11 Bush, 556; *Newberry* 181 U. S.

Bank v. Stegall, 41 Miss. 142; *Valentine v. Stewart*, 15 Cal. 887.

A separation of the good consideration from that which is illegal will be attempted in those cases only when the party seeking to enforce the contract is not the wrongdoer. *Saratoga Co. Bank v. King*, 44 N. Y. 87.

The general rule is that where the illegal cannot be severed from the legal part of a covenant, the contract is altogether void; but where they can be so severed, whether the illegality be created by the statute or by the common law, the bad part may be rejected and the good retained. *Pickering v. R. R. Co.* L. R. 3 C. P. 260; citing *Maleverer v. Redshaw*, 1 Mod. 35; *Collins v. Blantern*, 2 Wils. 851; *U. S. v. Bradley*, 35 U. S. 10 Pet. 343 (9 L. ed. 449); *Deering v. Chapman*, 22 Maine, 488; *Boby v. West*, 4 N. H. 235; *Coburn v. Odell*, 30 N. H. 540; *Woodruff v. Hinman*, 11 Vt. 592; *Frazier v. Thompson*, 2 Watts & S. 235; *Raguet v. Roll*, 7 Ohio, 70; *McBratney v. Chandler*, 22 Kan. 692; *Everhart v. Puckett*, 73 Ind. 409; *Anderson v. Powell*, 44 Iowa, 20; *Waite v. Jones*, 1 Scott, 730; *Newman v. Newman*, 4 M. & S. 66; *Gaskell v. King*, 11 East, 165; *Wigg v. Shuttleworth*, 13 East, 87; *Ladd v. Dillingham*, 34 Maine, 316; *Woodruff v. Hinman*, 11 Vt. 592; *Rose v. Truax*, 21 Barb. 361; *Donallen v. Lennox*, 6 Dana, 91; *Langdon v. Gray*, 58 How. (N.Y.) Pr. 387; *Tobey v. Robinson*, 99 Ill. 222.

Combinations to the prejudice of the public are criminal conspiracies.

A combination is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public or oppress individuals by unjustly subjecting them to the power of the confederates and giving effect to the purposes of the latter, whether of extortion or mischief. *Blah. Cr. L.* § 172; *Desty, Cr. L.* § 2; 8 *Chitty, Cr. L.* § 1188; *Archb. Cr. Pr.* 1830. See also *Reg. v. Kenrick*, 5 Q. B. 49.

Rousillon v. Rousillon, L. R. 14 Ch. Div. 851.

The performance of the covenant will be enforced, though the restriction is unlimited as to space.

Tallis v. Tallis, 1 El. & Bl. 891; *Peabody v. Norfolk*, 98 Mass. 452; *Vickery v. Welch*, 19 Pick. 523; *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 78; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64 (22: 315); *Mitchel v. Reynolds*, 1 Smith. Lead. Cas. *508-527; 1 P. Wms. 181; *Smith's App.* 5 Cent. Rep. 203, 113 Pa. 579, 590; *Wald's Pollock*, Cont. 316 and cases there cited.

(No counsel appeared for appellees.)

Mr. Chief Justice Fuller delivered the opinion of the court:

No question arises in respect to the sale and transfer by Williams to Butts, and by Butts to Seth W. Fowle, and the acquisition by complainants of all the right, title and interest of the latter, nor as to the sale by Williams to Sanford & Park, and the passage of the title, interest, and rights of Sanford and Park to Park, and through him to his codefendants; and the agreement between Park and Fowle & Son, as to the territory west of the Rocky Mountains, is produced, and sustains the averments of the bill in that regard.

By the contract between Williams and San-

ford and Park, Williams, in consideration of the payment of \$2,500 by Sanford and Park, and the covenants entered into on their part, sold and transferred to Sanford and Park a true copy of the recipe used in preparing said Balsam of Wild Cherry, together with the sole right to manufacture and sell said medicine in Ohio, Indiana, Illinois, Kentucky, Tennessee, Missouri, Michigan, Arkansas, Mississippi, Alabama, Louisiana, and all the territory lying west of those States, together with certain counties in the State of Virginia and certain counties in the State of Pennsylvania, and Sanford and Park covenanted and agreed to pay \$2,500 and \$4,764 for medicine consigned to them for sale, and also "that they will not sell or cause to be sold, or establish agencies for the sale of said balsam in any part of the United States except in the States and Territories herein granted to them, and also that they, the said Sanford and Park, will not sell, or cause any of said medicine to be sold, at less price than seven dollars for each and every dozen, except to such persons as shall become their agents for a whole State or Territory, and in all cases where such agencies are granted they also promise and agree to take from such agents an agreement, with a sufficient guarantee or penalty, that no sales of said medicine shall be made at a less price than that above named;" and Williams covenanted and agreed

State v. Stewart, 59 Vt. 273, 4 New Eng. Rep. 378; *Com. v. Carlisle, Bright (Pa.)* 36; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173.

A "corner," when accomplished by confederation to raise or depress prices and operate on the market, is a conspiracy if the means be unlawful. *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *People v. Melvin*, 2 Wheeler, Cr. Cas. 262.

Every association to raise or depress the price of labor beyond what it would bring if left without aid or stimulus, is criminal. If the means be unlawful, the combination is indictable. *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *Bish. Cont.* § 521.

No agreement for defrauding the public can be valid. *People v. Stephens*, 71 N. Y. 527.

An agreement by several commercial firms, by which they bound themselves for the term of three months not to sell any India cotton bagging, except with the consent of the majority of their number, was held unlawful in *India Bagging Asso. v. Kock*, 14 La. Ann. 164. And see *Stanton v. Allen*, 5 Denio, 434; *Craft v. McConoughy*, 79 Ill. 346; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666.

Conspiracies which involve mischief to the public are indictable, although neither the object sought to be accomplished nor the means used for its accomplishment is criminal. *Com. v. Ward*, 1 Mass. 473; *Com. v. Judd*, 2 Mass. 329, 3 Am. Dec. 54; *State v. Burnham*, 15 N. H. 396.

All confederacies whatsoever which wrongfully prejudice a third person are highly criminal at common law. *State v. Stewart*, 4 New Eng. Rep. 378, 59 Vt. 273; 2 Russ. Cr. 674; *People v. Petheram* (Mich.) 7 West. Rep. 592.

Conspiracies against trade.

Any agreement between large dealers, meant to control the market and obtain exorbitant prices, is an unlawful conspiracy against trade and void. *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Craft v. McConoughy*, 79 Ill. 346; *Fairbank v. Leary*, 40

Wis. 637; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 672. And see *Collins v. Locke*, L. R. 4 App. Cas. 674; *W. U. Teleg. Co. v. Chicago & P. R. Co.* 86 Ill. 248; *Western Union Teleg. Co. v. Am. Union Teleg. Co.* 65 Ga. 160; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 72 Ill. 360.

Conspiracies to injure trade were indictable at common law. *Rex v. Cope*, 1 Strange, 144; *Rex v. De Berenger*, 3 Maule & S. 68; *Rex v. Norris*, 2 Ld. Ken. 300; *Reg. v. Gurney*, 11 Cox, Cr. Cas. 414; *Levi v. Levi*, 6 Car. & P. 239.

Although a corporation is not dissolved by insolvency, the appointment of a receiver or by a lease of the corporate property (*People v. Northern R. Co.* 42 N. Y. 217; *Kincaid Dwinelle*, 59 N. Y. 543; *Com. v. Central Pac. R. Co.* 52 Pa. 506), yet when it is consolidated with another under authority of law, or when under such authority it transfers its franchise, it is dissolved. *Bishop v. Brainerd*, 23 Conn. 289; *Shields v. Ohio*, 95 U. S. 319 (24 L. ed. 357); *People v. North River S. R. Co.* (N. Y.) 2 L. R. A. 83.

Contracts to create a monopoly are void.

Contracts to obtain a monopoly are invalid. *Crawford v. Wick*, 18 Ohio St. 190; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio, 666; *Marsh v. Russell*, 68 N. Y. 288; *Kelley v. Devlin*, 58 How. Pr. 437; *Woodruff v. Berry*, 40 Ark. 251; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Craft v. McConoughy*, 79 Ill. 346; *Raymond v. Leavitt*, 41 Am. Rep. 170, 45 Mich. 447. As an agreement to absorb and monopolize the transportation of a community. *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Maguire v. Smock*, 43 Ind. 1.

A contract which creates a monopoly is in violation of the Constitution which declares that "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." If such is the effect of the contract, it is forbidden by the Constitution, and no legislation can give validity to it. *Brenham v. Brenham Water Co.* 67 Tex. 561; *Norwich Gas-Light Co. v. Norwich City Gas Co.* 25 Conn. 19; *Chicago v. Rumpff*, 45 Ill. 90; *Hudson v. Thorne*, 7 Paige 261; *Slaughter-House*

that he would not "manufacture, sell, or cause to be sold, any of said medicines within the territory herein granted to the said Sanford and Park, or any medicines under a different name, prepared from the same recipe used in preparing said balsam, or in any other form purporting to be an improvement on the said medicine," it being provided "that the said Sanford and Park shall not make known to any person the ingredients employed or manner of preparing said medicines." By a similar agreement Williams sold and transferred to Butts the recipe and the sole right to manufacture and sell said medicine in the six New England States; also in the States of New York, New Jersey, Delaware, Maryland, North and South Carolina, District of Columbia, and British America, and certain counties in the States of Pennsylvania and Virginia, for four thousand dollars, and eight thousand six hundred and sixty-one dollars for medicine consigned to him, the parties covenanting as in the agreement with Sanford and Park.

The contract between Butts and Fowle was similar in terms, the money consideration being twenty-nine thousand five hundred dollars, and some accounts, a stock of drugs, and some apparatus and stereotype plates being included in the purchase.

By the agreement between John D. Park and Seth A. Fowle and Lucy Ann S. Fowle, Park, in consideration of \$5,000, sold, assigned, transferred, and conveyed to said Seth A. and Lucy

Ann S. Fowle all his "right, title, interest and claim in and to the property or proprietary right or franchise of the medicine or medicinal preparation called and known as 'Wistar's Balsam of Wild Cherry,' for and so far as regards all the territory or part of North America lying westerly of the ridge of the Rocky Mountains, embracing the whole of the following States and Territories of the United States, viz.: the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Utah, Arizona, and Alaska, and so much and such parts of the Territories of Montana, Wyoming, Colorado and New Mexico as are westerly of the ridge of said Rocky Mountains meaning and intending all territory lying westerly of said Rocky Mountains (including the westerly slope thereof) and between said mountains and the Pacific Ocean, and also all my right, claim, and interest in and to the good will of the business of making, putting up and selling said Wistar's Balsam of Wild Cherry within said limits, and in and to the trademarks, so far as used within said limits, on the labels, bottles, wrappers, or packages containing said medicine, or otherwise used in carrying on said business within the limits or territory aforesaid;" also in all of British Columbia and Mexico; "intending hereby to transfer and relinquish to said Fowles the whole market for the said medicine of all said territory westerly of the Rocky Mountains, and also (so far as I have the power so to do),

Cases, 83 U. S. 16 Wall. 102 (21 L. ed. 417); *Live Stock D. & B. Assn. v. Crescent City, L. S. L. & S. H. Co.* 1 Abb. (C. S.) 268.

As a general rule no agreement will be sustained, the effect of which would be to fasten on the community the monopoly of an important staple or industry, although it has been held in Massachusetts that an agreement not to run an opposition stage between Boston & Providence was valid, on the ground that the act complained of was a breach of trust (*Pierce v. Fuller*, 8 Mass. 223); and the same reason may be applied to a ruling made shortly afterwards sustaining an agreement not to compete for seven years in the northwest trade. *Perkins v. Lyman*, 9 Mass. 522.

A railroad company cannot grant to a telegraph company the exclusive right to establish lines of telegraphic communication along its right of way, such contracts being contrary to public policy. *W. U. Tel. Co. v. Burlington & S. R. Co.* 11 Fed. Rep. 1, 3 *McCrary*, 130, 2 Col. Law, 307.

The restriction will not be extended so far as to cover agreements by employers to induce employes to deal exclusively in a particular store. *Crawford v. Wick*, 18 Ohio St. 190.

The English cases sustain purchases of land from brewers with covenant that the purchaser, in case he open a public house, shall buy all his beer from the vendor. *Cooper v. Twibill*, 3 Camp. 286a; *Gale v. Reed*, 8 East, 80; *Catt v. Tourle*, L. R. 4 Ch. App. Cas. 654. See *Schwalm v. Holmes*, 49 Cal. 665.

A covenant by an author to write exclusively for a particular publisher has been sustained. *Morris v. Colman*, 18 Ves. 437.

But to validate covenants of this class the commodity, or services rendered, should be fairly up to the market value. *Thornton v. Sherratt*, 8 Taunt. 520.

A contract for the exclusive right to supply a certain district with flour prepared under a certain patent, for a royalty, is not invalid. *Hecker v. Fowler*, 69 U. S. 2 Wall. 123 (17 L. ed. 759.)

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No remedy on illegal contract.

Where two or more parties have united in a transaction to defraud another or others, or the public, or the due administration of justice, or where it was against public policy, or contrary to good morals, no one of them can maintain a suit thereon against any other. *York v. Merritt*, 77 N. C. 213; *Wright v. Hindakopf*, 48 Wis. 344.

A court of equity will not lend its aid to require an account of profits and a division thereof, although the contract has been executed. *Craft v. McConoughy*, 79 Ill. 345.

Yet the court will not refuse to deal with that property, on the ground that it was acquired under an illegal contract. *W. U. Tel. Co. v. Burlington & S. R. Co.* 11 Fed. Rep. 1.

The modern doctrine of enjoining contracts because they tend to restraint of trade is restricted, so far as corporations are concerned, to contracts which under the circumstances tend to create monopolies; that is, to confer special or exclusive privileges the existence of which would be contrary to public policy. *Lealie v. Lorillard*, 1 L. R. A. 455, 110 N. Y. 519.

An agreement to form a pool for the purchase of lard, involving tying up and withdrawal from the market of large quantities, is an unlawful combination which would not be enforced between the parties. *Arnot v. Pittson & E. Coal Co.* 68 N. Y. 558; *Knowlton v. Congress & E. Spring Co.* 57 N. Y. 513; *Bell v. Leggett*, 7 N. Y. 176; *Keene v. Kent*, 4 N. Y. State Rep. 431.

A contract between attorneys and persons engaged in the illegal sale of liquors, providing that the attorneys shall, for a sum stated, defend all cases brought against such persons for violation of the Kansas Prohibitory Liquor Law is invalid, and the attorneys could not recover upon it for services actually performed thereunder. *Bowman v. Phillips*, 3 L. R. A. 631.

See also note on *Contracts in restraint of trade*, 87 U. S., 22 L. ed. 315.

of all said British Columbia and Mexico, so that they and their legal representatives and assigns may have and enjoy the sole and exclusive right of selling said medicines within said limits, so far as I can assure such right to them, and free from any competition or interference by me or any one claiming under me or acting by or with my authority, permission, or aid, either directly or indirectly;" and he further covenanted that he "will not, and my heirs, executors, administrators, and assigns shall not, either within said territory westerly of the ridge of the Rocky Mountains, or within said British Columbia or Mexico, hereafter make, put up, sell, or offer or expose for sale, any of said Wistar's Balsam of Wild Cherry, or any other medicine whatever bearing the name of 'Wild Cherry,' in whole or in part, nor the said medicine under a different name prepared substantially from the same recipe or formula, or use the same or trademarks, or any of them, or be concerned, directly or indirectly, in the business of selling or in promoting the sale of said medicine within said limits in competition with said Fowles, their representatives and assigns, or in any way or by any means whatsoever do or knowingly aid or abet any other person to do anything to prejudice or interfere with the business of selling said medicine within the limits aforesaid solely by said Fowles, their representatives and assigns;" and then follows a covenant of further assurance.

If the defendants violated the provisions of these contracts by selling this article within the territory which it was covenanted complainants should occupy exclusively, or by selling to others for sale there, or by promoting such sales, we are aware of no reason for the refusal of relief unless it may be, as is contended, that the contracts were not enforceable on the ground of public policy.

We have not been favored with any opinion of the learned Judge who decided the case in the circuit court, nor with any brief in appellees' behalf; and while we may naturally assume that the finding was based upon the supposed want of proof of violation of the contracts, or their supposed invalidity, or both, we are left to conjecture as to the precise views which were entertained.

As we remarked in *Gibbs v. Consolidated Gas Company*, 180 U. S. 409 [32: 984]: "The decision in *Mitchel v. Reynolds*, 1 P. Wms. 181, Smith's Leading Cases, Vol. 1, Pt. II, 508, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained. The question is whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. *Roussillon v. Roussillon*, L. R. 14 Ch. Div. 351; *Leather Cloth Co. v. Loraont*, L. R. 9 Eq. 845; *Oregon Steam Navigation Co. v. Winsor*, 87 U. S. 20 Wall. 64, 68 [22: 815, 818]."

Relating as these contracts did to a com-

pound involving a secret in its preparation; based as they were upon a valuable consideration, and limited as to the space within which, though unlimited as to the time for which, the restraint was to operate, we are unable to perceive how they could be regarded as so unreasonable as to justify the court in declining to enforce them.

The vendors were entitled to sell to the best advantage, and in so doing to exercise the right to preclude themselves from entering into competition with those who purchased, and to prevent competition between purchasers, and the purchasers were entitled to such protection as was reasonably necessary for their benefit. Williams had and transferred property in the secret process of manufacturing the article he had discovered, and he and his grantees could claim relief as against breaches of trust in respect to it. The policy of the law is to encourage useful discoveries by securing their fruits to those who make them. If the public found the balsam efficacious, they were interested in not being deprived of its use, but by whom it was sold was unimportant.

The decree below was probably not rendered, and cannot be sustained, upon the theory that these contracts were in themselves invalid.

It remains to be considered whether there is evidence tending to show that the defendants sold the balsam within the prohibited territory, or to those by whom to their knowledge it was to be there sold, or in any way promoted such sale. We are of opinion that the record discloses violations of the contracts in these particulars, and that the cause should have gone to a master to state an account. One of the defendants was called by complainants as a witness, and though apparently an unwilling one, he admits four shipments of balsam to Atlanta, Ga., in 1879, 1880, 1883, and 1884; a shipment, in 1879, to New York; a shipment, in April, 1880, to Philadelphia; and identifies an entry on defendants' sales book of a shipment to Coffin, Reddington & Co., San Francisco, Cal., in 1878, charged to Smith & Co., of Dayton, Ohio; although Georgia, New York, Philadelphia, and California were all within complainants' territory. Evidence was also adduced of shipments by defendants to Henry, Curran & Co., at New York, in 1874, 1875, and 1876, not for sale in defendants' territory, but for the general purposes of the eastern trade, and sold within the territory embraced in the original transfer to Butts, and of sales directly by Park & Sons to Crittenden, and McKesson & Robbins, of New York, in 1878, 1880, 1881, and 1882. Coffin, of Coffin, Reddington & Co., of New York and San Francisco, testifies that for seven years he had purchased Park's Wistar's Balsam from S. N. Smith & Co., Dayton, Ohio, commencing in 1877, and the last purchase being in 1883, and that purchases were made under orders to ship direct to California, and that Smith & Co. furnished it for seven dollars a dozen, less freight. Smith testifies to the shipment of nine gross of this balsam to California to the San Francisco branch of Coffin, Reddington & Co., during the years 1879, to 1883, inclusive, and one gross to John Helm & Co., of California; that he did not usually keep the article in stock, but ordered it from Park & Sons, and

sometimes had the goods shipped directly by them; that while they rendered bills charging \$84 and \$87 per gross in some instances, or seven dollars or more per dozen, he, in fact, paid them only what he received, seven dollars per dozen less the freight, which of course, indicates that defendants knew where the balsam was going, since they not only shipped some direct, but were paid by Smith on the basis of deducting freight equivalent to the charges to California, and, as well put by appellants' counsel, "if the sales were to Smith & Co. in fact, then they were for much less than seven dollars a dozen, and in violation of contract." Smith also testifies to two instances—one in 1877 and one in 1878—of the shipment of ten gross and five gross to Coffin, Reddington & Co., California, for so much less than seven dollars per dozen as the amount of the freight to California, which balsam Smith & Co. procured from the defendants, paying them the net sum received. The witness Park did not deny that balsam had been shipped directly to California, upon the order of Smith & Co.; he testified that they kept the balsam in stock at one time with Smith & Co., to be sold on their account; he would not say that the entries on the sales books in the name of Smith & Co. necessarily showed to whom the article was shipped, and said that he did not know whether, when charged to Smith & Co., the article was shipped to them or to other parties; he identified the entry of one shipment to Coffin, Reddington & Co.; he knew the average amount of freight per gross on balsam shipped to California, which, deducted from \$84, the contract sales price per gross, left substantially the amount in all cases received by Smith & Co. on the California shipments, and by them paid to Park & Sons; and he admitted several charges on Park & Sons' books against Smith & Co., for merchandise, corresponding in dates and amounts with shipments to California. The inference is a reasonable one, that the defendants knew that the balsam claimed to have been sold to Smith & Co., and which was shipped to California, was going there, and in addition, they had been informed in 1878, by the complainants, of the report that Wistar's Balsam of defendants' make had made its appearance in the San Francisco market, and complainants had subsequently objected to sales within their territory, to which defendants paid no attention. We do not think the latter are in any position to say that they did not know what was going on. Neither of them was called for the defense nor any testimony taken on their behalf. We are satisfied that complainants sufficiently made out their case to justify according to them the relief prayed.

The decree is reversed and the cause remanded, for further proceedings in conformity with this opinion.

UNITED STATES, *Pff.*,
v.

M. F. REILLY.

(See S. C. Reporter's ed. 58-60.)

Certificate of division in opinion—commissioner's authority to administer oath.

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1. On certificate of division in opinion, the whole case cannot be split into numerous points, in order to get this court to decide the whole matter in dispute.
2. A Commissioner of the United States Circuit Court has no authority to administer an oath to a Deputy United States Surveyor, as to his services, and make a certificate for the purpose for which the certificate set out in the indictment in this case is alleged to have been made and used.

[No. 1036.]

Argued April 8, 1889. Decided May 13, 1889.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of California, on demurrer to an indictment against defendant for falsely certifying, as a Commissioner of the Circuit Court of the United States, to an oath or affidavit taken before him. *Question answered in the negative.*

The facts are stated in the opinion.

Mr. G. A. Jenks, Solicitor-Gen., for the plaintiff.

Messrs. Frank H. Hurd, Walter H. Smith and William M. Stewart for defendant.

(The court declined to hear argument of counsel.)

Mr. Justice Miller delivered the opinion of the court:

This case comes before us from the Circuit Court of the United States for the District of California, upon a certificate of division in opinion between the Judges holding that court. It arises out of an indictment against the defendant, M. F. Reilly, in which he is charged with falsely certifying, as a Commissioner of the Circuit Court of the United States for that circuit, to an oath or affidavit taken before him by one Charles Holcomb.

The indictment sets out that Holcomb, as a Deputy United States Surveyor, had a contract similar to that recited in the previous case of *United States v. Hall* [post, 97], by which contract it was necessary that he should make affidavit that he had personally rendered the service required by it before he could obtain the certificate of the Surveyor-General, William H. Brown, or his successor in office, upon which he could draw compensation for that service. The indictment alleges that, instead of making such affidavit, he, or some one for him, procured the defendant, Reilly, who was a commissioner appointed by the Circuit Court of the United States under the Act of Congress on that subject, to make out the form of an affidavit, and certify to it under his seal as such commissioner; when in fact no such oath was taken by Holcomb, nor any such affidavit made by him. For this offense Reilly is indicted.

A demurrer to this indictment was filed, alleging eight different objections to it, and on the argument of that demurrer the Judges holding the Circuit Court certified to us ten different questions on which they were divided in opinion on that hearing.

The remarks already made in the previous case in regard to splitting up the case into numerous points in order to get this court to decide the whole matter in dispute in advance, apply with increased force to this case. Without further comment on this, it is sufficient to

say that, in the present case, as in that, one of the questions, relating to the power of the commissioner to administer the oath in this case, if he had attempted to do it, is we think pertinent and should be answered. That question, the fifth one of the series certified to us, is as follows: "Has a Commissioner of the United States Circuit Court authority to administer oaths and make certificates for the purposes for which the certificate set out in the indictment is alleged to have been made and used?"

Of course if he had no authority to administer the oath, it was a wholly useless paper in which he made the certificate that the oath had been taken; and whether there is any law punishing him for that offense we are not informed, nor are we required by any of these certificates of division in opinion to inquire.

With regard to the question here asked us, it is sufficient to say that, as in regard to the power of notaries public to administer oaths, presented by the preceding case referred to, we have been unable to find any authority for a circuit court commissioner to take such affidavits or to administer such oaths.

The question is, therefore, answered in the negative.

NATHAN D. THOMPSON, *Appt.*

ALFRED H. HUBBARD.

ALFRED H. HUBBARD, *Appt.*

NATHAN D. THOMPSON.

(See S. C. Reporter's ed. 123-151.)

Sale of copyright of book—statutory notice—when necessary—vendor and vendee—right of action.

1. Upon the facts in this case, *held*, that the transaction between the parties in regard to the sale of the copyright of the Manning book and the plates therefor was a completed transaction, independently of all contracts or agreements in regard to other matters, that the consideration therefor was paid, and that that contract was never rescinded.
2. Under section 4902 of the Revised Statutes, a person cannot maintain an action at law or in equity, for the infringement of his copyright, unless he shall have given the statutory notice in the several copies of every edition published by him.
3. The purchaser of a copyright must comply with the statute in the copies of every edition published by him, in order to maintain an action against his vendor for an infringement of the copyright. It is not enough that the vendor has given such notice, in the edition he published, while it was his copyright.
4. This right of action, as well as the copyright itself, are wholly statutory, and the means of securing such right of action are only those prescribed by Congress.

[Nos. 265, 271.]

Submitted April 17, 1889. Decided May 13, 1889.

CROSS appeals from a decree of the Circuit Court of the United States for the Eastern District of Missouri, adjudging that no assignment or sale of the copyright of the Manning book was ever made by Thompson to Hubbard;

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that Hubbard had no ownership in the copyright of said book, and dismissing the original bill, and decreeing under the cross bill that Thompson always had been the owner of the copyright, and that Hubbard deliver back to him the electrotype plates, illustrations, and stamps pertaining to said book on the tender to him of \$4,000 with interest. From this decree each party appealed. *Reversed.*

See S. C. below, 25 Fed. Rep. 188.

The facts are stated in the opinion.

Mr. J. B. Henderson, for Thompson

The assent of both the parties is necessary to constitute an agreement.

Bruce v. Pearson, 8 Johns. 534; *Innis v. Roane*, 4 Call (Va.) 379; *Hazard v. New Eng. Mar. Ins. Co.* 1 Sumn. 218; *Dodge v. Hopkins*, 14 Wis. 630.

A parol agreement to rescind a contract under seal may be presumed from the acts of the parties.

Green v. Wells, 2 Cal. 584; *Babcock v. Huntington*, 9 Ala. 869.

A party must rescind the contract *in toto*, or not at all.

Jennings v. Gage, 13 Ill. 610; *Tisdale v. Buckmore*, 33 Maine, 461; *Cocks v. Rucks*, 34 Miss. 105; *Evans v. Gale*, 17 N. H. 578; *Utter v. Stuart*, 30 Barb. 20; *De Peyster v. Pulver*, 3 Barb. 284; *Smethurst v. Woolston*, 5 Watts & S. 106; *Harris v. Bradley*, 9 Ind. 166; *Luey v. Bundy*, 9 N. H. 298; *Allen v. Webb*, 24 N. H. 278; *Webb v. Stone*, 24 N. H. 282; *Preble v. Bottom*, 27 Vt. 249; *Cromwell v. Wilkinson*, 18 Ind. 365; *Pratt v. Philbrook*, 41 Maine, 132; *Wright v. Haskell*, 45 Maine, 489; *Ford v. Smith*, 25 Ga. 675.

The plaintiff can have no copyright till he has performed the prescribed conditions.

Boucieault v. Hart, 13 Blatchf. 47; *Carillo v. Shook*, 22 Int. Rev. Rec. 152; *Esner v. Coze*, 4 Wash. C. C. 487.

Unless the conditions imposed by statute are complied with, there can be no copyright. Those conditions are essential to any right of action for infringement.

Callaghan v. Myers, 128 U. S. 1617 (82:547); *Wheaton v. Peters*, 33 U. S. 8 Pet. 591 (8:1055); *Merrell v. Tice*, 104 U. S. 557 (26:854); *Jollie v. Jaques*, 1 Blatchf. 618; *Baker v. Taylor*, 2 Blatchf. 82; *Struve v. Schwedler*, 4 Blatchf. 23; *Parkinson v. Laselle*, 3 Sawy. 330.

Messrs. J. R. Sypher, S. M. Breckinridge and John G. Johnson, for Hubbard:

The sale and delivery of the stereotype plates of the book, when made for the express purpose of enabling the purchaser to print, publish, and sell such book, carries with it the right to do so.

Stevens v. Gladding, 58 U. S. 17 How. 447 (15:155).

A partial failure of consideration would not work a defeat of plaintiff's title to the copyright or result in a reversion of that title to defendant.

Hartshorn v. Day, 60 U. S. 19 How. 211 (15:605); *Mackaye v. Mallory*, 12 Fed. Rep. 828; 1 Story, Cont. § 774.

Whenever the intent can be distinctly ascertained from the language of the contract it will prevail.

Nash v. Towne, 72 U. S. 5 Wall. 689 (18:527); *Slater v. Emerson*, 60 U. S. 19 How. 224

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(15:626); 1 Story, Cont. 788; *Tieman v. Jackson*, 30 U. S. 5 Pet. 580 (8:234); *Clanrickard v. Sidney*, Hobart, 277; *Merriam v. U. S.*, 107 U. S. 437 (27:581); *Brawley v. U. S.* 96 U. S. 168 (24:623).

The practical interpretation, which the parties themselves have put upon the contract, is entitled to great if not controlling influence.

Chicago v. Sheldon, 76 U. S. 9 Wall. 50 (19:594); *Nickerson v. Atchison, T. & S. F. R. Co.* 17 Fed. Rep. 408; *Cramp & Sons' Ship & Engine Building Co. v. Sloan*, 21 Fed. Rep. 561; *Gill Mfg. Co. v. Hurd*, 18 Fed. Rep. 678.

Where the acts stipulated to be done are to be done at different times, the stipulations are to be construed as independent.

Sater v. Emerson, 60 U. S. 19 How. 224 (15:626); *R. Co. v. Howard*, 54 U. S. 13 How. 807 (14:157); *Norrington v. Wright*, 5 Fed. Rep. 768; 11 Rep. 287; *Benj. Sales*, § 426, p. 881.

Contract cannot be rescinded by one party without a tender of what he received.

Farmers' Bank v. Groves, 58 U. S. 12 How. 57 (13:889).

It will be interpreted by the conduct of the parties and by what the parties did under it.

Nickerson v. Atchison, T. & S. F. R. Co. 17 Fed. Rep. 409.

A complete title to the copyright passed when plates were delivered and notes were accepted.

Warren v. Leland, 2 Barb. 618.

That plaintiff failed in the payment of part of the consideration would not justify a rescission of the sale of the copyright.

Benj. Sales, § 764; *Mackaye v. Mallory*, 12 Fed. Rep. 328; *Hartshorn v. Day*, 60 U. S. 19 How. 211 (15:605).

Acts and declarations amount to a practical affirmation of the contract.

Parton v. Prang, 2 Pat. Off. Gaz. 619; 3 Cliff. 537; *Pulle v. Derby*, 5 McLean, 328; *Drone*, Copyright, 360; *Copinger*, Copyright, 280; *Little v. Gould*, 2 Blatchf. 165.

Rescission not established.

Benj. Sales, § 568; *U. S. v. Smoot*, 82 U. S. 15 Wall. 36 (21:107); *Stoddart v. Warren*, 11 Chic. Law Jour. 167; *Cutter v. Powell*, 6 T. R. 320, 2 Smith, Lead. Cas. 7th Am. ed. note 57; *Warren v. Stoddart*, 105 U. S. 224 (26:1117).

The object of the statute is to give notice of the copyright to the public.

Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53 (28:349); *Baker v. Taylor*, 2 Blatchf. 82; *Myers v. Callaghan*, 5 Fed. Rep. 726.

To establish piracy of a compilation, it is necessary to show identity of materials.

Drone, 422-3-4-6; *Story v. Holcombe*, 4 McLean, 316.

The close resemblance between two books, both as to their external appearance and the general arrangement of matter throughout the books, are circumstances which tend to support a charge of piracy.

Copinger, 246; *Ohappell v. Davidson*, 2 Kay & J. 123; *Animus Furandi*, *Drone*, 402, 400, 430; *Lawrence v. Dana*, 4 Cliff. 1, 7 Pat. Off. Gaz. 90; *Jarrold v. Houlston*, 3 Kay & J. 708.

The unauthorized taking of illustrations from a copyrighted book is piracy.

Bogue v. Houlston, 5 De G. & Sm. 275.

Copyright protects the whole and all the parts and contents of a book; not only the text, 181 U. S.

but also any engravings, illustrations, figures, maps, etc., contained in the book.

Drone, 144, 178; *Shortt*, Law of Literature, 85; *Copinger*, 359.

Substantial identity of matter is not, if explained, sufficient to establish piracy.

Alexander v. Mackenzie, 9 Scotch Sess. Cas. (2d Series) 748; *Jarrold v. Houlston*, 3 Kay & J. 716; *Emerson v. Davies*, 3 Story, 793.

The similarity in the combination and arrangement is intentional.

Shortt, Law of Literature, 188.

The intention to pirate need not be shown to make out a case of piracy.

Drone, 402; *Lawrence v. Dana*, 4 Cliff. 1, 7 Pat. Off. Gaz. 90.

Defendant's compilers and editors used plaintiff's book as a common source from which materials could be taken.

Kelly v. Morris, L. R. 1 Eq. 697; *Longman v. Winchester*, 16 Ves. Jr. 269; *Lewis v. Fullarton*, 2 Beav. 6; *Scott v. Stanford*, L. R. 3 Eq. 718; *Morris v. Ashbee*, 19 L. T. N. S. 551; *Banks v. McDivitt*, 13 Blatchf. 163.

Mr. Justice Blatchford delivered the opinion of the court:

These are cross appeals from a decree of the Circuit Court of the United States for the Eastern District of Missouri. On the 28th of November, 1882, Alfred H. Hubbard, a citizen of Pennsylvania, carrying on business at Philadelphia under the name of Hubbard Bros., filed his bill of complaint in that court, against Nathan D. Thompson, a citizen of Missouri, carrying on business at St. Louis under the name of N. D. Thompson & Co. This bill alleges that in 1880 Thompson was the proprietor of a certain book entitled "Illustrated Stock Doctor and Live Stock Encyclopedia, including Horses, Cattle, Swine and Poultry, with all the facts concerning the various breeds and their characteristics, Breaking, Training, Sheltering, Buying, Selling, profitable use and general care; embracing all the diseases to which they are subject—the causes, how to know, and what to do; given in plain, simple language, free from technicalities, but scientifically correct, and with directions that are easily understood, easily applied, and remedies that are within the reach of the people; giving the most recent, approved, and humane methods for the preservation and care of stock, the prevention of disease and restoration of health. Designed for the farmer and stock-owner, by J. Russell Manning, M. D., V. S., with 400 illustrations. Saint Louis, Mo., N. D. Thompson & Co., Publishers, 520, 522, and 524 Pine Street, 1880;" that the book was a compilation, the manuscript of which was owned by Thompson; that Thompson entered it for copyright, in accordance with the provisions of the statute; that he deposited a title page of it in the office of the Librarian of Congress, on the 27th of March, 1880, and before its publication; that thereafter, having published the book, he, on the 7th of June, 1880, deposited two copies of it in the office of the Librarian of Congress, and printed in every copy of it, on the page next after the title page, a notice of copyright, as prescribed by statute, and thereby became the owner of the copyright; that, on the 30th of March, 1880, Thompson entered into an agreement in writing

with Hubbard Bros., a firm composed of Hubbard and one Ayer, carrying on business in Philadelphia, a copy of which instrument, marked Exhibit A, was annexed to the bill and is set forth in the margin,¹ and which was duly recorded in the office of the Librarian of Congress; that thereafter, and on May 28, 1880, Thompson rendered to Hubbard Bros. a further instrument in writing, in the form of a bill of sale for the book, a copy of which was annexed to the bill and marked B, and was duly recorded in the office of the Librarian of Congress, and was as follows:

"St. Louis, May 2d, 1880.
 "Messrs. Hubbard Bros. Philadelphia, Pa., bought
 of N. D. Thompson & Co.
 "To complete set electrots, plates, stock
 book, copyright, originals of illustrations,
 and stamps for binding same... \$4,000 00
 "Credit by amount deducted from bills in
 April..... 500 00
"\$3,500 00"

that Hubbard Bros. paid Thompson in full for said book, plates, copyright, illustrations, and stamps, the consideration mentioned in said bill of sale, and thereby became the sole owners of said book and of the copyright therein, and thereupon employed many persons in the United States and Canada to sell the book by subscription, giving to them the exclusive right to sell the book within the geographical limits assigned to them respectively, and employed Thompson, among others, as one of their agents to sell the book in a large and valuable territory, within which he had the exclusive privi-

lege of selling the book by subscription, and for that purpose of employing others to assist him; that Hubbard Bros. added to the book, and enlarged and improved it, and caused to be printed and bound a large number of copies, each copy having printed therein a notice of copyright, and expended large sums of money in doing so and in advertising the book in newspapers and by means of circulars and prospectuses; that, in June, 1881, Hubbard became, by purchase from Ayer, the sole proprietor of the book and the copyright of it; that Thompson, in 1881 and 1882, with full knowledge of the premises, compiled, printed, published, and sold, and was continuing to sell and offer for sale, a book entitled "The American Farmers' Pictorial Cyclopaedia of Live Stock, Embracing Horses, Cattle, Swine, Sheep and Poultry, including departments on Dogs and Bees; being also a complete Stock Doctor; combining the effective method of object-teaching with written instruction. Giving all the facts concerning the various breeds; characteristics and excellencies of each; best methods of breeding, training, sheltering, stable management and general care; with specific directions how to buy and how to sell, including careful and illustrated analysis of the points of domestic animals, with all the diseases to which they are subject, how to know them, the causes, prevention and cure, given in plain, simple language, free from technicalities, but scientifically correct, and prescribing remedies readily obtained and easily applied. Designed

1 MEMORANDUM OF AGREEMENT.

N. D. Thompson agrees to sell and does hereby sell, to H. Bros. the entire plates (not less than one thousand pages) of a new book entitled Manning's Illustrated Stock Doctor and Live Stock Encyclopedia, for the sum of \$4,000, including copyright, the originals of the illustrations, all the stamps for binding the book, and circular plates, and deliver same as soon as first edition now printing is off press, shipping same to Philadelphia, and delivering same well boxed to the depot in St. Louis, free of charge for boxing or drayage. He agrees further to pay for all books manufactured from said plates, upon his order, with his exclusive imprint and copyright, cash within sixty days, and to order not less than five hundred at a time, and to order in time to admit of their being bound after receipt, by Hubbard Bros., of the order.

He agrees to pay for all books he orders made from said plates, a net price which shall be ten per cent in advance of cost to H. Bros., of their manufacture, and also the further cost of boxing and drayage.

He further agrees to confine his sales to the following territory: the States of Mo., Ark., Indian Territory, La., Texas, Miss., So. Ill., Kentucky and Tenn. west of Tennessee River.

He further agrees, for the period of two years, to publish no books except those he now has in course of publication, viz.: Texas History, Almanac and the Tioe Almanac, and to devote his energies largely for the above period to the vigorous prosecution of the sale of the publications (Books and Bibles) of Hubbard Bros., and theirs exclusively, including bibles, aside from his own as named, paying for the same within sixty days of date of bills at the rate of 66 per cent off from retail prices, and for all circ., pros. books, posters, &c., at cost.

In consideration of the fulfillment of foregoing covenants and agreements, Hubbard Bros. agree to purchase and do hereby purchase the plates of

Manning's Stock Doctor, &c., as before described, paying for same \$500 offset present ac., \$1,000 by note at 8 mos.; \$1,000 note at 12 mos.; \$1,000 by note at 18 mos.; \$500 by note at 24 mos. Notes bearing interest at 6 per cent per annum. They further agree to supply N. D. Thompson all he may order of books from said plates in 500 lots, with his exclusive imprint and copyright mark, at 10 per cent advance on actual cost of manufacture, also cost of boxing and drayage, on 60 days by N. D. Thompson.

They further agree to supply N. D. Thompson their other books and bibles made for sale through and supplied to their branches, at a discount of 66 per cent from the retail prices of the same, granting him the exclusive right of sale of close books in Mo. (excepting six counties adjacent to Kansas City), Ark., Texas, La., that part of Ky. and Tenn. lying west of the Tennessee River and So. Ill.

It is mutually agreed that each party to this contract shall be responsible to the other in the amt. of \$1.00 per copy for each copy of exclusive or close books sold in the other's territory by the general agents or canvassing agents of the opposite party, and further, that all applications for agency of close or exclusive books outside the field of either shall be referred to the party having exclusive right of sale, and a charge of 50c. made for each application so referred. It is further agreed that, should N. D. Thompson go out of business, or for any reason cease to prosecute the sale of Manning's Stock Doctor, &c., then the right of sale in his exclusive field shall revert to Hubbard Bros., unless his successor shall prosecute the sale in like manner as he would have done; the field on stock book to be the same as on H. Bros' books, except the six counties in Missouri adjacent to Kansas City,

HUBBARD BROS.
N. D. THOMPSON.

Plates to be made collateral security for payment of notes.

H. BROS.
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for the successful and profitable use of the *American Farmer and Stock Owner*. By Hon. Jonathan Periam, editor 'American Encyclopedia of Agriculture,' editor 'Prairie Farmer,' former editor 'Western Rural,' Member Illinois Department of Agriculture; first Superintendent of Agricultural Illinois Industrial University; Life Member American Pomological Society; author 'History Farmers' Movement'; 'Lessons for Life,' etc., etc.; and A. H. Baker, V. S., Veterinary Editor 'American Field,' Veterinary Surgeon Illinois Humane Society; Medalist of the Montreal Veterinary College; Member of the Montreal Veterinary Medical Association, etc., etc. With over 700 appropriate engravings. Saint Louis, Mo.: N. D. Thompson & Co., Publishers, 520, 522 and 524 Pine Street. 1882;" and that such book was an infringement on the Manning book, its materials being copied in great part therefrom, the combination and arrangement of them in the two books being similar in all material respects.

The bill prays for an injunction, both preliminary and perpetual, to restrain Thompson from printing, publishing and selling or offering for sale, any copies of the Periam and Baker book, and for an account of those published and sold, and for the payment of the damages suffered by Hubbard, and for general relief.

An application for a preliminary injunction was denied by the court, but it required Thompson to give a bond in \$5,000, to answer any damages that might be adjudged against him, and to keep an account of the books in question which he had sold or should sell.

On the 5th of February, 1883, Thompson filed an answer to the bill, in which he admits that he was the owner of the manuscript of the Manning book, and obtained the copyright therefor. It alleges that said Exhibit A was not recorded in the office of the Librarian of Congress until August 23, 1882; that, before March 30, 1880, Hubbard Bros., composed of Hubbard and Ayer, entered into negotiations with Thompson to purchase from him the Manning book, including the copyright thereof, which was thereafter to be obtained, the originals of cuts, stamps for binding, and plates for circulars; that on the 30th of March, 1880, Thompson met Hubbard at the Union Depot in St. Louis, and there and on the railroad train while passing, on that day, from St. Louis to East St. Louis, Thompson verbally agreed with Hubbard for Hubbard Bros., on the basis for the future sale of said book, copyright, originals of cuts, plates, and stamps; that such agreement for the sale, thereafter to be made, was on the terms that Thompson would sell to Hubbard Bros. the plates necessary for printing the books, including the copyright, originals of cuts, and stamps for binding, Thompson to have the right first to publish an edition of 2,000 copies of the book, and then to deliver the plates, cuts, and stamps, properly packed for shipping, at the Union Depot in St. Louis, and, in consideration thereof, Hubbard Bros. were to pay to Thompson \$4,000, and also to manufacture said book for him and deliver the same to him in St. Louis, at a less cost than that for which he was then manufacturing the book, agreeing to manufacture and deliver it

to him in St. Louis for a less price than \$1.10 per copy, and that the book so to be manufactured for and delivered to Thompson should in each copy contain the name of "N. D. Thompson & Co., publishers, St. Louis, Missouri," exclusive of the name of any other publisher, and should contain on the proper page the exclusive copyright notice of N. D. Thompson & Co., in accordance with the Act of Congress; that Thompson would order delivery of the books in lots of 500 copies, Hubbard Bros. to have a reasonable time after the receipt of the order in which to have the books bound; that the books should be furnished to Thompson at a net price of 10 per cent in advance of the actual cost of manufacture, including boxing and drayage, and that Thompson should have the exclusive right to sell the book within the bounds of the following territory, namely: the States of Missouri, Arkansas, Indian Territory, Louisiana, Texas, Mississippi, and that portion of Iowa bounded on the north by the third tier of counties from the Missouri line, and that part of Illinois, not including, but south of, Rock Island and Will Counties, constituting about three fourths of the State of Illinois, and also in that portion of Kentucky and Tennessee bounded on the east by the Louisville and Nashville and the Nashville and Chattanooga Railroads, and also a portion of the State of Indiana; that Thompson, having agents and canvassers engaged in selling the book on subscription for future delivery, in Iowa, Wisconsin, Michigan, Illinois, and Ohio, at places and covering territory not included in that before mentioned, should continue to sell the book by such agents and canvassers then in his employ, in such territory then occupied by them; that Hubbard Bros. also agreed with Thompson that they would sell and furnish to him all other books and publications manufactured or issued for sale by them, through their house or branch offices, at a discount of 65 per cent off from the retail price of the same, and that he should have the exclusive right to sell said books and publications of Hubbard Bros. in Missouri (excepting the six counties adjacent to Kansas City), and also in Arkansas, Texas, Louisiana, that part of Kentucky and Tennessee lying west of the Tennessee River, and the southern half of Illinois; that Hubbard Bros. would supply to him all circulars, prospectus books, and posters necessary and usual in prosecuting the sale of said books, at the cost price thereof, payment to be made for the same, and for said publication of Hubbard Bros., by Thompson, within sixty days from the date of sale; that a contract and agreement should be written in proper form, and executed by Thompson and Hubbard Bros., in accordance with and on the considerations aforesaid, and that in such contract Thompson would agree, for two years from its execution, to publish no books other than such as he then had in course of publication, and devote his attention largely to the sale of such publications of Hubbard Bros., to be so purchased from them, and to push the sale thereof exclusively, except as to publications of Thompson; that each party to the contract so to be entered into would pay to the other \$1 per copy for each copy of the Manning book sold by either in any of the territory to be so reserved and exclusively set

apart for the other; that all applications for agencies for the sale of any of the said books, coming to one of the parties from territory reserved exclusively for the other, should be by such party referred to the other; that the party to whom such application should be referred would pay to the other 50 cents for every such application; that, if Thompson should go out of business or cease to prosecute the sale of the Manning book, then, unless the successor of Thompson would continue the same, Hubbard Bros. should have the exclusive right to sell said book; and that, on the execution of such contract, Thompson would assign the copyright to Hubbard Bros., and they would execute a mortgage to him on such plates, cuts, and stamps, to secure to him the performance of the contract.

The answer further alleges, that the \$4,000 so to be paid by Hubbard constituted only a small portion of the consideration of the contract to be made; that the plates, cuts, and stamps were of greater value than \$10,000; that Hubbard falsely pretending to have made a memorandum in writing, with pencil, on paper, containing an outline of the terms and considerations of the contract thereafter to be entered into, a copy of which memorandum written by Hubbard is Exhibit A to the bill, represented to Thompson that such memorandum was incomplete, but contained the outlines of the contract thereafter to be made in accordance with such full understanding of the parties, and promised that he would prepare a contract in proper form, in writing, and elaborate the same in accordance with such considerations, and that Hubbard Bros. would execute it; that thus by fraud and deceit, Hubbard persuaded Thompson to sign with a pencil, such memorandum, Thompson at the time believing and relying on such false promises and representations of Hubbard; and that such memorandum was not agreed upon as, or understood or intended to be, the contract to be entered into by Thompson and Hubbard Bros., nor was it understood as, or intended to be, an assignment of the copyright of the book.

The answer further avers that Thompson, believing that Hubbard Bros. would in good faith execute the contract as agreed to be made and carry out the same in accordance with the terms so agreed upon, shipped and delivered to Hubbard Bros. the plates, cuts, and stamps necessary for the manufacture of the book, and at the request of Hubbard or of Hubbard Bros., forwarded to them the paper marked Exhibit B to the bill, which was intended to be only a statement of the account of a part of the consideration to be rendered by Hubbard Bros., namely, \$4,000, which was to be paid in money; that Hubbard Bros. thereafter refused to carry out any part of the contract as agreed upon, and had refused to furnish Thompson with copies of the Manning book at the price agreed upon, or at any price less than the usual and regular wholesale price thereof, and had refused to manufacture for, or deliver to, Thompson any copy of said book, containing the copyright notice of him or of N. D. Thompson & Co., in accordance with the statute, and, having published editions of the book, had sold it in the territory exclusively to be reserved and

set apart to Thompson; that Hubbard thereupon declared that there was no agreement or contract in existence between Hubbard Bros. and Thompson, and Thompson assented thereto; that thereby said agreement for said contract, and the terms of said contract, were by mutual consent rescinded; and that Hubbard Bros. did not, in each or any copy of the book, have printed any legal notice of copyright. The answer denies that the defendant, by publishing and selling the Perlam and Baker book, has infringed any copyright belonging to Hubbard in the Manning book.

A replication was filed to this answer, on the 23d of February, 1888.

On the 10th of May, 1888, Thompson filed in the same court his cross bill against Hubbard, setting forth that, having procured to be compiled the Manning book, and being its owner, he, on the 27th of March, 1880, before the manuscript of it was completed, and before the book was published, deposited in the mail, addressed to the Librarian of Congress, at Washington, a printed copy of the title of the book, which was received by such librarian; and that, having thereafter published the book, he did, within ten days from its publication, deposit in the mail, addressed to such librarian, at Washington, two complete printed copies thereof, of the best edition issued, and did print in each copy of said book published by him, on the page next after the title page, a notice of copyright, in accordance with the statute, and so became the owner of the copyright of the book, and received from said librarian a certificate of the copyright thereof.

The cross bill contains in substance the same allegations as are found in Thompson's answer to the original bill, in regard to the negotiations between the parties and the terms of the verbal agreement alleged by Thompson to have been made between them. It alleges that, during the conversation at St. Louis, and while crossing to East St. Louis, each of the parties had in his hands a written paper, both of which were produced by Hubbard at the time; that, during the consideration of such writings, Hubbard made or pretended to make some alterations in the one held by him, which instrument and alterations Thompson did not at the time examine or read; that neither of the writings was at the time altered to correspond with the verbal agreement, and the two writings were not at the time compared, and the alterations so made in the one held by Hubbard were not made in the one held by Thompson; that afterwards Hubbard proposed to insert, and did insert, in said writings the clause, "Plates to be made collateral security for payment of notes;" that that clause was not in accordance with the agreement then and there made, it having been agreed that the plates should be collateral security for the performance of the verbal agreement; that afterwards, and when the train was about to leave East St. Louis, where Thompson was to leave it and return to St. Louis, Hubbard, representing to Thompson that the writings were incomplete, but that they contained the outlines of the contract thereafter to be made, and promising that he would prepare in proper form, in writing, a contract, and elaborate it in accordance with the verbal agreement and the considerations before set forth,

and that Hubbard Bros. would execute it, and representing and promising that the said writings would be used only as a guide and outline, from which the real agreement would be drawn and framed in accordance with the full understanding of the parties as so set forth, persuaded Thompson to sign, with a pencil, the writing attached to the original bill as Exhibit A; that, immediately on the return of Hubbard to Philadelphia, Hubbard Bros. caused their agents to be instructed to observe the boundary lines of the territory reserved to Thompson in said verbal agreement, as territory which had been reserved exclusively to Thompson thereby; that Thompson did not at the time see or know that the following clause in the writings was contained therein, namely: "The field on Stock Book to be the same as on H. Bros. books except the six Co's in Mo. adjacent to Kansas City," and did not discover the same until a day or two after he had signed the memorandum; that that clause was inserted by Hubbard without the knowledge and consent of Thompson, and Thompson never agreed or intended to agree to the same; that immediately after he discovered that clause in the writing retained by him, a copy of which writing is contained in the margin,¹ he and Hubbard Bros. had a correspondence in relation to the territory to be reserved to him, in which he insisted upon the territory described in such verbal agreement, as that agreed upon between Hubbard Bros. and himself to be reserved to him, except as afterwards mentioned in the cross bill; that, on the 18th of April, 1880, he proposed, by way of concession to Hubbard Bros., that instead

of the territory agreed to be reserved by the verbal agreement, the territory to be reserved by the contract to be made should be as follows: The two southern tiers of counties in Iowa, instead of three, as in said verbal agreement provided as aforesaid; Illinois, south of and including the Counties of Henry, Bureau, LaSalle, Grundy, and Kankakee; none in Indiana, instead of a third of it; the boundary line in Kentucky to be the Louisville and Nashville Railroad, and, in Tennessee, the Nashville and Montgomery Railroad; none of Alabama, instead of half of it, as in said verbal agreement provided; and the whole of Missouri, Arkansas, Texas, Louisiana and Mississippi and of the Indian Territory; and that Thompson should have the right to work out agencies made outside the field thus reserved prior to the acceptance by Hubbard Bros. of the proposal last aforesaid; that Hubbard Bros., on the 16th of April, 1880, declined such proposition, and made a counter proposition to Thompson, which he, on the 20th of April, 1880, declined to accept; that Thompson then proposed that if the Iowa and Illinois territory, which he reserved in such proposition, should be conceded to him, he would agree to the proposition of Hubbard Bros. to make the territory to be reserved to him in Kentucky and Tennessee all that lying west of the Tennessee River, the other territory to be the same as in his said proposition; that Hubbard Bros., on the 20th of April, 1880, proposed to accept the proposition last aforesaid of Thompson if Thompson would relinquish the outside agencies, meaning those agencies not within the territory reserved and

¹MEMORANDUM OF AGREEMENT.

N. D. T. agrees to sell H. Bros. the plates (1000 p.) of Manning's Stock Dr., etc., including copyright, the originals of cuts, stamps for binding and circular plates, for \$4,000, and deliver same soon as first edition now printing is off press, well boxed, at depot in St. Louis, free of charge for boxing and drayage.

He agrees further to pay for all books manufactured from said plates upon his order (with his exclusive imprint and copyright mark); to order not less than 500 at a time, and sixty days, and in time to admit of their being bound, after receipt by Hubbard Bros. of his order. He agrees to pay for all books he orders made from said plates, a net price of ten per cent in advance of cost of manufacture, including boxing and drayage.

He further agrees to confine his sales to the following territory, viz.: the States of Missouri, Arkansas, Indian Territory, Louisiana, Texas, Mississippi, Southern Illinois, one third of each Indiana, Kentucky, Tennessee.

He further agrees, for the period of two years, to publish no books, except those he now has in course of publication, viz.: Texas History, Almanac, and the Tice Almanac, and to devote his energies largely for the above period to the vigorous prosecution of the sale of the publications (Books and Bibles) of Hubbard Bros., and to theirs exclusively (including bibles), (aside from his own as named), paying for the same within sixty days of date of bills, at the rate of sixty-five per cent off from the retail prices, and for all circulars, prospectus books, posters, etc., at cost.

In consideration of the fulfillment of the foregoing covenants and agreements, H. Bros. agree to purchase and do hereby purchase the plates of Mg's Stock Dr., etc., as before described, paying

for the same as follows, viz.: \$300 in present stock accounts unsettled, and \$500, 24 months; \$1,000 by note at 8 months; \$1,000 by note at 12 months; \$1,000 by note at 18 months, notes bearing interest at 6 per cent per annum.

They further agree to supply N. D. T. all he may order of books from said plates in 500 lots, with his exclusive imprint and copyright mark, at 10 per cent advance on actual cost of manufacture (said cost to include boxing and drayage), and for cash on receipt of goods by N. D. T.

They further agree to supply N. D. T. such of their other publications (books and bibles, as are issued for sale through their home and branch offices), at a discount of 85 per cent off the retail price of the same, granting him the exclusive right of sale of close books in Mo. (excepting six counties adjacent to Kansas City), Ark., Texas, La., that part of Ky. and Tenn. lying west of the Tenn. River, and So. Ill.

It is mutually agreed that each party to this contract shall be responsible to the other in the amount of \$1 per copy for any close or exclusive books sold upon the territory of the other, and that all applications for agency coming from without the field of either shall be referred to the party having right of sale, and a charge of 50 cents made for each application so referred.

It is further agreed that, should N. D. T. go out of business, or for any reason cease to prosecute the sale of Manning's Stock Dr., then the right of sale in his exclusive field shall belong to H. Bros., unless his successor shall prosecute the sale in like manner.

The field on Stock Book to be same as on H. Bros. book, except as to six Co's adjacent to Kansas City. Plates to be made collateral security for payment of notes.

HUBBARD BROS.

to be reserved to Thompson under his two propositions last aforesaid; that Thompson refused to relinquish said outside agencies at once, but, on the 20th of April, 1880, proposed so to do by the 15th of July following, providing Hubbard Bros. would accept his proposition of the 18th of April, 1880, as modified by his subsequent propositions aforesaid; that afterwards, and on the 20th of April, 1880, and on the 24th of April, 1880, Hubbard Bros. accepted the last aforesaid proposition of Thompson, and any agreement then existing between Hubbard Bros. and Thompson, if not originally such as Thompson had averred, was modified in accordance with said propositions and acceptance thereof; that, between the 4th and 28th of May, 1880, Thompson shipped and caused to be delivered to Hubbard Bros. the plates, cuts and stamps, necessary for the manufacture of the Manning book; that on the 26th of May, 1880, Hubbard Bros. requested Thompson to send them a bill specifying the electrotype plates, copyright, original wood engravings, electrotypes of illustrations, and stamps for binding; that, on the 28th of May, 1880, he forwarded to them the written paper marked Exhibit B to the original bill; that, on June 1, 1880, Hubbard Bros. sent to him notes for the \$3,500 of the money part of the consideration, having theretofore allowed him \$500 on current account; that, on the 22d of July, 1880, Hubbard Bros. sent to him a draft in writing of a contract prepared in more regular form, a copy of which was annexed to the cross bill, and which, it is alleged, was materially different from either of the said purported memoranda of agreement, and from the said verbal agreement; that Thompson did not execute that draft; that, on the second of August, 1880, he prepared a draft of a contract, the provisions of which were substantially the same as those of the verbal agreements as so modified, except that he made in it certain alterations, by way of concessions in favor of Hubbard Bros.; that he sent it to Hubbard Bros., but they refused to execute it; and that afterwards there was further dispute over the territory to be reserved, and on other points.

The cross bill further alleges the bringing and pendency of the original bill, and states its contents and the proceedings which had taken place in the court in the original suit, and alleges that Thompson is still the owner of the Manning book and the copyright thereof; and that Hubbard, ever since he obtained possession of said property, had been and then was publishing and selling the book without any legal copyright notice therein, in the field which was to have been reserved exclusively to Thompson, and thus had been and was then infringing the copyright of Thompson in the Manning book, and threatened to continue to do so.

The cross bill tenders to Hubbard the sum of \$4,000 so paid by Hubbard Bros. to Thompson, with interest at the rate of 6 per cent per annum from the time it was paid, upon the condition that Hubbard Bros. shall surrender to Thompson the plates, cuts and stamps for the Manning book, and such other and further or different conditions as the court may order, and prays for a perpetual injunction to restrain Hubbard from publishing, selling or offering for sale any copies of the Manning book, and

for an account of all copies of it published or sold, or to be published or sold by Hubbard, and for the payment to Thompson by Hubbard of all damage for an unlawful publication by Hubbard of the Manning book, and for a decree that Hubbard deliver back the plates, cuts and stamps, on such conditions as the court may order.

On the 19th of October, 1888, Hubbard filed an answer to the cross bill reaffirming the matter set forth in his original bill, and averring that all communications in reference to the delivery of things purchased and payment therefor, between Thompson and Hubbard, were in writing; that the efforts made between the parties to agree upon a more perfect draft of the agreement of March 30, 1880, failed, and therefore both parties to it fell back upon its provisions; that the covenants of that agreement, in reference to the sale of the Manning book and its purchase by Hubbard, were fully complied with, and the terms and conditions of the sale were never called in question or made matter of dispute, until after Thompson had completed and published his infringing book; that the covenants in that agreement with reference to the mode of doing business between Hubbard and Thompson were subsequently modified by correspondence, so that Thompson was enabled to order books in less quantities than 500 copies at a time, and on shorter notice than had been provided in the agreement of March 30, 1880; that, in consideration of such variance, Thompson agreed that the books furnished to him in smaller quantities and on shorter notice should be charged at the rate of 65 per cent off the retail price; that there was some correspondence on the question of territory, and also in reference to the covenants in the agreement of March 30, 1880, by which Thompson agreed, for the period of two years from that date, to publish no other book or books than those mentioned in the agreement, and to devote his energies largely, for the period of two years, to the vigorous prosecution of the sale of Hubbard Bros' publications, and to them exclusively; that it was agreed by both parties, in that correspondence, that the adjustment of such matters in dispute should be made the subject of a personal conference between the parties, at the time of a proposed visit of Thompson to Philadelphia; and it was also agreed that at such conference the matter of the price at which Hubbard would agree to furnish the Manning books to Thompson in smaller quantities and at shorter notice than was provided in the agreement, should be settled finally; that it was agreed between Thompson and Hubbard that the contract between them was that the price to be paid by Hubbard for "complete electrotype plates, Stock Book, copyright, originals of illustrations, and stamps for binding" was \$4,000; that the considerations for the covenant on the part of Thompson, that he would for two years publish no books except "Texas History, Almanac, and the Tice Almanac," and would devote his energies largely for two years to the vigorous prosecution of the sale of Hubbard's books exclusively, paying for the same within 60 days from date, all bills at the rate of 65 per cent off from retail prices, and for all circulars, prospectuses, posters, etc., at cost, were the

granting of the exclusive right of sale of Hubbard's "close" books within the territory mentioned, and the agreement to furnish the Manning books in lots of 500 at an advance of 10 per cent on actual cost of manufacture, upon the further terms and conditions contained in the agreement of March 30, 1880; that, after Thompson had completed the delivery of the electrotype plates, illustrations, stamps, etc., and Hubbard had given to Thompson his promissory notes, the sale of the Manning book to Hubbard was complete, and the agreement providing for the sale and mode of payment was of no further legal effect than as an instrument in writing conveying the copyright, and the covenants providing for the regulation of the business of the publication and sale of books between the parties, which were executory and were to continue for the period of two years, remained in force, subject to modifications from time to time made and agreed to by the parties; that, notwithstanding the failure of Thompson to order books in accordance with the terms of the contract, Hubbard filled all orders for books made on him by Thompson, imposing the condition, nevertheless, that, until Thompson would bring himself under the terms of the contract of March 30, 1880, Hubbard would charge the Manning books to Thompson at 65 per cent off from the retail price, upon condition, however, that if Thompson would subsequently, upon his promised visit to Philadelphia, put himself upon the covenants of said contract, and show a willingness to perform them, Hubbard would abate the price at which the books were charged; that Thompson assented to such a course of dealing; that it is not true that the correspondence between the parties had reference to the contract of sale of the Manning book, plates, cuts, stamps and copyright; that such contract of sale was not at any time spoken of as annulled, withdrawn or rescinded, and no words were used in reference thereto which could be considered by Thompson to be a rescission, or an implied rescission, or an intended rescission, of the contract; that Thompson and Hubbard at all times considered the sale of the Manning book, including plates, cuts, copyright, etc., and the payment therefor, as complete, when the promissory notes were forwarded to Thompson by Hubbard; and that such sale was treated as conclusive, complete and absolute, by Thompson and Hubbard, until after Thompson had published the Periam and Baker book, and it was only then that Thompson began to dispute the title of Hubbard in the Manning book and the copyright thereof.

A replication was filed to the answer to the cross bill, proofs were taken on both sides, and it was stipulated between the parties that all proof taken in either suit might be used in both.

The case was brought to a hearing before Judge Treat, the District Judge, and on the 8th of July, 1885, he made a decision, holding that if the copyright of the Manning book had been transferred to Hubbard, the Periam and Baker book was an infringement of it, but ordering a reargument before the Circuit Judge (Judge Brewer) and himself, on three questions: (1) Whether Thompson assigned the copyright of the Manning book to Hubbard, so that Hub-

bard could pursue him for an infringement; (2) whether, if such assignment was made, it was rescinded; (3) whether, inasmuch as the imprint of Hubbard's publication did not conform to the terms of the statute, he could maintain an action against Thompson for an infringement, although Thompson knew that the copyright had been granted.

The case was heard before the two Judges, and was decided in an opinion given by Judge Brewer and reported in 25 Fed. Rep. 188. The view of the court was, that the testimony left the matter much in doubt, whether the paper signed on March 30, 1880, was understood by the parties to be a definite and close contract, "or a mere preliminary statement—a memorandum of matters upon which they had agreed, and which, with all unsettled details, were thereafter to be put into the form of a complete contract in writing and then signed and executed." The conclusion of both Judges was stated to be, that there was not in the testimony that which enabled the court to say that the parties, in respect to all the items of the proposed agreement between them, ever came to a definite understanding; that there were still some matters unsettled and undetermined, so that a contract, as it was a single contract and understood to be a single contract, could not be said to have been finally and definitely consummated; that the cross bill ought to be sustained so far as concerned the tender—that is, the plates ought to be returned to Thompson upon the payment by him to Hubbard of the \$4,000 and interest, but that, so far as any claim by Thompson for an accounting and damages was concerned, the course of dealing between the parties had been such that equitably Thompson was not entitled to any such accounting.

On the 27th of October, 1885, a decree was made, entitled in both suits, adjudging that no assignment or sale of the copyright of the Manning book, or of the electrotype plates, originals of illustrations and stamps for binding, was ever made by Thompson to Hubbard, by virtue of the instruments of writing and acts mentioned and described in the original bill, and that Hubbard neither acquired nor had any title to or ownership in the copyright of said book under said instruments and Acts, or any of them, and dismissing the original bill; and it was decreed under the cross bill, that Thompson was and always had been the owner of the copyright, electrotype plates, originals of illustrations, and stamps for binding, of the Manning book, and that Hubbard, on the tender to him of \$4,000 with interest from May 15, 1880, to the date of the tender, should, on demand, surrender and deliver back to Thompson the electrotype plates, originals of illustrations, and stamps for binding, pertaining to said book and received by him from Thompson; that, if such tender should not be accepted, then said sum and interest should be paid into the registry of the court, to abide its further order; that Thompson was not not equitably entitled to an accounting and damages; and that each party should pay his own costs. From this decree each party has appealed to this court.

We are unable to concur in the conclusion of the circuit court on the question of the sale by Thompson to Hubbard of the copyright of the Manning book.

The price of the book and its copyright, including originals of cuts, circulars, plates and book stamps, having been fixed by agreement at \$4,000, the disputed point in the negotiations of March 30, 1880, was as to the extent of territory to be allowed to Thompson for the sale of the Manning book, he insisting upon being allowed more territory than was specified in the draft agreements produced by Hubbard. The two drafts, one of which was retained by each party, differ practically only as to the amount of territory in which Thompson was to be allowed to sell the Manning book. The two instruments agree as to the territory in which Thompson was to have an exclusive right to sell the other publications of Hubbard.

The two parties differ in their testimony as to what was agreed upon in regard to the clause which is substantially the same in both of the instruments, namely: "The field on Stock Book to be the same as on H. Bros' books except the six counties in Missouri adjacent to Kansas City," Hubbard testifying that his copy represented exactly what had been settled upon, and that the concluding paragraph was added to make everything certain, while Thompson testifies that he supposed the concluding sentence was added to express the understanding about the plates being collateral security for the notes which were to be given, although the special provision about the collateral security was inserted in the paper retained by him as well as in that which he signed.

The two papers agree in providing for the sale to Hubbard of the plates of the Manning book, including copyright, the originals of cuts, the stamps for binding, and the plates for circulars, for \$4,000, the same to be delivered, well boxed, at the depot in St. Louis, free of charge for boxing or drayage, as soon as the first edition, then printing, should be off the press. They also agree in stating that Thompson should pay for all books which should be manufactured from the plates upon his order, with his exclusive imprint and copyright mark, if ordered in lots of not less than 500 at a time, payable in cash in 60 days, the price to be 10 per cent in advance of the cost to Hubbard Bros. of their manufacture, and also the further cost of boxing and drayage.

The two papers also agree in providing that, for the period of two years, Thompson would publish no books except those he then had in course of publication, namely: Texas History, Almanac, and the Tice Almanac, and would devote his energies largely for that period to the vigorous prosecution of the sale of the publications (Books and Bibles) of Hubbard Bros., and theirs exclusively (including Bibles), aside from his own, as named, paying for the same within sixty days of date of bills, at the rate of 65 per cent off from the retail prices, and for all circulars, prospectus books, posters, etc., at cost.

The two papers also agree in the time and manner of payment, in cash and in notes, for the plates and copyright.

The two papers also agree in providing that Hubbard Bros. should supply Thompson with all books he might order from such plates in 500 lots, with his exclusive imprint and copyright mark, at 10 per cent advance on the actual cost of manufacture, also the cost of boxing and drayage, to be paid in cash on the receipt

of the goods by Thompson; and in the statement that Hubbard Bros. would supply Thompson with their other books and bibles at a discount of 65 per cent from the retail prices of the same, and that they granted him the exclusive right of the sale of their "close" books in certain specified territory; and in stating that each party should be responsible to the other in the amount of \$1 per copy for any "close" or exclusive books sold in the territory of the other, and that all applications for agency coming from without the field of either should be referred to the party having the exclusive right of sale, and a charge of 50 cents to be made for each application so referred; and that, if Thompson should go out of business, or for any reason cease to prosecute the sale of the Manning book, the right of sale in his exclusive field should revert to Hubbard Bros., unless his successor should prosecute the sale in like manner as he would have done.

Afterwards, in correspondence with Hubbard, Thompson insisted upon being allowed a larger territory for the sale of the Manning book than that specified in the paper he had signed. Hubbard insisted that the provision which appears in both of the papers, "The field on Stock Book to be the same as on H. Bros' books except the six counties in Missouri adjacent to Kansas City," specified the territory which had been settled upon. Thompson also, in a letter to Hubbard, desired a date to be fixed for the notes and for the commencement of the two years of his exclusive right in the Hubbard books. As to those matters, Hubbard replied that the date of the notes and the commencement of the two years would properly be fixed as of the date of the delivery of the plates. The dispute about the territory to be allowed to Thompson in respect to the Manning book continued, but was finally settled in a correspondence which occurred in April, 1880, and such settlement resulted in the shipment of the plates by Thompson to Hubbard, and in the payment of the consideration therefor, by \$500 of cash and \$3,500 in notes, the longest of which ran for two years from the 15th of May, 1880, and all of which were duly paid.

Thompson testifies that he shipped the plates because he and Hubbard had come to an agreement as to territory; and he also sent to Hubbard the bill of sale before set forth as a part of the original bill.

In inclosing to Thompson, on the first of June, 1880, the notes amounting to \$3,500, Hubbard wrote to him as follows: "We inclose herewith notes to the amount of \$3,500, which, with \$500 allowed you on book account, is in full settlement of your bill of May 3d for plates, copyright, original cuts and stamps for binding, of Manning's Illustrated Stock Doctor and Live Stock Encyclopedia. The first lot of plates did not reach us till about the 12th, second lot about the 18th, and third lot is not in yet, so we date notes the 15th, which is sooner than is really due you. Please acknowledge receipt in full and oblige." The notes were all of them dated May 15, 1880, and each of them bore interest at 6 per cent per annum, the three \$1,000 notes being payable respectively at 8, 12, and 18 months after date, and the \$500 note at two years after date. Thompson, in a letter to Hubbard Bros., dated June 4, 1880, acknowl-

edged the receipt of the four notes and said: "With \$500 previously allowed, they are payment in full of plates, engravings, copyright and all the material that enter into the manufacture of the Stock Book. The reservation being that we control certain field, and are to get books at a certain rate above actual cost of manufacture."

The draft of an agreement which Hubbard sent to Thompson in July, 1880 related only to future deliveries of the Manning book, to the territory in which it was to be sold by Thompson, and to the exclusive agency by Thompson for the publications of Hubbard. It did not mention the sale of the plates or the copyright, or the consideration therefor, because that had been settled by the bill of sale and the delivery of the notes; and it fixed the territory in which the Manning book was to be sold by Thompson, according to the limits which had been settled upon by the compromise of April, 1880. Up to July, 1880, after the compromise of April, 1880, no controversy had arisen in regard to any copies of the Manning book ordered by Thompson, because he had ordered none; having on hand the edition which he had printed before he delivered the plates to Hubbard. The draft agreement prepared by Thompson and sent by him to Hubbard in August, 1880, differed in matters which Hubbard considered material, from the draft agreement sent by Hubbard to Thompson in July, 1880.

We are of opinion that the transaction between the parties in regard to the sale of the copyright of the Manning book and the plates therefor, was a completed transaction, independently of all contracts or agreements in regard to other matters, that the consideration therefor was paid, and that that contract was never rescinded.

The remark made by Hubbard, in his letter to Thompson of August 12, 1880, "I am quite agreeable to your view that there is virtually no agreement between us," had reference to matters other than the sale of the copyright and the plates, which had passed to Hubbard, and which he had in his possession, and for which he had paid partly in cash and partly in the negotiable promissory notes of Hubbard Bros. There was no idea on the part of either party that the copyright and the plates were to be reconveyed to Thompson, or that he was to repay the consideration to Hubbard. Neither party suggested anything of the kind. Hubbard was publishing the book and pushing its sale, and Thompson, in and after the fall of 1880, was buying from Hubbard and paying for such copies of the Manning book as he desired to sell. The real dispute between the parties was as to the extent to which Thompson should be bound to exert himself in selling Hubbard's other publications, and should be restricted in selling any other publications than the three specified in the paper of March 80, 1880, and the point which concerned the matter of the sale of Hubbard's publications for two years had become unimportant when the original bill was filed, because that time had then expired.

The preparing and publishing by Thompson of the Periam and Baker book was entirely inconsistent with the idea that he still owned the copyright of the Manning book. At the time 181 U. S.

the original bill was filed, Hubbard had fully performed his agreement to furnish the Manning book to Thompson as Thompson ordered it, had respected the territory allotted to Thompson, and had shipped his other publications to Thompson as demanded. On these facts, there could be no revesting in Thompson of the title to the copyright and the plates, and all that he could ever have a right to, growing out of the failure by Hubbard to perform any agreements which he had entered into, was a remedy by damages in an action at common law, or a remedy by a bill in equity for specific performance, on the basis of the existence of the actual agreement made.

The remaining question is as to whether Hubbard, as the owner of the copyright of the Manning book, can maintain his suit against Thompson for its infringement.

The following statement is made in the brief for Hubbard: "It is conceded that plaintiff's book was duly entered for copyright: that before publication a printed copy of the title of the book was delivered at the office of the Librarian of Congress at Washington; that, within ten days after publication, two complete copies of the best edition of the book were delivered at the office of the Librarian of Congress at Washington; and that on the page next after the title page there was printed, in every copy of the first edition of the book, notice of copyright in the following words, viz.: 'Entered according to Act of Congress, in the year 1880, by N. D. Thompson & Co., in the office of the Librarian of Congress, at Washington.' It is also conceded that, after Mr. Thompson had delivered the electrotype plates of the book to Hubbard Brothers, they changed the form of the copyright notice, so as to read as follows, viz.: 'Entered according to Act of Congress,' in which form the notice was printed in the copies of several editions, and that afterward plaintiff again changed the notice of copyright so as to read as follows: 'Copyright, 1880,' in which last mentioned form the notice was printed in the copies of several editions."

One of the forms used by Hubbard did not state either the year in which the copyright was entered, or by whom it was entered; while the other form mentioned the year but not the name.

Section 4962 of the Revised Statutes provides as follows: "No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: 'Entered according to Act of Congress, in the year——, by A. B., in the office of the Librarian of Congress, at Washington.'"

Section 1 of the Act of June 18, 1874, chap. 801 (18 Stat. at L. 78), which Act took effect on and after August 1, 1874, provides as follows: "That no person shall maintain an action

for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz.: 'Entered according to Act of Congress, in the year—, by A. B., in the office of the Librarian of Congress, at Washington;' or, at his option the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out; thus—'Copyright, 18—, by A. B.' The 4th section of the same Act repealed all laws and parts of laws inconsistent with the provisions contained in the first three sections of the Act.

It is very clear that Hubbard, as the proprietor of the copyright, was bound to give the statutory notice in the several copies of every edition published by him, and that he did not do so. The plain declaration of the statute is, that no person shall maintain an action for the infringement of *his* copyright, unless he shall give notice thereof by inserting the prescribed words in the several copies of every edition published. That means, every edition which he, as controlling the publication, publishes. His failure to give such notice debars him from maintaining an action for the infringement of *his* copyright. The word "action" means an action either at law or in equity.

Section 3 of the Act of May 31, 1790, chap. 15 (1 Stat. at L. 125), declared that no person should be entitled to the benefit of that Act, unless he should first deposit a printed copy of the title of a book in the prescribed office; and further provided that the author or proprietor should, within a prescribed time, cause a copy of the record of the title to be published in one or more newspapers, as prescribed.

Section 1 of the Act of April 29, 1802, chap. 36 (2 Stat. at L. 171), provided that every person who should seek to obtain a copyright of a book should, in addition to the requisites enjoined in the Act of 1790, give information, by causing the copy of the record to be inserted at full length in the title page, or in the page immediately following the title, of the book.

Section 5 of the Act of February 3, 1831, chap. 16 (4 Stat. at L. 437), declared that no person should be entitled to the benefit of that Act, unless he should insert the prescribed words in the published copies of the book. In section 97 of the Act of July 8, 1870, chap. 280 (16 Stat. at L. 214), now section 4962 of the Revised Statutes, the language of section 5 of the Act of 1831 was changed so as to declare that no person should maintain an action for the infringement of his copyright, unless he should insert in the several published copies the notice prescribed. This requirement of giving the prescribed notice has always been held, under all of the statutes, to be one of the conditions precedent to the perfection of the copyright, the other two being the deposit, before publication, of the printed copy of the title, and the depositing in the public office,

within the prescribed time after publication, of a copy or copies of the book. *Wheaton v. Peters*, 38 U. S. 8 Pet. 591 [8: 1055]; *Merrell v. Tice*, 104 U. S. 557 [26: 854]; *Callaghan v. Myers*, 128 U. S. 617, 652 [32: 547, 557].

It is not enough that Thompson, while he owned the copyright, gave the required notice in the copies of every edition he published, while it was *his* copyright. The inhibition of the statute extended to and operated upon Hubbard while he owned the copyright, in respect to the copies of every edition which he published; and for his failure he is debarred from maintaining his action.

The view is urged, that the only object of the notice required by the statute is to give notice of the copyright to the public; and that, as Thompson himself took the copyright, and had vested the title to it in Hubbard, he has no right to infringe the copyright, although it may be invalid as to the rest of the world. But we are of opinion that the failure of Hubbard to comply with the statute operated to prevent his right of action against Thompson from coming into existence. This right of action, as well as the copyright itself, are wholly statutory, and the means of securing any right of action in Hubbard are only those prescribed by Congress. *Wheaton v. Peters*, 38 U. S. 8 Pet. 591, 662, 663 [8: 1055]; *Banks v. Manchester*, 128 U. S. 244, 252 [ante, 425, 428].

The decree of the Circuit Court is reversed and the case is remanded to that Court, with directions to dismiss the original bill and the cross-bill, with costs in the Circuit Court to neither party. Each party is to pay one half of all the costs in this Court.

JESSE SPALDING, Collector of Customs
for the PORT AND DISTRICT OF CHICAGO,
Pff. in Err.,

v.
LOUIS MANASSE.

SAME *v.* SAME.

SAME *v.* JOSEPH VANACKER.

SAME *v.* SAME.

SAME *v.* S. YANADA.

SAME *v.* JOHN V. FARWELL ET AL.

SAME *v.* LEWIS COHN ET AL.

(See S. C. Reporter's ed. 65-66.)

Case tried by court—waiver of jury.

Where a case was tried by the court without a jury, by agreement of the parties, but there is no allegation that the stipulation was in writing, as required by the statute, no error in the rulings of the court at the trial can be examined by this court; it can only inquire whether the declaration was sufficient to sustain the judgment.

[Nos. 278, 279, 280, 281, 282, 284, 285.]

Nos. 278, 279, 280, and 281 Submitted April 24, 1889. Decided May 13, 1889.

Nos. 282, 284 and 285 Argued April 25, 1889, Decided May 13, 1889.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois, to review judgments in favor of plaintiffs for the recovery of duties illegally exacted. *Affirmed.*

The facts are stated in the opinion.

Mr. Wm. A. Maury *Assist. Atty-Gen.*, for plaintiff in error, in Nos. 278, 279, 284 and 285.

Mr. G. A. Jenks, *Solicitor-Gen.*, for plaintiff in error, in Nos. 280, 281 and 282.

Mr. Percy L. Shuman for defendants in error in all the cases.

Mr. Chief Justice Fuller delivered the opinion of the court:

All of these cases were tried by the court without a jury, by agreement of the parties as alleged in the record; but there is no allegation that the stipulation was in writing, as required by the statute; and, under the ruling in *Bond v. Dustin*, 112 U. S. 604 [28: 885], and *Dundee Mortgage Company v. Hughes*, 124 U. S. 157 [31: 357], no error can be examined in the rulings of the court at the trial. We can only inquire whether the declarations were respectfully sufficient to sustain the judgments. As there appears to be no error in this regard, the judgments are severally affirmed.

LOWELL M. PALMER, *Plff. in Err.*,

v.

E. F. ARTHUR.

(See S. C. Reporter's ed. 60-65.)

Objections when disregarded—writ of error brought for delay.

1. Where the objections to the petition amount simply to asserting that the ground of action was imperfectly and inaccurately stated, and whatever defects, imperfections or omissions there may have been, if not obviated by the subsequent pleadings, were cured by the verdict, which must be assumed to have proceeded upon proof of facts which justified it—the objections will be disregarded.
2. Where it is apparent that the writ of error could only have been sued out for purposes of delay, the judgment will be affirmed with 10 per cent damages, interest and costs.

[No. 802.]

Submitted April 26, 1889. Decided May 13, 1889.

IN ERROR to the Circuit Court of the United States for the District of Kentucky, to review a judgment in favor of plaintiff in an action to recover for a breach of a contract to pay for certain staves made for defendant. *Affirmed, with 10 per cent damages, interest and costs.*

The facts are stated in the opinion.

Mr. Walter Evans for plaintiff in error.

Mr. Wm. Lindsay for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

This is an action at law to recover upon an

alleged breach of contract to pay for certain staves made or procured to be made by defendant in error for plaintiff in error, to be culled, branded, and received by the latter on the Cumberland River and its tributaries, in the Counties of Knox and Bell, in the State of Kentucky.

The action was commenced in the Circuit Court of Whitley County, and removed into the Circuit Court of the United States for the District of Kentucky.

The petition of Arthur, the plaintiff below (omitting the application for attachment), was as follows:

"The plaintiff, E. F. Arthur, states that before the 30th of May, 1884, he had a contract with the defendant, L. M. Palmer, to make and have made for defendant an unlimited number of staves on the Cumberland River and its tributaries, in the Counties of Knox and Bell, State of Kentucky, for which defendant was to pay plaintiff \$14 for each 1,000 that were 44 inches in length on the creeks and \$15 per 1,000 on the river, \$9 per 1,000 for 34-inch staves on the river and \$8 per 1,000 on the creeks; that on the 30th of May, 1884, plaintiff had made under the contract 800,000 staves, at which time defendant did not wish any more staves made, and plaintiff and defendant agreed that no more were to be made at the time, and defendant was to pay plaintiff for the staves made, and paid plaintiff at the time \$4,017.78 for 286,000 of the staves, and was to pay plaintiff for the remainder, 514,000 staves, on the 1st of November, 1884. Plaintiff states that of 514,000 staves not paid for and that had been made, 489,000 were 44-inch staves, for which defendant was to pay \$14 per thousand, and 25,000 34-inch staves, for which defendant was to pay \$8 per thousand; that there was due and owing the plaintiff by the defendant on the 1st of November, 1884—

For 489,000 at \$14 per thousand... \$6,846

For 25,000 at \$8 per thousand.... 200

making due and owing the plaintiff by the defendant for said staves \$7,046. Plaintiff states that Williamsburg, Ky., is the place where defendant carries on the business of manufacturing staves, etc., and where his authorized agents were located; that at the time the money was due on said staves he called on the agent at his place of doing business for the money (the defendant being a nonresident of and absent from the State of Kentucky), and he failed and refused to pay the same or any part thereof; same still due and owing the plaintiff by the defendant, with interest from the 1st of November, 1884. Plaintiff states that all of said staves have been culled and branded by the defendant except about 50,000, which it was the duty of the defendant to have culled and branded. Wherefore, plaintiff asks judgment for said sum of seven thousand and forty-six dollars, his cost, interest, and all proper relief."

To this petition, Palmer, the defendant below, filed an answer, which conceded the existence of the contract but averred that it was not fully nor accurately set forth by plaintiff, and stated various alleged differences as to the size and character of the staves, and the price to be paid therefor, asserting also that "All upon inspection were to come up to contract require-

NOTE.—As to *What defects are cured by verdict and what not*—see note to *Wills v. Claflin*, 92 U. S., 23 L. ed. 490.

181 U. S.

ment," and that "The said contract related to and embraced only such staves as might be made by the plaintiff himself, or which might be made by others and paid for by plaintiff." It admitted that over 295,000 staves were received and paid for, but denied that defendant had agreed to pay for 514,000 other staves, or that he had culled or branded any other staves than those paid for May 30, 1884, since which date he had "not accepted nor has he had an opportunity to accept any more staves from the plaintiff, but he has also accepted and received from persons making and owning the staves within the territory covered by the agreement with plaintiff about 18,000 staves, and has, with the plaintiff's consent, paid to the persons so making or owning such staves (and who were in no wise parties to the contract between plaintiff and defendant) the full price thereof," giving items aggregating \$153.69.

To this answer plaintiff replied, averring, among other things, "that prior to the 30th of May, 1884, defendant's agents had inspected, culled and branded the 800,000 staves mentioned in the petition, except about 50,000."

The defendant rejoined to the reply, saying, that some time before May 30, 1884, he informed plaintiff "the contract with him would then be terminated, but that defendant would at once proceed to take up and inspect and pay for enough of the staves made to amount to the sum plaintiff then needed, viz.: about \$4,000, and the remainder of the staves already made could be inspected, and, if up to contract, taken later. The defendant authorized such an arrangement, and it was agreed upon between and by the parties." But defendant further averred that plaintiff refused to permit the remaining staves to be inspected. Whereupon plaintiff sur-rejoined, denying that he refused to allow the staves to be inspected, and also that "there was to be any other or further inspection of the staves by defendant or his agents after they had been once culled and branded."

The cause having come on for trial and a jury having been impaneled to try the issue joined, the defendant, after the evidence was all in, amended his answer by averring that the staves in controversy were owned by parties other than plaintiff, which amended answer was "traversed of record by the plaintiff." The jury found for the plaintiff the sum of \$6,084 with interest from November 1, 1884, and judgment was entered upon said verdict. No motion for a new trial or in arrest was made, nor was any bill of exceptions taken. From the judgment the pending writ of error was prosecuted to this court and errors assigned as follows: That the circuit court erred—

"1st. In rendering judgment for the plaintiff for any sum whatever.

"2d. In not rendering judgment on the trial for the said Lowell M. Palmer instead of for said E. F. Arthur.

"3d. In not adjudging that the plaintiff in error on the pleadings was entitled to a dismissal of the action and a judgment for his costs."

From the petition it appears that plaintiff sued upon a contract with defendant to make or cause to be made for him within Knox and Bell Counties an unlimited number of staves

of specified dimensions, to be paid for at stipulated prices; that on the 30th of May, 1884, plaintiff had made under the contract 800,000 staves, at which time the parties agreed the manufacture should cease, and defendant paid at once for 286,000 of the staves, and agreed to pay for the remainder, viz., 514,000, on the first day of the following November, but did not do so, and plaintiff claimed to recover as of November 1, 1884, \$6,846 for 489,000 staves at \$14 per thousand, and \$200 for 25,000 staves at \$8 per thousand, and that of the 514,000 staves all had been culled and branded by defendant except 50,000. The defendant disputed the terms of the adjustment of May 30th and various other of the facts alleged by plaintiff, and insisted he was not bound to take any more staves than he had paid for without an inspection, which he had not been allowed to make. The verdict of the jury excluded the contract price of the 50,000 unbranded staves, and the price of the 18,000 staves which defendant claimed to have paid others for, with the consent of plaintiff; disposed of the issue as to ownership; and necessarily determined the number of staves over and above what had been paid for May 30, 1884, and the number which had been culled and branded by the defendant, and that the agreement between the parties was such that the culling and branding amounted to an acceptance of the staves so culled and branded, the delivery and acceptance being complete without any further inspection. The objections to the petition amount simply to asserting that the ground of action was imperfectly and inaccurately stated; and whatever defects, imperfections or omissions there may have been if not obviated by the subsequent pleadings, were cured by the verdict, which must be assumed to have proceeded upon proof of facts which justified it; and as it is apparent that the writ of error could only have been sued out for purposes of delay, the judgment is affirmed, with 10 per cent damages, interest, and costs.

UNITED STATES, Plff.,

v.

GEORGE H. PERRIN ET AL.

(See S. C. Reporter's ed. 55-58.)

Question certified—qualifications of—jurisdiction.

1. A question certified on division of opinion must present a clear and distinct question of law.
2. It never was designed that, because a case is a troublesome one, or is a new one, and because the judges trying the case may not be perfectly satisfied as regards all the points raised in the course of the trial, the whole matter shall be referred to this court for its decision, in advance of a regular trial.
3. In cases which come here for review, this court is only an appellate court, except in the limited class of cases where the court has original jurisdiction.

[No. 1035.]

Submitted April 8, 1889. Decided May 13, 1889.

NOTE.—As to what the division of the Circuit Court should be on, in case of certification of division, see 10 How., 18 L. ed. 335.

ON A CERTIFICATE of division of opinion between the Judges of the Circuit Court of the United States for the District of California, on demurrer to an indictment for conspiracy. *Remanded.*

The facts are stated in the opinion.

Mr. A. H. Garland, Atty-Gen., for plaintiff.

Messrs. Frank H. Hurd, Walter H. Smith and William M. Stewart for defendants.

(The court declined to hear argument of counsel in this case.)

Mr. Justice Miller delivered the opinion of the court:

This case also comes before us by virtue of a certificate of division in opinion between the Judges holding the Circuit Court of the United States for the District of California, upon an indictment against George H. Perrin, John McNee, and John H. Benson for conspiracy. The indictment consists of three counts. They set out, so far as we can gather from the confused statement, that the three defendants entered into a conspiracy with some one else, to the jurors unknown, to defraud the United States of a large sum of money, to wit, \$492; that in pursuance of said conspiracy they procured a contract to be made between George H. Perrin, then a Deputy United States Surveyor, and William H. Brown, Surveyor-General for the State of California, for the survey of certain township lines; that said Perrin produced a fraudulent, fictitious and pretended survey of the lands described in that contract, and caused fictitious and fraudulent field-notes of said pretended survey to be made and returned to the United States Surveyor-General; whereas, in point of fact, no such surveys had been made, and said field-notes were utterly false and fictitious. Wherefore, it is alleged that in this manner the said Perrin, McNee and Benson fraudulently and corruptly conspired and agreed together to defraud the United States of the sum of money aforesaid.

The second count attempts to recite the same contract and the same pretended survey and field-notes, and that by these false documents and pretenses William H. Brown, the United States Surveyor-General, was deceived and induced to certify the sum accrued to and earned by said Perrin.

The third count, in addition to these charges, adds that the false and corrupt field-notes were accompanied by a willful and corrupt oath and affidavit that they were all true, and that Perrin had marked said corners and established said lines in the specific manner described in said field-notes, when in truth and in fact he had not in his own proper person made any actual survey of these lines at all.

To each of these counts there was filed a demurrer setting up thirty grounds for its support. Upon the argument of this demurrer the Judges certified seven questions as regards each of these counts, upon which they differed in opinion. As these are the same in regard to each count, those relating to the first count will be stated as follows:

"1. Do the facts stated in the first count of the indictment constitute an offense under section 5440 of the Revised Statutes as amended 181 U. S.

in 1879, 1 Sup. R. S. 484, and section 5438 of the Revised Statutes?

"Are sufficient facts stated in the first count of the indictment to make a good count under sections 5440 and 5438 Revised Statutes; or under section 5440 alone; or under section 5440 in connection with any other provision of the statutes?

"3. Does the first count of the indictment sufficiently describe an offense under sections 5440 and 5438, or any other provision of the Revised Statutes, or under section 5440 alone?

"4. Are the means by which the parties conspired and agreed to defraud the United States set forth with sufficient fullness and particularity in the first count of the indictment to constitute a good count in that particular?

"5. Is any overt act performed by any one of the alleged conspirators to effect the object of the conspiracy sufficiently stated in the first count of the indictment to constitute a good count in that particular?

"6. If there is any defect or imperfection in the first count of the indictment is it in the matter of form only, not tending to the prejudice of the defendant, within the meaning of section 1025, Revised Statutes?

"Does the surveying contract set out in the first count of the indictment appear, upon all the allegations of the count, to be the individual private contract of W. H. Brown, or a contract made in his official character as surveyor-general, on behalf of and binding upon the United States?"

We are not able to discover in any one of these points that clear and distinct presentation of a question of law which we have so repeatedly held to be necessary to invoke the action of this court. Indeed, they are but a repetition in various forms of the question whether the indictment presents facts sufficient to constitute an offense under the statute against conspiracy. The indictment is so diffuse and obscure, presenting in no point a distinct issue of law on which the guilt of the defendants must rest, that it is impossible to decide any of the points without the most laborious wandering through the whole of the three counts of the indictment, and passing upon the whole question whether, under all the circumstances set out, the parties are liable to the indictment.

The authorities on that subject have been reviewed so often, and we have so recently considered the question, that it is a waste of time to consider it further. It is sufficient to say that the system of criminal law of the United States does not contemplate a general right of appeal from the courts trying criminals to this court; it does not intend that in all cases before the trial is had the instructions of this court, concerning matters which may come in issue, shall be delivered as a guide to the court that is to try the cause. The purpose of the provision is that where a real question of a difficult point of law, clearly presenting itself and arising in the progress of the case, is such that the two judges sitting on the hearing differ in opinion in regard to that question, they are at liberty to certify it to this court for an answer. But it never was designed that, because a case is a troublesome one, or is a new one, and because the judges trying the case may

not be perfectly satisfied as regards all the points raised in the course of the trial, the whole matter shall be referred to this court for its decision in advance of a regular trial, or that, in any event, the whole case shall be thus brought before this court.

Such a system converts the supreme court into a *non prius* trial court; whereas, even in cases which come here for review in the ordinary course of judicial proceeding, we are always and only an appellate court, except in the limited class of cases where the court has original jurisdiction. See *United States v. Briggs*, 46 U. S. 5 How. 208 [12: 119]; *United States v. Northway*, 120 U. S. 327 [80: 664]; *Dublin Township v. Milford Savings Institution*, 128 U. S. 510 [32: 533]; and specially, *Jewell v. Knight*, 123 U. S. 426, 432 [81: 190, 192]; where all the cases are cited.

For these reasons we cannot take jurisdiction of the present case, and it is ordered that it be remanded to the Circuit Court for such further proceedings as it may be advised to be proper.

UNITED STATES, *Appt.*,

v.

CARRIE JONES.

SAME, *Appt.*,

v.

HENRY TAUBENHEIMER.

SAME, *Appt.*,

v.

JAMES B. MONTGOMERY.

(See S. C. Reporter's ed. 1-20).

Act of March 3, 1887—suits against the United States for equitable relief, when not authorized—jurisdiction of circuit and district courts.

1. The Act of March 3, 1887, to provide for the bringing of suits against the government of the United States (24 Stat. at L. 505), does not authorize suits for equitable relief, by specific performance, to compel the issue and delivery of a patent for land.
2. In the point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands.
3. No broader jurisdiction as to subject matter is given by that Act to the circuit and district courts than that which is given to the Court of Claims.

[Nos. 1108, 1102, 1482.]

Argued Jan. 28, 1889. Decided May 13, 1889.

APPEALS from decrees of the Circuit Court of the United States for the District of Oregon, overruling demurrers to the petitions and decreeing that the United States issue and deliver a patent granting and conveying certain public land. *Reversed.*

The facts are stated in the opinion.

See S. C. below, 85 Fed. Rep. 561, and 86 Fed. Rep. 4.

NOTE.—As to Jurisdiction of U. S. District Courts under Acts prior to that of 1887, see note to U. S. v. Hamilton, 3 Dall., 1 L. ed. 430, 490, 491.

Messrs. George A. Jenks, Solicitor-Gen., and Robert Howard, Assist. Atty-Gen., for appellant.

Messrs. James C. Carter and James K. Kelly, for appellees.

Mr. Justice Bradley delivered the opinion of the court:

These cases are suits in equity brought against the United States under the recent Act of March 3, 1887, extending the jurisdiction of claims against the government to the District and Circuit Courts of the United States. They are suits for specific performance, seeking to compel the United States to issue and deliver to the plaintiffs respectively patents for timber land, alleged to have been taken up and purchased by them under the Act for the sale of timber lands in the States of California, Oregon, etc., passed June 3, 1878 (20 Stat. at L. 89). The petitions contain averments of performance of the conditions required by said Act, the payment of the price of the lands to the receiver of the land office, the giving of his certificates and receipts therefor, and the refusal of the government to issue patents to the petitioners as entitled thereto. They pray, in each case, for a decree, 1st, that the petitioner is owner of the land by virtue of the purchase; and 2d, that the United States issue and deliver, or cause to be issued and delivered, in accordance with law, a patent granting and conveying the land purchased. The United States by its attorney demurred to the several petitions. The circuit court overruled the demurrers and rendered decrees for the plaintiffs. From these decrees the present appeals were taken.

The question involved is, whether the Act of March 3, 1887, which is entitled "An Act to Provide for the Bringing of Suits against the Government of the United States" (24 Stat. at L. 505), authorizes suits of the kind like the present, which are brought, not for the recovery of money, but for equitable relief by specific performance, to compel the issue and delivery of a patent. In the case of *United States v. Albre*, 73 U. S. 6 Wall. 573 [18: 947], we distinctly held that the Acts of 1855 and 1863, which established the Court of Claims and defined its jurisdiction, did not give it power to entertain any such suits as these; and that case was followed by *Bonner v. United States*, 76 U. S. 9 Wall. 156, [19: 666], and has been approved in subsequent cases. *United States v. Gillis*, 95 U. S. 407, 412 [24: 508, 504]; *United States v. Schurz*, 102 U. S. 378, 404 [26: 167, 174]. It is argued, however, that the new law has extended the jurisdiction of the Court of Claims and the concurrent jurisdiction of the circuit and district courts, or at least the latter, so as to embrace every kind of claim, equitable as well as legal, and specific relief, or a recovery of property, as well as a recovery of money. If such is the legislative will, of course the courts must conform to it although the management and disposal of the public domain, in which the newly claimed jurisdiction would probably be most frequently called into exercise, has always been regarded as more appropriately belonging to the political department of the government than to the courts, and more a matter of administration than ju-

dicature. A careful examination of the statute, and a comparison of its terms with those of the Acts of 1855 and 1863, can alone settle the question.

By the first section of the Act of 1855 (10 Stat. at L. 612) it was enacted that a court should be established, to be called the Court of Claims, the jurisdiction of which was defined as follows: "The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to it by either house of Congress." The Act of March 8d, 1863, passed to amend the Act of 1855 (12 Stat. at L. 765), added: "That the said court . . . shall also have jurisdiction of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government against any person making claim against the government in said court." Jurisdiction was subsequently given of claims for the proceeds of property captured or abandoned during the rebellion, and of claims of paymasters and other disbursing officers for relief from responsibility on account of capture of government funds or property in their hands. These latter branches of jurisdiction need not be considered here.

Turning now to the Act of March 3, 1887, which re-enacted or revised the previous laws as to the jurisdiction of the Court of Claims, and conferred concurrent jurisdiction for limited amounts on the ordinary courts, we find the following language used:

"The Court of Claims shall have jurisdiction to hear and determine the following matters:

"*First.* All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable."

"*Second.* All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court."

"*Sec. 2.* That the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars; and the Circuit Courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars."

The jurisdiction here given to the Court of Claims is precisely the same as that given in the Acts of 1855 and 1863, with the addition that it is extended to "damages . . . in cases

not sounding in tort" and to claims for which redress may be had "either in a court of law, equity, or admiralty."

"Damages in cases not sounding in tort"—that is to say, damages for breach of contract—had already been held to be recoverable against the government under the former Acts. *United States v. Behan*, 110 U. S. 838 [28:168]; *United States v. Great Falls Mfg. Co.* 112 U. S. 645 [28:846]; *Hollister v. Benedict & B. Mfg. Co.* 118 U. S. 59, 67 [28:901, 908].

"Claims" redressible "in a court of law, equity, or admiralty," may be claims for money only, or they may be claims for property or specific relief, according as the context of the statute may require or allow. The claims referred to in the original Statute of 1855, as described in the first section thereof, above quoted, might have included claims for other things besides money; but various provisions of that Act and of the Act of March 8, 1863, were inconsistent with the enforcement of any claims under the law except claims for money. Thus, in the 5th section of the Act of 1863, the right of appeal was limited to cases in which the amount in controversy exceeded \$3,000, and in the 7th section it was provided that if judgment should be given in favor of the claimant, the sum due thereby should be paid out of any general appropriation made by law for the payment of private claims; and if a judgment was affirmed on appeal, interest was to be allowed thereon, etc. In the case of *United States v. Alire*, 78 U. S. 6 Wall. 578 [18:947], Mr. Justice Nelson speaking for the court, said: "It will be seen by reference to the two Acts of Congress on this subject that the only judgments which the Court of Claims is authorized to render against the government, or over which the supreme court has any jurisdiction on appeal, or for the payment of which by the Secretary of the Treasury any provision is made, are judgments for money found due from the government to the petitioner. And although it is true that the subject matter over which jurisdiction is conferred, both in the Act of 1855 and of 1863, would admit of a much more extended cognizance of cases, yet it is quite clear that the limited power given to render a judgment necessarily restrains the general terms and confines the subject matter to cases in which the petitioner sets up a moneyed demand as due from the government." The decree of the Court of Claims in that case was that the claimant recover of the government a military land warrant for 160 acres of land, and that it be made out and delivered to him by the proper officer. This court said: "We find no provision in any of the statutes requiring a judgment of this character, whether in this court or in the Court of Claims, to be obeyed or satisfied."

The sections of the Act of 1863 referred to in this opinion are still in force, not being repealed by the Act of 1887, which only repeals "all laws and parts of laws inconsistent" therewith. Section five, relating to appeals, is transferred to section 707 of the Revised Statutes, giving an appeal to this court "where the amount in controversy exceeds \$3,000;" and section seven, relating to the mode of paying judgments out of a general appropria-

tion, and allowing interest where a judgment is affirmed, is contained in sections 1089, 1090 of the Revised Statutes. These sections are still the law on the subjects to which they relate, being necessary to the completion of the system, and not being supplied by any other enactments. Indeed, they are expressly retained. The fourth section of the Act of 1887 declares that "The jurisdiction of the respective courts of the United States proceeding under this Act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this Act," and the ninth section declares, "that the plaintiff or the United States, in any suit brought under the provisions of this Act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained." These provisions undoubtedly include the Court of Claims as well as the district and circuit courts. So, in relation to interest, section ten declares that "From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per cent per annum, until the time when an appropriation is made for the payment of the judgment or decree." It seems, therefore, that in the point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands. We do not think that it was the intention of Congress to go farther than this. Had it been, some provision would have been made for carrying into execution decrees for specific performance, or for delivering the possession of property recovered in kind. The general scope and purport of the Act is against any farther extension than that here indicated. The expression in the 5th section, referring to "money or any other thing claimed, or the damages sought to be recovered," on which so much reliance is placed by the appellees, cannot outweigh the considerations referred to, and operate to introduce entirely new fields of jurisdiction. It is one of those general expressions which must be restrained by the more special and definite indications of intention furnished by the context.

We cannot yield to the suggestion that any broader jurisdiction as to subject matter is given to the circuit and district courts than that which is given to the Court of Claims. It is clearly the same jurisdiction—"concurrent jurisdiction" only—within certain limits as to amount; and the language in which those limits are expressed furnishes an additional argument in favor of the conclusion which we have reached. It is declared "that the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims . . . where the amount of the claim does not exceed \$1,000," etc. This language is properly applicable only to a money claim. Had anything but money been in the legislative mind the language would have been, "where the amount or value of the thing claimed does not exceed \$1,000," etc.

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Of course, our province is construction only; the policy of the law is the prerogative of the legislative department. But notwithstanding the glowing terms in which able jurists have spoken of the progress of civilization and enlightened government as exhibited in subjecting government itself, equally with individuals, to the jurisdiction of its own courts, we should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belongs so appropriately to the political department, had been cast upon the courts—which it surely would have been, if such a wide door had been opened for suing the government to obtain patents and establish land claims, as the counsel for the appellees in these cases seems to imagine. We are satisfied that the door has not yet been thrown open thus wide.

The decrees of the Court are reversed in all the cases, and the causes are respectively remanded with instructions to dismiss the original petitions or bills.

Mr. Justice Miller, dissenting:

I find myself unable to concur with the majority of the court in the construction given by it, in the opinion just read, to the provisions of the Act of March 3, 1887. This Act was evidently intended to confer a new and important jurisdiction upon the Court of Claims, and a concurrent jurisdiction to a limited extent, in the same class of cases, upon the Circuit and District Courts of the United States. I can see no other possible object in that part of the statute which confers this new jurisdiction by the use of language which for the first time in the history of that court authorizes it to take cognizance of claims where the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, than to make them suable in such cases. To hold that the distinct grant of power here provided for is controlled by the fact that this court has under former statutes decided that it did not then exist, is simply to nullify this new grant of power.

The manifest purpose of this new Act was to confer power which the Court of Claims did not previously have, and to authorize it to take jurisdiction of a class of cases of which it had not cognizance before. To say that under such circumstances the new statute is to be crippled and rendered ineffectual in the only new feature which it has, in regard to the jurisdiction of that court, is in my mind a refusal to obey the law as made by Congress in the matter in which its power is undisputed.

It is clear to me that Congress intended by this Act to enlarge very materially the right of suit against the United States, to facilitate this right by allowing suits to be brought in the Circuit and District Courts where the parties resided, and that it also designed to enlarge the remedy in the Court of Claims to meet all such cases in law, equity and admiralty, against the United States, as would be cognizable in such courts against individuals.

I am authorized to say that *Mr. Justice Field* agrees with me in this dissent.

UNITED STATES, *Plff. in Err.*,

v.

HARRISON C. DREW.

(See S. C. Reporter's ed. 21.)

Suit in equity against United States for specific performance.

The suit is subject to the same objections which exist in relation to the suits of Carrie Jones and others, *ante*, p. 90, and the same decree is made as in those cases.

[No. 1061].

Argued Jan. 28, 1889. Decided May, 13, 1889.

IN ERROR to the Circuit Court of the United States for the Western District of Louisiana, to review a decree in favor of plaintiff in a suit in equity brought against the United States to obtain land warrants or certificates of location of public land. *Reversed.*

The facts are stated in the opinion.

Messrs. George A. Jenks, Solicitor-Gen., and Robert A. Howard, Assist. Atty-Gen., for plaintiff in error.

Messrs. James L. Bradford and Albert H. Leonard for defendant in error.

Mr. Justice Bradley delivered the opinion of the court:

This is a suit in equity brought against the United States to establish the claim of the plaintiff to have land warrants or certificates of location for one thousand and fifteen acres of land made out and delivered to him by way of indemnity and satisfaction for a certain concession or grant of land made by the Spanish governor to one Francisco Adante, in 1788, the land itself having been surveyed as public land by the United States and disposed of to purchasers. The claim is made under the provisions of the Act of June 2, 1858, entitled "An Act to Provide for the Location of Certain Confirmed Private Land Claims of the State of Missouri and for Other Purposes" (11 Stat. at L. 294), the claim in question having been confirmed by Act of Congress passed February 28, 1823 (3 Stat. at L. 727). The suit is subject to the same objections which exist in relation to the suits of *Carrie Jones and others* [*ante*, 90] just disposed of, and the same decree must be made as in those cases.

The decree of the Circuit Court is reversed, and the cause remanded, with instructions to dismiss the original petition or bill.

Mr. Justice Miller and Mr. Justice Field dissented.

(See dissenting opinion to *U. S. v. Jones*.)

UNITED STATES, *Appt.*,

v.

TYLER DAVIS.

UNITED STATES, *Appt.*

v.

HENRY SCHOFIELD.

(See S. C. Reporter's ed. 86-99.)

Act of February 16, 1876—jurisdiction under what amount necessary.

Note—See note to *Gordon v. Ogden*, 8 Peters, 7 L. ed. 562.
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1. This court has jurisdiction to re-examine judgments of circuit or district courts rendered under the Act of March 3, 1887 (24 Stat. at L. 506), although the matter in dispute does not exceed the sum or value of five thousand dollars, exclusive of costs.
2. Under said Act, the district and circuit courts may exercise concurrent jurisdiction with the Court of Claims in respect to suits against the United States, as therein provided; and the right of appeal from their judgments therein reserved to the Government is the same right of appeal as reserved in the statutes relating to the Court of Claims.
3. As that right could be exercised by the United States in the instance of any judgment of the Court of Claims adverse to the United States, it follows that the same right can be exercised by the United States in any case of the prosecution of a claim in the District or Circuit Courts of the United States under said Act.

[Nos. 1425, 1426.]

Submitted April 1, 1889. Decided May 13, 1889.

APPEALS from judgments of the District Court of the United States for the District of Maryland, in favor of plaintiff against the United States, for the sum of \$25 and costs, each.

On motions to dismiss. *Motions overruled.*
The facts are stated in the opinion.

Mr. Charles C. Lancaster in support of motion.

Mr. Robert A. Howard, Assist. Atty-Gen., in opposition.

Mr. Chief Justice Fuller delivered the opinion of the court:

On the third of March, 1887, an Act of Congress was approved, entitled "An Act to Provide for the Bringing of Suits Against the Government of the United States" (24 Stat. at L. 505), of which the first, second, ninth and tenth sections are as follows:

"That the Court of Claims shall have jurisdiction to hear and determine the following matters:

"*First.* All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, department or commission authorized to hear and determine the same.

"*Second.* All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided,* That no suit against the Government of the United States, shall be

allowed under this Act unless the same shall have been brought within six years after the right accrued for which the claim is made.

"SEC. 2. That the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section, where the amount of the claim does not exceed one thousand dollars, and the Circuit Courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this Act shall be tried by the court without a jury."

"SEC. 3. That the plaintiff or the United States, in any suit brought under the provisions of this Act shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes.

"SEC. 10. That when the findings of fact and the law applicable thereto have been filed in any case as provided in section six of this Act, and the judgment or decree is adverse to the Government, it shall be the duty of the district attorney to transmit to the Attorney-General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon, the Attorney-General shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same: *Provided*, That no appeal or writ of error shall be allowed after six months from the judgment or decree in such suit. From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree."

Under that Act Schofield filed his petition against the United States in the District Court of the United States for the District of Maryland, August 20, 1887, and judgment was rendered in his favor on the 6th day of October, 1887, in the sum of twenty-five dollars and costs. On the 16th day of January, 1888, an appeal was prayed by the United States to this court and allowed, and the transcript filed in the clerk's office, October 27, 1888.

Davis filed his petition in the same court, September 2, 1887, and recovered judgment November 18, 1887, in the sum of twenty-five dollars and costs, from which an appeal was prayed to this court, January 16, 1888, and the transcript filed in the clerk's office October 27, 1888.

A motion to dismiss is filed in each of these cases on behalf of the appellees, respectively, upon the ground that an appeal will not lie to
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this court from a District Court performing the appropriate duty of a District Court, and that this court has not jurisdiction to re-examine judgments of Circuit or District Courts since the Act of February 16, 1875 (18 Stat. at L. 816), in such actions, unless the matter in dispute shall exceed the sum or value of five thousand dollars, exclusive of costs, and "that the United States are not entitled to a writ of error or appeal if the same remedy would not be afforded under similar circumstances to a private party."

By the Act under which these suits were brought the District Court was given concurrent jurisdiction with the Court of Claims as to matters of which that court had jurisdiction, "where the amount of the claim does not exceed one thousand dollars;" and the same right of appeal was given to the plaintiff or the United States as "now reserved in the statutes of the United States in that behalf made."

Section 707 of the Revised Statutes reads:

"An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section one thousand and eighty-nine."

By section 708 such appeals must be taken within ninety days after the judgment is rendered, but this period is enlarged to six months by section 10 of the Act in question.

Inasmuch as the object of the latter Act was to enable the District and Circuit Courts to exercise concurrent jurisdiction with the Court of Claims in respect to suits against the United States, as therein provided, in our judgment the right of appeal reserved to the Government "in the statutes of the United States in that behalf made," before the enactment of this Act, was the right of appeal reserved in the statutes relating to the Court of Claims; and as that right could be exercised by the United States in the instance of any judgment of the Court of Claims adverse to the United States, it follows that the same right can be exercised by the United States in any case of the prosecution of a claim in the District or Circuit Courts of the United States under said Act. The result is that *the motions to dismiss in these cases must be overruled.*

DAVID S. TERRY ET UX., *App'ts.*

v.

FREDERICK W. SHARON, *Ex'r.*

(See S. C. Reporter's ed. 40-50.)

Order reviving suit—reviewable—frivolous appeal—effect of order—jurisdiction as to parties.

1. An order of the circuit court reviving a suit in the name of the executor of the plaintiff, on a bill of revivor, after decree therein, and ordering that the executor have the full benefit, rights and protection of the decree, and full power to enforce the same against the defendants, is such a final decree as can be brought to this court for review.

2. Such decree in this case affirmed, on the ground that the appeal is frivolous and unwarranted by the facts of the case.
3. On the mere review of the order reviving the suit and appointing a new party to conduct it on the part of the plaintiff, this court will not go back and decide upon the whole question which was passed upon by the circuit court in the original decree.
4. Where it appears by the record that the plaintiff is described as a citizen of the State of Nevada, and the defendant as a citizen of the State of California, this is sufficient to give jurisdiction of the parties.

[No. 1462.]

Submitted April 8, 1889. Decided May 13, 1889.

APPPEAL from a decree of the Circuit Court of the United States for the Northern District of California, reviving a suit, on a bill of revivor.

On motion to dismiss or affirm. *Affirmed.*
The facts are stated in the opinion.

Reported below, 1 L. R. A. 572.

Messrs. Samuel M. Wilson and Henry E. Davis in support of motion.

Messrs. Samuel Shellabarger and J. M. Wilson in opposition.

Mr. Justice Miller delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Northern District of California, and is now before us upon a motion on the part of the appellee to dismiss the appeal or to affirm the decree below.

The appeal, which was the subject of this dual motion, is from an order of the circuit court reviving a suit in equity after a final decree in the case had been made and after the death of William Sharon, the plaintiff in that suit. Sharon died after the case had been submitted to the court but before its decision, and the court, finding in his favor, ordered the decree to be entered, *nunc pro tunc*, as of the date of submission. The object of the original suit was to have a decree, declaring the nullity and invalidity of a certain instrument in writing purporting to be a declaration of marriage between the complainant, William Sharon, and Sarah Althea Hill, the defendant. The decree which was rendered in that case declared that said instrument was false, fabricated, forged, fraudulent, and utterly null and void, and directed that it be canceled and set aside. It further decreed, that upon twenty days' notice of the decree to the respondent, or to her solicitors, the instrument be delivered by the respondent to and deposited with the clerk of the court to be indorsed canceled; and the defendant was perpetually enjoined from alleging its genuineness or validity, or making any use of the same in evidence or otherwise to support any right or claim under it. The decree itself was rendered on November 23, 1885, and was entered as of September 29 of that year, the date of submission.

On March 12, 1886, Frederick W. Sharon, as executor of William Sharon, deceased, filed his bill of revivor in the cause, setting forth the fact of the death of William Sharon, and that he left a will which was duly probated, and on which letters testamentary had issued to him as executor; that the so-called declaration

of marriage had not been delivered for cancellation, as ordered by the decree; and that the plaintiff feared the defendant would claim and seek to enforce property rights as the wife of William Sharon, by virtue of said written declaration of marriage. The bill of revivor further stated that on January 7, 1885, the defendant, Sarah Althea Hill, had intermarried with David S. Terry, and he was accordingly made a defendant with her to the bill of revivor. It prayed, therefore, that the suit might be revived in his name as executor, and that the defendants be required to show cause why the original suit and proceedings should not stand revived against them.

To this bill of revivor the defendants interposed a demurrer which stated, among other things, that the court had no jurisdiction of the subject matter of the suit, and no jurisdiction to grant the relief prayed for in the bill, or any part thereof, and that the bill did not contain any matter of equity whereon the court could ground any decree or give to the plaintiff any relief against the defendants, or either of them.

The circuit court entered an order overruling the demurrer, and reviving the suit in the name of Frederick W. Sharon, as executor of William Sharon, and against Sarah Althea Terry and David S. Terry, her husband, and ordering that the executor have the full benefit, rights and protection of the decree, and full power to enforce the same against the defendants, and each of them, in all particulars. It is from this order that the present appeal is taken.

The motion to dismiss the appeal is based upon the proposition that the order reviving the suit is not such a final order or decree as can be brought to this court for review. The principal argument on that subject is, that like the proceedings subsequent to a judgment at law for its enforcement by execution or otherwise, it is merely ancillary to the original decree; and a mode of carrying it into effect. But we are not satisfied that this is a sound argument, and if the case before us rested alone upon the question of dismissing the appeal, or overruling the motion to do so, we should feel compelled to overrule the motion.

The idea cannot be sustained that when a judgment or decree is rendered against a defendant, and it remains wholly unexecuted, *anybody*, without any right, authority, or interest in the matter, can come in, and, by filing a bill of revivor, or by making a motion, have himself substituted for the plaintiff who has deceased, with all the rights which that plaintiff would have had to enforce the judgment or decree. Two questions must always present themselves in such a case, or at least may be presented: the one is, whether the decree is in condition that any further action can be had, or any right asserted under it by those who succeed the plaintiff as heirs, devisees, executors, or otherwise; and the other is, whether the party who thus asserts the right to the benefit of the decree is entitled to such right, and is by law the person who can claim its enforcement, or should, in any action or matter arising out of the decree, represent the rights of the original plaintiff. Both of these questions are matters which interest the defendant in the

original decree, and in regard to which he must have a right to a hearing before the circuit court; and the order of the circuit court on that subject is so far final, and may so far affect the rights of the defendant, that we think he is entitled to an appeal from such an order, if, in other respects, it is one within the jurisdiction of the supreme court. If the defendant had not this right of resistance, he might be harassed by suits to revive the judgment by any number of parties claiming in different or opposing rights, and he surely must have some power to protect himself from this; and the order which the court makes in such a case is so essentially decisive and important that we do not doubt that it is appealable.

The motion, therefore, to dismiss the appeal must be overruled.

Turning to the alternative branch of this motion, which claims that the order of the court, reviving the suit in the name of Frederick W. Sharon, executor, should be affirmed, because the appeal is frivolous and unwarranted by the facts of the case, we think it should be granted. This order does no more than place before the court in connection with the case a person occupying the position of plaintiff in that suit in the place of the deceased complainant, with such authority to avail himself of all the rights determined in favor of Sharon by the original decree as may be essential to the protection of the estate of Sharon, or the interests of his heirs or devisees, as they may be affected by that decree. That some one should be substituted in the place of Sharon, the complainant in that suit, who should be able to obtain the fruits of that litigation for the benefit of those who may be entitled to them, is so much a matter of course that it is difficult to conceive of a reason why such a substitution, through a bill of revivor, the usual proceeding in chancery cases, should not be had. If any objection had been made to the character in which Frederick W. Sharon asked to be made the representative of his father, to his fitness for the place, or that some one else was the proper person in whose name the suit should be revived, there might be some ground for a full hearing on the merits of the order. But no attempt is made to dispute the will of William Sharon, the disposition which it makes of his property or rights, or the validity of the appointment of Frederick W. Sharon, as executor of that will. There is no pretense, and there was no effort to show in the court below, that if the suit should be revived at all in the name of any person whatever, Frederick W. Sharon was not that person.

The broad ground taken, the only one worthy of consideration, and the one argued with great earnestness in the brief of counsel for appellants, is that the court which rendered the original decree was without jurisdiction; and that on the motion to revive, that question should be considered, and if the court was without jurisdiction in the original case, it can have no jurisdiction to appoint an executor. This matter is very fully argued in the briefs of counsel, and it is the only point made in opposition to the motion to affirm the judgment below. We have given it full consideration, and because it is the only point, and because it has been

fully and ably argued, we have the less reluctance in passing in this mode upon the merits of the order reviving the suit. We are satisfied that a later, and even more full, oral argument would throw no additional light upon the subject we are called upon to consider.

It would be a very anomalous proceeding for this court now, on the mere review of the order reviving the suit and appointing a new party to conduct it on the part of the plaintiff, to go back and decide upon the whole question which was passed upon by the circuit court in the original decree. That decree was open to appeal when it was rendered. If the defendant, Hill, was dissatisfied with it, or believed it was erroneous, or made without jurisdiction, she had the right to appeal to this court. It was not only open to her, but it was the proper remedy if she desired to test it further. The order substituting the executor as plaintiff in that suit grants no new rights, does not enlarge that decree, and does not change its status, its construction, or its validity. All the rights which she would have had against William Sharon, the plaintiff in that suit, she has against Frederick W. Sharon, who is substituted for him in the case. It would be productive of innumerable evils and delays if, on this proceeding to supply the defect in the original suit arising out of the death of the plaintiff, everything that had been done in that suit, although there was a final decree in the case, should be reconsidered and become the subject of renewed litigation.

If the jurisdiction of the circuit court in the original suit were in any respect open to question on this appeal or on this motion, we think that the record below presents so much of the elements of jurisdiction as to need no further inquiry in that direction in this proceeding. It appears by the record that Sharon, the plaintiff in that suit, describes himself as a citizen of the State of Nevada, and the defendant, Hill, as a citizen of the State of California. This is sufficient to have given jurisdiction of the parties; and the object of the suit, the cancellation of a forged instrument, is one of the common heads of equity jurisdiction. A general demurrer was filed to the bill, which the circuit court overruled. The defendant then pleaded in abatement that she had brought an action against the plaintiff in the state court of California, which she alleged involved the same matter as that on which Sharon's bill against her was founded. She also, as a further proposition in that plea, alleged that Sharon, the plaintiff, was not a citizen of the State of Nevada, but was a citizen of the State of California. This plea, in both its branches, was denied by Sharon; and, on a hearing, it was held to be bad and overruled, as the court said in its decision, because no testimony was taken to support it. Thus it appears that this matter of the jurisdiction of the circuit court was pleaded and relied on in that suit, and the court overruled it.

We have not made this reference to the proceedings in the court below with a view of reconsidering the soundness of those decisions. It is sufficient to say that, as presented to us, it is at least a *prima facie* case of jurisdiction as between the parties, and that the question of the soundness and correctness of the decision

of that court on the merits cannot be inquired into in the present proceeding.

Let us suppose for a moment that the circuit court was at liberty to make an order reviving this decree in the name of a proper person, and it had refused to do so. Whatever injury had been committed by the circuit court against Mr. Sharon could not, on the theory of the appellants, be reviewed in this court, because there would be no party to take an appeal, and even the error of the court, in holding that it had no jurisdiction, could not be reviewed for want of somebody to do so. Especially would this be so if the doctrine insisted on by the appellee be sound, that the order is not an appealable order.

On the other hand, let it be supposed that the defendant, Hill, in that suit desired to take an appeal, as she had a right to do, from the decree against her, she could only take such an appeal and prosecute it by reviving the suit against some party who must represent the Sharon interest.

The objection that the original suit and decree were without jurisdiction would be as valid against an application by Miss Hill to have some one substituted as plaintiff, in order that she might take an appeal, as it can be in the case of the present application by the plaintiff below. It is, we think, too clear for any serious argument that the representatives of Sharon had a right to supply the defect in the suit, created by the death of the plaintiff, by a bill of revivor, substituting a party in the place of Sharon.

It is averred in this bill of revivor that the decree has not been complied with by the defendant, Hill; that she has not delivered up the instrument to be canceled; and that she is using it in other ways to the prejudice of Sharon's estate and that of his devisees. Somebody capable of putting the decree into effect in those particulars is essential to its utility and to its execution.

We have not been able to find any precedent exactly representing the case before us. The ingenuity of counsel has been unable to supply us with any; but we think the decree of the court below, reviving the suit in the name of Frederick W. Sharon, is so clearly right that we feel bound to affirm that decree on this motion.

And it is so ordered.

Mr. Justice Field took no part in the decision of this case.

UNITED STATES, *Plff.*,

v.

JOHN D. HALL.

(See S. C. Reporter's ed. 50-54.)

Questions certified—perjury—authority of notary public to administer an oath.

1. Questions certified on division of opinion must not be such as to split up the case into fragments, upon which, before a trial or decision by the court below, it is intended to obtain the opinion of this court, but clear and distinct propositions of law.

NOTE.—Oath must be lawfully administered by competent authority to convict of perjury. See note to U. S. v. Curtis, 107 U. S., 27 L. ed. 534.

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2. A defendant indicted for perjury cannot be held to be guilty unless the oath in regard to which the perjury is charged was taken before an officer having authority to administer it.

3. A notary public has no authority to administer an oath to a deputy surveyor of the United States in reference to the manner in which he had discharged his duties as deputy surveyor under the contract which is made part of the indictment in this case.

[No. 1034.]

Argued April 8, 9, 1889. Decided May 13, 1889.

ON A CERTIFICATE of division of opinion between the Judges of the Circuit Court of the United States for the District of California, on a demurrer to an indictment for making a false oath, by a Deputy Surveyor of the United States, as to his services in surveying townships of land in California. *The sixth question certified answered in the negative.*

The facts are stated in the opinion.

Mr. G. A. Jenks, Solicitor Gen., for plaintiff.

Messrs. Frank H. Hurd and Walter H. Smith for defendant.

Mr. Justice Miller delivered the opinion of the court:

This case comes before us on a certificate of division of opinion between the Judges of the Circuit Court of the United States for the District of California.

The record presents an indictment against John D. Hall for making a false oath as to his services as Deputy Surveyor of the United States, in regard to the manner in which he had fulfilled a contract for surveying several townships of land in California. The indictment is diffuse and obscure, but it can perhaps be sufficiently ascertained from it that the offense charged against Hall is the false oath, intended to be used in procuring pay for services which the indictment charges were never rendered.

It is alleged that the oath set forth in the affidavit was made before T. T. Tidball, a notary public, duly appointed, commissioned and qualified as such, in and for the County of Monterey, California; and one of the questions certified to us, on which the judges were divided in opinion, is whether a notary public is authorized to administer oaths and certify affidavits of the character and purpose for which that affidavit is alleged to have been prepared.

There was a demurrer to the indictment, in which eighteen distinct grounds of demurrer are set out; and upon the hearing of this demurrer the judges certified to this court six matters on which they were divided in opinion. They are as follows:

"1. Do the facts set forth in this indictment constitute an offense under section 5418 of the Revised Statutes of the United States?

"2. Do the facts alleged in this indictment constitute an offense under section 5438 of the Revised Statutes of the United States?

"3. Are the words 'falsely makes' in section 5418, Revised Statutes, limited to forged instruments or instruments in the nature of forged instruments?

"4. Does the making of a genuine writing or instrument, signed by the party making it

or purporting to make it, with his own name, which instrument is false only in its statement of facts, for the purpose of defrauding the United States, constitute the 'falsely making' of a writing or instrument within the meaning of section 5418 of the Revised Statutes?

"5. Is it necessary that an instrument 'falsely made,' purporting to be an affidavit, and actually knowingly used for the purpose of defrauding the United States, contrary to the statute, should be sworn to before a person authorized to administer oaths for such purposes in order to constitute an offense under section 5418 Revised Statutes?

"6. Is a notary public authorized to administer oaths and take and certify affidavits of the character and for the purposes for which the affidavit set out in the indictment is alleged to have been prepared or used?"

Most of these are, by the settled doctrine of this court, insufficient to invoke its jurisdiction. They seem eminently liable to the objection that they are designed to split up the case before the court into fragments, upon which, before a trial or decision by that court, it is intended to obtain the opinion of this court. There are none of them, except the last one we have mentioned, which present, in the manner that we have frequently pointed out, clear and distinct propositions of law to which this court can respond. *Fire Insurance Association v. Wickham*, 128 U. S. 426 [32: 503]; *Dublin Township v. Milford Savings Institution*, Id. 510 [32: 538]. But they require, if they should be answered at all, an examination of this very voluminous and loose statement of facts found in the indictment before an answer could be made; and even then there is no certainty that the answers would turn upon any difficulty existing in the minds of the court which framed them for our consideration.

It is apparent, however, that the question we have suggested, the last of the series of six, is a distinct and clear proposition of law, which may be necessary, and probably is essential, to a decision of the demurrer. It can hardly be supposed that a defendant indicted for perjury can be held to be guilty, unless the oath in regard to which the perjury is charged was taken before an officer of some kind having due authority to administer the oath. We proceed, therefore, to inquire whether notaries public have authority to administer an oath, such as is required by the Act of Congress, in the matter in regard to which the defendant was sworn. It is a little singular that there is no general statute designating any class of persons or officers who may in all cases administer the oaths required to be taken by the laws of the United States. There are many statutes regulating the administration of oaths in particular classes of cases, and specifying the person before whom the oath shall be made, but the persons are not always the same. These oaths can be taken in the cases pointed out by the law before the courts, judges of the courts, clerks of the courts, notaries public, commissioners of the circuit court, and various other officers; but in all these instances the class of cases in which the oath can be taken before such officer, or any of them, is defined. We

have been unable to find any statute authorizing the oath required to be taken by Hall, in reference to the manner in which he had discharged his duties as deputy surveyor under the contract which is made part of the indictment, to be administered by a notary public.

In the case of *United States v. Curtis*, 107 U. S. 671 [27: 534], this court, after a very careful examination of the statutes on the subject of the powers of notaries public to administer oaths, declared that no such general power existed, and that up to the Act of February 26, 1881, chapter 82 (21 Stat. at L. 852), a notary public had no authority under any law of the United States to administer the oath to an officer of a national bank in the declaration or statement in a report required by section 5211 of the Revised Statutes. This examination, as found in the opinion of the court by *Mr. Justice Harlan*, seems to have been very thorough at the time the opinion was delivered, in April, 1883. We are not now able to find any statute giving such authority to a notary public in regard to the matter in which the oath was taken in the present case, nor any general authority to administer oaths under the laws of the United States.

A fair specimen of the manner in which Congress has dealt with the subject of oaths and affidavits, under its laws, may be seen by reference to chapter 82 of the Statutes of 1881, before mentioned. That Act was undoubtedly passed to meet the difficulty which had occurred in the lower courts in the case of *United States v. Curtis*, where the question was raised whether or not the oath required to be taken by bank officers, in making their reports to the Comptroller of the Currency, could be taken before a notary public. This new statute on that subject reads as follows:

"That the oath or affirmation required by section fifty-two hundred and eleven of the Revised Statutes, verifying the returns made by national banks to the Comptroller of the Currency, when taken before a notary public properly authorized and commissioned by the State in which such notary resides and the bank is located, or any other officer having an official seal, authorized in such State to administer oaths, shall be a sufficient verification as contemplated by said section fifty-two hundred and eleven: *Provided*, That the officer administering the oath is not an officer of the bank."

The Act limits itself exclusively to the case, then before the courts, of officers of national banks in regard to verifying the returns made by those banks to the Comptroller of the Currency; and it simply declares that it shall be sufficient if they are made before a notary public. The statutes are full of such partial and special enactments about notaries public, commissioners of the circuit courts, clerks of the courts, and various others by whom oaths may be administered, but there is no general definition; and we have been unable to find, after a most careful and protracted examination, any statute which gives a general authority to any officer, or any person whatever, to administer oaths in all cases where, by the laws of the United States, they are required.

It is, therefore, certified to the Circuit Court that this question is answered in the negative.

THE CITY OF NEW ORLEANS, *Appt.*,
v.

JAMES Y. CHRISTMAS ET AL., Admrs.
of MYRA CLARK GAINES, Deceased.

(See S. C. "New Orleans v. Gaines's Adm'r" Reporter's ed. 191-220.)

Rents and profits, when recovered—suit by grantee against grantor—when owner may recover against grantor—civil law in Louisiana—liability for use of unimproved land—possessor in bad faith, liability of—recovery of claims of Mrs. Gaines.

1. At common law the person who receives the rents and profits is the only person who is to respond for them.
2. By the law of Louisiana, a person evicted from property conveyed to him with warranty may recover from his warrantor not only the price but the amount of rents and revenues which he is bound to respond for to the true owner.
3. Such evicted grantee, who is condemned in judgment to pay the rents and revenues of the property, may, before satisfying such judgment, maintain a suit in equity against his guarantor to protect him against his adjudged liability to pay.
4. The real owner, who has recovered possession from the grantee, may be subrogated to such grantee's rights and may maintain a suit against such guarantor for such rents and revenues.
5. Such guarantor is not liable for interest on the valuation of unimproved land from which his grantee derived no rents or revenues.
6. Under the civil law obtaining in Louisiana, creditors may exercise all the rights and actions of their debtor, with the exception of those that are exclusively attached to the person. This right of the creditor may be pursued in a suit in equity in the courts of the United States.
7. The rule that a possessor in bad faith is bound to respond for all that the property possessed can be made to produce does not require him to change the state of the property, as to change wild land to cultivated.
8. Those who take a conveyance and go into possession in entire ignorance of any defect in their title, though technically possessors in bad faith because, by proper inquiry, they might have discovered the defect, are not to be placed on the same level with knavish and fraudulent possessors who, without any title, pertinaciously keep the true and known owner out of possession.
9. In the present case the claims of Mrs. Gaines against the City of New Orleans are sustained for the rents and revenues of improved property while in the hands of the grantees of the city, said property having been recovered by her from said grantees; but her claims for rents and revenues of unimproved lands are disallowed, no rents or revenues having been actually derived from them.
10. While such grantees would have been proper parties to this suit, still, as the objection of the want of parties was not specifically made, and as it would be a hardship to begin this suit again, the suit is not dismissed on that ground.

[No. 4.]

Argued Oct. 13, 14, 1887. Decided May 13, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana, against the City of New

Orleans for the rents and revenues of lands recovered by complainant from various persons, grantees of the city, of whose title the city was guarantor. *Reversed, with instructions to enter a decree in conformity with the opinion.* See opinion below, 17 Fed. Rep. 488.

The facts are stated in the opinion.

Messrs. Henry C. Miller and J. R. Beckwith, for appellant:

There is no equity jurisdiction to compel a unilateral account when there are no offsets or items to be charged, discharged or surcharged, nor to compute damages for alleged torts.

Hipp v. Babin, 60 U. S. 19 How. 271 (15: 688); *Fowle v. Lawrason*, 80 U. S. 5 Pet. 495 (8: 204); *Root v. R. Co.* 105 U. S. 189 (26: 975); *Ellis v. Davis*, 109 U. S. 485 (27: 1006); *Gaines v. Miller*, 111 U. S. 895 (28: 466); *Van Weel v. Winston*, 115 U. S. 228 (29: 384); *Buzard v. Houston*, 119 U. S. 347 (30: 451); *Parkersburg v. Brown*, 106 U. S. 487, 500 (27: 238, 243); *Ambler v. Choteau*, 107 U. S. 586 (27: 823); *Litchfield v. Ballou*, 114 U. S. 190 (29: 132).

In such case the defendant has a constitutional right to a trial by jury.

Ins. Co. v. Bailey, 80 U. S. 18 Wall. 616-621 (20: 501-508); *Grand Chute v. Winegar*, 83 U. S. 15 Wall. 873-875 (21: 174, 175); *Lewis v. Cocks*, 90 U. S. 23 Wall. 466-470 (23: 70, 71); *Killian v. Ebbinghaus*, 110 U. S. 568, 578 (28: 246-248); *N. Y. Guaranty Co. v. Memphis Water Co.* 107 U. S. 205, 207 (27: 484, 485); *Francis v. Flinn*, 118 U. S. 385 (30: 165); *U. S. v. Wilson*, 118 U. S. 86-89 (30: 110); *Fussell v. Gregg*, 113 U. S. 550 (28: 993).

Equity will not deal with an account simply because it is complicated; to sustain a bill for an account there must be mutual demands—not a single matter, but a series of transactions on one side and payments on the other.

Porter v. Spencer, 2 Johns. Ch. 169; *Badger v. McNamara*, 123 Mass. 117; *Walker v. Brooks*, 125 Mass. 241; *Ball v. Carew*, 13 Pick. 28; *Story, Eq. Jur.* §§ 458, 495; *Dinwiddie v. Bailey*, 6 Ves. 141; *Cooper v. Hatton*, 12 Price, 462; *Baily v. Taylor*, 1 Russ. & M. 73; *Andrews v. Dunmon*, 9 Beav. 508; *Padwick v. Stanley*, 9 Hare, 627, 16 Jur. 586; *King v. Rossett*, 2 Younge & J. 33; *Hemings v. Pugh*, 4 Giff. 456, 12 W. R. 44, 9 L. T. N. S. 283; *Barry v. Stevens*, 81 L. J. Ch. 785; *Smith v. Leccaux*, 12 W. R. 31, 9 L. T. N. S. 313; *Holmes v. Eastern Counties R. Co.* 3 Kay & J. 675; *Re Aberystwith R. Co.* 7 Jur. N. S. 510, 564, 30 L. J. Ch. 674, 4 L. T. N. S. 587; *Darthez v. Clemens*, 6 Beav. 165; *O'Mahony v. Dickson*, 2 Sch. & Lef. 400; *Foley v. Hill*, 1 Phil. Ch. 899, 8 Jur. 347; *Frietas v. Dos Santos*, 1 Younge & J. 574; *Grafton v. Reed*, 26 W. Va. 437; *Linn v. Gunn*, 56 Mich. 447.

Where there is an effort to give equity jurisdiction by a charge that accounts are intricate and can only be taken in a court of equity, unless the bill shows circumstances and facts showing the intricacy of the account, the bill will be dismissed.

Bowles v. Orr, 1 Younge & C. Exch. 464; *Padwick v. Hurst*, 18 Beav. 575, 18 Jur. 763; *Norris v. Day*, 4 Younge & C. Exch. 475, 10 L. J. N. S. 43; *Jones v. Maund*, 3 Younge & C. Exch. 347; *Phillips v. Phillips*, 9 Hare, 471; *Glennie v. Imri*, 3 Younge & C. Exch. 436; *Welchman v. Farebrother*, 1 Jur. N. S. 126;

NOTE.—*Meme Profits*. See *Greene v. Biddle*, 8 Wheat. 5 L. ed. 547; also 16 Peters, 10 L. ed. 873, 181 U. S.

Fluker v. Taylor, 8 Drew, 188; *Ranger v. Great Western R. Co.* 5 H. L. Cas. 72; *Blyth v. Whiffen*, 27 L. T. N. S. 880.

A bill in equity cannot be maintained for discovery if it cannot be maintained for relief, unless the bill shows the discovery to be in aid of a suit at law or the defense of a suit at law actually pending or about to be brought, and the action or defense not frivolous.

1 Story, Eq. Jur. ed. 1879, §§ 71, 72; *Brown v. Swann*, 85 U. S. 10 Pet. 497 (9: 508); *Mitchell v. Green*, 10 Met. 101; Story, Eq. Pl. §§ 812, 845; *Pease v. Pease*, 8 Met. 895; *Pool v. Lloyd*, 5 Met. 525; *Ahernd v. Osborne*, 118 Mass. 261; *Walker v. Brooks*, 125 Mass. 241; *Haskins v. Burr*, 106 Mass. 48; 2 Story, Eq. Jur. § 1495; Mitf. Eq. Pl. (Jeremy) 188; Cooper, Eq. Pl. chap. 8, § 8, pp. 191-192; *Dunn v. Coates*, 1 Atk. 288; *Anon.* 2 Ves. 451; *Gelston v. Hoyt*, 1 Johns. Ch. 547-548.

It is doubtful if a bill of discovery can be maintained, since parties can be examined as witnesses.

Heath v. Elrie R. Co. 9 Blatchf. 316.

A bill against a corporation as sole defendant, or a bill that waives answer under oath, is not a bill of discovery.

Huntington v. Saunders, 120 U. S. 78 (80: 580); *U. S. v. Wagner*, L. R. 2 Ch. App. Cas. 582; *Republic of Liberia v. Roye*, 15 Eng. Rep. (Moak) 44, L. R. 1 App. Cas. 189; *Republic of Costa Rica v. Erlanger*, 15 Eng. Rep. (Moak) 690, L. R. 1 Ch. Div. 171; *Republic of Peru v. Weguelin*, L. R. 20 Eq. Cas. 140, 18 Eng. Rep. (Moak) 679.

Res judicata bears upon parties and all those in privity, and is not only conclusive as to all matters that have been drawn into the controversy between them in a former judicial controversy, but also conclusive as to all matters that might have been litigated in the prior litigation.

Packet Co. v. Sickles, 72 U. S. 5 Wall. 592 (18: 558); *Hopkins v. Lee*, 19 U. S. 6 Wheat. 109 (5: 218); *U. S. Bank v. Beverly*, 42 U. S. 1 How. 184 (11: 75); *Chapman v. Smith*, 57 U. S. 16 How. 114 (14: 865); *Thompson v. Roberts*, 65 U. S. 24 How. 238 (16: 648); *Campbell v. Rankin*, 99 U. S. 261 (25: 435); *Baird v. U. S.* 96 U. S. 430 (24: 708); *Aurora City v. West*, 74 U. S. 7 Wall. 82 (19: 51); *The Apollon*, 22 U. S. 9 Wheat. 362 (6: 111); *Durant v. Esccez Co.* 74 U. S. 7 Wall. 107 (19: 154); *Nashville etc. R. Co. v. U. S.* 118 U. S. 261 (28: 971); *Hepburn v. Dunlop*, 14 U. S. 1 Wheat. 179 (4: 65); *Bullance v. Forsyth*, 65 U. S. 24 How. 188 (16: 733); *Beloit v. Morgan*, 74 U. S. 7 Wall. 619 (19: 205); *Gould v. E. & C. R. Co.* 91 U. S. 528 (23: 416); *Tioga R. Co. v. Blossburg & C. R. Co.* 87 U. S. 20 Wall. 137 (22: 331); *Montgomery v. Samory*, 99 U. S. 482 (25: 375); *Block v. Co. Comrs.* 99 U. S. 686 (25: 491); *Louis v. Brown Twp.* 109 U. S. 162 (27: 892); *Pollard v. R. Co.* 101 U. S. 228 (25: 840); *Lumber Co. v. Buchtel*, 101 U. S. 688 (25: 1074); *Cass v. Beauregard*, 101 U. S. 688 (25: 1004); *Stout v. Lye*, 103 U. S. 66 (26: 428); *Whiteside v. Haselton*, 110 U. S. 296 (28: 152); *Corcoran v. Ches. & O. Canal Co.* 94 U. S. 741 (24: 190); *Cromwell v. County of Sac*, 94 U. S. 351 (24: 195); *Bryan v. Kennett*, 118 U. S. 179 (28: 908); *U. S. v. Parker*, 120 U. S. 89 (30: 601); *Coffey v. U. S.* 116 U. S. 436 (29: 684); *U. S. v.*

McKee, 4 Dill. 128; *Merritt v. Campbell*, 47 Cal. 542.

This is the established jurisprudence in all the States.

Ounningham v. Ashley, 45 Cal. 485; *Jackson v. Lodge*, 36 Cal. 28; *Warren v. Comings*, 6 Cush. 108; *Simpson v. Hart*, 1 Johns. Ch. 91; *Kingsland v. Spalding*, 3 Barb. Ch. 341; *Gardner v. Buckbee*, 3 Cow. 120; *Burt v. Sternburgh*, 4 Cow. 559; *Etheridge v. Osborn*, 12 Wend. 899; *Embury v. Conner*, 8 N. Y. 511; *Doty v. Brown*, 4 N. Y. 71; *Castle v. Noyes*, 14 N. Y. 529; *Gelston v. Hoyt*, 1 Johns. Ch. 548; *Hoyt v. Gelston*, 13 Johns. 141; *Holmes v. Remsen*, 7 Johns. Ch. 286; *Egleston v. Knickerbacker*, 6 Barb. 458; *Ogden v. La Farge*, 2 N. Y. 112; *Davoue v. Fanning*, 4 Johns. Ch. 199; *Newcomb v. St. Peter's Church*, 2 Sandf. Ch. 636; *O'Brien v. Heeney*, 2 Edw. 242; *Lansing v. Russell*, 18 Barb. 510; *Burhans v. Van Zandt*, 7 N. Y. 523; *Bellinger v. Craigie*, 31 Barb. 534; *People v. Supra*, of *San Francisco*, 27 Cal. 675; *Stewart v. Stebbins*, 30 Miss. 81; *Barker v. Cleveland*, 19 Mich. 235; *Hooker v. Hubbard*, 102 Mass. 242; *White v. Simonds*, 38 Vt. 180; *Day v. Vallette*, 25 Ind. 48; 1 Herman, Estoppel and Res Adjudicata, ed. 1886, 121, and cases cited in note 8.

If one demand less than is due him and do not amend his petition in order to augment his demand, he shall lose the overplus.

La. Code Pr. art. 156; *McCaleb v. Fluker*, 14 La. Ann. 316; *Brandages v. Chamberlin*, 2 Rob. (La.) 207; *Vasoccu v. Pavie*, 14 La. 135.

The rule stated in article 156, Code Pr. is the same at common law and in equity.

Rockwell v. Langley, 19 Pa. 508; *Smith v. Weeks*, 26 Barb. 468; *Fulton v. Matthews*, 15 Johns. 483; *Bickford v. Cooper*, 41 Pa. 146; *Logan v. Caffrey*, 30 Pa. 196; *Wickersham v. Whedon*, 33 Mo. 561; *Bancroft v. Winepear*, 44 Barb. 209; *Guernsey v. Carner*, 8 Wend. 492; *Stein v. The Prairie Rose S. B.* 17 Ohio St. 471; *Mandeville v. Welch*, 18 U. S. 5 Wheat. 277 (5: 87); *Barksdale v. Greene*, 29 Ga. 420; *Walker v. Ames*, 2 Cow. 426; *Rogers v. Higgins*, 57 Ill. 247; *Stockton v. Ford*, 59 U. S. 18 How. 420 (15: 896); art. 2452, La. Civil Code (2427 Old Code).

The sale of a thing belonging to another person is null. It may give rise to an action for damages in case of eviction when the buyer knew not that the thing belonged to another person.

Jeannin v. Millaudon, 5 Rob. (La.) 76; *Hall v. Nevill*, 8 La. Ann. 326; *Scott v. Featherston*, 5 La. Ann. 306; Civil Code, art. 1965; *Nash v. Johnson*, 9 Rob. (La.) 8.

Daniel Clark's will of 1811, after its probate, was a muniment of title warranting possession by the occupants of the Blanc tract until it was set aside by the probate of the alleged will of 1818.

Davis v. Gaines, 104 U. S. 836 (26: 757); *Allen v. Dundas*, 3 T. R. 125; *Rez v. Vincent*, 1 Str. 481; *Woolley v. Clark*, 5 Barn. & Ald. 746; *Wms. Exrs.* 6th. Am. ed. 590 (note X); *Packman's Case*, 6 Co. 19; *Semine v. Semine*, 2 Lev. 90; *Graysbrook v. Fox*, 1 Plowd. 283; *Thomson v. Harding*, 2 El. & Bl. 680; *Parker v. Kett*, 1 Ld. Raym. 658; *Waters v. Stickney*, 12 Allen, 15; *Peebles' App.* 15 Serg. & R. 89; *Kittredge v. Folsom*, 8 N. H. 98; *Stone v. Peasley*, 28 Vt. 716; *Steele v. Kenn*, 50 Tex. 467.

A warrantor, who is not in possession, in the event of recovery on the covenant of warranty, only owes interest from judicial demand if the amount is liquidated or from judgment if the amount is unliquidated.

Melancon v. Robichaud, 19 La. 357; *Daquin v. Coiron*, 3 La. 357, 395; *Conolly v. Bertrand*, 12 La. 313; *Herman v. Sprigg*, 8 Martin, N. S. 190; *Bourguignon v. Destrehan*, 5 L. A. 115.

The warrantee has no right of action against the warrantor until the warrantee is actually put out of possession. The return of a writ of possession to which the warrantor is not a party is not adequate proof of actual eviction in a suit on the covenant of warranty.

Hale v. New Orleans, 13 La. Ann. 499; *Melancon v. Duhamel*, 7 La. 236; *Fletcher v. Cavalier*, 10 La. 120; *Laborde v. New Orleans*, 13 La. Ann. 326.

The owner of realty, after eviction of adverse holder, has no action against the vendor of the evicted for rents and profits.

Gillaspie v. Citizens Bank, 35 Ann. 779.

Mrs. Alfred Goldthwaite, and *Thomas J. Semmes*, for appellees:

The case made by the bill is a case in equity.

Cupit v. Jackson, 13 Price, 721; *Duke of Leeds v. New Radnor*, 2 Bro. Ch. 338; *Duke of Bridgewater v. Edwards*, 6 Bro. P. C. 363; *Cock v. Foley*, 1 Vern. 359; *Holder v. Chubbury*, 3 P. Wms. 256; *Pulteney v. Warren*, 6 Ves. 76; *Hambly v. Trott*, Cowper, 371; *Curtis v. Curtis*, 2 Bro. Ch. 630; *Dormer v. Fortescue*, 3 Atk. 123; *Bennet v. Whitehead*, 2 P. Wms. 644; *O'Connor v. Spaight*, 1 Sch. & Lef. 309; *Weymouth v. Boyer*, 1 Ves. Jr. 416; *Corporation of Carlisle v. Wilson*, 13 Ves. Jr. 276; *Ex parte Baz*, 3 Ves. Sr. 388; *Story*, Eq. Jur. § 67, 451; *Fowle v. Lavrason*, 30 U. S. 5 Pet. 503 (8: 207); *Hipp v. Babin*, 60 U. S. 19 How. 277 (15: 634); *Barber v. Barber*, 62 U. S. 21 How. 591 (16: 229); *Mitchell v. Great Works Milling & Mfg. Co.* 2 Story, 653; *Root v. R. Co.* 105 U. S. 215 (36: 984).

Equity will decree an account of rent and profits whenever the account is intricate and complicated and therefore not easily adjusted at law.

Nelson v. Allen, 1 Yerg. 372; 1 Maddock Ch. 363; *Cooper's Eq. Pl.* 134; *Ludlow v. Simond*, 2 Caines, Cas. 40; *Knotts v. Tarver*, 8 Ala. 743; *Printup v. Mitchell*, 17 Ga. 558; *Holcombe's Eq.* 85; *Riddle v. Mandeville*, 9 U. S. 5 Cranch, 322 (3: 114).

Courts of equity in bills for specific performance have liberally granted relief against persons, when courts of law could not give relief, and treated defendants as trustees for complainants where no privy existed.

Champion v. Brown, 6 Johns. Ch. 398; *Fry*, Spec. Perf. marg. pp. 57-61; *Foss v. Haynes*, 31 Maine, 89; *Potter v. Saunders*, 6 Hare, 1; *Root v. R. Co.* 105 U. S. 214 (26: 984).

When the Judiciary Act (1 Stat. at L. 73) speaks of a plain, adequate and complete remedy at law, it refers to the common law, not to the statutes of the States.

Robinson v. Campbell, 16 U. S. 3 Wheat. 212 (4: 373); *Bodley v. Taylor*, 9 U. S. 5 Cranch, 191 (3: 75); *U. S. v. Howland*, 17 U. S. 4 Wheat. 106 (4: 526); *Boyle v. Zacharie*, 31 U. S. 6 Pet. 643 (8: 532).

The seller and warrantor, who took and

conveyed in bad faith, is bound forthwith to restore the price to his vendee and to acquit, *i. e.*, discharge for him his liability to the owner.

Morris v. Abat, 9 La. 552; *Walworth v. Stevenson*, 24 La. Ann. 251; *Downes v. Scott*, 3 La. Ann. 278.

The party evicted shall recover the price paid to his warrantor, with interest from the date of eviction.

Hale v. New Orleans, 13 La. Ann. 501; *Daquin v. Coiron*, 3 La. 395; *Conolly v. Bertrand*, 12 La. 313; *Miles v. His Creditors*, 16 La. 35.

The damages allowed will at least consist in placing the injured party in the situation in which he would have been if the disturbance had not occurred.

Gray v. Lowe, 11 La. Ann. 392; *Sellick v. Kelly*, 11 Rob. (La.) 150; *Horn v. Bayard*, 11 Rob. (La.) 263; *Moore v. Withenburg*, 13 La. Ann. 22.

A corporation is liable for the wrongful acts of its officers and agents.

McGary v. Lafayette, 12 Rob. 668; *S. C. 4 La. Ann. 440*; *Rabassa v. Orleans Nav. Co.* 5 La. 463; *Wilde v. New Orleans*, 12 La. Ann. 15; *Gaines v. New Orleans*, 78 U. S. 6 Wall. 716 (18: 965).

Mr. Justice Bradley delivered the opinion of the court:

This is a bill filed by Myra Clark Gaines against the City of New Orleans to recover the amount, with interest, of the fruits, revenues and value for use, of certain lands in the City of New Orleans, containing about 135 arpents, which the complainant had recovered from various persons claiming title under the city. The charge is, that the city is liable as grantor of the land as well as guarantor of the title, and ought to respond for all the rents and revenues of the property actually received by itself or its grantees, or which might have been received by a judicious and provident use of the property.

The bill was filed August 7, 1879, and on the 5th of May, 1883, a decree was rendered in favor of the complainant for the sum of \$1,925,667.83, with interest on \$950,110 from January 10th, 1881. From that decree the present appeal is taken.

A brief outline of the history of this litigation will conduce to a better understanding of the case. Daniel Clark, a prominent citizen of New Orleans, of large wealth and possessions, died there on the 16th of August, 1813, without leaving any known heirs-at-law nearer than his mother, who was residing at Germantown, near Philadelphia. A will was found amongst his papers, sealed up in a package bearing the following inscription in his own hand: "This is my olographic will. New Orleans, 20th May, 1811." (Signed) "Daniel Clark." The will was short, containing only the following words, to wit: "In the name of God, I, Daniel Clark, of New Orleans, do make this my last will and testament: *Imprimis*. I order that all my just debts be paid. Second. I leave and bequeath unto my mother, Mary Clark, now of Germantown, in the State of Pennsylvania, all the estate, whether real or personal, which I may die possessed of. Third. I hereby nominate my friends, Richard Relf and Beverly Chew, my

executors, with power to settle everything relating to my estate." (Signed) "Daniel Clark." This will was duly admitted to probate, and letters testamentary were granted to the executors named therein.

The executors proceeded to take possession of the estate, and disposed of a large part of it. There were some outlying lands, in the suburbs of the city, bordering on St. John's Bayou, that were not disposed of until 1821, amongst others the lands now in controversy. Relf and Chew, besides being executors of Clark's will, held a power of attorney from Mary Clark, his mother, dated October 1, 1818, by which, styling herself to be heir, devisee and legatee of Daniel Clark, she appointed them (Relf and Chew), naming them as merchants of New Orleans and executors of the will of Daniel Clark, jointly and severally, as her lawful attorneys, for her and in her behalf to take possession of the real and personal estate of Clark; to manage, sell, let, occupy and sue for the same or any part thereof; to collect moneys, debts and effects belonging to her as sole legatee, devisee, or heir-at-law of said Clark; to make all necessary and proper acts and deeds for conveying any of the property, and generally to do everything that she could do in the premises. This power was deposited of record with John Lynd, a notary public of New Orleans, on the 22d of April, 1817. By an act of sale, dated 30th of October, 1821, Relf and Chew, in the name of Mary Clark, and by virtue of said power of attorney, after having put up the property at auction, sold, and conveyed to one Evariste Blanc, the highest bidder, for the sum of \$4,760, a piece of land described as situated on the Bayou St. John, containing about 185 superficial arpents [equal to 114 acres] adjoining the road of the Navigation, or Carondelet, Canal, the lands of E. Cauchoit, the Broad Street and Bellechasse Street, etc., in conformity with a plan drawn by Joseph Pilié, city surveyor, on the 20th of August, 1821; and they subrogated the purchaser to all the rights of property that Mary Clark had in the land, with right of seizing the same.

On the 26th day of September, 1834, Evariste Blanc sold and conveyed the same and other adjoining lands, amounting in all to 240 arpents [equal to nearly 208 acres], to the City of New Orleans for the sum of \$45,000, making the cost of the property in question about \$25,000. This purchase was made by the city for the purpose of controlling the laying out of the streets and other public improvements in that district, in conformity with the general plan of the city, and more for the public advantage. No one at that time had any serious question about the validity of the title. Mrs. Gaines, then Mrs. Whitney, it is true, had, with her husband, in June preceding, filed a petition in the probate court in a pending proceeding on the part of a creditor of Daniel Clark, claiming to be his daughter and heir, and Relf had been cited to answer it; but it was regarded as a visionary claim, and made no public impression.

The city reserved four or five blocks of this purchase for public purposes (the erection of drainage works, etc.), and in March, 1837, sold off most of the balance in building lots. This

happened at a time when real estate in New Orleans had suddenly risen to the most inflated and fictitious prices. The real estate craze, indeed, had infected large portions of the country. These sales were afterwards mostly annulled for defects of title or never carried out, and it would probably have been impossible for the purchasers to have responded for the extravagant prices agreed to be paid. In some cases they were six or seven times the normal value of the property. According to the *procès verbal* of the auctioneers, the adjudications amounted to the enormous sum of over \$600,000, and the sales of the lots and squares involved in the present case amounted to \$553,400; but, as before remarked, the whole transaction, except with regard to a few parcels, fell through, and the property came back into the city's hands. Yet the amount of these sales forms the basis of the exceedingly large decree in this case. The same property afterwards, about 1848, was again put up at auction, and the property now in question brought only about \$100,000, including some of the original sales not annulled,—being less than one fifth of the nominal amounts bid at the first sale. This property afterwards, by a long process of litigation, was recovered by Mrs. Gaines as the heir and devisee of Daniel Clark under a late discovered will, and the tenants were ousted, and this suit was brought, as before stated, to recover from the city the entire rents and revenues of the property from the time of its purchase from Evariste Blanc. The decree in the case, where there was no proof of actual rents and revenues received by the city or its grantees (as was the case wherever and as long as the particular property was unimproved) charges the city five per cent per annum on the amount of the sales of 1837, from that time to the date of the decree (46 years), and interest on that yearly five per cent from the time it accrued, making the amount of revenues, in many cases, more than 400 per cent of the said sales. In this way the amount of rents and revenues on unimproved property, with the interest thereon to the 10th of January, 1881, is figured up at \$1,848,959.91; in addition to which the decree awards the complainant the sum of \$576,707.92 for the revenues of the improved property whilst in the hands of grantees of the city; making a total decree of \$1,925,667.83, with interest to accrue from January 10, 1881, on the sum of \$950,110 (the assumed principal) until paid. The master had allowed but 70 per cent of the amount of the sales of 1837 as the basis of calculation, but the court in its final decree deemed it proper to add on the other 30 per cent.

The connection of Mrs. Gaines, with this property arose as follows: In the early part of the present century one Samuel B. Davis, generally known as Colonel Davis, resided in New Orleans, and in 1812 removed to Philadelphia, and afterwards to Wilmington in the State of Delaware. In the War of 1812 he had some command in the defense of the Delaware coast. One of the members of his family was a young girl named Myra, who passed as his daughter; but some of Daniel Clark's intimate friends, including Colonel Davis, were aware that the girl was acknowledged by Clark to be his daughter,—natural daughter, as generally sup-

posed. She had been born in New Orleans in 1805 or 1806, and placed in Davis' family, who was an intimate friend of Clark. Her mother was *née* Zulime Carriere, but at the time of the child's birth was called Madame Des Grange, having been married to a man of that name. In 1802 she had had a previous child by Clark, named Caroline, who was born in Philadelphia and educated there and in Trenton, at Clark's expense, his partner and agent in Philadelphia, Mr. Daniel W. Coxe, having charge of her. This daughter afterwards married a man by the name of Barnes. After the birth of her first daughter, Zulime, or Madame Des Grange, returned to New Orleans, and Myra was born there. This child was taken into the family of Colonel Davis, as before stated, and passed as his daughter. On the 18th of September, 1832, she was married to Mr. William Wallace Whitney at Delamore Place, State of Delaware (Colonel Davis' residence), as the daughter of Colonel Davis.* Mr. Whitney having died in 1837, she afterwards, in 1839, married General Edmund P. Gaines. She always asserted that, up to the time of her marriage to Whitney, she was wholly ignorant of her true paternity.

Her claim to be entitled to the property of Daniel Clark rests on two grounds: *first*, that she was his legitimate daughter; *second*, that he made a will shortly before his death, in 1813 (which, however, was lost or destroyed), in which he declared her to be his legitimate daughter and bequeathed to her all his estate, subject to the payment of certain legacies.

The first claim, that she was the legitimate daughter of Daniel Clark, was based on the allegation that he was married to her mother, Zulime Carriere, or Madame Des Grange, at Philadelphia in 1802 or 1803. This supposed marriage is testified to by Zulime's sister, Madame Despau, who says that Mr. Clark desired it to be kept secret, because Zulime's husband, Des Grange, was still living. This was true; but against that it is alleged that he (Des Grange) had another wife living when he married Zulime, so that his marriage with her was void. Proceedings were undertaken in the ecclesiastical court, at New Orleans, in September, 1802, to convict Des Grange of bigamy, but they failed and he was discharged. The validity of Zulime's marriage to Clark, therefore, in the last of 1802 or beginning of 1803 (if they were married), depended on the fact of Des Grange being a married man when he married Zulime, which was in 1794. On this point considerable evidence of a conflicting character was taken.

Meantime Daniel Clark, in 1806 or 1807, paid his addresses to a Miss Caton, of Baltimore, and in August, 1808, Zulime married a Dr. Gardette, of Philadelphia—proceedings, both, which seemed to many persons inconsistent with the marriage of Clark and Zulime in 1803. Her sister's explanation, however, was that Zulime was indignant that Clark delayed to acknowledge her, and that he paid his addresses to another lady.

This is the general result of the allegation of Zulime's marriage with Daniel Clark. It is clear from the evidence of some of his confidential business friends that they gave it no credence. But a majority of this court, in *Gaines v. Hennen*, 65 U. S. 24 How. 553 [18: 770], and *Gaines v. New Orleans*, 78 U. S. 6 Wall. 642 [18: 950], were satisfied from the evidence that they were married in 1802 or 1803, and that Zulime was free to marry at the time. Of course, we are bound by that decision in this case, as the City of New Orleans was a party or privy in those cases.

The other ground on which Mrs. Gaines' claim rests is the supposed will which Daniel Clark made shortly before his death, in 1813. No copy of such will was ever found; but the testimony of certain persons intimate with Clark was adduced, to the effect that they saw such a will in his hands, and knew it to be in his handwriting, and either read it or heard him state the contents of it, and heard him declare that he intended it to be his last will; and from this testimony the will on which the whole claim of Mrs. Gaines really turns was reduced to writing and admitted to probate in the state courts of Louisiana, and the courts of the United States considered themselves bound by that decision. It is true that the Louisiana courts have since decided against the will and revoked the probate; but their decision has been set aside by this court, because Mrs. Gaines had applied to have the cause removed to the United States Circuit Court, and the court of the State had refused to allow such removal. The case was afterwards tried by the Circuit Court of the United States, and that court made a decree confirming the probate of the will. This decree was made on the 30th of April, 1877, at the same time with decrees in two other cases against various possessors of the property in question, which will be noted hereafter.

All this was the outcome of a long series of litigation on the subject of Mrs. Gaines' claim. Her first appearance in the courts, and the first notice that anyone had of her claim, was her filing a petition with her husband, W. W. Whitney, as before stated, on the 18th of June, 1834 (21 years after Clark's death), in the Probate Court of New Orleans, in a certain proceeding instituted by one Shaumburg, a creditor of Clark, against his executors for not executing the will and settling up the estate. In this petition she claimed to be the child and only heir of Daniel Clark, and prayed that the will of 1811 might be annulled and set aside, and that she might be declared the heir of Clark, and that the executors of the will of 1811 might be decreed to deliver up to her the possession of all the property belonging to the estate. She alleged that Clark had made another will making her his sole heir; but made no application concerning it. After some litigation the plaintiff, Shaumburg, was nonsuited in June, 1836, and that proceeding was ended.

In July of the same year (1836) Myra and her husband, Whitney, filed a bill in the Circuit Court of the United States for Louisiana against Relf and Chew, the executors of the will of 1811, and against the heirs of Mary Clark (Daniel's mother—who had died in 1823)

**Marriage notice in the Philadelphia Gazette of September 17, 1832: "Married.—On Thursday evening, the 18th inst., at Delamore Place, Del., by the Rev. Mr. Pardee, William Wallace Whitney, Esq., of New York, to Miss Myra E., daughter of Colonel Samuel B. Davis."*

and against the occupants of the various tracts of land of which Clark died seised, amongst others, against the City of New Orleans as occupant of the Blanc tract of 185 arpents; and praying for the establishment of the will of 1813, which she alleged had been made and left by Mr. Clark and had been destroyed; and that it might be decreed that the will of 1811 was revoked by the will of 1813 and was void; and that it might be further decreed that she, Myra, was the legitimate child of said Clark, and that he, Clark, was the lawful husband of her mother, Zulime Carriere; and that all the sales of real and personal property and slaves of said Clark made by Relf and Chew were null and void; and that the occupants and possessors of the real estate and slaves should deliver up the same to the complainant with all the rents, profits and issues thereof, and for an accounting, etc. This suit was pending in the circuit court and in this court until 1852. Different phases of it will be found reported in 38 U. S. 18 Pet. 404 [10: 221]; 40 U. S. 15 Pet. 9 [10: 642]; 43 U. S. 2 How. 619 [11: 402]; 47 U. S. 6 How. 550 [12: 553].

The circuit court in the case of *Gaines v. Chew*, 43 U. S. 2 How. 619 [11: 402], was divided in opinion on three points: 1, whether the bill was multifarious or not; 2, whether the court had jurisdiction of the case without probate of the will of 1813; 3, whether the case was one of equity or law. This court held: 1, that the bill was not multifarious, being against the executors, Relf and Chew, and those who claimed under them; 2, that no claim could be based on the will of 1813 until it was admitted to probate, and the probate of the first will was revoked, and that the circuit court had no jurisdiction for this purpose; 3, that the discovery sought by the bill was sufficient to give the court of chancery jurisdiction. This decision was rendered in 1844. Meantime Mr. Whitney had died in 1837, and Myra was married to General Edmund P. Gaines in 1839, who died in June, 1849; the suit being revived as occasion required.

Proceedings were carried on separately against one of the defendants, named Patterson, in the circuit court, and a decree was obtained there in 1840 in favor of the complainants, requiring Patterson to surrender the property claimed by him. On appeal to this court the decree was reversed, and a decree was made establishing, as against Patterson, the validity of Clark's marriage with Zulime Carriere, the legitimacy and heirship of Myra, and her title as forced heir to four fifths of the property held by Patterson, notwithstanding the will of 1811. The other defendants have always insisted that this case was a collusive one. The decree of this court was rendered early in 1852, and the case is reported as *Patterson v. Gaines*, 47 U. S. 6 How. 550 [12: 553].

Thus far, thirty-nine years after Clark's death, only one piece of property had been recovered; but declarations of the majority of this court were made that gave the complainants great encouragement to continue the litigation.

As none of the parties, except Patterson, were bound by the decision against him on the legitimacy question, and as it was a question attended with some difficulties, it was deemed

important by Mrs. Gaines, and her counsel, if possible, to have the will of 1813 established by probate proceedings in Louisiana. The next move was in that direction. In January, 1855, a petition for that purpose was filed by her in the proper probate court in New Orleans. In March following judgment was rendered against the will, and denying probate. But in December, 1855, a decision was rendered by the Supreme Court of Louisiana, on appeal, establishing the will in the form contended for by Mrs. Gaines, and a decree was entered to that effect on the 25th of February, 1856. This was more than forty-two years after the death of Mr. Clark.

The decree of probate thus obtained was of limited effect. It bound none but those who were parties to the proceeding. The City of New Orleans and Relf, surviving executor of the will of 1811, applied for leave to intervene in the case; but leave was refused. An attorney was appointed to represent the absent relatives. But the probate of the will enabled Mrs. Gaines to take her stand upon it in the courts of the United States, and to avail herself, until it was successfully assailed, of the status which it gave her, by express declaration, as the legitimate child and sole heir and legatee of Daniel Clark.

Immediately after probate of the will was thus obtained, new litigation was started against the parties in possession of the property of Daniel Clark, all the suits being bills in equity. First, a bill was filed by Mrs. Gaines against François Dusnan De la Croix to recover the slaves left by Clark, which were purchased by De la Croix from the executors. Next a bill was filed December 22, 1856, by Mrs. Gaines against the City of New Orleans and four other persons, charging the city as possessor of the whole 240 arpents before mentioned, being the entire tract sold to the city by Evariste Blanc, including the 185 arpents now in question. Lastly, a bill was filed March 27th, 1857, against Lizardi, Egafia, Slidell, Hennen and fourteen others, as possessors respectively of the several lots contained in a square between Poydras and Perdido Streets in New Orleans, but not embracing any of the Blanc tract.

The bills in these three cases were dismissed by the circuit court by simultaneous decrees rendered by Judge McCaleb, on the 17th of April, 1858. These decrees were appealed to this court, and were severally reversed, and the claim of Mrs. Gaines was sustained by a majority of the court.

In the last case, that of *Gaines v. Lizardi and others*, decided in January, 1861, and reported in 65 U. S. 24 How. 558 [16: 770], under the name of *Gaines v. Hennen*, Chief Justice Taney and Justices Catron and Grier dissented. In the other two cases, *Gaines v. New Orleans* and *Gaines v. De la Croix*, decided in January, 1868, and reported in 73 U. S. 6 Wallace, 642, 719 [18: 950, 965], Justices Grier, Swayne and Miller dissented. In consequence of the absence of a justice of the supreme court at the circuit court holden at New Orleans, and the district judge being interested, the judgments were not entered there on the mandates until May, 1871.

The lands recovered were generally surren-

dered, and where no settlements were made references were ordered to ascertain and take account of the rents and revenues—but only five squares of the Blanc tract were recovered, being all that remained in the possession of the city. The circuit court, following the declarations of the supreme court, held that the defendants were possessors in bad faith—that is, that they were chargeable with notice of Relf and Chew's want of authority to sell the lands in question, and that this deprived them, under the law of Louisiana, of the benefit of prescription, and made them accountable for all the rents and revenues from the time their respective possessions commenced. This operated as a great hardship; for, although technically possessors in bad faith, the defendants really and in truth supposed their titles to be valid. The circuit court also decided in the case against the city, that the latter was not responsible for rents and revenues except whilst in actual possession of the property; and as the city had sold off the greatest portion of the Blanc tract, and had only retained possession of the square on which the drainage machine was located and four other vacant squares, a reference was ordered to ascertain the amount of rents and revenues derived from those portions and from the residue of the whole tract whilst it remained in the city's hands. The master estimated the rents and revenues derived from the drainage machine in several different ways, resulting in different amounts, the lowest being \$2,400 a year for the preceding 35 years, which, with interest and after deducting expense of repairs, amounted to \$125,266.79. He further reported that no rents or revenues were derived from the four vacant squares or from the residue of the property whilst in the city's possession. A decree was rendered for the amount reported, and was afterwards affirmed by this court in the case of *New Orleans v. Gaines*, 82 U. S. 15 Wall. 624 [21:215]. The principle established in that case, that the city was not responsible for rents and revenues except during the time of its actual possession, will have a bearing on one of the branches of the present case hereafter considered.

After the settlement of Mrs. Gaines' general claim in her favor in the cases of *Gaines v. Hennen*, *Gaines v. New Orleans*, and *Gaines v. De la Croix*, she commenced other suits against the actual possessors of the property of Daniel Clark. On the 22d of November, 1865, she filed a bill against P. H. Monseaux and over 190 other persons alleged to be in possession of various lots that belonged to said Clark, including portions of the Blanc tract sold to the city as aforesaid. On the 12th of February, 1870, she filed another bill against P. F. Agnelly and over 800 other persons alleged to be in possession of other lots belonging to said Clark, including other portions of the Blanc tract. On the 30th of April, 1877, decrees were entered in these suits in accordance with the previous decisions, and references were made to a master to ascertain the amount of rents and revenues due from the various parties. In the former case rents and revenues were reported to be due from 108 different parties occupying lots on the Daniel Clark portion of the Blanc tract, amounting in the aggregate to \$471,836.181 U. S.

54; in the latter case rents and revenues were reported due from 38 different parties occupying lots on said tract, amounting in the aggregate to \$45,212.80. The total of both was \$517,049.84. These sums included interest to the time of the accounting in each case, at different dates in the years 1877, 1878 and 1879. The property was generally improved property, and the parties were charged for the time they occupied it the full amount of rents and revenues received or that might have been received. These amounts with interest, continued to January 10, 1881 were included, without alteration, in the decree in the present case. They were regarded as in the nature of *res judicata*.

There was another suit determined by the circuit court at the same time with those just referred to. This was the case of Joseph Fuentes and 74 other persons, including the *City of New Orleans v. Mrs. Gaines*, instituted May 27, 1869, in the Probate Court of New Orleans, to revoke the will of 1813, and to recall the probate thereof. Mrs. Gaines applied to remove the case to the Circuit Court of the United States, but the state court, as before stated, refused to relinquish jurisdiction, and on the 4th of December, 1871, rendered a decree revoking the probate of that will. This decree was affirmed in February, 1873, in a very elaborate opinion by the Supreme Court of Louisiana; but the decree of that court was reversed by this court in March, 1876, on the ground that the case should have been removed. *Gaines v. Fuentes*, 92 U. S. 10 [28:524]. The circuit court afterwards, on the 30th of April, 1877, rendered a decree to the effect that the will was duly probated by the Louisiana court, in 1855, and upon sufficient legal and truthful testimony.

Finally, the present suit was commenced by a bill filed August 7th, 1879, as before stated, for the purpose of compelling the City of New Orleans to respond for all the rents, fruits, revenues and profits of the whole 185 arpents of Clark's land purchased of Evariste Blanc in 1834, from the time of such purchase until the time of bringing the suit, except those which had been accounted for in the suit of *Gaines v. City of New Orleans* before referred to.

The complainant's claim in this suit is, that the City of New Orleans, as unlawful possessor and vendor of the property, is primarily responsible in the same manner and to the same extent as it would have been if it had never sold any part of it, but had remained in possession of the whole from the time of its purchase to the present time. The argument is, that the city, as vendor, put its grantees into possession, and thus enabled them to keep the complainant out of possession, and is, therefore, responsible as principal, and not merely as surety or guarantor of its grantees;—although the latter position is also assumed. Its liability as principal is asserted as a fundamental proposition on which the case may be safely rested.

Another principle invoked and applied is, that, inasmuch as the City of New Orleans claimed the property under the sale of Relf and Chew, although claiming it through the medium of Evariste Blanc, it was a possessor in bad faith, and, as such, accountable, not only for the rents and revenues actually received,

but for all that might have been received by the most provident management of the property.

The manner in which these assumed principles of law have been applied by the court below in the disposition of the case will be considered hereafter.

As already stated, the amount of the decree pronounced against the city was \$1,925,667.83, of which \$1,848,959.91 was for rents and revenues of unimproved property. The remainder, \$576,707.92, was for rents and revenues of improved and unimproved property found due from the defendants in the suits of *Gaines v. Monseaux et al.* and *Gaines v. Agnelly et al.*, before referred to—the amount being somewhat increased by additional interest. The parties in those cases relied on the city to protect them, and appear to have let things take pretty much their own course.

As the complainant was allowed, in her first suit against the City of New Orleans, before referred to, to recover all rents and revenues received by the city from each portion of the Blanc tract derived from Clark's estate whilst it was in possession thereof, the complainant, in her claim before the master in the present case, waived all rents and revenues arising from the tract prior to March 10th, 1837, the time when the auction sale was made as before mentioned; but claimed that there had been no adjudication or recovery against the city for any such rents and revenues after that date, except for the five squares referred to in that former suit; and hence she claimed an account for all rents and revenues accruing after the 10th of March, 1837, except with regard to the said five squares, and some few other lots specially designated, which do not require attention here.

The master, therefore, in taking his account, assumed that no account of rents and revenues had ever been rendered by the city after the said 10th day of March, 1837, except as aforesaid, and proceeded to charge it with the entire rents and revenues of all the land in the whole tract (except as aforesaid), from the said date to the time of making the report, without regard to the question whether the city or its grantees were in actual possession or not. The rents and revenues thus charged against the city for unimproved land were not rents and revenues actually received, but fictitious rents and revenues, assessed at the rate of 5 per cent per annum on 70 per cent of the amount of the inflated sales of 1837, with interest thereon to the time of making the report, that being what the master deemed a fair equivalent of what the property ought to have produced. We shall see hereafter that the court added to this estimate interest on the other 30 per cent of the amount of said sales.

From the reports of the master we are led to understand that the amounts found due from the defendants in the other suits, aggregating, with interest, \$576,707.92, as above stated, were estimated and made up on the same principles which were followed with regard to the unimproved property; not by taking merely the actual rents and revenues received, but adding thereto fictitious amounts which it was supposed might have been received by provident management, and by interest on hypo-

thetical values in the absence of other evidence of income.

Now, in relation to the principles before referred to, on which the complainant contends that her case may be rested, and which the court seems to have adopted, we have the following observations to make. The first proposition is that the City of New Orleans is primarily liable for all the rents and revenues of the entire tract derived from the Clark estate and purchased from Evariste Blanc, for the entire period since 1837, down to the time of the decree. Leaving out of view, for the present, the secondary liability to which the city may be equitably bound to respond on its warranty of title to its grantees, is it true, in point of law, that the city is primarily liable in the manner above stated, with regard both to the time when it had possession itself, and also to the time when its grantees had the possession? The contrary of this proposition was distinctly decided by the circuit court in the case of *Gaines v. New Orleans*, and its decision was affirmed by this court in *New Orleans v. Gaines*, 82 U. S. 15 Wall. 625 [21: 215]. It is true that the complainant acquiesced in the decision of the circuit court in that case, and did not appeal; but that only left the decision standing as a precedent against her, all the more effective for such acquiescence.

The common law certainly does not recognize any such rule as that contended for. The person who receives the rents and profits is the only person who is to respond for them. It was even made a question in *Doe v. Harlow*, 12 Adol. & El. 40, and in *Doe v. Challis*, 17 Q. B. 166, whether the landlord of a tenant in possession was liable for mesne profits. After argument it was decided that he was. But the reason of this is obvious; the tenant's possession is the possession of his landlord. It is true that, by the ancient law, where there was an entire disseisin, the estate was deemed out of the disseisee for the time being, and no intrusion upon the land was a trespass against him; and, therefore, a grantee of the disseisor, or a second disseisor, was not responsible to the true owner at all, who had to look to his immediate disseisor for damages in an assize. (Hob. 98.) But the modern action for mesne profits only lies against the tenant in possession who is cast in an action of ejectment; and where no ejectment has been brought, the actual trespasser on the land is the person amenable to an action of trespass *quare clausum fregit*, or assumpsit for use and occupation, where the trespass is waived.

The present case, however, is not to be decided by the rules of the common law. The counsel for the complainant relies on the French or civil law to sustain his position. But no case is cited to show that the rule contended for has ever been adopted in Louisiana. On the contrary, there is a very recent case which decides the contrary. We refer to *Gillaspie v. Citizens' Bank*, 35 La. Ann. 779. In that case the bank had foreclosed a mortgage and bought in the property, and after three or four years' possession sold it to a third person. More than a year after this sale, a suit was brought by a guardian of minor children interested in the land, for a nullity of the sale on foreclosure, and judgment of nullity was rendered and the

sale was set aside, on the ground that in the executory process of the bank two of the joint owners of the property had not been made parties. A suit was then brought against the bank to recover the minors' share of the fruits and rents from the time of the sale under the foreclosure, including the time that the grantee or vendee of the bank had possession, as well as that in which the bank itself had possession. The Supreme Court of Louisiana held that this could not be done; that it was a familiar rule of their jurisprudence that "The possessor alone can be held liable to account for rents and revenues;" and, therefore, that the right of the plaintiff to demand rents and revenues against the bank must be restricted to the time it was in possession. This case is conclusive against the complainants' contention as to the primary liability of the city except for the actual time when the city was in possession.

The only plausible ground on which the city can be made responsible for the rents and revenues received by its grantees is that of subrogation, by which the real owner, whose title has been judicially established after pursuing the grantee in possession and reducing his or her demand against such possessor into judgment, may take the place of such grantee and possessor in suing the grantor, who is under obligation to protect and indemnify such grantee. Can this be done in the present case? The grantees have been sued; judgment has been obtained against them; the city was sufficiently notified of the prosecution to be bound by the result as guarantor; indeed, the city practically conducted the defenses. The complainant in her bill alleges, and it is proved, that the defendants in those suits have demanded of the city that it pay or settle the said judgments and protect them therefrom. The complainant also alleges in her bill that the said defendants are unable to pay the said judgments, except through the aid of the city.

Under these circumstances the grantees, who have lost their property, and who have thus been made liable in judgments for the rents and revenues, might themselves, before satisfying such judgments, have maintained a suit in equity against their guarantor, the City of New Orleans, to protect them from the adjudged liability to pay. An action at law would not lie until actual payment; but equity would regard it the duty of the guarantor to protect the grantee from the extreme hardship of having to pay that which the guarantor himself ought to pay, it being the law of Louisiana that a person evicted from property conveyed to him with warranty may recover from his warrantor not only the price but the amount of rents and revenues which he is bound to respond for to the true owner.

As between the city and its grantee, the former, by reason of its guaranty of title, is really the principal debtor and bound to protect the grantee as a principal is bound to protect his surety. Therefore the grantee is entitled to such remedies as a surety hath; and when fixed by judgment, if not before, may file a bill against his guarantor to protect him. Lord Redesdale says: "A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered, by a bill which has been sometimes called a

bill *quia timet*, in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress or impleading. Thus a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harmless, a bill may be filed to relieve the covenantee under similar circumstances." (Redesdale's Treatise, 4th ed. p. 148; and see *Ranclough v. Hayes*, 1 Vern. 189, 190; *Lee v. Rook*, Mosely, 818; *Woodbridge v. Norris*, L. R. 6 Eq. Cas. 410; *Marsh v. Pike*, 10 Paige 595, 597; *Taylor v. Heriot*, 4 Desaus. 227; Fell, Guaranties, 247; De Colyar, Guaranties, c. v. p. 308, Am. ed.) In *Lee v. Rook*, the Master of the Rolls said: "If I borrow money on a mortgage of my estate for another, I may come into equity (as every surety may against his principal) to have my estate disincumbered by him."

Then, if the grantees who have been ousted, and who are condemned in judgment to pay to Mrs. Gaines the rents and revenues due to her, might have maintained a suit in equity against the city to compel it to indemnify them, why may not Mrs. Gaines be subrogated to the grantees' right and equally maintain a suit against the city? The claim is an equitable one. It is in proof that all the acts of sale of the city contained express agreements of guaranty, with right of subrogation; and an act of sale in Louisiana imports a guaranty whether it is expressed or not.

But if the suit could not be maintained on purely equitable grounds alone, there is a principle of the civil law obtaining in Louisiana, by the aid of which there can be no doubt of its being maintainable. The Code Napoleon had an article (art. 1166) expressly declaring that creditors may exercise all the rights and actions of their debtor, with the exception of those that are exclusively attached to the person. It is true that the Louisiana Code has no such article; but it is laid down by writers of authority that this principle prevails in French jurisprudence without the aid of any positive law. (Dalloz, Vol. 43, pp. 239, etc., title, *Vente*, arts. 982-985.) The decisions to the contrary seem to be greatly outweighed by other decisions and by sound doctrine. The right thus claimed for the creditor (the word creditor being used in its large sense, as in the civil law) may very properly be pursued in a suit in equity, since it could not be pursued in an action at law in the courts of the United States; and all existing rights in any State of the Union ought to be suable in some form in those courts.

We think, therefore, that this part of the decree, amounting to the sum of \$576,707.92, with accruing interest, being for the amount of the judgments obtained in the other suits, ought to be allowed, unless subject to reduction for the cause hereafter referred to.

As to the remainder of the decree, amounting to \$1,848,959.91, being for rents and revenues and "value for use," as the master calls it, of the unimproved land, we cannot concur in the decision of the circuit court. We think that that sum is made up and arrived at by a method entirely too unsafe and unreliable. It being

conceded that the city or its grantees actually derived no rents or revenues at all from the property, the former is charged, instead, with interest, in many cases, for more than forty years, on a false and inflated valuation, based on the sales of 1837 which were never carried out, and never could be, and, in addition, with interest upon that interest. It seems to us an enormous charge. It cannot be reasonable or sound. The land was a waste, a wilderness, and much of it a swamp. It probably never would have had any material value but for the draining operations instituted and carried on by the city on a portion of it. The sales in 1837 were made at a time of public frenzy. One of the witnesses, who had been a deputy sheriff, being asked if he knew at what price real estate sold in 1837, said: "I was at the time in a notary's office with my uncle; and I remember it was a kind of frenzy. You could hardly buy a lot without being offered triple the price for it. Lawyers made fortunes by it, like Mr. Pepin. Property behind the paper mill was sold, and when people went there to look at [it] there was three or four feet of water, and they paid a big price for it." Dr. Labatut being asked in reference to the Blanc tract, testified as follows: "I know that Mr. Blanc bought it. I don't know when it was." Being asked if he could give a description of what condition that property was in in 1837, he said: "It was simply a forest, had trees on it, and it was not cultivated." The master in his report gives the following abstract from his point of view, of this class of testimony. He says: "The evidence on behalf of defendant has been chiefly directed to the establishing of the alleged facts—that the soil so left vacant and unimproved was not fit for use; that it would have been money thrown away, a waste of energy and substance, even to have endeavored to do anything with it; that for years, the end of which has not come, it had been and was destined to remain barren and untouched by the hands of man; and that, therefore, complainant could take nothing on account of her dispossession, even though it had lasted for a period of some forty-five years. To substantiate this view of the case, sixteen witnesses were examined before the master, several of whom being amongst the oldest citizens in this city. Few of those oldest witnesses have any distinct remembrance or knowledge of the exact locality in contest, the 'Blanc tract,' but all remember the city when it was nothing but a marsh, first, from Rampart back to Claiborne Street, a distance of six squares back from the old square or body of the city (carré de la ville), and then from Claiborne back to Broad Street, ten squares from Claiborne, Dorgenois Street, one square from Broad towards Claiborne, being the limit of said tract on the river side. And a few also remember that in 1837 all of this 'Blanc tract' was swampy, frequently a hunting ground for three of them, often inundated in heavy rains, and two of them say the land was partly high and partly low. But they all say the city has progressed since then; it is solidly built all along the front of the tract from Rampart to Broad, and that part of the city is well settled. Some of the witnesses had been and are yet the owners of large tracts or parcels of land in and around the

city, and had not been able to make anything out of them. Some had tried and had failed to obtain revenues from a few of their squares; others had not tried at all, deeming it beforehand a hopeless task. One of the oldest had purchased a piece of vacant land many years ago, and did not keep it long vacant, over five or six months, and built on it as soon as he could, so as to derive revenue from it. Witness did not think it produced a revenue whilst vacant, not well remembering, but inferring this from the fact of his building, for, says he, When vacant property produces a revenue you don't build on it to make it produce a revenue. Another witness says that in the aggregate property has produced no revenue whatever since 1868, taking as data for his opinion the decreased assessed value of property. Another witness testified that in his opinion 2½ per cent or 3 per cent is all that improved real estate could produce here; that this was also the opinion he had heard expressed years ago by agents of extensive land property; that so it was in his case when abroad some thirty-five years ago, his property being attended to by an agent, but that when he returned home and managed for himself he did a little better. Another witness was agent for several years of a large estate, and is so yet, there being in that estate a piece of ground on the outskirts of the city covering over five hundred acres, with good outbuildings and dwelling house, which did not bring over \$600 per year, though it brought at one time, after the war, \$2,400 per annum; but when asked if it had ever been used or attempted to be used as city property, answers in the negative. His principal had owned a piece of land in this 'Blanc tract,' but had never attempted to make it produce a revenue on account of the pending suit in eviction, and he adds that even without the suit in eviction nothing could have been made out of it, because vacant property is not wanted by anybody. Another says that the squares of this tract, from Broad along Canal Carondelet are worth nothing at all; but that all of this land, even along the Canal Carondelet, was salable from 1860 to 1870, provided there was nothing of Gaines' claim on them; and that, for seven or eight years, no vacant ground, high or low, can, in witness' opinion, be rented in this city. Another says there was no diligence by which the owner of vacant property in the Gaines' claim could have made it produce a revenue without improving it. Two of the witnesses state that this property, as all low lands in this city, needed ditching as well as artificial drainage in order that it might be built upon; and one of them, that this tract began to be drained artificially by machinery about the time of its purchase by the city. And the preceding witness, who states that the vacant property in the Gaines claim could not yield a revenue without improvements—would be too expensive, and that he would not make them on any one square for its ownership. The great inflation of the price of real estate in this city in 1837 was also testified to by several of the witnesses, together with the disastrous effect of the panic of that year in depreciating the value of property."

Notwithstanding this evidence, and a great deal more to the same purport, the master

reasoned that, because some people improved their land and obtained good revenues from it, the city, or its grantees, might have done the same; and that a possessor in bad faith is chargeable with all that can be made out of the property. We think that there are two errors in this reasoning. *First*, it does not follow that because small parcels of land in the suburbs of a city may be made profitable by cultivation and improvement, therefore the whole suburbs can be turned to account in the same way. There are hundreds of acres in the vicinity of Washington, for example, lying open and in common. A German gardener may purchase a small lot, and by his industry make it produce a large revenue; and another might erect a saloon and get a reasonable custom. But it would be impossible to convert the entire suburbs, consisting, perhaps, of more than a thousand acres, into market gardens and beer saloons, or to build cottages or rows of houses on them to any advantage. The small examples are exceptions. Large outlying tracts have to abide the natural growth and spread of the city. They may lie unproductive in the hands of the most provident men for years.

Another error made by the master, and by the court, is as to the extent to which the rule is to be carried, that a possessor in bad faith is bound to respond for all that the property possessed can be made to produce. We do not understand that this rule requires a possessor to change the state of the property. Suppose, for example, a large tract of land is wild, mostly forest, and might be made to produce immense yields of grain and produce if it were cleared of timber and broken up and cultivated. Is the possessor in bad faith—only technically such perhaps—bound to respond to the true owner, on recovery, for the thousands of bushels of wheat and corn and other produce that might have been raised on the land? Is it the duty of a possessor, even a possessor in bad faith, to change the state of the land from wild land to cultivated, farming land, for example, or to open and work mines of iron or copper or gold, so as to make as much out of the land as can be made out of it, and hand it over to the true owner? Does any such principle as this prevail in the law? We think not. The estimation of such undeveloped revenues is altogether too speculative a matter. It is true, the master does not enter into an account of what might have been, but, under the idea that a great deal might have been made out of the land, assumes the arbitrary basis of the crazy prices of 1837, and charges the city with the interest on them, and interest on that interest; and no wonder that the decree is swelled up to nearly two millions of dollars.

The truth is, that there are degrees of bad faith. There are some possessors who, without any title at all, pertinaciously keep the true and known owner out of possession. They may properly be called knavish possessors. There are others who take a conveyance and go into possession in entire ignorance of any defect in their title, though they are technically possessors in bad faith, because by proper inquiry they might have discovered the defect. Such possessors, certainly, cannot be placed on the same level with the knavish and fraudulent possessors of whom we have just spoken. In the

case of *Donaldson v. Hull*, 7 Martin, N. S. 112, 113, Judge Martin, delivering the opinion of the court in a case of mere technical possession in bad faith, said: "The case appears peculiarly a hard one, as the defendant bought in *moral* good faith, with the knowledge of the only one of the plaintiffs who was of age, and from the aunts of all of them, who had been selected by their mother to protect their interests after her death, and as the plaintiff who was of age received from him her part of the price. It is to be lamented that the law imposes on courts of justice the obligation of decreeing the restoration of the value of the services of slaves against a possessor who has fairly paid a full price for them, while it authorizes them to do no more in the case of a dishonest holder, who has taken them in possession without paying anything for them. But on assessing the value of the services which a defendant is to be decreed to restore, we think the same rule ought not to prevail. In assessing damages for their detention, the good faith or dishonest conduct of a defendant should influence us; and if justice demands vindictive damages in the latter case, it prescribes a just moderation in the former. The plaintiff must not receive more than he would if he had been in possession."

In the present case, notwithstanding the strong language which has been applied to the City of New Orleans in resisting so perseveringly the claims of Mrs. Gaines, we cannot but express our conviction that those claims have been opposed in entire good faith. When the city purchased the land, no one dreamed of any defect in the title. Only one will was known, and by that will Mary Clark, the mother of the testator, was made universal heir and legatee. She had accepted the heirship; her giving a power of attorney to sell the lands of the estate indicated that, and her subsequent conduct all went to the same point. Mrs. Gaines, in her first bill, alleged that Mary Clark had accepted the inheritance and taken possession. Why should anyone have doubted of the title? Nevertheless, a majority of this court has held that the vice in the title ought to have been known to the purchaser. We abide by that decision, but we cannot shut our eyes to the fact that it was not a moral but a mere technical failure of duty on the part of the purchaser not to have discovered a defect in the title.

Then the evidence to sustain the claims of Mrs. Gaines was so full of obscurities and improbabilities that a possessor of land purchased from the representatives of Daniel Clark could not be blamed for not giving it credence, and for resisting her suits to the utmost. We have given an outline of the history of her litigation for the purpose of showing how great reason the parties attacked in their possessions had to defend themselves with vigor. A full report of the evidence would have shown it still more strongly. We cannot blame them for making resistance. Although bound by the decisions that have been made by this court in the matter, we cannot say, and no one can say, that there was not much evidence of a very strong character in favor of a contrary conclusion.

In our judgment, there was no sufficient evidence that any rents or revenues were derived from the unimproved lands, either by the City of New Orleans, or by its grantees; and that

part of the decree which is based on such supposed rents and revenues, amounting to \$1,348,959.91, must be disallowed, and the bill must be dismissed with regard thereto.

As to the residue of the decree, amounting to \$576,707.92, founded on the judgments recovered against persons in possession of various portions of the property, claiming under sales made by the City of New Orleans, whilst those persons would have been proper parties to the suit, in order that it might appear that the sums recovered against them had not been released or compromised for less amounts than the face of the judgments, and that they might be bound by the decree, still, as the objection of want of parties was not specifically made, and as it would be a great hardship on all the parties concerned to have to begin this litigation over again, we do not think that the bill should be dismissed on that ground, but that the said sum of \$576,707.92 should be allowed to the complainant, with interest thereon, as provided in the decree of the circuit court, subject, however, to the qualification that if the defendant can show that any of the said judgments have been compromised and settled for any less sums than the face thereof, with interest, the defendant should be entitled to the benefit of a corresponding reduction in the decree; and a reasonable time should be allowed for the purpose of showing such compromises if any have been made.

The result is that the decree of the Circuit Court must be reversed and the cause remanded, with instructions to enter a decree in conformity with this opinion.

The Chief Justice and Mr. Justice Lamar were not members of the Court when this case was argued, and took no part in its decision.

CITY OF NEW ORLEANS, *Appt.*,

v.

UNITED STATES, *ex rel.*, JAMES Y. CHRISTMAS AND HATTIE L. WHITNEY, Admr. and Admr. of MYRA CLARK GAINES, Deceased.

CITY OF NEW ORLEANS, *Appt.*,

v.

UNITED STATES, *ex rel.*, JAMES Y. CHRISTMAS AND HATTIE L. WHITNEY, Admr. and Admr. of MYRA CLARK GAINES, Deceased.

(See S. C. Reporter's ed. 220.)

The decision in the case of *New Orleans v. Gaines*, ante, 99, followed.

[Nos. 2, 3.]

Argued Oct. 13, 14, 1887. Decided May 13, 1889.

APPEALS from and in error to the Circuit Court of the United States for the Eastern District of Louisiana, to review a decree granting a writ of mandamus against the City of New Orleans and its officers requiring them to levy a tax to pay a judgment against the city. *Reversed.*

Mr. Justice Bradley delivered the opinion of the court:

The decision just made in the case of *The*

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City of New Orleans v. Myra Clark Gaines, ante, 99, renders it necessary that the judgment or decree in this case should be reversed, and it is reversed accordingly, and the cause remanded with instructions to dismiss the petition.

RICHARD T. KENNON, *Pff. in Err.*,

v.

JOHN T. GILMER *et al.*

JOHN T. GILMER *et al.*, *Pffs. in Err.*,

v.

RICHARD T. KENNON.

(See S. C. Reporter's ed. 22-30.)

Change of venue—refusal to grant—habit, how shown—prior and subsequent vicious acts, as proof of habit—mental suffering an element of damages—power of court to diminish verdict for tort—not absolute.

1. The granting or denial of a change of venue, like the granting or refusal of a new trial, is a matter within the discretion of the court, not ordinarily reviewable by this court on writ of error.
2. The refusal to grant a change of venue on the mere affidavit of the defendant's agent as to the state of public opinion in the county involves matters of fact and discretion, and is not a ruling upon a mere question of law.
3. The habit of an animal is, in its nature, a continuous fact, to be shown by proof of successive acts of a similar kind.
4. Evidence having been first offered to show that a horse has been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition is competent to prove that his previous conduct was not accidental or unusual, but the result of a fixed habit at the time of the accident.
5. In an action for an injury to the person, when the injury produces mental as well as bodily suffering, the mental suffering may be taken into consideration by the jury in estimating the damages.
6. Where damages for a tort have been assessed by a jury at an entire sum, the court, upon a motion for a new trial, cannot, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, enter an absolute judgment for any other sum than that assessed by the jury.
7. Where the court entered an absolute judgment for a lesser sum than that awarded by the jury instead of ordering that a judgment for that sum should be entered if the plaintiff elected to remit the rest of the damages, and that if he did not so remit there should be a new trial of the whole case, each party is prejudiced; and either is entitled to have the judgment reversed.

[Nos. 178, 203.]

Argued Jan. 30, 31, 1889. Decided May 13, 1889.

IN ERROR to the Supreme Court of the Territory of Montana, to review a judgment of that Court reducing the amount of a judgment of a District Court of that Territory and affirming it for the reduced amount, in an action to recover damages for personal injuries by reason of defendant's negligence in failing to pro-

NOTE.—*Damages, etc.*, see 102 U. S., 26 L. ed. 141.

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vide a safe and competent driver and safe and well broken horses by reason of which, and of the negligence of their servants, the horses became unmanageable and plaintiff's leg was broken in jumping from the coach. *Reversed.*

The facts are stated in the opinion.

Mr. M. F. Morris, for Kennon:

That the horse was of vicious disposition, and known to be such by the defendants or their employes can be proved only by proof of acts of viciousness; and subsequent acts of viciousness may be proved to show that he was vicious at the time of the accident.

Grand Trunk R. Co. v. Richardson, 91 U. S. 454 (28: 356); *Maggi v. Cutts*, 128 Mass. 585; *Todd v. Bowley*, 8 Allen, 51; *Chamberlain v. Enfield*, 43 N. H. 356; *Rosenthal v. Walker*, 111 U. S. 185 (28: 395); *Butler v. Watkins*, 80 U. S. 13 Wall. 456 (20: 629); *Lincoln v. Clafin*, 74 U. S. 7 Wall. 182 (19: 106).

The limit of time within which such misbehavior may be proved must depend largely upon the discretion of the presiding judge. It is not, however, wholly within such discretion. It is the right of a party to prove such instances immediately before and immediately after.

A negligent habit may be proved by other acts of negligence than the one causing injury.

Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 470 (28: 356), and cases cited.

A judgment is not to be set aside because the charge of the court may be open to some verbal criticisms, in particulars considered apart by themselves, which could not, when taken with the rest of the charge, have misled a jury of ordinary intelligence.

Chicago & N. R. Co. v. Whittin, 80 U. S. 13 Wall. 275 (20: 571); *Tweed's Case*, 83 U. S. 16 Wall. 504 (21: 889).

The common carrier's contract is to transport his passengers safely as far as human care and foresight can go.

Stokes v. Saltonstall, 38 U. S. 18 Pet. 181, 191 (10: 115); *R. Co. v. Pollard*, 89 U. S. 22 Wall. 341 (22: 877); *Pa. Co. v. Roy*, 102 U. S. 451, 456 (26: 141, 144).

Messrs. J. Hubley Ashton and Nath'l Wilson, for Gilmer *et al.*:

The judgment reducing the amount of the verdict was error.

Ex parte Lange, 85 U. S. 18 Wall. 175, 176 (21: 879).

The trial by jury in the courts of the United States, as secured by the seventh article of Amendment to the Constitution, has always been guarded by this court with jealousy.

Elmore v. Grymes, 26 U. S. 1 Pet. 471 (7: 225); *Hodges v. Easton*, 106 U. S. 412 (27: 171); *Webster v. Reid*, 52 U. S. 11 How. 460 (18: 770); *Baylis v. Travelers Ins. Co.* 118 U. S. 320 (28: 990).

There is no precedent for the action of the court below, in this case, in the practice in the California Code of Civil Procedure, from which the Montana Civil Practice Act is derived.

Ellis v. Jeans, 26 Cal. 272; *Carpentier v. Gardiner*, 29 Cal. 164; *Hayes v. Martin*, 45 Cal. 563.

Evidence of subsequent instances of misbehavior of the horse was inadmissible.

Smith v. Old Colony & N. R. Co. 10 R. I. 22. If the plaintiff's injury was to be attributed to his rashness and imprudence in jumping

from the stage, he was not entitled to recover.

Stokes v. Saltonstall, 38 U. S. 18 Pet. 181 (10: 115).

Mental suffering of the plaintiff is not a distinct element of damage, in addition to bodily suffering.

Joch v. Dankwardt, 85 Ill. 331; *Ill. Cent. R. Co. v. Sutton*, 53 Ill. 399; 2 Greenl. Ev. § 287; *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 554 (30: 257).

Mr. Justice Gray delivered the opinion of the court:

This action was brought April 4, 1882, in a District Court of the County of Deer Lodge and Territory of Montana, against Gilmer and others, common carriers of passengers for hire by stage coaches between the Towns of Deer Lodge and Helena, by Kennon, a passenger in one of those coaches, to recover damages for personal injuries sustained by him on June 30, 1879.

The complaint alleged that the defendants were guilty of negligence in failing to provide a safe and competent driver and safe and well broken horses, by reason of which, and of the negligence and mismanagement of their servants, the horses became unmanageable, broke the pole of the coach and took fright, so that it was apparently unsafe for the plaintiff to remain in the coach, and he jumped to the ground and in so doing broke his leg, and it became necessary to amputate it, whereby he sustained damages in the sum of \$25,000, and was obliged to pay \$750 for necessary medical and surgical expenses. The answer denied these allegations.

Before a jury had been called, the defendants moved for a change of venue, on the ground that an impartial trial could not be had in the County of Deer Lodge; and in support of the motion filed an affidavit of one Riddle, deposing "that he is agent of defendants in the above entitled cause; that he resides in the County of Deer Lodge, where said action is depending; that he is acquainted with and knows the general sentiments and opinions of the public in reference to said action and the parties thereto, and from his knowledge of such public opinion has reason to believe and does believe that the defendants cannot have a fair and impartial trial of said cause in the County of Deer Lodge; that the general sentiment of the public in said county is prejudicial to the defendants, as far as concerns said action; that one trial has already been had of said cause in this county, in which heavy damages were awarded to the plaintiff by the jury which tried said cause; that said verdict and the judgment rendered thereon have been generally canvassed and commented upon by the public in a manner favorable to the plaintiff and unfavorable to the defendants, and thereby has produced a general prejudice against the defendants which cannot fail to have an influence on the second trial of said cause."

The court withheld its decision on the motion until a jury had been called and examined on their *voir dire*, and then denied it, and the defendants excepted to the denial.

At the trial, the defendants took exceptions to evidence introduced by the plaintiff, and to instructions given to the jury at his request.

The jury returned a verdict for the plaintiff, assessing his damages at "the sum of \$20,000 for general damages, and also the sum of \$750 for medical expenses and surgical operations."

The defendants moved for a new trial, for excessive damages appearing to have been given under the influence of passion or prejudice, for insufficiency of the evidence to justify the verdict, and for errors of law in the rulings excepted to. The motion was denied and judgment entered on the verdict, and the defendants appealed to the supreme court of the Territory, which ordered the judgment to be reduced to the sum of \$10,750, and affirmed it for this amount. Its opinion is reported in 5 Montana, 257.

Writs of error were sued out by both parties: by the defendants on January 1, 1885, and by the plaintiff on May 1, 1885, both returnable at October Term, 1885; and the plaintiff's writ of error was docketed first in this court.

The questions arising out of the exceptions taken by the defendants to the rulings of the inferior court present no difficulty.

By the statutes of the Territory, "The court may, on good cause shown, change the place of trial, when there is reason to believe that an impartial trial cannot be had therein;" and an appeal lies to the supreme court of the Territory from an order granting or refusing a new trial, or from an order granting or refusing to grant a change of venue. Montana Code of Civil Procedure of 1879, §§ 62, 408; Act of Amendment of February 23, 1881, § 7.

But the statutes of the Territory cannot enlarge the appellate jurisdiction of this court. The granting or denial of a change of venue, like the granting or refusal of a new trial, is a matter within the discretion of the court, not ordinarily reviewable by this court on writ of error. *McFaul v. Ramsey*, 61 U. S. 20 How. 523 [15: 1010]; *Kerr v. Clappitt*, 95 U. S. 188 [24: 498]; *Railway Co. v. Heck*, 102 U. S. 120 [26: 58]. And the refusal to grant a change of venue on the mere affidavit of the defendants' agent to the state of public opinion in the county clearly involves matter of fact and discretion, and is not a ruling upon a mere question of law.

The only objection to the admission of evidence, relied on in argument, is that the plaintiff, who introduced evidence tending to support the allegations of his complaint, as well as evidence that one of the leading horses in the defendants' coach had been fractious and vicious on former occasions, was permitted to introduce evidence that in March, 1881, twenty months after the accident, this horse, when being driven in a buggy, kicked and broke the pole and tried to run away.

But evidence of subsequent misbehavior of the horse might properly be admitted, in connection with evidence of his misbehavior at and before the time of the accident, as tending to prove a vicious disposition and fixed habit, and to support the plaintiff's allegation that the horse was not safe and well broken. The length of time afterwards to which such evidence may extend is largely within the discretion of the judge presiding at the trial.

As observed by *Chief Justice* Bigelow, delivering the judgment of the Supreme Judicial Court of Massachusetts, overruling exceptions

to the admission of evidence of the conduct of a horse as long after the accident as in the case at bar: "The objection to the evidence relating to the habits of the horse subsequent to the time of the accident goes to its weight rather than to its competency. The habit of an animal is in its nature a continuous fact, to be shown by proof of successive acts of a similar kind. Evidence having been first offered to show that the horse had been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition was competent to prove that his previous conduct was not accidental or unusual, but frequent, and the result of a fixed habit at the time of the accident." *Todd v. Rowley*, 8 Allen, 51, 58. To the same effect are *Maggi v. Outts*, 123 Mass. 535, and *Chamberlain v. Enfield*, 43 N. H. 356.

The defendants' exceptions to the instructions on the question of their liability to the plaintiff are based upon some expressions in the fifth and sixth instructions given at the plaintiff's request, considered separately, and disregarding subsequent and perfectly definite instructions, which put it beyond doubt that the jury could not have been misled. The qualification supposed to be omitted in the sixth instruction is distinctly stated in the seventh, and the supposed implication in the fifth instruction is absolutely refuted by the twelfth instruction given at the request of the defendants themselves. It would therefore be a waste of time and space to state or to comment upon those instructions at greater length.

The remaining exception taken at the trial is to the instruction on the measure of damages, by which the jury were directed that they should assess the general damages claimed "in such sum as will compensate the plaintiff for the injury received, and in so doing may take into consideration his bodily and mental pain and suffering, both taken together, but not his mental pain alone, the inconvenience to him of being deprived of his leg, and loss of time and inconvenience in attending to his business generally, from the time of the injury to the present time, such as the plaintiff may have proved, and the jury are satisfied, to a reasonable certainty, inevitably and necessarily resulted from the original injury."

The defendants object to this instruction that the jury were permitted to assess damages for mental suffering. But the instruction given only authorized them, in assessing damages for the injury caused by the defendants to the plaintiff, to take into consideration "his bodily and mental pain and suffering, both taken together" ("but not his mental pain alone"), and such as "inevitably and necessarily resulted from the original injury." The action is for an injury to the person of an intelligent being; and when the injury, whether caused by willfulness or by negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded. The instruction was in accord with the opinions of this court in similar cases.

In *Railroad Co. v. Barron*, decided at December Term, 1866, *Mr. Justice* Nelson, de-

livering judgment, in giving the reasons why the damages in an action brought against a railroad corporation by a person injured by its negligence must depend very much on the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case, said: "There can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body." 73 U. S. 5 Wall. 90, 105 [18: 591, 594].

The case of *McIntyre v. Giblin*, decided at October Term, 1879, is directly in point. That was an action to recover damages for the careless and negligent shooting and wounding of Giblin by McIntyre, and the jury were instructed that in computing damages they might take into consideration "a fair compensation for the physical and mental suffering caused by the injury." It was argued in behalf of McIntyre that the action being for a negligent injury, and not for a willful and malicious one, the instruction was erroneous, because the words "and mental" were included. But the Supreme Court of the Territory of Utah held otherwise. 2 Utah, 384. And this court affirmed its judgment, *Chief Justice Waite* saying: "We think, with the court below, that the effect of this instruction was no more than to allow the jury to give compensation for the personal suffering of the plaintiff caused by the injury, and that in this there was no error." 151 U. S. appendix; *S. C.* 25 L. C. P. Co. ed. 572.

The most serious question arises upon the judgment of the Supreme Court of Montana, reducing the judgment of the inferior court from \$30,750 to \$10,750, and affirming it for this amount. Both parties contend that this judgment was erroneous and should be reversed, but they are not agreed as to the result of a reversal. The plaintiff contends that it must be to affirm the judgment of the inferior court, in accordance with the verdict, for the larger sum, while the defendants contend that a new trial of the whole case must be ordered.

The judgment of the supreme court of the Territory, reducing the amount of the verdict and the judgment of the inferior court thereon without submitting the case to another jury, or putting the plaintiff to the election of remitting part of the verdict before rendering judgment for the rest, was irregular, and, so far as we are informed, unprecedented; and the grounds assigned for that judgment in the opinion sent up with the record, as required by the rules of this court, are far from satisfactory.

Those grounds were, in substance, that the court, applying the rule that the verdict of a jury will not be disturbed if there is evidence to support it, unless it seems to have been the result of passion or prejudice, was satisfied that the clear weight of the testimony strongly favored the defendants' position that there was no negligence on their part and the plaintiff's injury was the result of unavoidable accident, and that "this large verdict comes from something outside of the testimony;" as well as that "if the case had been between two strangers unknown to the jury and tried on this evidence, if there had been a verdict at all for the plaintiff, it would have been for a very much less

sum," and "the evidence does not support this verdict;"—the legitimate inference from all which would seem to be that the whole verdict was tainted by passion or prejudice—yet the court, because it could not "say that there is no evidence to support a verdict for such an amount as the plaintiff ought to recover," forthwith proceeded to adjudge that the verdict and the judgment thereon be reduced to what in its opinion was such an amount, without apparently considering the question of its power to do this. 5 Montana, 273, 274.

The seventh article of Amendment of the Constitution declares that, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." This article of the Constitution is in full force in Montana, as in all other organized Territories of the United States. Act of May 26, 1864, chap. 95, § 13, 18 Stat. at L. 91; Rev. Stat. § 1891; *Webster v. Reid*, 52 U. S. 11 How. 437 [13: 761]. In accordance therewith, the Code of Civil Procedure of Montana provides that "An issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered by consent of the parties." § 241.

That Code authorizes the court in which a trial is had, or the supreme court of the Territory on appeal, to set aside a verdict and grant a new trial "for excessive damages appearing to have been given under the influence of passion or prejudice," or "for insufficiency of the evidence to justify the verdict," §§ 285, 408; Act of Amendment of 1881, § 7. And by § 423 of that Code, "Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties;" "and may, if necessary or proper, order a new trial." But this section does not authorize the appellate court to render a judgment which the lower court could not have rendered.

Under these statutes, as at common law, the court, upon the hearing of a motion for a new trial, may, in the exercise of its judicial discretion, either absolutely deny the motion, or grant a new trial generally, or it may order that a new trial be had unless the plaintiff elects to remit a certain part of the verdict, and that, if he does so remit, judgment be entered for the rest. *Hopkins v. Orr*, 124 U. S. 510 [31: 523]; *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69 [33: 854]. And if the pleadings and the verdict afforded the means of distinguishing part of the plaintiff's claim from the rest, this court might affirm the judgment upon the plaintiff's now remitting that part. *Bank of Kentucky v. Ashley*, 27 U. S. 2 Pet. 327 [7: 440].

But this court has no authority to pass upon any question of fact involved in the consideration of the motion for a new trial. And, in a case in which damages for a tort have been assessed by a jury at an entire sum, no court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of

damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury.

By the action of the court in entering an absolute judgment for the lesser sum, instead of ordering that a judgment for that sum should be entered if the plaintiff elected to remit the rest of the damages, and that if he did not so remit there should be a new trial of the whole case, each party was prejudiced; and either, therefore, is entitled to have the judgment reversed by writ of error. The plaintiff was prejudiced, because he was deprived of the election to take a new trial upon the whole case. The defendants were prejudiced, because, if the judgment for the lesser sum had been conditional upon a remittitur by the plaintiff, the defendants, if the plaintiff had not remitted, would have had a new trial generally; and if the plaintiff had filed a remittitur, and thereby consented to the judgment, he could not have sued out a writ of error and the defendants would have been protected from the possibility of being obliged in any event to pay the larger sum. Whereas, upon the absolute judgment entered by the court, without any election or consent of the plaintiff, the plaintiff had the right to sue out a writ of error; and he availed himself of that right, and docketed his writ of error in this court before the defendants docketed their writ of error. The defendants were thus put in the position of being obliged to contest the plaintiff's writ of error, in order to defend themselves against being held liable for the larger sum, as the plaintiff contended that they must be upon this record.

The erroneous judgment of the supreme court of the Territory being reversed, the case will stand as if no such judgment had been entered; and that court will be at liberty, in disposing of the motion for a new trial according to its view of the evidence, either to deny or to grant a new trial generally, or to order judgment for a less sum than the amount of the verdict, conditional upon a remittitur by the plaintiff.

Judgment reversed and case remanded to the Supreme Court of Montana for further proceedings in conformity with this opinion; each party to pay one half the expense of printing the record and other costs in this Court.

JAMES REID STEWART, *Appt.*,

v.

BRANCH T. MASTERSON.

(See S. C. Reporter's ed. 151-159.)

Demurrer—when overruled—decree dismissing bill as to one defendant, when appealable.

1. A demurrer cannot introduce, as its support, new facts which do not appear on the face of the bill, and which must be set up by plea or answer.
2. Where there is matter properly pleaded in the bill, which is proper ground for equitable relief and which requires an answer or a plea, a demurrer to the whole bill ought to be overruled.
3. Where an order taking the bill as confessed by one defendant and directing that the cause be proceeded in thenceforth *ex parte* as to him, was entered before the decree was made sustaining the demurrer of the other defendant and dismiss-

ing the bill as against him, that decree is final as to him, and one from which the plaintiff can appeal.

[No. 287.]

Argued April 25, 1889. Decided May 13, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Texas, dismissing, on demurrer to the amended bill, a suit in equity as to Masterson, one of the defendants, after it was taken as confessed as to Tait, the other defendant, and an order made that the cause be proceeded in *ex parte* as to him. *Reversed.*

The facts are stated in the opinion.

Mr. Charles C. Lancaster for appellant.
Mr. S. S. Henkle for appellee.

Mr. Justice Blatchford delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the Western District of Texas, by James Reid Stewart. The original bill was filed against James L. Tait and his wife, and Branch T. Masterson. Tait and wife demurred to the bill, among other things, for multifariousness, as did also Masterson. On a hearing, the demurrers were sustained, with leave to amend the bill. The plaintiff then filed an amended bill against Masterson and Tait. It was taken as confessed as to Tait, and an order made that the cause be proceeded in *ex parte* as to him. Masterson demurred to the amended bill, and the demurrer was sustained and the bill as against him was dismissed. The plaintiff has appealed to this court.

The allegations of the amended bill are substantially as follows: On the 10th of May, 1878, at Glasgow, Scotland, Stewart and Tait entered into a written agreement. By that agreement, Stewart's son and Tait were to proceed together to Texas, and Tait was to purchase 2,560 acres of land, in such place as might seem to him most advantageous, at a price not to exceed 12 shillings per acre, title deeds to be made out and recorded in the name of Stewart, and he to authorize payment of the purchase money on delivery of the title deeds to the order of such party as might be named therein, money for improvements to be furnished by Stewart as required by Tait, he to give receipts as acting for Stewart, and the farm to be worked on equal shares, and profits to be equally divided between Stewart's son and Tait, the agreement to remain in force for five years from the date of purchase of the land; a further tract of 2,560 acres to be purchased in the names of Tait and Stewart's son, on a credit of four years, payment to be made out of realized profits; and until such additional land should be paid for, but not exceeding five years, Stewart should not require the repayment of moneys advanced; interest to be paid for such moneys at the rate of 6 per cent per annum; Tait to do his best as to supervision and guidance of Stewart's son, and to have the management and be responsible to Stewart; the amount to be advanced by Stewart not to exceed in all £3,250 sterling.

The amended bill then makes the following allegations: In pursuance of such agreement, Tait, in June, 1878, purchased for Stewart and in his name, and went into the occupancy of,

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and held for him as his agent, for five years, 4,605 acres of land in Bexar County, Texas, known as the Gasper Flores survey No. 18, and situated within the territory of the McMullen grant, thereafter described and bounded as set forth; Stewart paid for the land \$9,000, and expended in improvements, as owner, \$8,147.51, and thereby increased the value of the land at least \$8 per acre, making the whole value of the improvements, as made by him, \$19,962.51. He paid about \$1,000 taxes on the land. The title was from the Government of Spain, which conveyed in fee to the Indians of San José Mission, land known as the McMullen grant, in the Counties of Medina and Bexar. It was conveyed by the Indians to one Garza, and by him and the Indians to one John McMullen, in fee. While McMullen owned and occupied it, and in February, 1840, one Maverick, being the owner of Texas land certificate No. 276, as the assignee of Gasper Flores, the grantee of the State of Texas, located such certificate on a portion of the land within the McMullen grant, known as the Gasper Flores survey No. 18, being the identical land owned by Stewart and thereinbefore described, and afterwards procured a patent for the land and became vested with all the title of the Republic or State of Texas thereto, and claimed survey No. 18, adversely to the title and possession of McMullen. Afterwards McMullen conveyed the McMullen grant to one Howard, and he, in February, 1851, commenced a suit in equity, styled chancery suit No. 10, in the Circuit Court of the United States for the Western District of Texas, to remove the cloud upon his title. Maverick was made a party to that suit and appeared, and on the final hearing it was decreed that the heirs of Howard (he having died and they having been substituted as plaintiffs) should recover the McMullen grant from Maverick and the other defendants, and that the title of said heirs was free from all clouds, and that all patents, locations, and surveys, owned by the defendants in the suit, were void, and they were ordered to cancel the same, and the title of said heirs to the McMullen grant was adjudged to be a good title. On a reference made by said decree, a master reported that Maverick appeared to have claimed to be the owner of the Gasper Flores survey No. 18, being the land of Stewart, and that the same was situated within the limits of the McMullen grant. The master made a deed in triplicate, conveying all the interest of the heirs of McMullen to the McMullen grant, and the heirs of Howard acquired legal title to and possession of that grant, and one Castro purchased from the heirs of Howard and became the owner of said survey No. 18, and went into possession thereof, and afterwards sold the same in fee to Stewart, for \$9,000, and delivered possession thereof to him in June, 1878, the deed expressing the consideration of \$10,500, and being duly recorded in Bexar County, as was also the said deed to Castro. Thus, Stewart's land became and was land titled from the State, evidence of the appropriation of which was on the county records of the County of Bexar, and in the general land office of the State, according to the provisions of section 2 of article 14 of the Constitution of the State. The heirs of How-

ard were, by virtue of said decree, put in possession of all the land in the McMullen grant claimed by the defendants in suit No. 10, and the State of Texas acquiesced in the decree, and caused the McMullen grant to be marked on the maps of the general land office by its boundaries within the Counties of Bexar and Medina, and the grant was marked on the county maps of each of those counties by authority of the State; and the heirs of Howard and those holding under them have been required to pay state and county taxes on the land, and the State and the County of Bexar have levied taxes on Stewart's land and collected the same from him as owner thereof, ever since he purchased it, and he has ever since been in the actual possession and occupancy of the same and the improvements thereon, and thus his appropriation of the land was evidenced by the occupation of the owner or some person holding for him, under the provisions of section 2 of article 14 of the State Constitution. Masterson became and was a party defendant to said suit No. 10, before the final determination of the same, as the assignee in bankruptcy of one Herndon, a defendant therein (who had located a certificate on and taken out a patent to lands within the McMullen grant, and whose claim was a cloud on the McMullen title), and had full knowledge of the decree and of the proceedings in suit No. 10, before and after the decree, and knowledge of the possession and title of the heirs of Howard and of Castro, and of Stewart's title, possession and improvements; and that Tait was, during five years from June 22, 1878, holding Stewart's land and the improvements thereon as the agent of Stewart. The foregoing decree and conveyances vested in Stewart the absolute property in said 4605 acres of land; but Masterson and Tait fraudulently colluded with each other that Tait should abandon Stewart's land and all the improvements thereon and deliver the same over to Masterson for the consideration of \$750, to be paid by him to Tait, with intent to cheat Stewart out of the value of said improvements and deprive him of his title to the land. Masterson, with such intent, and in contempt of said decree, and in violation of said provision of the Constitution of Texas, fraudulently located and caused to be surveyed the whole of Stewart's land, as vacant and unappropriated domain of the State of Texas, by virtue of several land certificates issued by the State and owned by Masterson, and caused the surveys thereof and the field notes of the surveys to be recorded in the office of the county surveyor of Bexar County, with particulars set forth in the amended bill, and procured patents to issue to himself thereon to the lands described in such surveys and field notes, covering Stewart's said land. In August, 1882, Masterson commenced an action of ejectment or trespass to try title, in the District Court of Bexar County, against Tait, to acquire possession of Stewart's said land. The suit was brought for the purpose, among other things, of furnishing a pretext for Tait to abandon Stewart's property, and having served its purpose, it was dismissed by Masterson, who paid all the costs thereof; and Tait, in pursuance of such collusive agreement and the payment to him of \$750 by Masterson,

surrendered, and Masterson received occupancy of 1260 acres of the land and a dwelling house and improvements thereon; and pretends to hold the same as owner, and also to claim title and the right of possession to the remainder of Stewart's land, unoccupied by him, under and by virtue of Masterson's said locations and patents thereon. The amended bill tenders to Masterson the amount of the actual expenses incurred by him in paying for the certificates, surveys and patents. Tait is insolvent; and if, upon a final hearing, the title of Masterson should be decreed to be paramount to that of Stewart, the value of Stewart's improvements on the land, namely, \$19,962.51, would be lost to him, unless adjudged to him against Masterson by a decree, and made a lien upon the land.

The amended bill waives an answer on oath as to all matters except those specified in six interrogatories, as to which an answer on oath is required. It prays for an accounting by Masterson as to the cost incurred by him in the purchase of his certificates, the location and running of the surveys, and the procurement of patents on the 4605 acres of land; that the title acquired by him, if any, be by a decree vested in Stewart, on the payment of the amounts so expended by Masterson; that the cloud upon Stewart's title be removed, and Masterson forever barred of all interest in the land; and that Stewart be quieted in his title and possession, and be decreed to be the owner. There is an alternative prayer that, in case the title to the 4605 acres be found to be in Masterson, then the amount of the value of the improvements made on the land be adjudged to Stewart against Masterson, and made a lien on the land; that the land be sold to satisfy the lien; and that Masterson be foreclosed and barred of all interest in the land, except the equity of redemption before sale by the payment of the amount of the lien; and for general relief.

The demurrer of Masterson purports to be a demurrer to the amended bill, and to the original bill as amended by the amended bill. It demurs thereto and to the jurisdiction of the court sitting in equity, and assigns several grounds of demurrer: (1) that the amended bill sets up substantially matters against which the court sustained the demurrer to the original bill, in that it appeared by the original bill, and cause No. 10 in equity therein referred to and stated as a part of Stewart's title, and the exhibits, order and decree in cause No. 10, that Stewart's pretended title to the lands sued for is based on the so called McMullen grant, which the Supreme Court of Texas, in the case of *McMullen v. Hodge*, 5 Tex. 84, and in *Howard v. McKeneis*, 54 Tex. 171, declared to be vacant public domain; and the decision in *McMullen v. Hodge* was rendered long before Stewart purchased, and McMullen, against whom it was rendered, is a remote vendor of Stewart, and Stewart's claim is under him; and Stewart has not, by the amended bill, set up any other claim than the void one defectively set up in the original bill; and the amended bill does not contain proper allegations to entitle him to assert a claim for the value of improvements; (2) that there is a want of equity in the bills; (3) that Tait has no interest in the matters con-

cerning which the decree is sought against Masterson, and no relief is asked against Tait, and no facts are alleged which would entitle Stewart to maintain this suit against Masterson and Tait, and there is a misjoinder of parties defendant; (4) that Stewart has a full, complete and adequate remedy at law.

We think the demurrer to the amended bill ought to have been overruled, and Masterson put to his answer thereto. It appears by the opinion of the court below, filed in deciding on the demurrer to the original bill, that the case made by that bill against Masterson and Tait was substantially the same as the case made against them by the amended bill, and that the demurrer to the original bill was sustained on the ground of multifariousness, because, in addition, it sought an account from Tait personally, as agent or trustee of Stewart, in respect to funds intrusted by Stewart to Tait, and also prayed to have established a lien in respect thereto, in favor of Stewart, upon a homestead which it was alleged Tait had purchased for himself and his wife with such funds. The court was of opinion that Tait was a proper party to the bill with Masterson, in respect to the matters other than the accounting by Tait, and that Stewart might reform his original bill and so frame it as to embrace solely the matters against Masterson and Tait relating to Stewart's title to the land in question, and the alternative claim to a right to be paid for the value of permanent improvements made upon the land, as against Masterson.

It is assigned as error by Stewart that nowhere in the original bill or in the amended bill it is admitted that the McMullen title, which Stewart is litigating in this case, is the identical McMullen title which has been at various times litigated in the courts of Texas; that the court below had no authority to take judicial notice of the identity of the grant in litigation with another grant referred to it in the state reports, when this identity was not admitted in the bill demurred to; and that that court could derive knowledge of such identity only from evidence properly offered and admitted, after due allegations in a plea or answer.

It is very clear that the present demurrer introduces as its support new facts which do not appear on the face of the bill, and which must be set up by plea or answer. Story, Eq. Pl. 9th ed. §§ 447, 448, 508, 647.

In addition to this, as there is matter properly pleaded in the amended bill, and properly ground for equitable relief, which requires an answer or a plea, and as the demurrer is to the whole bill, it ought to have been overruled. The case, as stated, shows there is no plain, adequate and complete remedy at law.

As the order taking the bill as confessed by Tait, and directing that the cause be proceeded in thenceforth *ex parte* as to him, was entered before the decree was made sustaining the demurrer of Masterson and dismissing the bill as against him, that decree is final as to him, and one from which he could appeal. There was no decree from which Tait could appeal, and when the case returns to the Circuit Court a final disposition of it can be made as against Tait. He was properly made a defendant with Masterson, although no relief was prayed

against him in respect of the matters in which he is alleged to have been concerned with Masterson.

The decree of the Circuit Court is reversed, and the case is remanded to that Court, with a direction to overrule the second demurrer of Masterson, and to take such further proceedings as shall not be inconsistent with this opinion.

EMILE CORNELY, *Appl.*,

FREEMAN D. MARCKWALD.

(See S. C. Reporter's ed. 159-161.)

Patent, damages for infringement of—reduction in price—settlements in other cases, not evidence of value.

1. In an action for infringement of a patent, where there is in the evidence no basis for a computation of the damages, only nominal damages can be given.
2. Where the evidence did not show that the reduction in prices sustained by the plaintiff was solely due to the acts of the defendant, or to what extent it was due to such acts, damages cannot be awarded on such alleged reduction.
3. The payment of a sum in settlement of a claim for an alleged infringement of a patent cannot be taken as a standard to measure the value of the improvements patented, in determining the damages sustained by the owner of the patent in other cases of infringement.

[No. 293.]

Argued April 26, 1889. Decided May 13, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, in a suit for the infringement of letters patent, awarding to the plaintiff the profit made by defendant by the sale of infringing machines, and six cents damages.

Affirmed.

Reported below, 23 Blatchf. 163, 248.

The facts are stated in the opinion.

Mr. B. F. Lee, for appellant:

Gains and profits are the measure of damage in equity suits, except in cases where the injury sustained by the infringement is greater than the aggregate of what was made by the respondent.

Birdsall v. Coolidge, 93 U. S. 64, 69 (28:802, 804); *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 189, 200, 201 (26:975, 979); *Goodyear Dental Vulcanite Co. v. Van Antwerp*, 9 Pat. Off. Gaz. 497.

An established royalty has been proved, within the rulings of this court.

Clark v. Wooster, 119 U. S. 822, 326 (30:392, 393).

The forced lowering of a complainant's prices by the infringement of a defendant is a basis of damages.

Yale Lock Mfg. Co. v. Sargent, 117 U. S. 586 (29:354).

Where there have been substantial profits or damages, a substantial recovery will, if possible, be awarded.

Gould's Mfg. Co. v. Cowing, 105 U. S. 258 (26:967); *Tilghman v. Proctor*, 125 U. S. 136 181 U. S.

(31:664); *Callaghan v. Myers*, 46 Pat. Off. Gaz. 565.

Mr. W. A. Coursen for appellee.

Mr. Justice Blatchford delivered the opinion of the court:

This is a suit in equity brought by Emile Cornely against Freeman D. Marckwald, for the alleged infringement of letters patent No. 88,910, granted to Cornely, as assignee of Antoine Bonnaz, the inventor, for an "improvement in sewing-machine for embroidering." There was an interlocutory decree for the plaintiff, establishing the validity of the patent and its infringement, and ordering a reference to a master to take an account of profits and damages.

The master reported that the defendant had made a profit of \$142.92, by the sale of 26 infringing machines; and that he was not a willful and deliberate infringer. As to damages, he reported that the plaintiff had instituted ten suits against other infringers on the patent, all of which, with one exception, were settled on the basis of \$50 for each infringing machine; that the plaintiff claimed that that afforded a proper measure of damages, on the basis of an established license fee; that there was a deviation in one instance because, as was stated by a witness, the case presented "circumstances of exceptional hardship," but what the circumstances were did not appear; that it did not appear that licenses were issued to anyone other than in the settlement of a suit or that the plaintiff had adopted the sum of \$50 as a sum on the payment of which he was prepared to grant a license to any and all who wished to use the invention; and that the facts did not warrant the measurement of the damages by a fixed and established license fee.

The master also reported that the plaintiff claimed that he had been forced to lower his prices to compete with the defendant; that the evidence did not show that any reduction in prices by the plaintiff was solely due to the acts of the defendant, or to what extent it was due to such acts; that as to damage to the plaintiff from the loss of the sale of machines which the defendant had sold, it did not appear what profits the plaintiff made on his machines, or what it cost to make them; and that, therefore, such damage could not be computed and could not be reported as exceeding the nominal sum of six cents.

The plaintiff excepted to the report, and, on a hearing, the court made a decree (23 Blatchford, 163) overruling the exceptions, and confirming the report, and awarding to the plaintiff the \$142.92, with interest and costs, except the costs on the accounting subsequent to the master's draft report and the costs on the exceptions, which two items of costs it awarded to the defendant. The plaintiff has appealed from so much of the decree as awards to him no damages beyond the six cents.

The circuit court, in its opinion, held, that evidence of payments made for infringements was incompetent to establish a price as for a fixed royalty; that, as to loss by the plaintiff from the diversion of sales, he had failed to give any evidence showing the cost of his machines, or what his profits would have been; that, as there was no basis for a computation of the loss

of profits, the determination of the master was correct; and that his conclusion was proper as to the alleged loss of the plaintiff by reason of the enforced reduction of his prices.

We concur in these views. As to the question of an established license fee, the case is governed by the recent decision of this court in *Rude v. Westcott*, 180 U. S. 152 [82:888], where it was held that the payment of a sum in settlement of a claim for an alleged infringement of a patent "cannot be taken as a standard to measure the value of the improvements patented, in determining the damages sustained by the owner of the patent in other cases of infringement."

Decree affirmed.

Ex parte:

In the Matter of HANS NIELSEN, *Appt.*

(See S. C. Reporter's ed. 176-191.)

Habeas corpus—only one indictment for unlawful cohabitation, under Law of 1882—second conviction, when unlawful—double conviction—autrefois convict—want of power in court—conviction for adultery.

1. If the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally; and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus.
2. Only one indictment and conviction of the crime of unlawful cohabitation, under the Act of 1882, can be had for the time preceding the finding of the indictment; the crime is a continuous one, and is but a single crime until prosecuted.
3. A second conviction and punishment of the same crime, for any part of said period, was an excess of authority on the part of the District Court of Utah; and a habeas corpus may be issued for the discharge of the defendant imprisoned on such conviction.
4. Where the double conviction for the same offense appears anywhere in the record, it is sufficient; as where it appears on the record in the plea of *autrefois convict*, which is admitted to be true by a demurrer.
5. By a second prosecution and trial for the same offense, a constitutional immunity of the defendant is violated; and where such a case appears on the record, the party is entitled to be discharged from imprisonment.
6. A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner.
7. The conviction of the petitioner of the crime of unlawful cohabitation was a bar to his subsequent prosecution for the crime of adultery, committed during the same period, where the adultery charged in the second indictment was an incident and a part of the unlawful cohabitation, for which he had been convicted.

[No. 1527.]

Argued April 18, 22, 1889. Decided May 13, 1889.

NOTE.—See notes as follows: *Habeas Corpus*, 3 Dall., 1 L. ed. 489 et seq.; *Bigamy, proof of marriage in cases of*, 108 U. S., 28 L. ed. 481; *Former acquittal or conviction*, 85 U. S., 21 L. ed. 872.

A PPEAL from a final order of the First Judicial District Court of the Territory of Utah, refusing to issue a habeas corpus to discharge the petitioner from imprisonment on a judgment rendered by said court, that the petitioner be imprisoned on conviction of adultery. *Reversed.*

The facts are stated in the opinion.

Messrs. Jeremiah M. Wilson, Franklin S. Richards and Samuel Shellabarger, for appellant:

When a prisoner is held under a judgment of the court made without authority of law, the proper tribunal will issue a writ of habeas corpus to look into the record so far as is necessary to ascertain that fact, and, if it is found to be so, will discharge the prisoner.

Re Snow, 120 U. S. 274 (80: 658); *Ex parte Lange*, 85 U. S. 18 Wall. 163, 178 (21: 872, 879); *Ex parte Milligan*, 71 U. S. 4 Wall. 2, 181 (18: 281, 299); *Church, Habeas Corpus*, §§ 848, 862, 863.

When the two indictments are for matters arising out of the same transaction, there can be but one conviction.

Farrington v. Payne, 15 Johns. 482, 1 Bish. Crim. Law, 7th ed. § 1060; 4 Bl. Com. 886; *Roberts v. State*, 14 Ga. 8; *State v. Cooper*, 18 N. J. L. 861; *State v. McCormack*, 8 Or. 236; *Jackson v. State*, 14 Ind. 827; *Quitzow v. State*, 1 Tex. App. 47; *State v. Locklin*, 4 New Eng. Rep. 808, 59 Vt. 654; *Hinkle v. Com.* 4 Dana, 518; *State v. DeGraffenreid*, 9 Baxt. 289; *U. S. v. Burch*, 1 Cranch, C. C. 86; *Com. v. Hudson*, 14 Gray, 11; *Com. v. Jenks*, 1 Gray, 490; *Com. v. Mead*, 10 Allen, 896; *State v. Eggesht*, 41 Iowa, 574; *State v. Lindley*, 14 Ind. 430; *State v. Nutt*, 28 Vt. 598; *State v. Fayetteville*, 2 Murph. (N. C.) 871.

It is not necessary that the offense in each indictment should be the same in name, if the transaction is the same.

1 Bish. Crim. Law, 7th ed. § 1050; 7 Crim. Law Mag. 718; *Hirschfeld v. State*, 11 Tex. App. 207; *Holt v. State*, 88 Ga. 187; *Moore v. State*, 71 Ala. 807-811.

If the conviction is for the whole transaction, there can be no further conviction for any part of it.

7 Crim. Law Mag. 718; *Wilcox v. State*, 6 Lea (Tenn.) 571; *Wright v. State*, 17 Tex. App. 152; *State v. Townsend*, 2 Harr. (Del.) 543; *Fisher v. Com.* 1 Bush, 211; *Dinkey v. Com.* 17 Pa. 126; *State v. Chaffin*, 2 Swan, 498; *Com. v. Hawkins*, 11 Bush, 608; *Winingar v. State*, 18 Ind. 540; *Piddler v. State*, 7 Humph. 508; *Sanders v. State*, 55 Ala. 42.

There can be no further conviction, either for the whole or for any part of the transaction.

State v. Lewis, 2 Hawks (N. C.) 98; *Dizon v. Washington*, 4 Cranch, C. C. 114; *U. S. v. Lee*, 4 Cranch, C. C. 446; *State v. Shepard*, 7 Conn. 54; *People v. McGowan*, 17 Wend. 886; *Reg. v. Ellington*, 9 Cox, C. C. 86; *State v. Colgate*, 81 Kan. 511.

If the adultery occurred during the unlawful cohabitation which is covered by the conviction, it was a part of and involved in such cohabitation, and a conviction for the latter bars a prosecution for the adultery.

Cannon v. U. S. 116 U. S. 71 (29: 567); *U. S. v. Crawford*, 6 Mackey, 819; *Re Snow*, 120 U. S. 282 (80: 661).

Mr. G. A. Jenks, Solicitor-Gen., for the United States:

The defendant was not placed twice in jeopardy for the same offense.

Cannon v. U. S. 116 U. S. 55 (29: 561); *Com. v. Robinson*, 126 Mass. 262; *Com. v. Armstrong*, 7 Gray, '49; *Moore v. Ill.* 55 U. S. 14 How. 20 (14: 306); *Morey v. Com.* 108 Mass. 438-436; *Com. v. Roby*, 12 Pick. 496; *State v. Elder*, 65 Ind. 285; *Com. v. McShane*, 110 Mass. 502; *Shannon v. Com.* 14 Pa. 227.

Mr. Justice Bradley delivered the opinion of the court:

This is an appeal from a final order of the District Court for the First Judicial District of the Territory of Utah, refusing to issue a *habeas corpus* applied for by the petitioner, who prayed to be discharged from custody and imprisonment on a judgment rendered by said court on the 12th of March, 1889. The judgment was that the petitioner, Hans Nielsen, having been convicted of the crime of adultery, be imprisoned in the penitentiary of the Territory for the term of 125 days. The appeal to this court is given by section 1909 of the Revised Statutes.

The case arose upon the statutes enacted by Congress for the suppression of polygamy in Utah. The third section of the Act, approved March 23, 1883, entitled "An Act to Amend Section Fifty-three Hundred and Fifty-two of the Revised Statutes of the United States, in Reference to Bigamy, and for Other Purposes," reads as follows:

"Sec. 8. That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court." 22 Stat. at L. 31.

The third section of the Act of March 8, 1887, entitled "An Act to Amend An Act Entitled An Act to Amend Section Fifty-three Hundred and Fifty-two of the Revised Statutes of the United States in Reference to Bigamy, and for Other Purposes," reads as follows:

"Sec. 8. That whoever commits adultery shall be punished by imprisonment in the penitentiary not exceeding three years; and when the act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery; and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery." (24 Stat. at L. 635.)

On the 27th of September, 1888, two indictments were found against the petitioner, Nielsen, in the district court, one under each of these statutes. The first charged that on the 15th of October, 1885, and continuously from that time till the 18th of May, 1888, in the district aforesaid, he, the said Nielsen, did unlawfully claim, live and cohabit with more than one woman as his wives, to wit: with Anna Lavinia Nielsen and Caroline Nielsen. To this indictment, on being arraigned, Nielsen, on the 29th of September, 1888, pleaded guilty, and on 181 U. S.

the 19th of November following he was sentenced to be imprisoned in the penitentiary for the term of three months and to pay a fine of \$100 and the costs.

The second indictment charged that said Nielsen, on the 14th of May, 1888, in the same district, did unlawfully and feloniously commit adultery with one Caroline Nielsen, he being a married man and having a lawful wife, and not being married to said Caroline. Being arraigned on this indictment, on the 29th of September, 1888, after having pleaded guilty to the other, Nielsen pleaded not guilty, and that he had already been convicted of the offense charged in this indictment by his plea of guilty to the other.

After he had suffered the penalty imposed by the sentence for unlawful cohabitation, the indictment for adultery came on for trial, and the petitioner, by leave of the court, entered orally a more formal plea of former conviction, in which he set up the said indictment for unlawful cohabitation, his plea of guilty thereto and his sentence upon said plea, and claimed that the charge of unlawful cohabitation, though formally made only for the period from 15th October, 1885, to 18th May, 1888, yet in law covered the entire period from October, 1885, to the time of finding the indictment, September 27th, 1888, and thus embraced the time within which the crime of adultery was charged to have been committed; and he averred that the Caroline Nielsen with whom he was charged to have unlawfully cohabited as a wife, was the same person with whom he was now charged to have committed adultery; that the unlawful cohabitation charged in the first indictment continued without intermission to the date of finding that indictment; and that the offense charged in both indictments was one and the same offense and not divisible, and that he had suffered the full penalty prescribed therefor.

To this plea the district attorney demurred, the court sustained the demurrer, and the petitioner, being convicted on the plea of not guilty, was sentenced to be imprisoned in the penitentiary for the term of 125 days. The sentence was as follows, to wit:

"The defendant, with his counsel, came into court. Defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none; and no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment:

"That whereas, said defendant, Hans Nielsen, having been duly convicted in this court of the crime of adultery, it is therefore ordered, adjudged and decreed that the said Hans Nielsen be imprisoned in the penitentiary of the Territory of Utah, at the County of Salt Lake, for the term of one hundred and twenty-five days.

"You, said defendant, Hans Nielsen, are rendered into the custody of the United States Marshal for the Territory of Utah, to be by him delivered into the custody of the warden or other proper officer of said penitentiary.

"You, said warden or other proper officer of said penitentiary, are hereby commanded to receive of and from said United States Marshal him, the said Hans Nielsen, convicted and sen-

tenced as aforesaid, and him, the said Hans Nielsen, to safely keep and imprison in said penitentiary for the term as in this judgment ordered and specified."

Thereupon being delivered into the custody of the marshal, the defendant below, on the next day or day following, during the same term of the court, presented to the court his petition for a *habeas corpus*, setting forth the indictments, proceedings and judgments in both cases, and his suffering of the sentence on the first indictment, and claiming that the court had no jurisdiction to pass judgment against him upon more than one of the indictments, and that he was being punished twice for one and the same offense. As before stated, the court being of opinion that if the writ were granted he could not be discharged from custody, refused his application. That order is appealed from. The first question to be considered, therefore, is whether, if the petitioner's position was true, that he had been convicted twice for the same offense, and that the court erred in its decision, he could have relief by *habeas corpus*?

The objection to the remedy of *habeas corpus*, of course, would be that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on *habeas corpus*. But there are exceptions to this rule which have more than once been acted upon by this court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*. This was so decided in the cases of *Ex parte Lange*, 85 U. S. 18 Wall. 168 [21: 872], and *Ex parte Siebold*, 100 U. S. 371 [25: 717], and in several other cases referred to therein. In the case of *Re Snow*, 120 U. S. 274 [30: 658], we held that only one indictment and conviction of the crime of unlawful cohabitation, under the Act of 1882, could be had for the time preceding the finding of the indictment because the crime was a continuous one and was but a single crime until prosecuted; that a second conviction and punishment of the same crime for any part of said period was an excess of authority on the part of the District Court of Utah; and that a *habeas corpus* would lie for the discharge of the defendant imprisoned on such conviction. In that case the *habeas corpus* was applied for at a term subsequent to that at which the judgment was rendered; but we did not regard this circumstance as sufficient to prevent the prisoner from having his remedy by that writ.

It is true that in the case of *Snow* we laid emphasis on the fact that the double conviction for the same offense appeared on the face of the judgment; but if it appears in the indictment, or anywhere else in the record (of which the judgment is only a part), it is sufficient. In the present case, it appeared on the record in the plea of *autrefois convict*, which was admitted to be true by the demurrer of the Government. We think that this was sufficient. It was laid down by this court in *Re Coy*, 127 U. S. 781, 120

758 [82: 274, 280], that the power of Congress to pass a statute under which a prisoner is held in custody may be inquired into under a writ of *habeas corpus* as affecting the jurisdiction of the court which ordered his imprisonment; and the court, speaking by Mr. Justice Miller, adds: "And if their want of power appears on the face of the record of his condemnation, whether in the indictment or elsewhere, the court which has authority to issue the writ is bound to release him;" referring to *Ex parte Siebold*, 100 U. S. 371 [25: 717].

In the present case, it is true, the ground for the *habeas corpus* was, not the invalidity of an Act of Congress under which the defendant was indicted, but a second prosecution and trial for the same offense, contrary to an express provision of the Constitution. In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant. This was the case in *Ex parte Lange*, where the court had authority to hear and determine the case, but we held that it had no authority to give the judgment it did. It was the same in the case of *Snow*: the court had authority over the case, but we held that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision, securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment. The distinction between the case of a mere error in law, and of one in which the judgment is void, is pointed out in *Ex parte Siebold*, 100 U. S. 371, 375 [25: 717, 718], and is illustrated by the case of *Ex parte Parks* as compared with the cases of *Lange* and *Snow*. In the case of *Parks* there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the cases of *Lange* and *Snow*, there was a denial or invasion of a constitutional right. A party is entitled to a *habeas corpus*, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. As said by Chief Baron Gilbert, in a passage quoted in *Ex parte Parks*, 98 U. S. 18, 22 [23: 787, 788]: "If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge." This was said in reference to cases which had gone to conviction and sentence. Lord Hale laid down the same doctrine in almost the same words. (3 Hale's P. C. 144.) And why should not such a rule prevail in *favorem libertatis*? If we have seemed to hold the contrary in any case, it has been from inadvertence. The law could hardly be stated with more categorical accuracy than it is in the opening sentence of *Ex parte Wilson*, 114

U. S., 417, 420 [29: 89, 90], where *Mr. Justice Gray*, speaking for the court, said: "It is well settled by a series of decisions that this court, having no jurisdiction of criminal cases by writ of error or appeal, cannot discharge on *habeas corpus* a person imprisoned under the sentence of a circuit or district court in a criminal case unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence." This proposition, it is true, relates to the power of this court to discharge on *habeas corpus* persons sentenced by the circuit and district courts; but with regard to the power of discharging on *habeas corpus*, it is generally true that, after conviction and sentence, the writ only lies when the sentence exceeds the jurisdiction of the court, or there is no authority to hold the defendant under it. In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction.

Being of opinion, therefore, that *habeas corpus* was a proper remedy for the petitioner, if the crime of adultery with which he was charged was included in the crime of unlawful cohabitation for which he was convicted and punished, that question is now to be considered.

We will revert for a moment to the case of *Re Snow*. Three crimes of unlawful cohabitation were charged against Snow, in three indictments, the crimes being laid continuous with each other, one during the year 1883, one during 1884, and one during 1885. We held that they constituted but a single crime. In the present case there were two indictments; one for unlawful cohabitation with two women down to May 18th, 1888, and the other for adultery with one of the women the following day, May 14th, 1888. If the unlawful cohabitation continued after the 18th of May, and if the adultery was only a part of and incident to it, then an indictment for the adultery was no more admissible, after conviction of the unlawful cohabitation, than a second indictment for unlawful cohabitation would have been; and for the very good reason, that the first indictment covered all continuous unlawful cohabitation down to the time it was found. The case would then be exactly the same as that of *Re Snow*. By way of illustrating the argument we quote from the opinion in that case. *Mr. Justice Blatchford* delivering the opinion of the court, said: "The offense of cohabitation, in the sense of this statute, is committed if there is a living or dwelling together as husband and wife. It is inherently a continuous offense, having duration; and not an offense consisting of an isolated act. That it was intended in that sense in these indictments is shown by the fact that in each the charge laid is that the defendant did on the day named and 'thereafter and continuously,' for the time specified, 'live and cohabit with more than one woman, to wit, with 'the seven women named, and 'during all the period aforesaid' 'did unlawfully claim, live and cohabit with all of said women as his wives.' Thus, in each indictment, the offense is laid as a continuing one, and a single one, for all the time covered by the indictment; and taking the three indictments together, there is charged a continuing offense

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for the entire time covered by all three of the indictments. There was but a single offense committed prior to the time the indictments were found. . . . On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half, and fines amounting to \$10,500, or even an indictment covering every week. . . . It is to prevent such an application of penal laws, that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once for the purposes of indictment or prosecution, prior to the time the prosecution is instituted." These views were established by an examination of many authorities.

Now, the petitioner, in his plea, averred in terms that the unlawful cohabitation with which he was charged in the first indictment, continued without intermission up to the time of finding that indictment, covering the time within which the adultery was laid in the second indictment. He also averred that the two indictments were found against him upon the testimony of the same witnesses, on one oath and one examination as to the alleged offense, covering the entire time specified in both indictments. This plea was demurred to by the prosecution, and the demurrer was sustained. The averments of the plea, therefore, must be taken as true. And assuming them to be true, can it be doubted that the adultery charged in the second indictment was an incident and part of the unlawful cohabitation? We have no doubt of it. True, in the case of *Snow*, we held that it was not necessary to prove sexual intercourse in order to make out a case of unlawful cohabitation; that living together as man and wife was sufficient; but this was only because proof of sexual intercourse would have been merely cumulative evidence of the fact. Living together as man and wife is what we decided was meant by unlawful cohabitation under the statute. Of course, that includes sexual intercourse. And this was the integral part of the adultery charged in the second indictment, and was covered by and included in the first indictment and conviction. The case was the same as if the first indictment had in terms laid the unlawful cohabitation for the whole period preceding the finding of the indictment. The conviction on that indictment was in law a conviction of a crime which was continuous, extending over the whole period, including the time when the adultery was alleged to have been committed. The petitioner's sentence, and the punishment he underwent, on the first indictment, was for that entire, continuous crime. It included the adultery charged. To convict and punish him for that also was a second conviction and punishment for the same offense. Whether an acquittal would have had the same effect to bar the second indictment is a different question, on which we express no opinion. We are satisfied that a conviction was a good bar, and that the court was wrong in overruling it. We think so because the material part of the adultery charged was comprised within the unlawful cohabitation of which the petitioner was already convicted and for which he had suffered punishment.

The conclusion we have reached is in accord with a proposition laid down by the Supreme Judicial Court of Massachusetts in the case of *Morey v. Commonwealth*, 108 Mass. 488, 485. The court there says, by Mr Justice Gray: "A conviction of being a common seller of intoxicating liquors has been held to bar a prosecution for a single sale of such liquors within the same time, upon the ground that the lesser offense, which is fully proved by evidence of the mere fact of unlawfully making a sale, is merged in the greater offense; but an acquittal of the offense of being a common seller does not have the like effect. *Commonwealth v. Jenks*, 1 Gray, 490, 492; *Com. v. Hudson*, 14 Gray, 11; *Com. v. Mead*, 10 Allen, 896." Whilst this proposition accords so nearly with our own views, it is but fair to say that the decision in *Morey v. Commonwealth* is the principal one relied on by the Government to sustain the action of the District Court of Utah in this case. Morey was charged under a statute in one indictment with lewdly and lasciviously associating and cohabiting with a certain female to whom he was not married; and in another indictment he was charged with committing adultery with the same person on certain days within the period of the alleged cohabitation. The court held that a conviction on the first indictment was no bar to the second, although proof of the same acts of unlawful intercourse was introduced on both trials. The ground of the decision was, that the evidence required to support the two indictments was not the same. The court said: "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not, whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." (p. 494.) We think, however, that that case is distinguishable from the present. The crime of loose and lascivious association and cohabitation did not necessarily imply sexual intercourse, like that of living together as man and wife, though strongly presumptive of it. But be that as it may, it seems to us very clear that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.

It may be contended that adultery is not an incident of unlawful cohabitation, because marriage of one of the parties must be strictly proved. To this it may be answered, that whilst this is true, the other ingredient (which is an incident of unlawful cohabitation) is an essential and principal ingredient of adultery; and, though marriage need not be strictly proved on a charge of unlawful cohabitation, yet it is well known that the Statute of 1882 was aimed against polygamy, or the having of

two or more wives; and it is construed by this court as requiring, in order to obtain a conviction under it, that the parties should live together as husband and wives.

It is familiar learning that there are many cases in which a conviction or an acquittal of a greater crime is a bar to a subsequent prosecution for a lesser one. In Mr. Wharton's Treatise on Criminal Law, Vol. I, § 560, the rule is stated as follows, to wit: "An acquittal or conviction for a greater offense is a bar to a subsequent indictment for a minor offense included in the former, wherever, under the indictment for the greater offense, the defendant could have been convicted of the less;" and he instances several cases in which the rule applies; for example, "An acquittal on an indictment for robbery, burglary, and larceny, may be pleaded to an indictment for larceny of the same goods, because upon the former indictment the defendant might have been convicted of larceny." "If one be indicted for murder, and acquitted, he cannot be again indicted for manslaughter." "If a party charged with the crime of murder, committed in the perpetration of a burglary, be generally acquitted on that indictment, he cannot afterwards be convicted of a burglary with violence, under 7 Wm. IV and 1 Vict. chap. 86, § 2, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence." "An acquittal for seduction is a bar to an indictment for fornication with the same prosecutrix." "On the same principle, in those States where, on an indictment for adultery, there could be a conviction for fornication, an acquittal of adultery is a bar to a prosecution for fornication." It will be observed that all these instances are supposed cases of acquittal; and in order that an acquittal may be a bar to a subsequent indictment for the lesser crime, it would seem to be essential that a conviction of such crime might have been had under the indictment for the greater. If a conviction might have been had, and was not, there was an implied acquittal. But where a conviction for a less crime cannot be had under an indictment for a greater which includes it, there it is plain that while an acquittal would not or might not be a bar, a conviction of the greater crime would involve the lesser also, and would be a bar; and then the proposition first above quoted from the opinion in *Morey v. Commonwealth* would apply. Thus, in the case of *State v. Cooper*, 18 N. J. Law, 861, where the defendant was first indicted and convicted of arson, and was afterwards indicted for the murder of a man burnt and killed in the fire produced by the arson, the Supreme Court of New Jersey held that the conviction of the arson was a bar to the indictment for murder, which was the result of the arson. So, in *State v. Nutt*, 28 Vt. 598, where a person was convicted of being a common seller of liquor, it was held that he could not afterwards be prosecuted for a single act of selling within the same period. "If," said the court, "the government see fit to go for the offense of being 'a common seller,' and the respondent is adjudged guilty, it must, in a certain sense, be considered as a merger of all the distinct acts of sale up to the filing of the complaint, and the respondent can be pun-

ished but for one offense." Whereas, in *Com. v. Hudson*, 14 Gray, 11, after an acquittal as a common seller, it was held that the defendant might be indicted for a single act of selling during the same period. See 1 Bishop, Crim. Law, 5th ed. § 1054, etc.

The books are full of cases that bear more or less upon the subject we are discussing. As our object is simply to decide the case before us and not to write a general treatise, we content ourselves in addition to what has already been said, with simply announcing our conclusion, which is, that the conviction of the petitioner of the crime of unlawful cohabitation was a bar to his subsequent prosecution for the crime of adultery; that the court was without authority to give judgment and sentence in the latter case, and should have vacated and set aside the same when the petitioner applied for a *habeas corpus*; and that the writ should have been granted and the petitioner discharged. *The judgment of the District Court is reversed, and the cause remanded with directions to issue a habeas corpus as prayed for by the petitioner, and proceed thereon according to law.*

Ex parte:

In the Matter of **HOLLON PARKER**,
Petitioner.

(See S. C. Reporter's ed. 221-227).

Notice of appeal in Washington Territory—where application made—mandamus to inferior court—change of judges.

1. Under the Act of Washington Territory of November 23, 1883, notice of appeal may be given in open court or at chambers, and must be entered on the journal of the court; and no notice to the opposite party need be given, before application is made to the judge, of the intention of the party to give notice of appeal.
2. The proceeding may be taken at the chambers of the judge where he can conveniently attend to business, and not necessarily within the territorial limits of his district.
3. The writ of mandamus may be issued where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise.
4. Although when the order dismissing the appeal was made the supreme court of the Territory consisted of other judges than its present members, yet a mandamus can issue to the court, constituted as it now is, to reinstate a case dismissed by their predecessors.

[No. 5, Original.]

Submitted April 26, 1889. Decided May 13, 1889.

ON PETITION for a writ of mandamus.
Granted.

The case appears in the opinion.

Mr. John H. Mitchell for petitioner.

Messrs. W. W. Upton, C. B. Upton, John B. Allen and B. L. Sharpstein for respondents.

NOTE.—As to *When this Court May Issue Writ of Mandamus to Inferior Courts*, see *Ex parte Morgan* and note 114 U. S., 29 L. ed. 136.—When to others, see 2 Wheat., 4 L. ed. 283.

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Mr. Justice Field delivered the opinion of the court:

This is an application for a writ of mandamus to the Supreme Court of Washington Territory to reinstate an appeal to that court from a judgment of the District Court of the First Judicial District of the Territory, dismissed for alleged irregularity in taking it. The case is before us on a return of the supreme court to our rule. The material facts upon which the application is made, condensed from the statement contained in the record and briefs of counsel, are as follows:

In May, 1884, the petitioner, Hollon Parker, commenced an action in the District Court of the First Judicial District of Washington Territory against George Dacres, to recover possession of certain real property situated in the County of Walla Walla, in the Territory, and demanding also in his complaint \$22,500 as the value of the rents and profits of the property whilst unlawfully detained from him. The defendant appeared and answered the complaint, denying generally its allegations, and setting up that he had purchased the premises at a judicial sale had on a judgment rendered in an action between other parties in that court, and had made permanent improvements thereon to the value of \$6,000. The plaintiff replied to the answer denying its allegations. On the trial which followed, the defendant, under the instructions of the court, obtained a verdict of the jury, upon which judgment was entered in his favor on the 14th of February, 1885. Soon afterwards, and during the same month, an appeal from the judgment was taken by the plaintiff to the supreme court of the Territory, which, on the 14th of July following, was dismissed because no assignment of errors had been filed with the clerk of the district court and served on the adverse party or his attorney, within twenty days after entry of notice of appeal in the journal of the district court, as required by its rules.

By the law of the Territory a party against whom a judgment is rendered is allowed six months to appeal from it. In this case the time to appeal extended to August 14, 1885. Accordingly, on the 27th of July, 1885, the plaintiff gave another notice of appeal, by writ of error, to the supreme court of the Territory, from the judgment, at the chambers of the Judge of the District Court, and requested that the notice be entered upon the journal of the court; and it was thereupon ordered that the notice of appeal be thus entered, and that the appeal be allowed. This proceeding was had at the chambers of the District Judge whilst he was at Olympia, attending the supreme court of the Territory, he being one of its members. Olympia is without the territorial limits of the district of which he was judge.

The important sections of the Act of the Territory of November 23, 1883, under which the appeal was taken, are as follows:

"An Act in relation to the removal of causes to the supreme court.

"Sec. 1. Be it enacted by the Legislative Assembly of Washington Territory, That any person desiring to remove a cause from any District Court of Washington Territory may do so, either in person or by his attorney of

record, and in the following manner: Such person or attorney may give notice in open court, or at chambers, that he appeals such cause to the supreme court of the Territory; such notice shall, by order of the court or judge having jurisdiction of the cause, be entered in the journal of such court, and no other service or notice shall be required; and thereupon the clerk of such court shall make and certify a full and complete transcript of said cause, including the journal entries thereunto appertaining, and cause such transcript to be filed with the clerk of the supreme court within the time allowed by law; and thereupon the supreme court shall have complete and perfect jurisdiction of such cause.

"Sec. 2. That the supreme court shall hear and determine all causes removed thereto, in the manner hereinbefore provided, upon the merits thereof, disregarding all technicalities."

"Sec. 5. The notice of appeal hereinbefore provided for may be given at any time within six months after the rendition of the judgment, order or decision intended to be removed to the supreme court.

"Sec. 6. All Acts and parts of Acts, so far as they conflict herewith, are hereby repealed.

"Approved November 28, 1883."

Subsequently the defendant moved to dismiss this second appeal, and at the January Term of the supreme court of 1887 it was dismissed, on the ground that the notice of appeal, not being given in open court and being in its nature an application for an order allowing the appeal, was entertained by the judge without the preliminary notice to the adverse party prescribed by section 2140 of the Code. (Wash. Rep. Vol. 8, p. 12.) That section, so far as it relates to this matter, is as follows:

"Sec. 2140. When a party to an action has appeared in the same he shall be entitled to at least three days' notice of any trial, hearing, motion or application to be had or made therein before any judge at chambers, which shall be in writing, setting forth the nature of the motion or application and the grounds thereof, and specifying the time and place where the same will be made, and which may be served on the adverse party or his attorney."

It would appear, from the statements of counsel, that on the argument of the motion to dismiss the appeal it was also contended that the District Judge of the First Judicial District had no jurisdiction to hear the application for an appeal at chambers, without the territorial limits of his district; and that position is also taken here.

We are of opinion that neither the objection that no notice of application for the appeal was given nor that the Judge, in acting without the territorial limits of his district, was without jurisdiction in the matter is tenable.

1. The Act of the Territory of November 28, 1883, in providing for a new mode, different from what previously existed, by which cases can be removed from the district court to the supreme court of the Territory, declares that notice of appeal may be given in open court or at chambers; that such notice shall, by order of the court or judge having jurisdiction, be entered on the journal of the court; and that no other service or notice shall be required.

This language is inconsistent with any requirement that notice to the opposite party shall be given that the party desirous of appealing intends to give notice of an appeal. The nature of the proceeding is such that no notice of it is required before application is made to the judge. When an appeal is taken notice of the fact is usually given to the opposite party, or a citation is served on him. The Act of the Territory, however, renders the entry upon the journal sufficient notice to all parties. Section 2140 of the Code can have no proper application to orders which are granted of course, as being matters of right, but only to those matters which may be contested and refused. An appeal from a district court to the supreme court of the Territory within the six months allowed by law was not a matter which could be refused at the discretion of the district judge or court. Rights under our system of law and procedure do not rest in the discretionary authority of any officer, judicial or otherwise. There was, therefore, no occasion to give notice of the intention of the party to take the proceeding.

The second objection is equally untenable. When the law allowed the proceeding to be taken at the chambers of the judge of the court, it meant at the chambers where he can conveniently attend to business relating to cases in his district, not that they must necessarily be within the territorial limits of his district. As one of the judges of the Territory, it is a part of his duty to sit in the supreme court. He is one of its members, and his chambers, whilst the supreme court is in session and he is in attendance upon it, may be at the place where that court is sitting. Otherwise, the right of appeal within the six months allowed by law would be abridged for the period for which notice is to be given.

It is also objected that mandamus is not the proper remedy for the petitioner, under the decision in *Ex parte Brown*, 116 U. S. 401 [29: 676]. There the supreme court of the Territory entertained jurisdiction of the cause which was brought before it by appeal, but dismissed it for want of due prosecution; that is to say, because errors had not been assigned in accordance with rules of practice applicable to the form of the action; and we held that the judgment could only be reviewed here on writ of error or appeal, as the case might be. In the case before us, the supreme court of the Territory dismissed the appeal because not properly taken, that is, because the cause had not been brought before it from the lower court. The distinction in the two cases is obvious: in the one, the court below had taken jurisdiction and acted; but in the present case it refused to take jurisdiction. The right of mandamus lies, as held in *Ex parte Parker*, 120 U. S. 787 [30: 818], where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise. It does not lie to correct alleged errors in the exercise of its judicial discretion. *Ex parte Morgan*, 114 U. S. 174 [29: 185]; *Chateaugay Ore and Iron Co. Petitioner*, 128 U. S. 544, 557 [33: 508, 518].

It is also objected that when the order dismissing the appeal was made the supreme court of the Territory consisted of other judges than

its present members. The then Chief Justice has died and a new Chief Justice occupies his place. The only Associate Justice then in office who now remains on the bench, *Mr. Justice Langford*, took no part in the decision. The question, therefore, is raised whether under such circumstances the mandamus can issue to the court, constituted as it now is, to reinstate a case dismissed by their predecessors. We do not think the objection is tenable. The mandamus is to correct a mistake as to its jurisdiction, committed by the court; and although it is the custom in such cases to direct the writ not merely to the court but to its judges by name, yet including their names within the writ, except in special cases where disobedience may be apprehended, is at the present day little more than a mere matter of form. Disobedience to the writ would be as unusual on the part of the court to which it is directed as would be a refusal to carry into effect the reversal of its judgment in an ordinary action. The object of the writ in the present case is to require the court to proceed in a matter properly cognizable by it, but upon which, from a mistaken view of the law as to its jurisdiction, it has refused to act. *Thompson v. United States*, 108 U. S. 480, 488 [26: 521, 528]; *People v. Collins*, 19 Wend. 56; *State v. Warner*, 55 Wis. 271.

It follows that the writ of mandamus must issue as prayed, directing the Supreme Court of the Territory to reinstate the appeal taken to it in the case mentioned, and to proceed to the hearing thereof in the usual course of its business.

And it is so ordered.

REUBEN P. SEGRIST *et al.*, *Plffs. in Err.*,
v.

WILLIAM B. CRABTREE.

(See S. C. Reporter's ed. 287-293.)

Promissory note, when payment—unconditional sale—evidence of payment—delivery of goods, effect of—bill of sale, effect of.

1. A promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt.
2. The question whether a note is given and accepted in payment for goods sold is for the jury.
3. If the sale is an unconditional one, and if a note is given and accepted as absolute payment, the original debt is extinguished, and the remedy of the seller is on the note.
4. If a note is taken as conditional payment only, it is *prima facie* evidence of payment so long as the seller holds it, and he cannot rightfully retake the goods while he retains the note.
5. Where the buyer is by contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the prop-

erty depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.

6. A bargain and sale of personal property, accompanied by delivery, divests the vendor of any lien for payment, unless such lien is secured by chattel mortgage or by agreement between the parties.
7. If the bill of sale is not given to pass the absolute title, but simply to enable vendee to use it in obtaining the goods, and it is agreed that the goods are to remain the property of the vendor until paid for according to the terms of the note, it will not transfer the title.

[No. 113.]

Argued Dec. 7, 10, 1888. Decided May 13, 1889.

IN ERROR to the Supreme Court of the Territory of New Mexico, to review a judgment of that Court affirming a judgment of the District Court of that Territory in favor of plaintiff for damages for conversion of certain cattle and horses. *Affirmed.*

The facts are stated in the opinion.

Messrs. O. D. Barrett and W. T. Thornton, for plaintiffs in error:

The acceptance of a negotiable note for an antecedent debt will not extinguish such debt unless it is expressly agreed that it is received as payment.

Peter v. Beverly, 85 U. S. 10 Pet. 568 (9:536); *James v. Hackley*, 16 Johns. 277.

A note without a special contract would not of itself discharge the original cause of action.

If, by express agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it.

Sheehy v. Mandeville, 10 U. S. 6 Cranch, 264 (8:219); *Lyman v. Bank of U. S.* 53 U. S. 12 How. 243 (18:972); *The Kimball*, 70 U. S. 3 Wall. 45 (18:54); *Downey v. Hicks*, 55 U. S. 14 How. 249 (14:407); *Glenn v. Smith*, 2 Gill & J. 498; *Tobey v. Barber*, 5 Johns. 71; 2 Parsons, Notes & Bills, 158 and notes and authorities there cited; Story, Promissory Notes, 7th ed. § 104 and notes and cases cited.

When the right to receive payment before delivery is waived by the seller, and immediate possession is given to the purchaser and yet by express agreement the title is to remain in the seller until the payment of the price upon a fixed day, such payment is strictly a condition precedent, and until performance the right of property is not vested in the possessor.

1 Parsons, Cont. 6th ed. 587; *Porter v. Feltengill*, 12 N. H. 299; *Sargent v. Gile*, 8 N. H. 825; *Gambling v. Bead*, Meigs (Tenn.) 881; *Bigelow v. Huntley*, 8 Vt. 151; *Barrett v. Pritchard*, 2 Pick. 512; *Ayer v. Bartlett*, 9 Pick. 156; *Tibbets v. Towle*, 12 Maine, 841; *Bennett v. Sims*, Rice, 421; *Smith v. Lynes*, 1 Seld. 41; *Herring v. Hoppock*, 3 Duer, 20; *Brewster v. Baker*, 20 Barb. 364; *Parris v. Roberts*, 12 Ired. L. 268; *Smith v. Foster*, 18 Vt. 182; *Buckmaster v. Smith*, 22 Vt. 203; *Root v. Lord*, 23 Vt. 568; *Davis v. Bradley*, 24 Vt. 55; *Buson v. Dougherty*, 11 Humph. 50; *Harkness v. Russell*, 118 U. S. 663 (30:285).

Where an unconditional bill of sale is given which recites that the seller had received payment in notes, and the vendee sells the property to an innocent purchaser, yet the vendor can

NOTE.—When note is payment, see 3 Cranch, 2 L. ed. 450.

Delivery of ponderous and bulky goods, what sufficient to transfer the title. See 8 How., 12 L. ed. 1123.

recover the property from such purchaser on showing that the sale was made on condition that no title was to pass until the purchase money was paid.

Lane v. Borland, 14 Maine, 77.

It is not sufficient that a part of the instructions contain a correct exposition of the law, if it is incorrectly announced in others.

Proffatt, Jury Trial, § 845; *Wilder v. Cowles*, 100 Mass. 487; *Vanslyck v. Mills*, 34 Ia. 375; *Davis v. Strohm*, 17 Ia. 421; *Chicago, B. & Q. R. Co. v. Payne*, 49 Ill. 499; *Clem v. State*, 81 Ind. 480; *Pendleton St. R. Co. v. Stallmann*, 22 Ohio St. 1.

Messrs. S. F. Phillips, W. H. Lamar and J. G. Zachry, for defendant in error:

Mr. Justice Harlan delivered the opinion of the court:

This is an action of trover. It was brought in the District Court of the First Judicial District of New Mexico, to recover damages for the conversion by the plaintiffs in error to their own use of certain cattle and horses of which the defendant in error, who was the plaintiff below, claimed to be the owner. The alleged unlawful conversion occurred in that Territory. The defendant Segrist, separately, and the defendants, Stapp, Stoops and Holstine, jointly, pleaded not guilty. The record does not show service of process upon Bell, nor any appearance by him. There was a trial before a jury, resulting in a verdict for \$6,083.04 in favor of the plaintiff against the defendants followed—a motion for a new trial having been made and overruled—by a judgment for the above amount against Segrist, Stapp and Stoops. Upon appeal to the supreme court of the Territory the judgment was affirmed.

The bill of exceptions taken at the trial contains, though in very confused form, the entire evidence in the case. It is so stated as to render it difficult to understand the precise facts. But upon a careful scrutiny of all the testimony, we think that the general nature of the case is fairly indicated in the following extract from the opinion of the Supreme Court of the Territory, made part of the transcript:

"In 1880 the plaintiff bought of one Babb the remnant, as it is termed in the record, of the latter's herd of cattle, then to be found on certain ranges in Texas. The plaintiff came after said cattle and secured them."

At the time of making this agreement plaintiff gave Babb notes for the amount agreed upon as the purchase money, and received from Babb a bill of sale for the cattle. Thereafter plaintiff secured and took possession of the cattle, but how many head there were does not appear from the evidence in the record before us.

The only serious contention in the evidence is as to whether this transaction was an absolute or merely a conditional sale, the plaintiff insisting and giving evidence tending to show that the sale was absolute, accompanied by a bill of sale absolute on its face, and by delivery of possession of the cattle as fast as they could be secured by him, and that his notes were given in full satisfaction. These notes consist of two promissory notes, each for the sum of eight hundred dollars, one payable in September, 1881, and the other '1 September, 1882. The defendant, however, insists and introduced

evidence tending to show that the sale was conditional upon the payment of the notes at maturity, it being agreed between the plaintiff and Babb that the title to the cattle should remain in the latter until the notes were paid, and that if not paid when due he might assert his title and resume possession of the cattle. After the cattle were secured by the plaintiff he drove them from the range in Texas, upon which they had been found by him, into Lincoln County, New Mexico.

The notes were not paid at maturity, and thereafter, in January or February, 1882, Babb undertook to sell the cattle to the defendants. He sent his son, armed with a power of attorney, to take possession of the cattle. This son, accompanied by the defendants, or some of them, went on the range in New Mexico, where the cattle were being herded in connection with other cattle belonging to the plaintiff, in charge of an employé of the plaintiff, and took possession of them and sold them to the defendants. It does not appear that this employé of the plaintiff had any authority to give up the possession of the cattle."

The supreme court of the Territory deemed it proper to consider only such questions as were brought to the attention of the trial court. This general rule, it said, was strengthened by this statutory provision, in force in that Territory, that, "No exception shall be taken in an appeal to any proceeding in the district court except such as shall have been expressly decided in that court." *Prince's Laws*, pp. 68-9, § 5.

One of the principal questions arising upon the evidence was whether the two notes, payable respectively in September, 1881, and September, 1882, were received in actual payment (in which event the remedy is upon the notes), or only as evidence of the amount to be paid by Crabtree. In *Sheehy v. Mandeville*, 10 U. S. 6 Cranch, 258, 264 [8: 215, 219], *Chief Justice* Marshall said: "That a note, without a special contract, would not, of itself, discharge the original cause of action, is not denied. But it is insisted that if, by express agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it. This principle appears to be well settled. . . . Since, then, the plaintiff has not taken issue on the averment that the note was given and received in discharge of the account, but has demurred to the plea, that fact is admitted, and, being admitted, it bars the action for the goods." In *Peter v. Beverly*, 35 U. S. 10 Pet. 582, 588 [9: 522, 586], it was said that the acceptance of a negotiable note for an antecedent debt will not extinguish such debt, unless the evidence is at least so clear and satisfactory as to leave no reasonable doubt that such was the intention of the parties. In *Lyman v. Bank of the United States*, 58 U. S. 12 How. 225, 248 [18: 965, 972], it was held that the mere acceptance of the note by the creditor does not necessarily operate as satisfaction of the original debt, and whether or not there was an agreement at the time to receive them in satisfaction, or whether the circumstances attending the transaction warranted such an inference, were properly questions for the jury. In *The Kimball*, 70 U. S. 3 Wall. 87, 45 [18: 50, 54], the court said that

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"By the general commercial law, as well of England as of the United States, a promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties; it only operates to extend until its maturity the period for the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment." These cases show the course of decision in this court. In some of the States the mere acceptance of a note for the amount of a debt raises a presumption of payment.

The contention of the appellants is that the instructions given at the request of the plaintiff and the charge of the court were in conflict with or did not conform to, the principles settled in the above cases. There is some slight ground for this contention, arising out of the multiplicity of the instructions given. All the instructions asked, except one on each side, were given, and they were supplemented by a charge covering substantially the same ground. But, taking as a whole all the instructions given, and interpreting them in the light of the charge delivered by the court, they are not subject to the criticism of being so inharmonious or misleading as to justify a reversal. The question whether the notes were given and accepted in payment for the cattle was fairly left to the jury. And although they were not told, in words, that an express or special agreement was necessary before the notes could be deemed to have been received in satisfaction of the original debt, they were substantially so instructed. At the instance of the defendants, and in language of which, perhaps, the plaintiff might complain, they were instructed that "A promissory note is never considered as payment, unless it is taken *absolutely* as payment; if there be any agreement that a note is not to be considered payment if unpaid at maturity, then it is no payment; but the payment of the note only will be the payment of the original claim, and in such case the original contract will remain independent of the notes." The court, upon its motion, said to the jury that if they "found from the evidence that Babb sold and delivered the stock on the range and took promissory notes in payment, this would be an absolute, unconditional sale, and Babb could not retake the stock. Babb's remedy in such case would be by suit to collect what might be due him upon said notes." The principal instruction given, at the instance of the plaintiff, left it to the jury to determine whether the notes were actually given and accepted in absolute payment for the cattle. That is one form of saying that they were so given and so accepted, pursuant to an understanding, that is, by special agreement between the parties, that the original debt should, in that mode, be extinguished. The instructions and the charge mean that if the sale was an unconditional one, and if the notes were given and accepted as absolute payment, the original debt was extinguished, and the remedy of the defendant was on the notes. There was in this no error to the prejudice of the defendants; for the facts thus hypothetically stated to the jury imported a special agreement between the parties that the notes were to be taken in payment.

Among the instructions given to the jury at the instance of the plaintiff was the following:

"If you find from the evidence that the plaintiff or the plaintiff and his brother purchased the cattle from W. M. Babb or W. T. Babb, and that he or they gave their promissory notes in payment therefor, and the same was accepted by the Babbs, although the notes were taken only as conditional payments, yet they would be *prima facie* evidence of payment, and the said Babbs, whilst holding said notes, could not proceed to take possession of the said cattle and horses as their own. Their remedy would be upon the notes or to cancel the trade; and if you find from the evidence that said Babbs did, under the circumstances just mentioned, take possession of said cattle without authority of the plaintiff and dispose of them to the defendants, you will find for the plaintiff the value of the cattle and horses at the time of taking the same, with interest."

Taken in connection with other instructions, this was intended only to express the idea that, if the notes were taken as conditional payment only, they would be regarded as *prima facie* evidence of payment, so long as the Babbs held them, and until by nonpayment they ceased to have any force, if the Babbs elected to so treat them. The court below properly held that they could not rightfully retake the cattle, while they retained the notes.

Nor, in our judgment, was any error committed by the instructions relating to the question of the title to the property, as affected by the contract of sale. In *Harkness v. Russell*, 118 U. S. 668, 668 [80:285, 287], this court, after a full examination of the adjudged cases, recognized the general rule—at least as between the original parties to a conditional sale, and where the subject is not controlled by local statutes—to be as stated by Mr. Benjamin in his treatise on sales of personal property, namely: "Where the buyer is by contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Nothing was said in the instructions or charge in conflict with this doctrine. The jury were told that a bargain and sale of personal property, accompanied by delivery, divests the vendor of any lien for payment, unless such lien is secured by chattel mortgage or by agreement between the parties; that if the bill of sale in evidence was not given to pass the absolute title, but simply to enable plaintiff to use it in gathering the cattle, and that it was agreed that the cattle were to remain the property of Babb until paid for according to the terms of the notes, it must not be considered as transferring the title; and that, in such case, Babb had the right, upon the failure to pay the notes when due (if he did not elect to keep the notes), to retake the cattle and sell them; but if there was no such agreement, and if the notes were given and accepted as absolute payment, without any reservation of a lien, that Babb, in order to enforce payment, would have no right to retake the cattle from the possession of the plaintiff or of his agent. And that there might be no confusion in the mind of the jury as to

the right of Babb to resume possession of the cattle, they were instructed to find for the defendants, if they believed from the evidence that Carter, in whose possession they were when retaken, had authority from Crabtree to settle his debts and to sell and dispose of his cattle, and that he delivered them, under authority from Crabtree, in payment of the notes. In all this we do not perceive any error to the prejudice of the substantial rights of the defendants.

There are no other questions presented that we deem it necessary to notice, and the judgment must be affirmed.

It is so ordered.

LYDIA A. BACON *et al.*, *Plffs. in Err.*,
v.

THE NORTHWESTERN MUTUAL LIFE
INS. COMPANY.

(See B. C. Reporter's ed. 258-267.)

Recording mortgage, effect of—condition in mortgage—complying with—laches and effect of irregularity—state statute—defect in notice of mortgage sale.

1. The object of recording a mortgage is to give notice to third persons. As between the parties thereto, a mortgage is just as effectual for all purposes without recording as with.
2. A condition in a mortgage that if, at the expiration of the time limited for the payment of the installments, there should remain due on the mortgage a named sum, the mortgagor might have the privilege of paying the amount due by giving his note therefor, secured by mortgage on other real estate, does not prevent the installments from falling due at the time stipulated, nor prevent a sale under the mortgage to satisfy them when due.
3. The mortgagor may, in such case, stop the sale by insisting on the terms of the stipulation in the mortgage and complying with the terms thereof.
4. Where the mortgagor neither paid nor offered to pay the installments as they came due, nor did he pay nor offer to pay them by giving his note secured by mortgage on other real estate at any time thereafter; but, on the contrary, stood by and allowed the property to be sold, saw the sheriff's deed executed for it, and never attempted to redeem, he cannot, afterwards, thirteen years after the purchaser at the sale took possession of it, and after the property had increased in value, regain possession of it by a suit in ejectment and thus defeat the title acquired at the mortgage sale, by setting up an irregularity in the foreclosure proceedings.
5. This court follows the construction of a state statute by the highest court of the State, which is a rule of property in that State.
6. Defects in a notice of mortgage sale, not sufficient to deceive anyone, will not defeat the title acquired at the sale.

[No. 173.]

Argued Jan. 23, 1883. Decided May 13, 1883.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan, to review a judgment in favor of plaintiffs for the recovery of possession of real estate. *Affirmed.*

The facts are stated in the opinion.

Mr. Edward Bacon, for plaintiffs in error:

Prior possession is sufficient to entitle a party to recover in an action of ejectment only against a mere intruder or wrong doer, or a person subsequently entering without right.

Gamble v. Horr, 40 Mich. 585; *Farmer v. Hunter*, 45 Mich. 337; *Newton v. Doyle*, 38 Mich. 649, 650.

A single judgment in ejectment is not necessarily final for any purpose.

Rice v. Auditor General, 30 Mich. 18-14; *Busch v. Neeter*, 62 Mich. 383; *Cook v. Judge of Kent Co.* 14 West. Rep. 195; *Strother v. Lucas*, 37 U. S. 12 Pet. 410 (9:1137); *Miles v. Caldwell*, 69 U. S. 2 Wall. 85 (17:755); *Equator Co. v. Hall*, 106 U. S. 87 (27:114); *Britton v. Thornton*, 112 U. S. 535 (28:819).

The opinion must show with sufficient certainty what was decided, and nothing can be assumed in addition thereto.

Detroit City R. Co. v. Guthard, 114 U. S. 137 (29:119); *Ingraham v. Dawson*, 61 U. S. 20 How. 491 (15:984); *Supervisors v. Kennicott*, 94 U. S. 499 (24:260); *Gross v. U. S. Mortgage Co.* 108 U. S. 486 (27:798); *Adams Co. v. Burlington & Mo. R. Co.* 112 U. S. 128 (28:630); *Boyd v. Ala.* 94 U. S. 646 (24:308).

The opinion can be no estoppel in any matter where it is uncertain and ambiguous.

Russell v. Place, 94 U. S. 606 (24:214); *Campbell v. Rankin*, 99 U. S. 261 (25:435); *St. Clair v. Cox*, 106 U. S. 351 (27:223).

As to construction of opinions, see *West v. Brashear*, 39 U. S. 14 Pet. 51 (10:350); and *Northern Bank v. Porter, Trp.* 110 U. S. 615 (28:261).

There is no estoppel without final judgment. *Reed v. Proprietors of Locks and Canals*, 49 U. S. 8 How. 291 (12:1038); *City of Aurora v. West*, 74 U. S. 7 Wall. 82 (19:42); *Bucher v. Cheshire R. Co.* 125 U. S. 578 (31:796).

There are presented now here new features in the controversy concerning which the opinion of the Supreme Court of Michigan is not *res judicata*, and questions arise which were neither presented nor decided in said court and therefore are open for decision in this court.

Boyd v. Ala. 94 U. S. 646 (24:308); *Oromwell v. County of Sac.* 94 U. S. 354 (24:198); *Russell v. Place*, 94 U. S. 606 (24:214); *Forgeron v. Smith*, 2 West. Rep. 311; *Commercial Union Assur. Co. v. Scammon*, 10 West. Rep. 337; *Umlauf v. Umlauf*, 6 West. Rep. 68; *Brenner v. Coerber*, 42 Ill. 497.

There was no default, sufficient under the mortgage, to render operative its power of sale. *Albert v. Grosvenor Investment Co. L. R.* 3 Q. B. 127; *Butler v. Ladue*, 12 Mich. 180.

There was no such record as the statute required, and therefore the power of sale never became operative.

Miller v. Clark, 56 Mich. 340; *Reynolds v. McMullen*, 55 Mich. 577; *Thorp v. Merrill*, 21 Minn. 337-8; *Ross v. Worthington*, 11 Minn. 443; *Hayes v. Lientolcken*, 48 Wis. 510; *Hayes v. Frey*, 54 Wis. 512; *Wells v. Wells*, 47 Barb. 416; *Treat v. Pierce*, 53 Maine, 71.

The agreement, dated November 29, 1848, was a part of the mortgage and was never recorded.

Doyle v. Mizner, 42 Mich. 338; *Smith v. Carlington*, 8 U. S. 4 Cranch, 70 (2:553); *Bassett v.*

Hathaway, 9 Mich. 31; *Starkweather v. Martin*, 28 Mich. 478; *Pope v. Outler*, 94 Mich. 150; *Shelden v. Warner*, 45 Mich. 638-641; *Sinclair v. Lawson*, 44 Mich. 125; *Gale v. Morris*, 29 N.J. Eq. 226; *Farmers & Mechanics Bank v. Bronson*, 14 Mich. 371; *Peck v. Mallams*, 16 N. Y. 519, 520; *Jacobs v. Miller*, 50 Mich. 127; *Hinchman v. Town*, 10 Mich. 514, and cases there cited; *Roadick v. Schall*, 99 U. S. 250 (25: 339); *Hervey v. R. I. Locomotive Works*, 98 U. S. 672 (23: 1004).

The notice of the mortgage sale must be signed by the party giving the notice.

Miller v. Hull, 4 Denio, 107; *Treat v. Pierce*, 58 Me. 71; *Olcott v. Robinson*, 20 Barb. 148; *Burnet v. Denniston*, 5 Johns. Ch. 35; *Hayes v. Lienlokken*, 48 Wis. 510; *Abbot v. Banfield*, 43 N. H. 155.

Foreclosure proceedings must conform to the statute.

Walker v. Whitehead, 88 U. S. 16 Wall. 314-317 (21: 357); *Cargill v. Power*, 1 Mich. 369; *Brine v. Ins. Co.* 96 U. S. 627 (24: 858); *La. v. New Orleans*, 102 U. S. 203 (23: 182).

Mr. John E. More, for defendant in error: The regularity of the foreclosure proceedings cannot be questioned.

M'Keen v. Delaney, 9 U. S. 5 Cranch, 22 (3: 25); *Elmendorf v. Taylor*, 23 U. S. 10 Wheat. 152 (6: 239); *Sumner v. Hicks*, 67 U. S. 2 Black. 532 (17: 355); *South Ottawa v. Perkins*, 94 U. S. 260 (24: 154); *Brine v. Ins. Co.* 96 U. S. 627 (24: 858); *Conn. Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51 (27: 648); *Equator Co. v. Hall*, 106 U. S. 86 (27: 114).

In statutory foreclosures, the requirements of the law must be substantially complied with.

Niles v. Ransford, 1 Mich. 388, 342; *Lee v. Mason*, 10 Mich. 408; *Doyle v. Howard*, 16 Mich. 261; *Sandford v. Flint*, 24 Mich. 26; *Dodge v. Brewer*, 31 Mich. 227; *Grover v. Fox*, 36 Mich. 461, 466; *Lee v. Clary*, 38 Mich. 223; *Mich. State Ins. Co. v. Soule*, 51 Mich. 312; *Miller v. Clark*, 56 Mich. 387.

A fact or controversy once decided by a competent tribunal cannot be re-examined by another court of concurrent jurisdiction in a suit between the same parties or their privies.

Bank of U. S. v. Beverly, 42 U. S. 1 How. 184, 148 (11: 75, 81); *Aspden v. Nixon*, 45 U. S. 4 How. 467, 497 (11: 1059, 1078); *Hopkins v. Lee*, 19 U. S. 6 Wheat. 109 (5: 218); *Lessee of Parrish v. Ferris*, 67 U. S. 2 Black. 606 (17: 317); *Wilson v. Deen*, 121 U. S. 525 (30: 980).

Mr. Justice Lamar delivered the opinion of the court:

This is a suit in ejectment, brought in the court below by the defendant in error, a Wisconsin corporation authorized by the laws of that State to purchase and hold real estate, against the plaintiffs in error, citizens of Michigan, to recover possession of certain real estate in the City of Niles, in the last named State, together with damages for its retention.

The defendants pleaded the general issue. The case was tried by the court without the intervention of the jury, which, by the written request of counsel for defendants, made a special finding of facts in accordance with §§ 649, 700 of the Revised Statutes of the United States, and, upon such findings, rendered judgment

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in favor of the plaintiff. This writ of error is brought to review that judgment.

The findings of the court are substantially as follows: At the commencement of this suit, the premises in controversy were valued at from \$12,000 to \$25,000, and were in the possession of the defendants, Lydia A. Bacon claiming title in fee simple, and the other defendants claiming under her as tenants, or otherwise. Solyman Waterman is the common source of title to both the plaintiff and the defendant, Lydia A. Bacon. On the 8th of May, 1849, Waterman, then owning the fee to this property and the right of possession, gave a purchase-money mortgage to one Anna H. Dickson, to secure the payment of \$1,400, payable in five equal annual installments on the 29th of November, with interest quarterly, each year. He failed to make the payments specified, the mortgage was foreclosed, and, upon such foreclosure, the premises were bid off by the mortgagee for \$684.80. The time for redemption having expired without anyone redeeming, the sheriff of the county made and executed a deed to her for the property, which was duly recorded, and she entered into actual possession thereof as such purchaser, claiming title April 1, 1855. Anna H. Dickson afterwards conveyed the premises to one Crofoot, and he, on the 20th of September, 1887, conveyed them to Edgar Reading, who entered and continued in the actual possession thereof until 1876.

On the 19th of June, 1874, Reading executed a mortgage of this property to the plaintiff to secure the payment of \$, which was afterwards duly foreclosed for failure to comply with its terms, and the property was bid in by the plaintiff. The sale was duly confirmed, and the master made and executed a deed therefor to the plaintiff on the 28th of October, 1879.

There is no controversy concerning the proceedings in equity to foreclose the Reading mortgage, nor as to the sale and conveyance of the property under the decree in that case. The contention relates to the prior foreclosure under the Waterman mortgage.

Waterman's mortgage to Anna H. Dickson, the foreclosure proceedings as to which are claimed by defendants to have been illegal and invalid, contained the usual power of sale upon default of any part of the sum thereby secured to be paid; and, at the time of the foreclosure thereof, there was due and unpaid thereon \$664.50, and no proceeding at law had been commenced to recover any part of the debt.

The statutes of Michigan provide that "Every mortgage of real estate containing therein a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement in the cases and in the manner hereinafter specified." It then specifies, among other things, that the mortgage must have been recorded, and that a notice that the same will be foreclosed by a sale of the mortgaged premises shall be given by publishing it for twelve successive weeks, at least once in each week, in a newspaper printed in the county where the premises are situated, which notice shall specify: (1) The names of the mortgagor and mortgagee; (2) the date of the mortgage and when recorded; (3) the amount

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claimed to be due thereon at the date of the notice; and (4) a description of the mortgaged premises. 2 Compiled Laws of 1871, §§ 6912, 6913, 6914, and 6915.

December 18, 1852, Anna H. Dickson caused notice that the mortgage from Solyman Waterman to her would be foreclosed, by a sale of the mortgaged premises, describing them, to be published in *The Niles Republican*, a newspaper published in the county where the premises are situated. The day of sale fixed in the notice was March 15, 1853. That notice, as printed, is dated "Dec. 28, 1852," ten days subsequent to the date of the first publication thereof. It describes the mortgage as having been given "by Solyman Waterman to Anna H. Dixon, both of the Village of Niles, in the State of Michigan," and "dated the eighth day of May, 1848;" whereas, the real date of the mortgage is 1849 and the real name of the mortgagee is "Dickson." Again, as then published, the notice is signed "Anna H. Dixon, mortgagee." With such mistakes, it was published once in each week for three successive weeks; then "Dixon" was changed to "Dickson" where the name is appended to it. With no other change it was published the fourth, fifth and sixth weeks. The seventh publication was made January 29, 1853, when the name appended to it read "Dickens." It was then published weekly till February 12, 1853, on which day's publication the final letter "e" in the word "mortgagee," appended to the signature, disappeared. No other changes occurred. It was then published, for and including the remainder of the period of twelve successive weeks, once in each week in said newspaper.

The notice stated correctly the day when, and the book in which, the mortgage was recorded, and also the sum due thereon. The sale took place at the time specified in the notice. The mortgage had been duly recorded prior to the commencement of the foreclosure proceedings; but neither an agreement referred to in the body of the mortgage as having been made between the parties thereto on the 29th of November, 1848, adopted and made a part of it, nor the bond mentioned therein had been recorded. There is a stipulation in the mortgage giving the mortgagor a right to pay any sum not exceeding \$1,000 of the \$1,400 there by secured, at any time before the last installment should become due, by a bond and mortgage well securing such sum on other real estate in the Village of Niles.

August 25, 1868, Waterman commenced an ejectment suit in the Circuit Court of Berrien County, Michigan, against Reading, to recover possession of the premises, to which suit Reading appeared and pleaded the general issue. That suit was once tried in 1880, resulting in a judgment in favor of Waterman, but on error the Supreme Court of the State reversed that judgment, and remanded the cause for a new trial (46 Mich. 107); and the same was pending and undetermined in the Circuit Court of Berrien County at the time this suit was commenced. On the 16th of October, 1880, Waterman, for the consideration of \$800, conveyed to the defendant, Lydia A. Bacon, all his right and title to the premises in dispute. Under that deed she claims title herein.

The assignments of error may all be reduced

to one proposition, viz.: The findings of the court upon the facts in the case do not support the judgment.

To support the judgment it is only necessary that the findings should show possession by the defendants, and title and right of possession in the plaintiff. There is no question but that they show that the defendants were in possession of the premises at the time the suit was commenced. There is no privity between the parties to the suit, and the only question for consideration, therefore, relates to the title the plaintiff has to the property. It is insisted by the plaintiffs in error that that title is invalid, because the foreclosure proceedings in the matter of the Waterman mortgage were not in accordance with law, and were fatally defective in at least three particulars, viz.:

(1.) The mortgage was not "duly recorded" so as to warrant a foreclosure by advertisement under the power of sale, for the reason that the agreement of November 29, 1848, which is referred to and in all its terms and conditions adopted and made part of the mortgage was not recorded.

(2.) The power of sale contained in the mortgage was not operative between December 1, 1852, and April 1, 1853.

(3.) The notice under which the sale was made was irregular, defective and illegal.

The first of these propositions cannot be sustained. The registry statutes of Michigan provide that "Every conveyance of real estate within this State hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded." How. Stat. §§ 5688 and 5674 to 5677, inclusive, prescribe the manner in which such recording should be done.

The object of recording the mortgage is to give notice to third persons. The rule is well nigh universal in the United States that, as between the parties thereto, the mortgage is just as effectual for all purposes without recording as it is with it. *Jones on Mortgages*, §467. That is the rule in Michigan. *Sloan v. Holcomb*, 29 Mich. 153.

The condition in the mortgage which, it is claimed, prevented the power of sale from being operative at the time the sale was made, when read in connection with the rest of the instrument, means simply this: That if, at the expiration of the time limited for the payment of the five installments and the interest thereon, the mortgagee had not foreclosed for the accrued installments, and there should still remain due on the mortgage a sum not greater than \$1,000, the mortgagor might have the privilege of paying the amount due by giving his note therefor, secured by mortgage on other real estate in the City of Niles. That privilege, however, did not prevent the installments from falling due at the times stipulated, nor prevent a sale of the property, under the other terms of the mortgage, to satisfy them when they fell due. True, the mortgagor might have stopped the sale by insisting on the terms of the stipulation in the mortgage and complying with the obligations resting on him. It was his privilege to have

done so. But that privilege could have been waived, and the rights held under that stipulation lost by failure to assert them.

Even granting that the mortgagor had the right of insisting on the terms of the stipulation at any time before the date fixed for the fifth installment to become due, notwithstanding the sale before that time, it is not apparent how anyone but the purchaser at the sale could be heard to complain, since no one else could be injured. For, under these circumstances, the sale which purported to be absolute, with only the right to redeem within the statutory period attaching thereto, would have a still further condition limiting it, viz.: Be subject to annulment and rescission at any time before the expiration of the period mentioned in the stipulation. But the proposition which we have assumed does not arise here, for the mortgagor in this case did nothing. He neither paid nor offered to pay the installments as they came due, in cash, nor did he pay or offer to pay them by giving his note secured by mortgage on other real estate in the City of Niles, at any time before the sale of the property, or at any time thereafter. But, on the contrary, he stood by and allowed the property to be sold, saw the sheriff's deed executed for it, and never attempted to redeem. Afterwards, the purchaser at the sale, who, it happens, was the original mortgagee, took possession of it. It is not until 18 years after that event, when the property has increased in value many fold by improvements thereon and the natural rise in the value of real estate attendant upon the growth of the city, that he seeks to regain possession of the property by bringing a suit in ejectment.

It would be going too far to hold that, after all these laches, he or his assigns can defeat the title acquired at the mortgage sale and transmitted to the plaintiff, by setting up any supposed irregularity in the foreclosure proceedings. The time to have asserted any rights that he possessed under and by virtue of the stipulation incorporated in the mortgage was limited by the terms of that instrument. And by failing to assert them within that time, allowing the sale to go on, and that time to elapse, he and his assigns should be estopped from setting up any claim to the property in question.

With reference to the third reason assigned for the illegality of the foreclosure proceedings, we do not think much need be said. The Supreme Court of Michigan, in *Reading v. Waterman*, 46 Mich. 107, in passing upon this identical question, held that, so far as the notice of sale and the sale itself were concerned, there were no defects sufficient to defeat the title acquired at that sale. As the question involved the legality of proceedings provided for by the statutes of the State, and is thus a question of the construction of a state statute by the highest court of the State, or, more properly, perhaps, a rule of property in that State, we would follow the ruling of the Michigan Supreme Court upon it, even though we might have some doubts upon it as an original proposition. *Sumner v. Hicks*, 67 U. S. 2 Black, 582 [17: 355]; *South Ottawa v. Perkins*, 94 U. S. 260 [24: 154]; *Brins v. Insurance Co.* 96 U. S. 627 [24: 868]; *Connecticut Insur-*

ance Co. v. Crushman, 108 U. S. 51 [27: 648]; *Equator Co. v. Hall*, 106 U. S. 86 [27: 114]. But in our opinion that question was properly decided by that court.

Say the court in its opinion in the case referred to:

"The error in the indorsement cures itself by reference to the deed itself, from which the time of redemption could be determined at once. *Johnstone v. Scott*, 11 Mich. 282. Such a mistake was there held unimportant. The blunders which appear to have got into the notice of sale indicate very careless printing, and the changes in the different issues are not easily explained; but how far they can be allowed to defeat the sale depends on the effect they were likely to have on persons interested. Authorities are cited and arguments made on this matter which relate to proceedings which are had, of a hostile character and *ex parte*, where it is commonly held that such action, contrary to the usual course of law, and against persons who have not the common-law benefit of self-protection, should be held invalid unless conforming strictly to statutory authority. We held in *Lee v. Clary*, 88 Mich. 228, that statutory foreclosures did not come in all respects within the same mischief. The statutes regulating them are made to enlarge, and not to cut down, the rights of mortgagors. Before such statutes were passed, sales made under a power of sale contained in the mortgage were governed by the same rules applicable to the sales under any other power; and courts, in the absence of statutes, have never applied to such powers any such technical rules as would impair the security of purchasers. The power is part of the contract, and should be construed on principles applicable to contracts and not as a hostile process.

"The statutes were intended to prevent surprise or unfairness, and they should be enforced in everything substantial. Courts cannot disregard any of their positive provisions. But, on the other hand, those provisions cannot be enlarged or unreasonably construed, so as to render mortgage sales unsafe, or to make bidding hazardous. The law was designed to encourage and not to destroy recourse to these simple and cheap remedies; and while no substantial right should be disregarded, substantial regularity is all that should be held imperative.

"The only things absolutely required in the notice of sale are the names of the parties, original or by assignment, the date of the mortgage and of its record, the amount claimed to be due, and a description *substantially* agreeing with that in the mortgage. In the present case the body of the notice contained the name of the mortgagor, but the mortgagee was named therein 'Dixon,' and not 'Dickson.' These names, however, are the same in sound, and legally identical unless shown to refer to two different persons. Here the name of Mrs. Dixon was referred to as mortgagee, and the mortgage itself removed any such possibility of error. The name signed to the notice was shifted by some accident to the types, but as the notice showed the foreclosure was on behalf of the original mortgagee, no harm could come from such a manifest slip, which could

mislead no one. The notice was first published December 18th, but was dated December 28th. This was also of no account, as the error was palpable. The day of sale was properly given and the publication full. The notice gave the date of the mortgage once correctly and once incorrectly. The date and place of record and the volume and page were also given accurately. It was manifest on the face of the notice that one of these dates was wrong, and the means of correction were given by the record. It is indeed suggested that the date given correctly as 1849 refers to the bond, and not to the mortgage, which is mentioned as of 1848, the days of the month corresponding. This does not strike us forcibly, for it would not be likely that a mortgage given one year would refer to a bond not made until a year after. It is not to be supposed that purchasers under foreclosure sales look at the dates of instruments without consulting the records to ascertain the state of the title. The information given by this notice directed every one immediately to the record, and that necessarily explained the true date of the two dates set out in the notice itself. We cannot imagine that anyone could be deceived by the imperfection."

The reasoning of the Michigan Supreme Court, in our opinion, is sound and its conclusion correct.

There are no other features of the case that call for extended discussion or even special mention.

Upon the whole case, we think the judgment of the court below was correct, and it is, accordingly, affirmed.

J. PIERPONT MORGAN, *Ptff. in Err.*,

v.
THOMAS STRUTHERS.

(See S. C. Reporter's ed. 246-257.)

Contract to purchase stock—right of stockholder to sell—right of corporation to release stockholder—security for shares.

1. A contract, fair and honest in itself, and untainted with actual fraud, entered into by a subscriber of stock with other subscribers, to the effect that they will purchase the same, and pay to him the amount paid by him, if at a time specified he chooses to sell the same, is not contrary to public policy, and can be enforced against the party to it.
2. In a joint stock corporation, each stockholder, whether by purchase or original subscription, has the right, unless restrained by the charter or articles of association, to sell and transfer his shares, and, by transferring them, introduce others in his stead.
3. A corporation has no legal capacity to release an original subscriber to its capital stock from payment of it, in whole or in any part.
4. But such subscriber has a right to make any arrangement for the security of his shares, provided he does not lessen the amount of his subscription, which constitutes a part of the trust fund in which all the subscribers have an equal interest.

[No. 234.]

Argued March 29, 1889. Decided May 13, 1889.

NOTE.—Contracts void as against public policy or as illegal. See 4 Peters, 7 L. ed. 825.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania, to review a judgment in favor of defendant in an action to recover for a violation of an agreement to purchase certain stock of plaintiff within a certain time if he shall desire to sell the same at the price paid for it by him with interest. *Reversed.*

The facts are stated in the opinion.

Mr. John Dalzell for plaintiff in error.

Messrs. R. Brown, W. M. Lindsay and George Shiras, Jr., for defendant in error.

Mr. Justice Lamar delivered the opinion of the court:

This is an action of assumpsit, brought in the court below by J. Pierpont Morgan, a citizen of the State of New York against Thomas Struthers and one Thomas S. Blair, citizens of Pennsylvania, to recover the sum of \$26,282.19, with interest, on a certain contract in writing, more particularly described hereafter. The defendant Blair not having been served with process, the case proceeded against Struthers alone.

The material facts in the case are substantially as follows: In the year 1878, Thomas Struthers, Thomas S. Blair and Morrison Foster were the owners of certain patents for the manufacture of iron and steel, and also of certain real estate and works erected thereon, to be used for such manufacture, situated in Pittsburgh, Pennsylvania. They then procured an incorporation under the laws of the State of New York, in the name of the "Blair Iron and Steel Company," with a capital of \$2,500,000, divided into 25,000 shares of \$100 each, the stock being paid up in full by a transfer to the company of the patents and the works at Pittsburgh. The entire amount of the capital stock was issued to the incorporators on or about April 12, 1878. With a view of raising a working capital, Blair, Struthers and Foster had issued the following prospectus:

"NEW YORK, January 20, 1878.

"The capital stock of the Blair Iron and Steel Company is 25,000 shares, of \$100 each, \$2,500,000. This capital has been paid up by the transfer of the patents for the Blair process and the works at Glenwood, Twenty-third Ward of Pittsburgh, Pa., to the company (the deed for the Glenwood property to be made as soon as an empowering Act can be obtained from the Pennsylvania Legislature, which we have bound ourselves to procure), and the whole stock of said company issued to us in payment thereof. We have agreed to place in the hands of General A. S. Diven, as trustee, 9,000 shares of this stock, to be used as working capital for the company, subject to the order of the board of trustees of said company, except \$50,000 of the proceeds thereof first to be paid to us by said trustee. The trustees of the company have, with our consent, ordered a sale of 6,000 of said shares, for the purpose of raising a present working capital, and paying said \$50,000, the minimum price to be \$50 per share; and said trustee with the approbation of the board of trustees, now offers said 6,000 shares at said minimum price of \$50 per share, to be paid for as follows, viz., one third part thereof as soon as the whole 6,000 shares shall be subscribed for, and the remainder in such

installments as the board of trustees may call for the same for the purposes of the business, the certificates to be delivered when the whole shall be paid.

"THOMAS S. BLAIR.

"T. STRUTHERS.

"MORRISON FOSTER.

"By his attorney T. STRUTHERS."

"We, the undersigned, hereby subscribe to the number of shares of the above six thousand shares set opposite to our names, respectively, to be paid for according to the terms above set forth; but this subscription not to be binding until the whole six thousand shares shall have been reliably subscribed."

A number of persons subscribed to this paper without any other condition; but Morgan, the plaintiff, demanded and obtained from the promoters of the enterprise a further stipulation or agreement, the existence of which was not made known to others who signed the original paper, some before and some after Morgan, and which additional stipulation was as follows:

"Whereas, J. Pierpont Morgan has purchased four hundred shares of the stock of the Blair Iron and Steel Company, at the price of fifty dollars per share, and sold by A. S. Diven, trustee of said company: Now we, the undersigned, in consideration of one dollar to us in hand paid, the receipt whereof is hereby acknowledged, do hereby agree that if, at the end of one year from this date, said J. Pierpont Morgan shall desire to sell the said shares at the price paid for the same by him, we will purchase the same at that price, and pay to him the amount paid by him on the same, with interest at the rate of seven per cent per annum.

"THOS. S. BLAIR.

"T. STRUTHERS.

"New York, April 4, 1878."

At the end of the year the agreement of purchase was renewed for another year, and at the expiration of that year it was again renewed, the following agreement being entered into:

"NEW YORK, March 22, 1875.

"In consideration of the waiver by J. Pierpont Morgan of the right of election to sell to us the four hundred shares of stock in the Blair Iron and Steel Company (subscribed and paid for by him), as he was entitled to do by agreement with us in 1878, renewed and extended, by agreement of 1874, to April 4, 1875, we do hereby agree that his right to do so shall be extended for another year, viz., to April 4, 1876. If he shall at that time elect to sell to us the four hundred shares so subscribed and held by him, we will receive and pay for the same the amount paid by him therefor, with interest at the rate of seven per cent per year from the date of the payment by him of the respective installments thereon; and, as collateral security for the performance by us of this our agreement, we have placed in the hands of Joseph W. Drexel, Esq., four hundred shares of the stock of the said Blair Iron and Steel Company to be held by him in trust for that purpose.

"T. STRUTHERS.

"T. S. BLAIR."

On the 20th of March, 1876, Morgan notified
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Blair and Struthers that he desired to avail himself of the terms of the agreement entered into between them, and on the 4th of April of that year tendered them the stock referred to in the agreement.

The defendants having failed and refused to comply with the terms of the contract of repurchase, Morgan, on the 1st of March, 1882, brought this action, averring in his declaration the foregoing facts. The defendant in his answer admitted the making of the contract declared upon, and all the facts alleged by the plaintiff in support of his claim; but set up, by way of defense, two propositions, either of which he claimed was sufficient to defeat the plaintiff's case, viz.:

First. The contract sued on was invalid, and against public policy, because made secretly with one of a number of persons who had subscribed together, upon the same express terms and conditions, for stock in a manufacturing corporation, whereby the plaintiff had sought to procure to himself an advantage withheld from the other subscribers; and

Second. The defendant is not precluded from setting up the invalidity of such contract because he was a party to it.

The case was tried by a jury, which, under instructions from the court, found in favor of the defendant; and judgment was rendered accordingly. To reverse that judgment this writ of error is prosecuted.

Several exceptions were taken during the progress of the trial, to the rulings of the court in excluding evidence offered by the plaintiff, to its refusal to give instructions requested by the plaintiff, and to its general charge to the jury, which are embodied in twelve assignments of error. It is not necessary to discuss them *seriatim*, as the main contention relates to the correctness of the instructions given by the circuit court to the jury. In order to determine the principle on which the instructions rest, it will be useful to ascertain the points incidentally connected with the case about which there is no dispute.

First. It is conceded, and the court so charged the jury, correctly, as we think, that the contract made by Morgan with Struthers touching the repurchase of the stock, standing by itself, was a perfectly fair and honest one, in which there was no vice inherent that would relieve the person making it from its obligation. If, therefore, its validity or binding force is impaired, it must be because of its extrinsic effect by reason of the relations of the parties to the other stockholders in the corporation.

It is also conceded that, as to these stockholders, no actual fraud or deceit was practiced in the making of the contract sued upon. This is virtually the ground upon which the court refused to admit evidence offered by the plaintiff for the avowed purpose of showing the good faith of the transaction as to the other subscribers. It said:

"It is not necessary for the defendants, to sustain their defense, to show actual fraud. If the tendency of such things is to operate as a fraud upon others, that is the basis of the rule."

It is also a fact, undenied and undeniable, that the plaintiff strictly complied with all the terms and stipulations expressed in the prospectus.

tus, and in the contract of subscription, by paying into the treasury of the corporation the entire amount of his subscription.

It should also be considered as conceded—for there is nothing in the pleadings, nor in the evidence, nor in any of the rulings of the court, nor in the argument of counsel, to the contrary—that he did not enter into any secret agreement with the corporation or any other person that he should not be required to pay the amount he had subscribed. And, finally, the court more than once gives strong intimation that there is no reason in equity, justice or fair dealing, why the defendant should not be made to comply with his obligation.

On the other hand, it is conceded that the contract sued on was a collateral, optional contract, made at the time of plaintiff's subscription, which constituted the inducement to it, and was not made known to all the other subscribers to stock.

The only question, then, presented for our consideration is, whether the collateral contract, perfectly fair and honest in itself, and untainted with any actual fraud upon any person, entered into by a subscriber of stock with other subscribers, to the effect that they will purchase the same, and pay to him the amount paid by him, if at a time specified he chooses to sell the same, is contrary to public policy, and cannot be enforced against the party to it. Upon this question the view of the court below is stated very explicitly. It says:

"If others of the subscribers to the stock were not informed of the fact that plaintiff had obtained said agreement as a condition or part of his agreement to subscribe for the said stock, and that the existence of such accompanying agreement was not made known to others of said common subscribers, this said agreement was in the eye of the law a fraud upon the other subscribers who did not receive and were not informed of the existence of such agreement, and was contrary to the policy of the law, and the plaintiff cannot recover."

Again, in his general charge he repeats: "Whatever may be our own views as to the honesty of such an attempt to defeat the enforcement of an honest contract, that is a consideration which you or I have nothing to do with. If you find that the beneficial arrangement set up and sought to be enforced in this suit was not made known to all the subscribers to that stock, and they were not afforded an opportunity to avail themselves of like security, that arrangement was void, and cannot be enforced."

We cannot concur in this conclusion. We are not prepared to affirm that there is a public policy which operates such a restraint upon the transfer of stock in a corporation as to render the contract in question, conceded to be valid and fair in itself, fraudulent as to the co-subscribers with the plaintiff for the 6,000 shares sold by the company, and to render it invalid against the party to it, who, it is admitted, has no equity or justice in his favor.

Nor do we assent to the proposition upon which this conclusion rests. That proposition is, that when a man purchases or subscribes to shares of stock in an incorporated joint stock company, there is upon him, in addition to the

express terms of the subscription contract, an implied obligation, incident to the common enterprise, which restrains him from making any engagement with other individuals to secure his own stock against risk, unless the other subscribers are informed of it and put upon an equal footing as to such security.

One essential feature of an incorporated joint stock company is the right of each stockholder, without restraint, to sell or transfer his shares at pleasure. Thompson, *Liability of Stockholders*, § 210, and cases there cited. So well established is this right that a by-law of a bank putting restrictions upon the transferability of stock in the hands of its members has been held void as being in restraint of trade. *Moore v. Bank of Commerce*, 52 Mo. 377. Even where the charter gives the corporation the power to regulate transfer of stocks, it has been held that this power does not include the authority to restrain transfers. *Chouteau Spring Co. v. Harris*, 20 Mo. 382, citing 10 Mass. 476, and numerous other authorities.

Counsel for defendant urges that notwithstanding this right to make an absolute sale of his stock belongs to each subscriber, the policy of the law forbids one of them, whose act of subscription may be held out as an inducement for others to subscribe, from making a contract of future sale with a view to secure his investment; and renders such a contract void, because many co-stockholders "may have been chiefly induced to subscribe by a knowledge that so prominent and successful an operator was willing to risk his money in such an adventure; and who, had they been told that he had exacted a private security or guaranty which availed to give him the benefit of both the experiment in business and of getting back his money with interest, if it did not succeed, would assuredly either have refused to subscribe, or have demanded a similar guaranty. Moreover, they had a right to suppose that the new firm was to have the countenance of Mr. Morgan, and probably his assistance in the future." This is a palpable misconception of the nature of the transaction. There was nothing in the prospectus, or in the subscription contract, or in the nature of the enterprise, to justify such a presumption or expectation on the part of the other stock subscribers. It is just in this respect, especially, that an incorporated joint stock company differs from an ordinary copartnership. In the latter, the individual members of the firm are presumed to, and in general actually do, contribute to the common enterprise, not only their several shares of partnership capital, but also their individual experience, skill, or credit, no member having the right to sell out his interest or to retire from the firm without the consent of the copartners; and if he does either, the act amounts to a dissolution of the partnership. Principles of Partnership, Parsons, § 171. The very reverse, as we have said, is the case of a joint stock corporation, in which each stockholder, whether by purchase or original subscription, has the right, unless restrained by the charter or articles of association, to sell and transfer his shares, and, by transferring them, introduce others in their stead.

It is also urged that "The other subscribers had a right to presume that Mr. Morgan went

into the common enterprise upon the same terms with themselves." This proposition is true so far as those terms are prescribed in the charter, the prospectus, and the contract of subscription; but it is also true that each of those stockholders had the equal right to sell, or agree to sell, that stock whenever and to whomsoever he chose, such stock being personal property, and subject to any disposal he might choose to make of it; and that this right belonged none the less to Morgan, on account of his prominence and known skill as an operator, than it did to any other member of the corporation.

We have read with care all the authorities cited by counsel for defendant in error to support the claim that the contract in question is, in the eye of the law, fraudulent and void. Those which relate to contracts connected with subscriptions of stock are simply illustrative, in different forms, of a doctrine settled in a great number and variety of decisions, that a corporation has no legal capacity to release an original subscriber to its capital stock from payment of it, in whole or in any part; and that any arrangement with him by which the company, its creditors, or stockholders, shall lose any part of that subscription, is *ultra vires* and a fraud upon creditors and the co-subscribers. *Burke v. Smith*, 88 U. S. 16 Wall. 390, 895 [21: 361, 868]; *Bedford R. Co. v. Bowser*, 48 Pa. 29; *Green's Brice, Ultra Vires*. This doctrine rests upon the principle that the stock subscribed, both paid and unpaid, is the capital of the company, and its means of carrying out the object for which it was chartered and organized. All these cases fall within this principle. In each of them the agreement declared void, had it been carried out, would have diminished the common fund, which is a trust fund for the benefit of the general creditors of the corporation, the stockholders, and all others having an interest therein, and would have been violative of the terms upon which the subscriptions had been expressly made, and under which the trust originated. The corporation would have been damaged in its capital by the loss of the subscriptions, and the co-subscribers would have been damaged by the lessening of their common trust fund. As we have seen, no feature of damage to the corporation, actual fraud, or violation of contract, exists in this case. The contract sued on, if specifically carried out, would have simply resulted in what all agree lay within the power of each subscriber at the time of making his subscription—a transfer of his stock and the introduction of other stockholders in his stead.

Counsel for defendant has cited cases of composition between an insolvent debtor and his creditors, where one creditor has secured, by a secret arrangement, either with the insolvent or some other person, terms more favorable to himself than the composition agreement provided for all of the other creditors joining therein. In the English cases the doctrine is carried to the fullest extent, that such secret arrangements are utterly void, even as against the party with whom the arrangement was made. The American decisions, whilst perhaps not going to the extent of the English decisions, clearly assert the illegality of such arrangement. 1 Story, *Equity Jurisprudence*, §§ 378, 379; *White v. Kuntz*, 107 N. Y. 518 [9 Cent. Rep. 181 U. S.

911]. But we think that the analogy between the cases of composition agreements and those of stock subscriptions is remote, and that the decisions as to the former are not applicable to this case.

The relations of composition creditors, either to the insolvent's estate or to each other, are widely different from those which stock subscribers bear to the corporation and their co-subscribers. Upon the failure or insolvency of a debtor, his creditors stand together in a common relation of claims, proportionate to their amount and grade, upon an interest in his (the insolvent's) estate. "The purport," says *Mr. Justice Story*, "of a composition or trust deed, in cases of insolvency, usually is, that the property of the debtor shall be assigned to trustees, and shall be collected and distributed by them among the creditors, according to the order and terms prescribed in the deed itself. And, in consideration of the assignment, the creditors, who become parties, generally agree to release all their debts beyond what the funds will satisfy." 1 Story, *Equity Jurisprudence*, § 378. It is clear that any secret bargain by which one of these creditors obtains more than the composition deed gives, and more than he agrees under it to take, violates the equality which is the basis of the deed of settlement, and operates a gross fraud upon the creditors—a fraud which the law, in its policy of precaution rather than by mere remedial justice, suppresses by depriving the parties of the fruit of their clandestine arrangements.

It is not necessary to restate the widely different basis of the relation of stock subscribers to a joint stock corporation and to each other, where each subscriber acts for himself, in the act of subscription with the unrestricted right, in the exercise of vigilance and foresight, to make any arrangement for the security of his shares, provided he does not lessen the amount of his subscription, which constitutes part of the trust fund in which all the subscribers have an equal interest.

We think this case perfectly clear on principle. We cite, however, as persuasive authority in support of our conclusion, the decision in *Meyer v. Blair*, 109 N. Y. 600 [12 Cent. Rep. 653], in which a contract identical in every material particular with the one we are considering, made between Blair and Struthers and Meyer, a subscriber to the 6,000 shares of stock was considered by the Court of Appeals of the State of New York, and held valid and binding upon the parties to it. In that case the court says:

"The present case[is] not, we think, within the principle of the stock subscription cases, or the cases of composition, to which reference has been made. The main object of the company in offering the stock for sale was to secure 'working capital,' as is shown by the prospectus. This object was known to the subscribers. If the subscription of the plaintiff was a pretense merely, or if the subscription had been accompanied by a secret agreement between the plaintiff and the company that he should be relieved from the subscription, or by which the terms of the purchase were materially changed to the disadvantage of the company, and for the advantage of the plaintiff, there

might be ground for applying the rule declared in the subscription cases, and declaring the transaction to be a fraud on the other subscribers. . . . But there was no agreement between the company and the plaintiff, secret or otherwise, direct or indirect, except the agreement contained on the face of his subscription. The plaintiff, by his subscription, became bound to the company to take the shares subscribed for, and this agreement has never been discharged, or in any way impaired. The plaintiff remained bound by his subscription, notwithstanding the agreement with the defendants, as fully and completely as though the agreement with the defendants had never been made. Nothing has occurred to change, qualify or limit his obligation to the company. The company sold the shares to secure 'working capital.' . . . The defendants were interested in setting the company afoot. They were the principal holders of its stock. . . . They sought out the plaintiff. On his declining at first to subscribe to the stock of the company, they offered him the inducement that they would take the stock off his hands within a year, at cost price, if he desired it. It appears that the same inducement was offered to other subscribers, but not to all. We think there was nothing illegal in the arrangement."

The conclusions to which we have come on the questions discussed dispense with any consideration of the other point presented by the plaintiff in error, viz., that the defendant should be estopped from setting up the invalidity of the contract sued on because he is a party to it. For, as we have found the contract valid and legal, the question of estoppel does not arise.

For the foregoing reasons, the judgment of the court below is reversed and the cause remanded, with instructions to grant a new trial and to take such further proceedings as shall be consistent with this opinion.

So ordered.

EDWARD M. STICKNEY ET AL., *Appts.*,
v.

JEANNIE K. STICKNEY.

(See S. C. Reporter's ed. 227-240.)

Married women, rights of property—gift to husband not presumed—husband, in absence of contract, presumed to hold wife's property, as trustee for her—possession by him, no proof of title—evidence.

1. By the Married Woman's Act of April 10, 1889 (chap. 23, 16 Stat. at L. 45), in the District of Co-

NOTE.—*Husband and wife—Dealings between—Gifts from one to the other—Evidence of—Separate property of married women—When husband accountable for wife's money, or property, which he has reduced to possession—Statute of Limitations.*

The intimacy of the relation of husband and wife is such, and acting as agent for each other so habitual, that the possession by one of the movables of another, as the possession by a husband of a bond belonging to his wife, is very slight, if any, evidence of a gift or transfer, and not enough to transfer the burden of proof. *Bachman v. Killinger*, 55 Pa. 418; 1 Bish. Mar. Wom. § 732; *Cox v. James*, 45 N. Y. 557, affirming 50 Barb. 144; *Abb. Tr. Ev.* 160.

Declarations made by the husband, at the time

lumbia, a married woman becomes as absolute owner of her separate property as though she were unmarried, and should have the same protection, through her own evidence, as a *feme sole*; and she may testify to directions to her husband to invest her moneys in her name.

2. Since the passage of the Married Woman's Act, there is no presumption that a married woman intended to give to her husband the moneys she placed in his hands, any more than a gift would be inferred from a third person who in like manner deposited money with him.
3. Whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him.
4. The mere possession of it by the husband is no proof that the title has passed from the wife to him. After it has been shown that the property accrued to the wife by descent from her father's and brother's estates, the presumption necessarily is that it continued hers.
5. In such a case it lies upon one who asserts it to be the property of the husband to prove a transmission of the title, either by gift or contract for value.

[No. 243.]

Argued April 9, 10, 1889. Decided May 13, 1889.

APPEAL from a decree of the Supreme Court of the District of Columbia, that William Stickney, complainant's husband, was justly indebted to her at the time of his death in a certain sum mentioned in the decree, by reason of his having received moneys belonging to her from her father's estate and invested by him in his own name, and that said sum be paid to her out of his estate. *Affirmed.*

The husband, William Stickney, was one of the executors of Amos Kendall, the wife's father, from whose estate the money came to her, as legatee under his will.

As the money of the estate was ready to be distributed a check for a large part of it was made by the executors payable to Jeannie Stickney or bearer, which was collected by her husband and placed to his own credit. Mrs. Stickney contemporaneously gave to the executors her receipt for the amount thus paid over. The money was taken and used by her husband. The relations between Mrs. Stickney and her husband had been those of confidence and affection. The auditor, to whom the matter was referred, finds, in his report, that the proceeds of the estate coming into the hands of the executors were from time to time divided, and upon the receipts of Mrs. Stickney to them, her share was currently delivered

of giving his wife money, as to the purpose for which he gave it, and declarations as to the person for whom he was acting, made when he received a security in her favor, are competent in favor of her title. *Kelly v. Campbell*, 2 Abb. App. Dec. 492.

So his express declaration may constitute him trustee for her, as where he credits her in account with moneys given by him to her, but not actually delivered. *Crawford's App.* 61 Pa. 55; *Abb. Tr. Ev.* 172.

To prove a gift by him to her, the evidence must be clear. *Shuttleworth v. Winter*, 55 N. Y. 629; 1 Bish. Mar. Wom. § 732.

Savings from house keeping allowance, etc., not

to her husband, who used or invested the same in his own name.

The other facts are stated in the opinion.

Mr. S. S. Henkle, for appellants:

At common law all the personal property and money of the wife which was reduced to possession by the husband became absolutely his.

Towers v. Hagner, 8 Whart. 56; *Keener v. Trigg*, 98 U. S. 54 (25:88).

In equity, however, the wife might have a separate estate which was not subject to the control of the husband.

Calton v. Rideout, 1 MacN. & G. 600.

This separate estate was usually settled upon trustee for her use.

Hardy v. Van Harlingen, 7 Ohio St. 209; *Jones v. Clifton*, 101 U. S. 229 (25:910).

As to the control and disposal of the income of her separate estate she was as independent of the control of her husband as though she were *feme sole*.

Muller v. Bayly, 21 Gratt. 529; *Hardy v. Van Harlingen*, 7 Ohio St. 209.

If she permits him to receive the income, without complaint, it is evidence of her assent.

Powell v. Hankey, 2 P. Wms. 83; *Pavlet v. Delaval*, 2 Ves. Sr. 668; *Parkes v. White*, 11 Ves. Jr. 225; *Towers v. Hagner*, 8 Whart. 57.

If her money or other separate property has been received by the husband with the knowledge and acquiescence of the wife, without express promise at the time, no implied assumption will arise to support a claim against the husband or his estate.

Grocer & B. Sewing Mach. Co. v. Radcliff, 68 Md. 496; *Farmers & M. Nat. Bank v. Jenkins*,

8 Cent. Rep. 710, 65 Md. 245; *Jenkins v. Middleton*, 11 Cent. Rep. 542, 68 Md. 540; *Logan v. Hall*, 19 Iowa, 492; *Jacobs v. Healer*, 118 Mass. 157; *Muller v. Bayly*, and *Hardy v. Van Harlingen*, *supra*.

A husband may act as trustee for his wife. *Walker v. Walker*, 76 U. S. 9 Wall. 743 (19:814); *Jacobs v. Healer*, 118 Mass. 157.

Since the enabling statutes, the wife may sue in her own name even her husband, and enforce payment as against a stranger.

Emerson v. Clayton, 82 Ill. 498; *Strong v. Skinner*, 4 Barb. 555; *Monroe v. May*, 9 Kan. 473; *Drury v. Briscoe*, 42 Md. 155; *Logan v. Hall*, 19 Iowa, 491; Wells, Sep. Prop. Married Women, § 878 *et seq.* and cases cited.

The disability of a married woman being removed, the Statute of Limitations so far as her separate property is concerned, applies to her as well as to any other person.

Brown v. Cousens, 51 Maine, 805-807; *Castner v. Walrod*, 88 Ill. 176; *Wilson v. Wilson*, 36 Cal. 450.

Mr. John Selden, for appellee:

Where the wife has no other trustee, her husband becomes such, by operation of law.

Hutchins v. Dixon, 11 Md. 29; *Goer v. Owings*, 18 Md. 99.

When he obtains possession of her separate estate, whether *in invitum*, or through her consent, he holds it in trust for her benefit.

Wales v. Newbould, 9 Mich. 65-66; *Bergey's App.* 60 Pa. 416; 2 Story, Eq. Jur. § 1880; *Jones v. Clifton*, 101 U. S. 229 (25:910).

The circumstances that her means have been mingled with moneys of his own, cannot affect,

readily presumed gifts. Schouler, Dom. Rel. 242. Compare Wells, Sep. Prop. Mar. Wom. 142.

The fact that he received her property as a loan, so as to entitle her to payment among other creditors, may be proved by indirect or circumstantial evidence, without proving an express promise at or before the transaction. Wells, Sep. Prop. Mar. Wom. 237-238, 317, and cases cited; *Fliok v. Devries*, 50 Pa. 267; *Trippner v. Abrahams*, 47 Pa. 228; *Earl v. Champion*, 65 Pa. 194; *Sandford v. Weeden*, 2 Heisk. 76; *Crisman v. Crisman*, 23 Mich. 217; *Steadman v. Wilbur*, 7 R. I. 481; *Jaycox v. Caldwell*, 51 N. Y. 995.

Evidence of the husband's declarations is enough to establish a trust in her favor as against him and his personal representatives, though not as against his creditors. *Moyer's App.* 77 Pa. 498; *Alston v. Rowles*, 18 Fla. 128; *Jacobs v. Healer*, 118 Mass. 151.

The modern doctrine, since the statutes in regard to the separate property of a married woman, is that where she has a right to her property under the statute, as if sole, her husband's dealing with her funds will be presumed, in the absence of proof to the contrary, to be in the character of agent for her, and they will not be deemed to have become his property, unless he affirmatively establishes a gift or other legal transfer. *Abb. Tr. Ev.* 174; *Patten v. Patten*, 75 Ill. 446, 449; *Houston v. Clark*, 50 N. H. 432.

A wife received a banker's draft for the amount of a legacy given to her separate use. She, after having indorsed the draft, gave it to her husband, who paid it into his current account, and on the same day placed it upon a deposit account in his own name, and then showed his wife the deposit note. He died very shortly after. The widow gave evidence that she never intended to give up the control of this money. *Held*, that the executors of the husband must pay her this sum. *Green v.* 181 U. S.

Carill, 46 L. J. N. S. Ch. 477, L. R. 4 Ch. Div. 882; 4 Jac. Fish. Dig. 5704.

Where defendant, executor, alleged a gift, before a death, *held*, that the defendant held the affirmative, and that the burden of establishing the alleged gift rested upon her. *Conklin v. Conklin*, 20 Hun. 278.

The defendant, who was the widow of the intestate, testified that a few days before his death she took possession of the bonds in question, and kept continuous possession thereof until after his death, when she deposited them with a friend. *Held*, that this evidence failed to show, as between a husband and his wife, a change of the title to the bonds, or in any legal sense a change of his possession thereof, and was insufficient to establish a gift from the husband to his wife. *Idem*.

Presumption is against gift. It must be established beyond suspicion. *Id.* 280; *Grey v. Grey*, 47 N. Y. 552-556; *Walter v. Hodge*, 2 Swanst. 97; 2 Kent, Com. 444, 8th ed; *Contant v. Schuyler*, 1 Paige, 316.

The fact of the gift having been made must be clearly proved. *Jennings v. Davis*, 31 Conn. 138; *Walter v. Hodge*, 2 Swanst. 97; *Williams, Exrs.* 715; *Mews v. Mews*, 15 Beav. 529; *Contant v. Schuyler*, 1 Paige, 316 (Bk. 2, Law. ed. p. 632 and note); *Shuttleworth v. Winter*, 55-N. Y. 629; *Kenney v. Public Administrator*, 2 Bradf. 319.

Since the Act of 1843, in relation to the rights of married women, when the wife is in possession of property under claim of ownership, her rights as owner cannot be overlooked without evidence, any more readily than if she were unmarried. *Peters v. Fowler*, 41 Barb. 467.

The statute has worked this change; and instead of an adverse presumption that the property connected with a business which she carried on before her marriage, and which she claimed to own as a single woman, with the property in her possession,

as between themselves, the obligations of the trust.

Central Nat. Bank v. Conn. Mut. L. Ins. Co. 104 U. S. 54-70 (26:698-700).

By Act of Congress, April 10, 1869, § 1 (16 Stat. at L. 45), now § 727, R. S. D. C., the title of the appellee to her separate estate was rendered as absolute as if she were *feme sole*, and her estate placed, in express terms, beyond the disposal of her husband.

Hitz v. National Met. Bank, 111 U. S. 729 (28:579); *Mattoon v. McGrew*, 112 U. S. 718 (28:824).

After it had been shown that the property accrued to the wife, by descent from her father's and brother's estate, the presumption necessarily is that it continues hers.

In such a case, it lies upon one who asserts it to be the property of the husband, to prove a transmission of the title, either by gift, or contract for value. The law does not transmit it, without the act of the parties.

Grabill v. Moyer, 45 Pa. 534; *Bergey's App.* 60 Pa. 408; *Bishop v. State*, 58 Ind. 74, 75.

The husband cannot acquire the property of his wife, except by gift or purchase, any more than he can that of a *feme sole*.

White v. Zane, 10 Mich. 385; 2 Kent, Com. 438; *Boyd v. De La Montagne*, 78 N. Y. 498; *Darlington's App.* 86 Pa. 512; *Smyley v. Reese*, 53 Ala. 101; *McRae v. Battle*, 69 N. C. 106-7.

The confidence, affection, or sense of duty so readily established in all fiduciary relations, requires the transactions between persons occupying such relations to be viewed under principles essentially different from those which prevail in ordinary cases. And by a general

rule of equity, the burden of sustaining such transactions is imposed upon the fiduciary.

1 Story, Eq. Jur. § 812.

Gifts from the wife to her husband are examined by courts of chancery "with an anxious watchfulness and caution and dread of undue influence."

2 Story, Eq. Jur. § 1395; *Farmer v. Farmer*, 39 N. J. Eq. 215; *Comstock's App.* 4 New Eng. Rep. 592, 55 Conn. 222.

They are never to be inferred, without clear evidence.

1 Dan. Ch. Pr. 100, 5th Am. ed.; Wells Sep. Est. Mar. Wom. § 888.

The profits or income of her separate estate might be supposed, were there no evidence to the contrary, to have been applied to their common support.

Lyon v. Green Bay & M. R. Co. 42 Wis. 553; *Stennett v. Bradley*, 70 Wis. 280; *Reeder v. Flinn*, 6 S. C. 216; *Allen v. Allen*, 80 Ala. 180. *Lower v. Lower*, 46 Iowa, 527; Schouler, Husb. & Wife, §§ 254, 284.

His possession and use of her estate, and the length of the period for which such possession and use were continued must be viewed in connection with the relations of confidence and affection between the parties.

Sexton v. Wheaton, 21 U. S. 8 Wheat. 239 (5:808); *Darlington's App.* 86 Pa. 519; *Bank of U. S. v. Lee*, 38 U. S. 13 Pet. 118 (10:81); *U. S. Trust Co. v. Sedgwick*, 97 U. S. 808 (24:957).

The money was her own. She was not bound to rescue it from her husband, or proclaim that it was not a gift, but might properly suppose that he took it to keep for her.

Bergey's App. 60 Pa. 415; Wells, Sep. Prop.

belonged to the husband, the presumption is now in her favor, and must be overcome by the party who disputes her right or title. *Peters v. Fowler*, 41 Barb. 467.

A husband is accountable for the personal estate of the wife, secured to her separate use by a deed of marriage settlement, and which has come into his hands during the coverture, but not for interest on moneys he may have received for debts due to her. The husband is also accountable for the rents and profits of the wife's real estate, received by him; and lands purchased by him with the moneys of the wife are deemed to be held in trust for her, though purchased in his own name; and a third person to whom the husband had conveyed an estate so purchased, with notice of the manner of his acquiring it, was held to be chargeable with the trust; but the trustee is to be allowed for any beneficial and permanent improvements made by him on the estate. *Methodist Epis. Church v. Jaques*, 1 Johns. Ch. 450 (Bk. 1, Law. ed. 206 and note).

A married woman deposited U. S. Treasury notes in a bank, taking a receipt therefor, by which the bank agreed to deliver the notes to her on the surrender to it of the receipt. The notes were sold by the bank by direction of the husband, and the proceeds paid to him. After the death of both husband and wife, the wife's administrator presented the receipt of the bank, and demanded a return of the notes. Held, that in the absence of proof that the notes belonged to the husband or came to the wife in such a way as to vest title in him, it must be inferred that they were her separate property, and payment to him was no defense. *Ganley v. Troy City Nat. Bank*, 96 N. Y. 487, affirming 20 N. Y. Week. Dig. 541.

The intestate received his wife's separate property, and invested and reinvested it, and deposited

the securities, together with his own, in the joint name of himself and wife. He subsequently converted the securities to his own use, and on his death she claimed them from the estate. Held, that the presumption was, that the husband held the securities for safe keeping, and that the Statute of Limitations did not begin to run until a demand and refusal, or until after their conversion. *Brooks v. Brooks*, 4 Redf. 813.

Money of the wife, by her given into her husband's possession, presumed, even against his creditors, a loan, not a gift. *Berdell v. Berdell*, 2 Month. L. Bul. (N. Y.) 32.

Where money belonging to a wife was deposited in her name by her husband in a bank and credited to her individually in the pass book, the bank cannot justify payments to him by proving an oral agreement with him to the effect that it might be withdrawn by his checks, in her name, without showing that he had authority to make the checks. *Bates v. First Nat. Bank of Brookport*, 23 Hun, 420.

Property purchased in part with the wife's money, being claimed by the husband's creditors, held, legally and equitably the husband's but subject to the equitable claim of the wife for her money used in its purchase. *Ford v. Johnston*, 7 Hun, 568.

The closeness of the relation has induced the courts to apply strictly the laws relating to principal and agent as between husband and wife. *Comstock v. Comstock*, 57 Barb. 453; *Clancy, Rights of Women*, 347; *Hoffman v. Treadwell*, 3 Thomp. & C. 57; *Smith v. Fellows*, 9 Jones & S. 38, 47.

Transfer of wife's choses in action to husband, what necessary to establish. 1 Bish. Mar. Wom. § 111; *Nash v. Nash*, 2 Madd. 123; *Richards v. Richards*, 2 Barn. & Ad. 447; *Gaters v. Madely*, 6 Mees. & W. 423; *Brooks v. Brooks*, 4 Redf. 815.

The presumption of law is, that the wife's money

Married Women, § 889; *McLaren v. Hall*, 26 Iowa, 305; *Rodgers v. Pike Co. Bank*, 69 Mo. 564, 565.

The use and possession of property create, of themselves, no presumption of gift.

McDermott's App. 106 Pa. 367, 368.

Nor should the use, possession and management by the husband of the separate estate of the wife raise, *inter se*, the presumption of a gift.

Wells, Sep. Prop. Married Women, §§ 45, 256, 388; *White v. Zane*, 10 Mich. 885; *Grabill v. Moyer*, 45 Pa. 584; *Louder v. Louder*, 46 Iowa, 527; *Vreeland v. Vreeland*, 16 N. J. Eq. 523; *Bongard v. Core*, 82 Ill. 20, 21; *Rodgers v. Pike Co. Bank*, 69 Mo. 564; *Broughton v. Brand*, 18 West. Rep. 255, 94 Mo. 174.

Nor do they, of necessity, elsewhere subject her estate to the claims of his creditors.

Voorhees v. Bonesteel, 88 U. S. 16 Wall. 81 (21:271); *Aldridge v. Muirhead*, 101 U. S. 899 (25:1018); *Tresch v. Wirtz*, 84 N. J. Eq. 129, 30; *Holcomb v. People's Sav. Bank*, 92 Pa. 344; *Weaver v. Roth*, 105 Pa. 408; *Wheeler v. Raymond*, 180 Mass. 249.

If, while they are living together, he is permitted to take the interest or profits of the estate, it should, as between the husband and wife, raise no presumption prejudicial to her rights.

Bongard v. Core, 82 Ill. 20, 21.

The exercise by the husband of acts of apparent ownership over property belonging to his wife, is scarcely to be avoided.

2 Bish. Mar. Wom. 132; *Dean v. Bailey*, 50 Ill. 484; *Primmer v. Olabough*, 78 Ill. 94; *Blood Barnes*, 79 Ill. 488, 489; *State v. Reigart*, 1 Gill, 28; *Gover v. Owings*, 16 Md. 99.

The obligations of the husband, where the receipt and appropriation are made with the wife's knowledge and acquiescence, are always founded on an agreement by the husband to repay the money or property so appropriated.

Edelen v. Edelen, 11 Md. 420; *Kuhn v. Stansfield*, 28 Md. 215; *Hill v. Hill*, 88 Md. 185; *Tyson v. Tyson*, 54 Md. 88; *Jenkins v. Middleton*, 11 Cent. Rep. 542, 68 Md. 540; *Reeder v. Plinn*, 6 S. C. 216; *McLure v. Lancaster*, 24 S. 281, 282; *Hackett v. Shuford*, 86 N. C. 144; *Morris v. Morris*, 94 N. C. 616, 617.

Delivery and intention are essential to the creation of such gifts of personal property as may be lawfully made between husband and wife.

Marshall v. Jaquith, 184 Mass. 188; *Williams v. King*, 48 Conn. 572, 573; *Comstock's App.* 4 New Eng. Rep. 592, 55 Conn. 222.

Where, by virtue of the marital relation, the husband is empowered to acquire title to the property of the wife, he must do some act evincing a clear intention to make the property his.

White v. Waite, 47 Vt. 508; *Perry v. Wheelock*, 49 Vt. 67; *Moulton v. Haley*, 57 N. H. 184; *Newton v. Taylor*, 82 Ohio State, 414; *Hicks v. Skinner*, 71 N. C. 539; *Bergey's App.* 60 Pa. 417; *Moyer's App.* 77 Pa. 484; *Patten v. Patten*, 75 Ill. 451, 452.

In what the husband did, there was no intent to appropriate the money to himself.

Tresch v. Wirtz, 84 N. J. Eq. 129.

He will stand as her debtor for the amount received.

Young's Est. 65 Pa. 104, 105.

A gift of this nature, if established by proof,

remains her own after her husband has taken it into his possession, and that he holds it for her use and benefit. His holding must be deemed to be in trust, and the Statute of Limitations does not begin to run until from the time of a demand. *Hileman v. Hileman*, 85 Ind. 1.

Considering the confidential relations of husband and wife, the mere receipt of her money or property by him is but slight, if any, evidence of a gift. An intention on her part to divest her right to it by gift should be made to appear. *McNally v. Weld*, 30 Minn. 209.

Where a husband deposits his money in a bank, and takes a receipt in his wife's name, this does not constitute a donation to his wife, but the money remains community property, and subject on his death to be administered as belonging to his estate. *Wellborn v. Odd Fellows Bldg. & Exch. Co.* 56 Tex. 501.

A husband deposited money in a savings bank in the joint names of himself and wife. There was no proof of a delivery and no evidence of a gift beyond the fact that he once said that he would have no more to do with it. *Held*, that the deposit was not hers. *Schick v. Grote*, 5 Cent. Rep. 829, 42 N. J. Eq. 352; *People v. State Bank*, 36 Hun, 607.

While a married woman may make a gift to her husband, her intention to do so must clearly appear. *Farmer v. Farmer*, 39 N. J. Eq. 211.

Where a wife deposited money of her husband, consisting mainly of her own earnings, in a savings bank, in her own name, without his knowledge—*Held*, not a gift but to belong to the husband. *McDermott's App.* 106 Pa. 368; 5 S. O. 51 Am. Rep. 528.

If a husband has received money belonging to his wife, it is not necessary, to enable her to prove a claim against his administrator, to show that he

held the money in trust for her, or had the use of it for a specific purpose. *Palmer v. Hanna*, 6 Colo. 53.

The mere possession by the husband, of the wife's property raises no presumption of a gift. *Lyle's Est.* 11 Phila. (Pa.) 64.

Where a man bought land with his wife's money, which both occupied as a homestead till his death, and attempted to convey it to his wife by an invalid deed,—*Held*, that the wife, who had continued in possession for four years after the execution of the deed, could have her title quieted as against her husband's heirs. *Leonard v. Wills*, 24 Kan. 281.

Where a husband has used his wife's money in payment of family expenses, with her consent, and without any agreement to repay her, she cannot recover therefor from her husband's estate. *Courtright v. Courtright*, 58 Iowa, 57; *Darnaby v. Darnaby*, 14 Bush (Ky.) 485.

The form of the account to which the deposit was made, is not evidence of gift to the wife from the husband. *Brabrook v. Boston Sav. Bank*, 104 Mass. 223; *Brown v. Brown*, 28 Barb. 565; *Marshall v. Crutwell*, L. R. 20 Eq. 223; *Smith v. Speer*, 84 N. J. Eq. 396; *Dilts v. Stevenson*, 17 N. J. Eq. 407.

Where money belonging to the husband is deposited in the name of the wife, the drawing checks thereon by her in payment of his debts and for household expenses is evidence to show that the wife is the mere agent of the husband, and that the money so deposited and remaining in the bank belongs to his estate and not to the wife's. *Lloyd v. Pughe*, L. R. 8 Ch. App. 88; 4 Moak, Eng. Rep. 775, reversing same case, 3 Moak, Eng. Rep. 715; L. R. 14 Eq. 241. See *Gilliland v. Gilliland*, 96 Mo. 523.

Evidence that the intestate gave his wife money to purchase furniture, which she did, without any thing further to show a gift, does not exonerate

would be regarded with much jealousy, in a court of equity.

No such donation is ever supported, unless it satisfactorily appears that it is not tainted with the influence springing out of the marital relation.

Smyley v. Reese, 53 Ala. 101; *Boyd v. De La Montagnie*, 73 N. Y. 498.

The obligation of the husband to provide for the maintenance of the wife, is not avoided by her possession of a separate estate.

Hodgens v. Hodgens, 4 Clark & F. 323; *Dodge v. Knowles*, 114 U. S. 430 (29:144); *Wells*, Sep. Prop. Married Women, § 85.

There has been no laches, nor any acquiescence, on her part, to defeat her rights.

Keller v. Keller, 45 Md. 275; *Bowis v. Stone-street*, 6 Md. 432; *Oswald v. Hoover*, 48 Md. 363, 369; *Comstock's App.* 4 New Eng. Rep. 592, 55 Conn. 222; *McLaren v. Hall*, 26 Iowa, 305; *Rodgers v. Pikes Co. Bank*, 69 Mo. 564, 565.

It would shock the sense of right, if a possession which was permissive and entirely consistent with the title of another, should silently bar that title.

Kirk v. Smith, 22 U. S. 9 Wheat. 288 (6:81).

When a trustee unequivocally repudiates the trust, and claims to hold the estate as his own, and such repudiation and claim are brought to

the knowledge of the *cestui que trust*, the Statute of Limitations will begin to run.

U. S. v. Taylor, 104 U. S. 223 (26:723); *Bacon v. Rives*, 106 U. S. 107 (37:71); *Phillippi v. Phillippe*, 115 U. S. 157 (29:339).

Mr. Justice Field delivered the opinion of the court:

This suit was brought by the complainant below, appellee here, Jeannie K. Stickney, widow of William Stickney, who died in October, 1881 against certain of his heirs, to establish her claim as creditor for the sum of about seventy-nine thousand dollars against the estate, real and personal, held in the name of her husband at the time of his death, and to obtain a decree that said estate be applied to its payment, except so far as may be necessary to discharge his just debts. Her contention is, that all that estate was acquired by her husband with her moneys received by her as legatee under the will of her deceased father, Amos Kendall, and which were delivered to him to invest for her benefit and in her name, but which without her knowledge, and contrary to her directions, he used and invested in his own name.

Complainant intermarried with William Stickney in January, 1852 and continued his wife until his death in October, 1881. They

her from accounting for it as administratrix. *Re Ward*, 2 Redf. 251, citing *Bedell v. Carll*, 33 N. Y. 531; *Shuttleworth v. Winter*, 55 N. Y. 624; *Irish v. Nutting*, 47 Barb. 370.

After it has been shown either that the husband received property to his wife's use, or that she had title to property in the possession of either or both, or that it was in her possession in a separate business belonging to her under the statute, the burden is on those who claim it to be his to show his title. *Peters v. Fowler*, 41 Barb. 467; *Vrooman v. Griffiths*, 4 Abb. App. Dec. 556.

It being shown that title to property was in either the wife or the husband, no presumption of a transfer of the title to the other can be drawn from the mere fact of possession by the other; the burden of proof is on the one who asserts a change, to give some evidence beyond the mere possession. *Wells*, Sep. Prop. Married Women, 224-226, and cases cited; *Abb. Tr. Ev.* 168.

The plaintiff's intestate being at the point of death, and desiring to give to the respondent a sum of money then on deposit to his credit in a bank, delivered to him a check upon his bank for the amount of the deposit. Held, that the delivery of the check was not a sufficient delivery of the money to render the gift valid and effectual. *Re Smither*, 30 Hun, 632.

It was held in *Harris v. Clark*, 3 N. Y. 93, that a written order upon a third person, made by the donor, was not the subject of a valid gift, either *inter vivos* or *mortis causa*. *Hewitt v. Kaye*, L. R. 6 Eq. 198; *Second Nat. Bank v. Williams*, 13 Mich. 291. A gift to a married woman from her husband, validity of, and what is a sufficient delivery, determined. *Armitage v. Mace*, 16 Jones & S. 107; *S. C.* 21 Daily Reg. No. 42.

Whoever alleges a gift must prove it clearly. *Walter v. Hodge*, 2 Swanst. 97; *Doty v. Willson*, 47 N. Y. 580.

A check, or order to pay money, is not good as a gift. An indorsement is simply an order to pay money. A check does not amount to an assignment of the funds; until payment it is revocable by the drawer. *Harris v. Clark*, 3 N. Y. 93; *Lunt v. Bank*

of N. A. 49 Barb. 221; *Phelps v. Phelps*, 23 Barb. 123; *Fulton v. Fulton*, 43 Barb. 592; *Beak v. Beak*, 2 Moak, Eng. Rep. 900, 393, note, L. R. 13 Eq. 439.

It is otherwise as to the delivery of a certificate of deposit, or choses in action which are evidence of indebtedness enforceable against the institution or individual by whom they are issued. *Westerlo v. De Witt*, 36 N. Y. 340; *Champney v. Blanchard*, 59 N. Y. 111; *Re Smither*, 30 Hun, 632, 634, 635.

Where a husband deposited in a savings bank, money belonging to himself, to his own credit, saying he wanted it so that either he or his wife could draw the money, and both he and his wife entered their names on the signature book, opposite which the clerk of the bank wrote the words, "to be drawn by either," and a pass book was given to the husband, as a voucher for the deposit, it was held (1) that this was not a valid gift of the money to the wife—a delivery of the money, or at least of the evidence of the deposit, being indispensable to such a gift; and (2) that the wife was a mere agent of the husband, in respect to the sum deposited, without any beneficial interest therein. *Brown v. Brown*, 23 Barb. 565.

Money of the wife in the hands of the husband, creates a liability on his part to pay principal and interest. And the Statute of Limitations will not commence to run until a demand or until he has refused to account for the same. *Re Wiltsie*, 12 N. Y. State Rep. 144; affirmed in 17 N. Y. State Rep. 253.

As to Statute of Limitations, see *Boughton v. Flint*, 74 N. Y. 476; *Payne v. Gardiner*, 29 N. Y. 146, and other cases cited in 12 N. Y. State Rep. 146.

Husband holds in trust for the wife property purchased with her money and conveyed to him. *Broughton v. Brand*, 12 West. Rep. 255, 94 Mo. 169.

A husband who receives the principal of his wife's separate estate is bound to account to her for it. *Wood v. Chetwood*, 12 Cent. Rep. 243, 44 N. J. Eq. 64.

A husband is bound to account to his wife for such part of the principal of her estate as he receives for her. *Jones v. Davenport*, 11 Cent. Rep. 597, 44 N. J. Eq. 33.

resided in the District of Columbia, and their married life was one of mutual confidence and affection, nothing ever occurring to mar its happiness. From his marriage to 1857 he was, the greater part of the time, a clerk in the government service. In that year he became secretary of Mr. Kendall, and continued so until the latter's death in November, 1869, receiving a monthly salary of \$100, or, as supposed by one of his brothers, a yearly salary of \$1,500, himself and wife living with and receiving their board from Mr. Kendall. Whilst secretary of Mr. Kendall he received no salary from any other source. He had, however, accumulated a small amount of property, chiefly in lands, but it appears to have been acquired from moneys or proceeds of property given to his wife by her father or from moneys furnished by him. It is not, however, important for the disposition of the present case to determine whether he had, previous to the death of Mr. Kendall, property in his own right, and, if so, the extent of it. The question is, did he receive moneys of his wife to invest for her benefit, which he used and invested in his own name, and, if so, whether the estate which he left standing in his name can be subjected to the payment of the amount thus received.

Mr. Kendall left at his death an estate worth nearly half a million of dollars. By his will he made his four daughters residuary legatees, and provided that payment of any debts which might be due to him from any of them should not be required in money, but should be adjusted in the distribution them of certain specified bonds. He appointed as executors Mr. Stickney and Mr. Robert C. Fox, his sons-in-law. His will was admitted to probate, and letters testamentary were issued to them. The distributive share which came to Mrs. Stickney from her father's estate amounted to nearly eighty thousand dollars in money or its equivalent. Mr. and Mrs. Stickney had one son and to him Mrs. Stickney desired in 1879 to make a Christmas present of \$1,000. At her request Mr. Stickney sent her the money for that purpose. It appears also that Mrs. Stickney received from him at different times checks, amounting to \$600. No other sum except these is shown to have been paid by him to her of the means she received from her father. The whole went into his hands under directions, and with the understanding, as she asserts, that it was to be invested by him for her benefit and in her name. When she wanted the \$1,000 mentioned, she wrote to him the following letter:

"December 23, 1879.

"DEAR WILL: I wish 'Will' to have \$1,000 of the Chicago payment for his Christmas gift. Please bring check for the amount, and the balance invest in my name, as I have asked you to do with all other moneys accruing from my inheritance.
"JEANNIE."

The evidence that Mrs. Stickney expected that her husband would invest her money for her benefit in her name, and that he understood that to make such investment was his duty, consists not merely in her declarations, but in the statements of Stickney himself, made at different times to parties with whom he was deal-

ing. The instances of this kind are numerous, and in their combined force, considered with the presumption attendant on the receipt of money where there is no relation of debtor and creditor between the parties, that the receiver is to hold it subject to the other's order or to invest it for his use, remove all reasonable doubt on the subject. How far the presumptions thus raised are to be deemed rebutted by the fact that there is no proof of any express promise on Stickney's part to comply with her request, and by her failure to call for any account from him or statement as to the investments made will be hereafter considered. It would seem that the confidence in her husband prevented any suspicion that her wishes as to the investment of her moneys had not been respected.

The illness of which Mr. Stickney died created no apprehension until within a few hours before his death. He then handed to his wife the keys to his box in the Safe Deposit Company, with instructions to retain them and examine his papers. Upon their examination after his funeral, none were found showing any property in her name; all the property which he held stood in his own name. He died intestate, leaving as his sole heirs and next of kin three brothers and four children of a deceased brother, two of whom were minors. She was appointed administratrix of his estate. The three brothers, upon being acquainted with the situation of affairs, and the fact that the moneys received by her from her father had been used and invested by the deceased in his own name, immediately relinquished to her all their claims to his estate, by a conveyance reciting that he had left in his individual name real and personal property acquired from the proceeds of her sole and separate estate and formally recognizing her beneficial interest therein. By this conveyance Mrs. Stickney became the owner in her own right of three fourths of her husband's estate absolutely, with a right of dower in the remaining fourth of the real estate, and her distributive share in the personalty. She thereupon, to avoid any litigation over the property with the relatives of her husband, offered to recognize the claims of the infant children of the deceased brother, and to make reasonable compensation to the adult children, provided they would execute a release to her of their claims. The adults declined to execute such a release upon those terms, and the infants were incompetent to do so. Mrs. Stickney accordingly filed the present bill against the four children to determine the controversy, and the justice of her claim to be paid out of the estate of her husband as its creditor, the amount received by him from her separate property, after deducting the \$1,600 mentioned, which she had received from him.

The adult children answered the bill denying the equities claimed, and pleading the Statute of Limitations against their assertion. The minor children, by their guardians *ad litem*, also answered the bill, claiming such interest in the premises as they might be entitled to, and submitting themselves to the protection of the court.

In October, 1882, on motion of the complainant, and with the consent of the solicitors of

the adult defendants and of the guardians *ad litem* of the infant defendants, the case was referred to the auditor of the court to ascertain and report, upon the evidence to be produced before him, among other things, whether the complainant was a creditor of or entitled to repayment out of the estate of her deceased husband, and, if so, to what amount, liberty being given to state any special circumstances.

Much testimony was taken by the auditor, and the books of account of the executors of the estate of Amos Kendall and also of William Stickney were produced before him. He reported that the proceeds of the estate of Amos Kendall which came into the hands of his executors were from time to time divided among the legatees, and upon the receipts of the complainant to the executors her share was delivered to her husband, who used and invested the same in his own name without the knowledge of the complainant and in contravention of her express directions; that the books of William Stickney, deceased, showed in most instances the specific use made by him of the moneys which were the share of the complainant, derived from her father's estate; that the complainant never assented to or acquiesced in the use or investment of the property by her husband in his own name; that she intended to retain the apparent as well as the real ownership, the nominal as well as the equitable right; and that he considered himself as her trustee and proclaimed himself as such. The auditor, in applying the Act of Congress passed on the 10th of April, 1869, commonly known as the Married Woman's Act, to the facts of the case, held that Mr. Stickney received the moneys as her agent and trustee, and was liable to account to her as such, and that no appropriation or investment by him without authority from her relieved him from such accountability. He reported also that the amount which Mr. Stickney had received of the moneys belonging to her from her father's estate was \$79,971.18, from which he deducted the \$1,600 mentioned and found a balance due her of \$78,371.18.

To the plea of the Statute of Limitations, which was urged by the defendant in bar of the complainant's claim, the auditor replied that there were several answers: *first*, the complainant's disability by reason of her coverture; *second*, the character of the indebtedness, which had its origin in a relation of trust; and *third*, that not until the death of her husband did she discover that her property was not invested or held in her own name. He therefore reported that the complainant was a creditor and entitled to repayment, out of the estate of her deceased husband, of the amount found to be due to her for moneys received by him which came to her from the estate of her father.

Exceptions were taken to this report, which were heard at a special term of the court and overruled, and a decree was entered thereon for the complainant, that William Stickney, her husband, was justly indebted to her at the time of his death in the sum of \$78,371.18; that no portion of it had been paid or satisfied; that, as administratrix of the personal estate of her deceased husband, she was entitled, in the regular course of her administration, to devote to the reduction of the said indebtedness, as against the defendants, and each of them, the

undistributed balance of the personal estate in her hands, ascertained by the report of the auditor to be \$32,202.08; that she be permitted to withdraw from the register of the court \$2,650.26, previously paid into it by her, after deducting the clerk's fees; and that the real estate of the said William Stickney at the time of his death, or so much thereof as might be necessary, be sold for the payment of the commutation of her dower therein and the balance of said indebtedness. On appeal to the court in general term this decree was affirmed. To review that decree the case is brought by appeal here. The exceptions to the auditor's report calling for consideration are founded upon two grounds: one, the supposed incompetency of the complainant to testify as to directions given to her husband to invest moneys of her separate estate for her benefit and in her name; and the other, the supposed conclusiveness of the presumption that moneys belonging to the separate estate of the wife, when she allows her husband to use them, become gifts to him.

The general rule of the common law is that neither husband nor wife is admissible as a witness for or against each other in any case, civil or criminal. This exclusion, as Greenleaf says, is founded partly upon the identity of their legal rights and interests and partly on principles of public policy, that the confidence existing between them shall be sacredly protected and cherished to the utmost extent, as being essential to the happiness of social life. But this doctrine has been modified in several States, in many particulars, by direct legislation upon the subject, such as that neither husband nor wife shall be compellable to disclose any communication made to him or her during the marriage, as in New York. A voluntary statement is receivable under such a statute. *Southwick v. Southwick*, 2 Sweeny, 284. In some States the statutes include only private conversations in the privilege, but not such as take place in the presence of others. *Fay v. Guymon*, 181 Mass. 81. The Revised Statutes of the United States relating to the District of Columbia, on the subject of witnesses, provide as follows:

"Sec. 876. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or other proceeding, in any court of justice in the District, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence within the District, the parties thereto, and the persons in whose behalf any such action or proceeding may be brought or defended, and all persons interested in the same, shall, except as provided in the following section, be competent and compellable to give evidence, either *in oca voce* or by deposition, according to the practice of the court, on behalf of any of the parties to the action or other proceeding.

"Sec. 877. Nothing in the preceding section shall render any person who is charged with an offense in any criminal proceeding competent or compellable to give evidence for or against himself; or render any person compellable to answer any question tending to criminate himself; or render a husband competent or compellable to give evidence for or against

his wife, or a wife competent or compellable to give evidence for or against her husband, in any criminal proceeding or in any proceeding instituted in consequence of adultery; nor shall a husband be compellable to disclose any communication made to him by his wife during the marriage, nor shall a wife be compellable to disclose any communication made to her by her husband during the marriage."

These provisions dispose of the objection of counsel. Mrs. Stickney was at liberty, though not compellable to state the directions given by her to her husband respecting the investment of her money. And without this qualification of the rule of the common law we are inclined to think that the changed law respecting her separate property, created by the Married Woman's Act of April 10, 1889, (chap. 23, 16 Stat. at L. 45) would require for its successful enforcement some modification of the common-law rule as to a husband or wife being a witness where a controversy arises between them relating to the disposition of her separate personal property. That property no longer, as at common law, vests in her husband by the marriage. That Act provides as follows:

"Sec. 1. That, in the District of Columbia, the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were *feme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts: but such married woman may convey, devise, and bequeath the same, or any interest therein, in the same manner and with like effect as if she were unmarried.

"Sec. 2. That any married woman may contract, and sue and be sued, in her own name, in all matters having relation to her sole and separate property in the same manner as if she were unmarried; but neither her husband nor his property shall be bound by any such contract nor liable for any recovery against her in any such suit, but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole."

So far as her separate property is concerned, a married woman thus becomes as absolute owner as though she were unmarried, and it would seem should also have the same protection, through her own evidence, as a *feme sole*. We do not think, therefore, that the exception of the defendants is well taken. With the testimony of Mrs. Stickney, corroborated as it is in many particulars by statements of others and by the books of her husband and those of the executors of the estate of Amos Kendall, there can be no serious contention as to the correctness of the conclusions reached by the auditor as to matters of fact involved, upon the evidence presented to him.

This view of the admissibility of Mrs. Stickney's testimony disposes also of the supposed presumption arising from her allowing her husband to use the moneys of her separate estate, that she intended them as a gift to him. Any presumption of that kind, if it would otherwise arise in the case, was entirely rebutted by her repeated and express directions to invest the moneys for her benefit in her own name.

But we are of opinion that, in the absence of her testimony, there would be no presumption, since the passage of the Married Woman's Act, that she intended to give to her husband the moneys she placed in his hands, any more than a gift would be inferred from a third person who in like manner deposited money with him. If there be no proof of indebtedness to the party receiving the moneys, the presumption would naturally be that they were placed with him to be held subject to the order of the other party, or to be invested for the latter's benefit. We think that whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him. In *Grabill v. Moyer*, 45 Pa. 583, the Supreme Court of Pennsylvania, in speaking of the effect of an Act of that State, passed on the 11th of April, 1848, containing provisions similar to the Married Woman's Act of the District of Columbia, said: "When the Act of Assembly declares, as it does, that all property, real, personal, and mixed, which shall accrue to any married woman during coverture, by will, descent, deed of conveyance, or otherwise, shall be owned, used, and enjoyed by such married woman, as her own separate property; when the leading purpose of the Act is to protect the wife's estate by excluding the husband, it is impossible for us to declare that the mere possession of it by the husband is proof that the title has passed from the wife to him. After it has been shown, as it was in this case, that the property accrued to the wife by descent from her father's and brother's estates, the presumption necessarily is that it continued hers. In such a case it lies upon one who asserts it to be the property of the husband to prove a transmission of the title, either by gift or contract for value, for the law does not transmit it without the act of the parties. If mere possession were sufficient evidence of a gift, the Act of 1848 would be useless to the wife. Nothing is more easy than for the husband to obtain possession, even against the consent of the wife. And where he obtains it with her consent, it can be at most but slight evidence of a gift."

The case of *Bergey's Appeal*, 60 Pa. 408, cited by the auditor in his report, is in point here. Bergey received money belonging to his wife, being her patrimonial portion, in her presence, and both united in a receipt for it. Not a word was spoken by the wife when her husband took up the money to count it, and put it in his pocket; nor was a word ever heard afterwards to the effect that the wife had made a gift of it. The husband appropriated it to the purchase of a farm, and the supreme court of the State held that no inference could arise of a gift from the transaction as detailed, observing that "She was not bound to attempt a rescue of it from him, or proclaim that it was not a gift. She might rest on the idea that his receipt, in her presence, was with the intent to take care of it for her. In *Johnston v. Johnston*, 7 Casey, 450, this court said, in a case of the nature of this, 'As the law made it (the money) hers, it presumes it to have been received for her by her husband.' That case contrasts the presumptions arising from the receipt of

money by husbands, prior and subsequent to the Act of 11th of April, 1848. In the first period, the presumption is that he has received it under and by virtue of his marital power as his own; in the second, the presumption is the opposite, that he received it for his wife, the Act of Assembly having declared it hers, and for her 'sole and separate use.' And again: "If it was not a gift, the husband was a trustee for his wife, and whether he kept the money in his pocket or put it into real estate which he had purchased, honesty required that he should account to her for it. He could be compelled to do so in equity."

There are decisions of courts of some of the other States, holding that a presumption arises of a gift from the wife to the husband of moneys placed by her in his hands, unless an express promise is made by him at the time that he will account to her for them or invest them for her benefit. But the decisions we have cited are more in accordance, we think, with the spirit and purpose of the Married Woman's Act, and only by conformity with them can it be fully carried out. Here there are no creditors alleging that they gave credit to the deceased upon his supposed ownership of the property standing in his name, or any other circumstance calling for any qualification of the widow's right to claim an application of that property to the payment of the moneys by which it was acquired, received from her to be invested for her benefit, and in her name.

Decree affirmed.

W. W. CREHORE, *Plff. in Err.*,
v.
THE OHIO AND MISSISSIPPI RAIL-
WAY COMPANY.

(See S. C. Reporter's ed. 240-245.)

*Removal of case from state to federal court—
what petition must show—record—when state
court retains jurisdiction—amendment in
circuit court, when not allowable.*

1. A state court is not bound to surrender its jurisdiction of a suit on a petition for its removal into the Circuit Court until a case has been made which, on its face, shows that the petitioner has a right to the transfer.
2. The mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this, the suit must be one that may be removed; and the petition must show a right in the petitioner to demand the removal.
3. A case is not, in law, removed from the state court, upon the ground that it involves a controversy between citizens of different States, unless at the time the application for removal is made, the record, upon its face, shows it to be one that is removable.
4. If the case be not removed, the jurisdiction of the state court remains unaffected, and the jurisdiction of the Federal Court cannot attach until it becomes the duty of the state court to proceed no further. No such duty arises unless a case is

made by the record that entitles the party to a removal.

5. If a suit entered upon the docket of a Circuit Court as removed was never, in law, removed from the state court, no amendment of the record, made in the former, can affect the jurisdiction of the latter, or put the case rightfully on the docket of the Circuit Court.
6. No amendment of the record can be made in the Circuit Court to show that the case was a proper one to have been removed from the state court.

[No. 273.]

Argued April 24, 1889. Decided May 13, 1889.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

On motion in behalf of the railway company that the judgment of reversal herein be so framed as to omit therefrom an absolute direction to the circuit court to remand the cause to the state court in order that the defendant may take steps in the circuit court, or in the state court, for the correction and amendment of the petition for removal, and of the record and proceedings, so that they shall show that the case was removable from the state court. *Motion denied.*

The facts are stated in the opinion.

Messrs. Wm. M. Ramsey and Lawrence Maxwell, Jr., for defendant in error.

Messrs. John Mason Brown, Alex. P. Humphrey and George M. Davis for plaintiff in error:

[The argument of this case was commenced April 24th, 1889, by Mr. Brown for plaintiff in error. Upon attention being called to the fact that the record did not show the citizenship of the parties and for that reason did not show that the cause was removable, the court declined to hear further argument and entered judgment of reversal and remanded the case with directions that it be sent back to the state court. On the next day, April 25th, 1889, the motion to modify the judgment, as above mentioned was submitted by *Mr. Maxwell* in support of the motion and *Mr. Brown* in opposition. *Ed.*]

Mr. Justice Harlan delivered the opinion of the court:

This action was brought by the plaintiff in error, who was the plaintiff below, in the Louisville (Kentucky) Law and Equity Court, against the Ohio and Mississippi Railway Company, to recover damages for personal injuries alleged to have been sustained by him, while a passenger upon the road of that company, by reason of the willful neglect of those by whom it was operated. The company, on the 24th of November, 1884, filed its petition, accompanied by bond in proper form, for the removal of the case upon the ground of the diverse citizenship of the parties, into the Circuit Court of the United States for the District of Kentucky. Thereupon an order was made by the state court that it would proceed no further. The case was docketed and tried in the Circuit Court of the United States, and resulted in a verdict for the defendant, followed by a judgment dismissing the plaintiff's petition. From that judgment the plaintiff prosecuted a writ of error.

At the argument in this court at the present term, attention was called to the fact that the record did not sufficiently show the citizenship of the parties at the commencement of the action, as well as at the time of the application for removal. *Stevens v. Nichols*, 180 U. S. 280 [82: 914]. Upon this ground an order was entered reversing the judgment of the Circuit Court and remanding the cause, with directions that it be sent back to the state court. The case is again before us upon a motion in behalf of the railway company, that the judgment of reversal be so framed as to omit therefrom an absolute direction to the Circuit Court to remand the cause to the state court, to the end that the defendant may take steps for the correction and amendment of the petition for removal, and of the record and proceedings in that behalf.

It is conceded that the record does not show affirmatively the citizenship of the parties at the commencement of the action in the state court, and that the judgment, for that reason, must be reversed.

Upon the filing by either party, or by any one or more of the plaintiffs or defendants, "entitled to remove any suit" mentioned in the first or second sections of the Act of March 3, 1875 (18 Stat. at L. 470), of the petition and bond required by its third section, "it shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit." The effect of filing the required petition and bond in a removable case is, as said in *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 185, 141 [26: 96, 98], that the state court is thereafter "without jurisdiction" to proceed further in the suit; or in *Baltimore & O. R. Co. v. Koonitz*, 104 U. S. 5, 14 [26: 643, 645], its rightful jurisdiction comes to "an end," or in *National Steamship Co. v. Tugman*, 106 U. S. 118, 123 [27: 87, 89], "upon the filing, therefore, of the petition and bond—the suit being removable under the statute—the jurisdiction of the state court absolutely ceased, and that of the Circuit Court of the United States immediately attached." It has also been repeatedly held, particularly in *Stons v. South Carolina*, 117 U. S. 480, 482 [29: 962], following substantially *Baltimore & O. R. Co. v. Koonitz*, that "A state court is not bound to surrender its jurisdiction of the suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer;" and that "The mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the state court in the case ends, and that of the Circuit Court begins." These decisions were in line with *Phoenix Ins. Co. v. Pechner*, 95 U. S. 188, 185 [24: 427], arising under the Judiciary Act of 1789, in which it was held that a "petition for removal when filed becomes a part of the record in the cause;" that the party seeking the removal should state "facts which, taken in connection with such as already appear, entitle him to transfer;" and that, "if he fails in this, he has not, in law,

shown to the court that it cannot 'proceed further with the cause.'"

It thus appears that a case is not, in law, removed from the state court, upon the ground that it involves a controversy between citizens of different States, unless, at the time the application for removal is made, the record, upon its face, shows it to be one that is removable. We say, upon its face, because "The state court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further;" and "All issues of fact made upon the petition for removal must be tried in the Circuit Court." *Stons v. South Carolina*, 117 U. S. 480, 482 [29: 962]; *Carson v. Hyatt*, 118 U. S. 279, 287 [30: 167, 169]. If the case be not removed, the jurisdiction of the state court remains unaffected; and, under the Act of Congress, the jurisdiction of the federal court could not attach until it becomes the duty of the state court to proceed no further. No such duty arises unless a case is made by the record that entitles the party to a removal.

All this is made entirely clear by the express requirement of the Act of 1875 that the Circuit Court shall remand "to the court from which it was removed" any cause brought from that court, whenever it appears that it is not one of which the federal court can properly take cognizance. *Cameron v. Hodges*, 127 U. S. 322, 326 [32: 182]. If a suit entered upon the docket of a circuit court as removed upon the ground of the diverse citizenship of the parties, was never, in law, removed from the state court, no amendment of the record made in the former could affect the jurisdiction of the latter or put the case rightfully on the docket of the Circuit Court as of the date when it was there docketed; for the only mode provided in the Act of Congress by which the jurisdiction of the state court of a controversy between citizens of different States can be divested is by presenting a petition and bond in that court showing, in connection with the record, a case that is removable. The present motion, in effect, is that such amendment of the record may be made in the Circuit Court as will show that this case might have been removed from the state court, not that, in law, it has ever been so removed.

This question was before us at the present term in *Stevens v. Nichols*, above cited, which was brought in a state court, and tried in a Circuit Court of the United States as one involving a controversy between citizens of different States, and, therefore, removable from the state court. But as the record did not show that it was a removable case, the judgment was reversed, with directions to send the case back to the state court. It is proper to say that the question was there fully considered, although it was not deemed necessary to state the reasons for the conclusion then reached. The present motion, bringing that question distinctly before us, seemed to require that the reasons for our conclusion be stated with fullness, especially because inadvertent language in some previous cases is interpreted as announcing different views from those now expressed.

The motion to modify the order of reversal heretofore made is denied.

W. N. COLER, JR., *Plff. in Err.*,

THE CITY OF CLEBURNE.

(See S. C. Reporter's ed. 162-175.)

Municipal bonds, signatures thereto—registry by comptroller—statement, by whom furnished—bona fide purchasers—antedated bonds, when void—false date, equivalent to a false signature.

1. Where the statute provides that the bonds of a city shall be signed by the mayor, they must be signed by the person who is mayor of the city when they are signed and not by any other person; and the city council cannot authorize them to be signed by another person.
2. Where the statute provides that it shall be the duty of the mayor, whenever any bonds are issued, to forward them to the comptroller of public accounts of the State for registry, the comptroller can receive them lawfully for registry only from such mayor.
3. Where it is, by statute, made the duty of the same mayor, and not that of any other person, at the time of forwarding the bonds to the comptroller for registration, to furnish him with the statement specified in the statute, no other person than such mayor can furnish the comptroller with such statement.
4. Even *bona fide* purchasers of municipal bonds must take the risk of the official character of those who execute them.
5. Where the bonds were not signed by an officer who was in office when they were signed, but by a person who was in office on the antedated day on which they bore date, and who was when he signed them a private citizen, they are not valid.
6. A public agent cannot bind a principal under powers that have been taken away, by simply antedating his contracts. Under such circumstances, a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other.

[No. 728.]

Submitted Jan. 3, 1889. Decided May 13, 1889.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas, to review a judgment in favor of defendant in an action to recover on coupons of municipal bonds. *Affirmed.*

The facts are stated in the opinion.

Mr. W. S. Herndon, for plaintiff in error:

Plaintiff, being a *bona fide* holder, was not required to look beyond the recitals in the bond and the legislative enactments giving the power to issue them.

If at the date of the bond it was authorized by law and appears to have been properly issued in accordance with the enabling Acts, he must recover, though there may have been irregularity and even fraud or misconduct on the part of the agents who acted for the city in uttering them.

The bonds bear date January 1, 1884. At that time W. N. Hodge was the mayor of this city, and his signature appears upon the bonds and on the coupons.

Weyauvega v. Ayling, 99 U. S. 112 (25: 470); *Walnut v. Wade*, 108 U. S. 688 (26: 526); *East Lincoln v. Davenport*, 94 U. S. 801 (24: 322); *Olay Co. v. Society for Savings*, 104 U. S. 579

(26: 856); *Moultrie Co. v. Rockingham Sav. Bank*, 92 U. S. 631 (23: 631); *Nauvoo v. Ritter*, 97 U. S. 889 (24: 1050).

The act of registration by the comptroller is a judicial act, determined upon information then in his possession.

The exercise of discretion by a judicial officer, clothed with this power, is not the subject of revision by another tribunal. Such power having been exercised and the bond registered, the innocent purchaser may rely upon such judicial decision in favor of the regularity and validity of the bond.

Arts. 323, 424, Rev. Stat. of Texas; *Sherman Co. v. Simonds*, 109 U. S. 735 (27: 1098); *Anderson Co. v. Beal*, 118 U. S. 227 (28: 966); *Coloma v. Eaves*, 92 U. S. 484 (23: 579); *Douglas Co. v. Bolles*, 94 U. S. 104 (24: 46); *Marion Co. v. Clark*, 94 U. S. 278 (24: 59).

Mr. James W. Brown, for defendant in error:

The registration of the bonds by the comptroller cannot be construed into a recital, showing that all of the conditions precedent to their issue had been complied with.

Parties buying municipal bonds are required to take notice as to whether or not there is power to issue them.

Anthony v. Jasper Co. 101 U. S. 698 (25: 1006); *Ogden v. Davies Co.* 102 U. S. 641 (26: 265); 1 *Dillon*, Mun. Corp. 449; *Boone*, Corp. 44, 298-595; *Louisiana City v. Wood*, 102 U. S. 294 (26: 153); *Merchants' Exchange Nat. Bank v. Bergen Co.* 115 U. S. 384 (29: 430); *Buchanan v. Litchfield*, 102 U. S. 278 (26: 188); *Dixon Co. v. Field*, 111 U. S. 83 (28: 360); *Litchfield v. Ballou*, 114 U. S. 190 (29: 152); *Independent School Dist. v. Stone*, 106 U. S. 183 (27: 90); *Sheboygan Co. v. Parker*, 70 U. S. 8 Wall. 93 (18: 83); *Hoff v. Jasper Co.* 110 U. S. 53 (28: 68); *Parkersburg v. Brown*, 106 U. S. 487 (27: 238); *Knox Co. v. Aspinwall*, 62 U. S. 21 How. 539 (16: 208); *Knox Co. v. Wallace*, 62 U. S. 21 How. 546 (16: 211); *U. S. v. Macon Co.* 99 U. S. 582 (25: 331).

Mr. Justice Blatchford delivered the opinion of the court:

This is an action at law brought in the Circuit Court of the United States for the Northern District of Texas, by W. N. Coler, Junior, against the City of Cleburne, a municipal corporation of Texas, to recover on 234 coupons, of \$35 each, amounting to \$8,190, cut from a series of 51 bonds, of \$1,000 each, purporting to have been executed and issued by that corporation. The case was tried by the court, on the written waiver of a jury, and, having heard the evidence, it adjudged that the plaintiff take nothing by his suit, and that the defendant go without day and recover its costs. The plaintiff has brought a writ of error.

There is no special finding of facts, but there is a bill of exceptions, which, after setting forth what was proved, states that the court, on the pleadings and proof, found the law for the defendant, and rendered final judgment for it and against the plaintiff, for costs of suit. This is a sufficient special finding of facts to authorize us, under § 700 of the Revised Statutes, to determine whether the facts found are sufficient to support the judgment.

The plaintiff, in his petition and four supple-

mental petitions, alleged that he was the *bona fide* owner, holder and bearer, before maturity, of the coupons, for a valuable consideration paid; that the bonds were issued by the city for the purpose of erecting a system of water works; and that the bonds and coupons were made and issued in pursuance of article 420 of the Revised Statutes of the State of Texas, and of an ordinance adopted by the city council of the defendant, September 18, 1888.

The defendant, with other pleas, interposed one, called in the record a plea of *non est factum*, which says that the bonds and coupons in question are not the obligations of the defendant, and were never executed and delivered by it, because they never had any existence prior to July 8, 1884; that they were never signed by J. M. Odell (who had, on the first Tuesday in April, 1884, been duly elected to the office of mayor of said city for a term of two years, and was on the 8d of July, 1884, the legally qualified and acting mayor of the city), nor by his authority, nor by any person authorized by law to act as mayor of the city; that said mayor at all times refused to sign the same; that although said bonds and coupons purport, on their face, to have been executed on January 1, 1884, and to be signed by the mayor of the city, they were in fact made on the 8d of July, 1884, and antedated, and signed by one W. N. Hodge, a private citizen, but formerly mayor of the city, whose term of office had expired in April, 1884; that any registration of the bonds in the office of the comptroller of public accounts of the State of Texas was illegal and without authority, because they were never forwarded to the comptroller by the mayor, Odell, or by any person authorized by him to do so; and he never forwarded to the comptroller his certificate showing the values of taxable property, real and personal, in said city for the year 1884, and never authorized any person so to do; and that said bonds and coupons were never delivered by said mayor, or by his authority, or by any person authorized to act as mayor of the city, to the Texas Water and Gas Company, or to any other person or persons.

The plaintiff filed a demurrer to the above plea, as insufficient in law. The bill of exceptions states that this demurrer was considered by the court in its general finding.

The bonds and coupons, which were put in evidence, were in the following form:

"1,000. UNITED STATES OF AMERICA. 1,000.
"No. 51. \$1,000.

"The City of Cleburne, in Johnson County, State of Texas, hereby acknowledges that, for value received, it is indebted and bound and hereby promises to pay, unto the Texas Water and Gas Company, or bearer, at the _____, in the City of New York, at the expiration of twenty years from the date hereof, the sum of one thousand dollars in lawful money of the United States of America, and also that it is bound and will pay interest on said sum of one thousand dollars, at the rate of seven per centum per annum, on the first days of January and July of each year thereafter, to and including the first day of January, A. D. 1904, to the bearer, according to the respective coupons therefor hereto attached, for thirty-five

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dollars each, signed by the mayor of the City of Cleburne and attested by the secretary of the City of Cleburne, upon presentation at the fiscal agency in New York. This bond is authorized by article 420 of the Revised Statutes of the State of Texas and by an ordinance adopted by the board of aldermen in the City of Cleburne, on the 18th day of Sept., 1888, in conformity to said article 420.

"This bond is one of a series of fifty-one of like tenor and effect, issued for the erection of a complete system of water works, and is secured by an ordinance of the City of Cleburne under the general laws of the State, and setting apart all the net revenues of said water works to pay the interest and sinking fund upon the same, and requiring the council to annually levy and collect a tax of thirty-five cents on the one hundred dollars' worth of property, if so much shall be required, to pay the interest and two per cent sinking fund.

"It is understood that the City of Cleburne shall have the right to call in any or all the bonds of this series, numbered from one to fifty-one, respectively, at any time after ten years from the date of said bonds, upon first giving public notice thereof in the city organ of the City of Cleburne, for three months before the first days of January or July in any year, and interest shall cease from the time they are so called in, respectively.

"In witness whereof the mayor of the City of Cleburne hereto signs his name, and the city secretary of the City of Cleburne attests with the seal of the said City of Cleburne, hereto affixed, this the first day of January, A. D. 1884.

"W. N. HODGE, Mayor.

"Attest: W. H. GRAVES, Secretary.

"1,000."

The bond is indorsed as follows: "51. \$1,000 City of Cleburne water works bond; interest seven per cent, payable July 1st and January 1st of each year. Twenty-years bond. Registered July 12th, 1884. Wm. J. Swain, comptroller."

"\$85.00.

\$85.00.

"On the first day of July, 1886, the City of Cleburne, State of Texas, will pay to bearer, in the City of New York, thirty-five dollars, being six months' interest on water-works bond No. 51.

"W. N. HODGE, Mayor.

"W. H. GRAVES, Secretary."

The plaintiff proved that the Texas Water and Gas Company, a corporation, through its proper officers, made a written contract with the city, through its proper officers, on September 18, 1888, to erect for it a complete system of water works, the material used and the manner of building being fully shown in specifications and plans, on or before June 1st, 1884, in consideration for which the city agreed to pay the builder \$51,000, in bonds of \$1,000 each, payable to bearer 20 years after January 1, 1884, bearing interest at seven per cent, represented by semi-annual coupons for \$85 each attached thereto, the same to be engraved, signed by its mayor and secretary, and delivered to the Texas Water and Gas Company upon the completion of said system of water works according to plans and specifications,

and the acceptance thereof by the city after the same had been duly tested. It was further proved, that said contract provided that, upon the works having been tested and the same reported and received by the city, the builder should be discharged from all further obligations on account of the works. It was further proved, that the system of water works was built within the time agreed upon, and accepted by the city; and that, on the 18th of September, 1883, the city council adopted an ordinance fully authorizing the contract above mentioned, a copy of which ordinance is given in the margin.¹

It was also proved, that after the defendant accepted the water works, and on July 8, 1884, the 51 bonds for \$51,000 were delivered to the Texas Water and Gas Company, and registered by the comptroller of the State; that the defendant, before the delivery of said bonds, cut off and canceled the first coupon thereon, maturing July 1, 1884; that it took charge of the works and contracted a sale of them to another corporation, which corporation operated them for a time; that afterwards the defendant resumed the control of them and still has possession of them, and uses them for fire protection and other uses; that the Texas Water and Gas Company sold all of the bonds and coupons and delivered them to third parties soon after they were received; that the defendant, by its city council, on July 3, 1884, adopted a resolution authorizing and requesting ex-Mayor W. N. Hodge, whose name had been engraved on the coupons attached to the 51 bonds, to

sign the bonds as and upon the date January 1, 1884, when he was actually the mayor of the city, and that said bonds be signed by W. H. Graves, who was the secretary of the defendant on January 1, 1884, as well as on July 3, 1884. The defendant proved that W. N. Hodge, who signed the bonds, ceased to be mayor in April, 1884; that Odell became then the mayor; that the bonds were signed July 3, 1884; and that the city council authorized Hodge, who was then a private citizen, to sign the bonds on that day.

It was also proved that Mayor Odell did not furnish a statement of the valuation of property to the comptroller, nor forward to him the 51 bonds for registration, and refused to sign more than 40 of said bonds; and that the defendant was using and operating the water works, and had been for over 20 months.

Articles 420 to 424, of the Revised Statutes of Texas, in force at the time of the issue of these bonds (Rev. Stat. of 1879, title 17, chap. 4, p. 72), were as follows:

"Art. 420." The city council shall have power "to appropriate so much of the revenues of the city, emanating from whatever source, for the purpose of retiring and discharging the accrued indebtedness of the city, and for the purpose of improving the public markets and streets, erecting and conducting city hospitals, city hall, water works, and so forth, as they may from time to time deem expedient; and in furtherance of these objects they shall have power to borrow money upon the credit of the city, and issue coupon bonds of the city there-

¹An Ordinance to Provide for the Construction of Water Works in the City of Cleburne, to Provide for Issuing Bonds, and to Levy a Tax to Pay Interest and Create a Sinking Fund.

Whereas, the city council of the City of Cleburne deem it absolutely necessary that some steps should be taken by the City of Cleburne to protect the property of the city and citizens against fire; and whereas, it is further manifest that the establishment of an efficient system of water works is the most economical protection against fires; and whereas, the Texas Water and Gas Company, a corporation having its chief domicile in the City of Tyler, Smith County, Texas, has made a proposition, with plans and specifications, to construct a complete system of water works in the City of Cleburne and for the City of Cleburne (as per plans and specifications now on file in the office of the city secretary), for fifty-one bonds of the City of Cleburne for one thousand dollars each, with interest at seven per cent per annum, with coupons attached for interest, payable semi-annually; and whereas, the city council of the City of Cleburne has accepted said proposition of the said Texas Water and Gas Company: now, therefore—

Be it ordained by the city council of the City of Cleburne, That the mayor and city secretary are hereby authorized and fully empowered to execute, sign, and deliver for and in behalf of the City of Cleburne a contract with the Texas Water and Gas Company, a corporation under the laws of Texas, for the construction of a complete system of water works within the corporate limits of the City of Cleburne, according to the plans and specifications submitted by the Texas Water and Gas Company, through M. T. Brown, vice-president and general manager of said corporation; and it is further ordained that the mayor is forthwith required to have lithographed fifty-one bonds for one thousand dollars each, due twenty years after date, and redeemable at the option of the city at any time after ten years, with forty coupons attached to each, for thirty-five dollars each, payable in the City of New York or in the City of Austin, Texas, the said coupons to fall due the first day of July, 1884, and the first day of January, 1885, and on each subsequent first day of July and first day of January

for each and every year up to and including the first day of July, 1905, and, after said bonds are lithographed, the same to be executed, signed, and delivered to the said Texas Water and Gas Company, upon the said company's complying with their contract, as therein provided.

And it is further ordained by the city council aforesaid, that all the revenues realized from operation of water works aforesaid, over and above the expenditures in operating the same be, and the same is hereby, appropriated and constitute a fund to pay the interest and create a sinking fund for the final redemption of said bonds as afore provided.

And it is further ordained by the city council aforesaid, that the following tax shall be annually levied and collected, and the same is hereby appropriated, to pay the interest on water-works bonds hereinbefore authorized to be issued, one fourth of one per cent on each one hundred dollars' worth of property; and that this provision shall remain and be in force until the said water-works bonds are fully paid and satisfied, *provided* nothing herein shall prevent the city from remitting the tax or any part thereof herein provided for, in the event the net revenue shall realize a fund sufficient to pay interest and create ten per cent sinking fund on said water-works bonds.

And it is further ordained that this ordinance take effect from and after its passage.

And it is further ordained by the city council aforesaid, that to the above there shall be levied and collected one tenth of one per cent, under and by virtue of the power of the city to levy and collect an annual tax to defray the current expenses of its local government, and the same is hereby set apart and appropriated to the payment of the interest and the sinking fund of the bonds herein provided for.

Provided, that this section of this ordinance shall be inoperative for such year or years as it may be found that the tax and revenue heretofore provided for and set apart shall be sufficient to pay the interest and sinking fund as provided.

Passed September 13th, 1883.

Approved September 13, 1883.

(Signed) W. N. HODGE, Mayor.

Attest: W. H. GRAVES, Secretary.

for, in such sum or sums as they may deem expedient, to bear interest not exceeding ten per cent per annum, payable semi-annually at such place as may be fixed by city ordinance: *Provided*, That the aggregate amount of bonds issued by the city council shall, at no time, exceed six per cent of the value of the property within said city, subject to *ad valorem* tax.

"Art. 421. All bonds shall specify for what purpose they were issued, and shall not be invalid if sold for less than their par value; and when any bonds are issued by the city a fund shall be provided to pay the interest and create a sinking fund to redeem the bonds, which fund shall not be diverted nor drawn upon for any other purpose; and the city treasurer shall honor no drafts on said fund except to pay interest upon, or redeem the bonds for which it was provided.

"Art. 422. Said bonds shall be signed by the mayor and countersigned by the secretary, and payable at such places and at such times as may be fixed by ordinance of the city council, not less than ten nor more than fifty years.

"Art. 423. It shall be the duty of the mayor, whenever any bond or bonds are issued, to forward the same to the comptroller of public accounts of the State, whose duty it shall be to register said bond or bonds in a book kept for that purpose, and to indorse on each bond so registered his certificate of registration, and to give, at the request of the mayor, his certificate certifying to the amount of bonds so registered in his office up to date.

"Art. 424. That it shall be the duty of the mayor, at the time of forwarding any of said bonds for registration, to furnish the comptroller with a statement of the value of all taxable property, real and personal, in the city; also, with a statement of the amount of tax levied for the payment of interest and to create a sinking fund. It is hereby made the duty of the comptroller to see that a tax is levied and collected by the city sufficient to pay the interest semi-annually on all bonds issued, and to create a sinking fund sufficient to pay the said bonds at maturity, and that said sinking fund is invested in good interest-bearing securities."

It is assigned for error, that the circuit court erred in overruling the plaintiff's demurrer to the plea of *non est factum*, because that plea failed to exclude the idea that the defendant, or the law, had authorized the person who actually signed the bonds and coupons to do so.

Article 423 of the statute provides that the bonds shall be signed by the mayor. This clearly means that they shall be signed by the person who is mayor of the city when they are signed, and not by any other person. The Legislature having declared who shall sign them, it was not open to the city council to provide that they should be signed by some other person. Article 423 of the statute provides that it shall be the duty of the mayor, whenever any bonds are issued, to forward them to the comptroller of public accounts of the State, for registry. They could not be issued until they were properly signed by a person who was the mayor at the time they were signed, and the comptroller could receive them lawfully for registry only from such mayor. So, also, by article 424, it is made the duty of the same mayor, and not that of any other per-

son, at the time of forwarding the bonds to the comptroller for registration, to furnish him with the statement specified in that article. No other person than such mayor could furnish the comptroller with such statement.

The complete answer to the suggestion that the plea does not negative the idea that the bonds may have been signed by a person authorized by the defendant to sign them, is that, in view of the statute, the defendant had no power to authorize any other person to sign them than the person who was mayor at the time they were signed. The answer to the suggestion that the plea does not negative the idea that they may have been signed by a person authorized by law to sign them, is, that in view of the provisions of the statutes of Texas referred to, and of the allegations of the plea, it was for the plaintiff to aver or show, in reply to the plea, that the person who signed them, or some other person than the person who was mayor at the time they were signed, was authorized by law to sign them.

It is contended for the plaintiff that, as Hodge, who signed the bonds as mayor, was the mayor on January 1, 1884, the date of the bonds, and the plaintiff was an innocent purchaser of them for value, he was not bound to look beyond the bonds themselves, and the enabling Acts authorizing their issue, and that, if there was lawful authority to issue them, and the city appeared to have acted upon that authority, he was not obliged to inquire further, no matter what irregularity characterized the acts of the officers who issued them on behalf of the city; that the face of the bonds referred him to article 420 of the statutes, and to the ordinance of September 13, 1883; that an examination of the statute and the ordinance would show authority to issue the bonds; that the records of the city would show that the persons who signed the bonds were the mayor and the secretary of the city on the 1st of January, 1884, the date of the bonds; that the indorsement on each bond would show that it had been registered by the comptroller; and that he had a right to presume that the bonds had been forwarded to the comptroller by the mayor, as provided by the statute, or otherwise the comptroller would not have registered them.

But we have always held that even *bona fide* purchasers of municipal bonds must take the risk of the official character of those who execute them. An examination of the records of the city in regard to the issuing of the bonds would have disclosed the fact that the bonds had not been signed and issued under the ordinance of September 13, 1883, until July 3, 1884; that W. N. Hodge was not mayor on that day; and that the person who then signed the bonds as mayor was a private citizen.

In *Anthony v. County of Jasper*, 101 U. S. 693 [25: 1005], municipal bonds were signed and issued in October, 1872, on a subscription made in March, 1872, to the stock of a railroad company, and bore date the day of the subscription. The presiding Justice who signed the bonds did not become such until October, 1872. Thus, the person who was in office when the bonds were actually signed, signed them, but they were antedated to a day when he was not in office. In the present case, the bonds were not signed by an officer who was in of-

face when they were signed, but by a person who was in office on the antedated day on which they bore date. In the Jasper County case there was a false date inserted in the bonds in order to avoid the effect of a registration Act which took effect between the antedated date and the actual date of signing. In the present case, there was a false signature. But the principle declared in the Jasper County case is equally applicable to the present case. It was there said by *Chief Justice* Waite, delivering the judgment of the court, p. 698 [1008]: "The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties. The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted; and he cannot bind his principal under powers that have been taken away, by simply antedating his contracts. Under such circumstances, a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. After the power of an agent of a private person has been revoked, he cannot bind his principal by simply dating back what he does. A retiring partner, after due notice of dissolution, cannot charge his firm for the payment of a negotiable promissory note, even in the hands of an innocent holder, by giving it a date within the period of the existence of the partnership. Antedating, under such circumstances, partakes of the character of a forgery, and is always open to inquiry, no matter who relies on it. The question is one of the authority of him who attempts to bind another. Every person who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other. In *Bayley v. Taber*, 5 Mass. 286, it was held that when a statute provided that promissory notes of a certain kind, made or issued after a certain day, should be utterly void, evidence was admissible on behalf of the makers to prove that the notes were issued after that date, although they bore a previous date. . . . Purchasers of municipal securities must always take the risk of the genuineness of the official signatures of those who execute the paper they buy. This includes, not only the genuineness of the signature itself, but the official character of him who makes it."

This ruling has been since followed. In *Bissell v. Spring Valley Township*, 110 U. S. 162 [28: 105], where bonds were issued by a township in payment of a subscription to railway stock, under a statute which made the signature of a particular officer essential, it was held, that without the signature of that officer they were not the bonds of the township, and that the municipality was not estopped from disputing their validity by reason of recitals in the bond, setting forth the provisions of the statute, and a compliance with them. The same principle is recognized in *Northern Nat. Bank v. Porter Township*, 110 U. S. 608, 618, 619 [28: 268, 262]; and *Merchants Exch. Nat. Bank v. Bergen County*, 115 U. S. 384, 390 [29: 420, 431].

The case of *Weyauwega v. Ayling*, 99 U. S. 112 [25: 470], is cited for the plaintiff. In that case the bonds of a town bore date June 1, and were signed by A. as chairman of the board of supervisors, and by B. as town clerk, and were delivered by A. to a railroad company. When sued on the coupons by a *bona fide* purchaser of the bonds for value before maturity, the town pleaded that the bonds were not in fact signed by B. until July 18, at which date he had ceased to be town clerk, and his successor was in office. It was held, *Chief Justice* Waite delivering the opinion of the court, that the town was estopped from denying the date of the bonds, because, in the absence of evidence to the contrary, it must be assumed that the bonds were delivered to the company by A. with the assent of the then town clerk.

In *Anthony v. County of Jasper* the court distinguished that case from *Weyauwega v. Ayling*, and said that in the latter case it held that "The town was estopped from proving that the bonds were actually signed by a former clerk after he went out of office, because the clerk in office adopted the signature as his own when he united with the chairman in delivering the bonds to the railroad company," while in the former case the bonds were not complete in form when they were issued, and it was only by a false date that they were apparently so. In the present case, it appears affirmatively by the bill of exceptions that the person who was mayor of the city at the time the bonds were signed took no part in signing, delivering or issuing them; that they were not complete in form when they were issued, because they were not signed by the then mayor; and that it was only by a false date that they were then apparently complete in form. Hence, the present case is not like *Weyauwega v. Ayling*, but is like *Anthony v. County of Jasper*.

This case is analogous to that of *Amy v. Wattertown*, No. 1, 180 U. S. 801 [32: 946], where the statute required process to be served on the city by serving it on the mayor, and it was not so served; and it was held that there could be no substituted service, and no legal service without service on the mayor.

Regarding these views as decisive of this case, we forbear discussing other questions on which it is maintained that the ruling of the circuit court was correct.

Judgment affirmed.

Ex parte:

In the Matter of ALEJANDRO SAVIN,
Appt.

(See S. C. Reporter's ed. 267-290.)

Power of U. S. Courts to punish for contempts—improperly influencing witness—Act of 1789—power to proceed summarily—misbehavior in presence of court, what is—hallway and witness room—practice—privilege of accused—errors and irregularities.

1. The courts of the United States have power to punish for contempts of court committed in the

NOTE.—See *Ex parte Robinson* and note on *Power of Court to Punish for Contempt*, 86 U. S., 22 L. ed. 205; also the succeeding case, *Ex parte Ouddy*; and also note to *Baker v. Ga.* 4 L. R. A. 128.

presence of the said courts, or so near thereto as to obstruct the administration of justice.

2. Where the charge against the appellant is, that he endeavored, by forbidden means, to influence or impede a witness from testifying the offense charged is punishable by indictment, yet the court may punish him for a contempt, if the offense was committed in its presence or so near as to obstruct the administration of justice.
3. Under the Act of 1789, the question whether particular acts constitute a contempt is to be determined according to the rules and principles of the common law.
4. Under the Revised Statutes, courts of the United States have power to proceed summarily, for contempt.
5. The court, when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court.
6. Attempting, while a witness is in the witness room or in the hallway of the court room, to deter him from testifying, by offering him money, is a misbehavior in the presence of the court and punishable, without indictment, by fine and imprisonment, as a contempt.
7. The court is not bound to require service of interrogatories upon the appellant, so that, in answering them, he could purge himself of the contempt charged; but it can in its discretion, adopt such mode of determining that question as it deems proper, provided due regard is had to the rules that obtain in the trial of matters of contempt.
8. Although the appellant was entitled, of right, to purge himself, under oath, of the contempt, yet it is sufficient that he was informed of the nature of the charges against him by the testimony of a witness taken down by a sworn stenographer at the preliminary examination and that he was present at the hearing of the contempt, was represented by counsel, testified under oath in his own behalf, and had full opportunity to make his defense.
9. Where the district court had jurisdiction of the subject matter, and of the person, any irregularities occurring in the mere conduct of the case, do not affect the validity of its final order. Its judgment, so far as it involves mere errors, cannot be reviewed in this collateral proceeding.

[No. 1553.]

Argued April 25, 1889. Decided May 13, 1889.

APPEAL from a judgment of the Circuit Court of the United States for the Southern District of California, denying a petition for writ of *habeas corpus*. The appellant claimed to be illegally imprisoned under color of the authority of the United States. *Affirmed*.

The facts are stated in the opinion.

Mr. J. A. Anderson, for appellant:

The district court had no jurisdiction to summarily punish appellant for the matters and things set out in its judgment ordering his imprisonment.

Ex parte Robinson, 86 U. S. 19 Wall. 511 (23:208); *Harwell v. State*, 10 Lea (Tenn.) 547; *Bac. Abr. title, Courts, E.*

The judgment is clearly void, on account of the absolute departure by the court, in the proceedings upon which its judgment is based, from the mode of procedure in criminal contempt cases.

Re Terry, 128 U. S. 806-810 (32:405); *Ex parte Wright*, 65 Ind. 505; *Whittem v. State*, 181 U. S.

86 Ind. 212; *Rapalje*, *Contempts*, 121, 122; *Burke v. State*, 47 Ind. 580, 584; *Re Pitman*, 1 Curtis, 186, 189, 190; *Re May*, 2 Flipp. 569; *Ex parte Kilgore*, 3 Tex. App. 253, 254; *Ex parte Ireland*, 38 Tex. 351; *Ex parte Langdon*, 25 Vt. 682, 683; *Windsor v. McVeigh*, 93 U. S. 284 (23:918).

Messrs. George J. Denis, U. S. Atty., and *G. A. Jenks*, Solicitor-Gen., for the United States:

The misbehavior complained of obstructed the administration of justice.

U. S. v. Anon. 21 Fed. Rep. 765; *Harwell v. State*, 10 Lea (Tenn.), 548; *Sinnot v. State*, 11 Lea (Tenn.), 282; *U. S. v. Carter*, 3 Cranch, C. C. 423; *Sharon v. Hill*, 24 Fed. Rep. 738; *State v. Doty*, 32 N. J. L. 404; *Gandy v. State*, 18 Neb. 451.

The contention of prisoner's counsel, that because the offense is an indictable one the court could not punish him as for contempt, but that punishment could only follow conviction after indictment, is untenable and against all the authorities.

See 2 Bishop, *Crim. Law*, Vol. II, § 264; 1 *Id.* § 1067; *Gandy v. State*, 18 Neb. 451; *Sharon v. Hill*, 24 Fed. Rep. 738; *Re Griffin*, 98 N. C. 225; *Passmore Williamson's Case*, 26 Pa. 28; *Re Tyler*, 64 Cal. 438; *Rapalje*, *Contempts*, 121 and cases cited.

Mr. Justice Harlan delivered the opinion of the court:

The appellant, claiming to be illegally imprisoned under color of the authority of the United States, presented to the Circuit Court of the United States for the Southern District of California his petition for a writ of *habeas corpus*. The prayer for the writ was denied, and the petition was dismissed. This appeal brings up the judgment of the court for review.

It appears that on the 27th day of February, 1889, the District Attorney stated to the District Court of the United States for the Southern District of California that he had been informed that one of the witnesses for the Government in the case of *The United States v. Hippolyte Goujon*, then pending in that court, had been corruptly approached, and an effort made to intimidate him from testifying. The witness alleged to have been thus approached was on the same day examined under oath in open court, in the presence of the respondent, who was in the custody of the marshal. The evidence was taken down by a stenographer, designated by the court and acting under oath. As the result of that examination an order was made that the appellant be cited to show cause before the District Court, at a specified hour, on the next day, why he should not be adjudged guilty of contempt. On the succeeding day, the citation having been duly served, the matter came on for hearing, the respondent being present in court, and represented by counsel. He demanded of the prosecution "service of interrogatories." That demand was denied by the court, and to that ruling he excepted. Witnesses having been examined on behalf of the Government, and the respondent having testified in his own behalf (but to what effect does not appear from the record), and the matter having been submitted, the District Court, upon the testimony taken down by the

stenographer, entered the following order and judgment:

"Whereas, during the progress of the trial of the action of *The United States of America v. H. Goujon*, in this court, on the 27th day of February, 1889, one Bartolo Flores, a witness on the part of the Government duly subpoenaed and in attendance upon the court, testified, in substance, that while in said attendance, on said 27th day of February, one Alejandro Savin, on two several occasions, once in the jury room of said court, temporarily used for witnesses, and within a few feet of the court room, and once in the hallway of said court building, immediately adjoining said court room, did approach said witness, and in said jury room did improperly endeavor to deter the said witness from testifying in behalf of the Government in said cause, and in the said hallway he offered the said witness money not to testify against the defendant in said action of *The United States v. Goujon*; and whereas, upon such testimony of said Flores, this court then and there made an order directing the said Savin to show cause before this court, at 9.30 o'clock A. M., on the 28th day of February, 1889, at the court room thereof, why he should not be adjudged guilty of a contempt of this court; and whereas, on said 28th day of February, the said Savin appeared with counsel in response to said order; whereupon, the said matter was heard in open court, and witnesses for and against him were sworn, and their testimony given, and the same having been duly considered by the court, the court now finds the facts to be: That during the progress of the trial of the action of *The United States of America v. H. Goujon*, in this court, on the 27th day of February, 1889, one Bartolo Flores, a witness on behalf of the Government, duly subpoenaed and in attendance upon the court, while in such attendance, on the said 27th day of February, was on two several occasions, once in the jury room of said court, which was temporarily used for a witness room, and which is located within less than seven feet of the court room, and once in the hallway of said court building, immediately adjoining the court room, was approached by the respondent, Alejandro Savin, and said Savin did then and there, in said jury room, unlawfully attempt and endeavor to deter said witness, Flores, from testifying for the Government in the aforesaid action, and in said hallway the said Savin did at the time stated unlawfully offer the said witness, Flores, money not to testify against the defendant therein, the aforesaid Goujon; from which facts it is considered and adjudged by the court that the said respondent, Alejandro Savin, did thereby commit a contempt of this court, for which contempt it is by the court now ordered and adjudged that the said Alejandro Savin be imprisoned in the county jail of Los Angeles County, California, for the period of one year.

"The marshal will execute this judgment forthwith.

"February 28, 1889. "Ross, District Judge."

Pursuant to that order, and in conformity with a warrant, reciting that he had been convicted of a contempt of said court, the respondent was committed to jail. In his petition he

claimed that the district court had no jurisdiction or legal authority to try and sentence him in the manner and form above stated, for these reasons: 1. The matters set out in the judgment do not constitute a contempt of court provided for by section 725 of the Revised Statutes of the United States. 2. The proceedings were insufficient to give the court jurisdiction to render judgment. 3. The judgment is not based or founded upon any proceedings in due course of law, and is, therefore, void.

The power of the courts of the United States to punish contempts of their authority is not merely incidental to their general power to exercise judicial functions, but, as was said in *Ex parte Terry*, 128 U. S. 289, 304 [32: 405, 408], where this subject was considered, is expressly recognized and the cases in which it may be exercised are defined, by Acts of Congress. The Judiciary Act of September 24, 1789, chap. 20, § 17, invests them with "power to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." 1 Stat. at L. 88. By an Act of Congress of March 2, 1831, chap. 99, "declaratory of the law concerning contempts of court," 4 Stat. at L. 487, it was enacted:

"That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.

"Sec. 2. That if any person or persons shall corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct or impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons so offending shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offense."

Section 725 of the Revised Statutes, title "The Judiciary," is in these words: "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

The second section of the Act of 1881 is in part reproduced in section 5899 of the Revised Statutes, title "Crimes." That section is as follows: "Every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both."

It is contended that the substance of the charge against the appellant is, that he endeavored, by forbidden means, to influence or "impede" a witness in the District Court from testifying in a cause pending therein, and to obstruct or impede the due administration of justice, which offense is embraced by section 5899, and, it is argued, is punishable only by indictment. Undoubtedly, the offense charged is embraced by that section, and is punishable by indictment. But the statute does not make that mode exclusive, if the offense is committed under such circumstances as to bring it within the power of the court under section 725; when, for instance, the offender is guilty of misbehavior in its presence, or misbehavior so near thereto as to obstruct the administration of justice. The Act of 1789 did not define what were contempts of the authority of the courts of the United States, in any cause or hearing before them, nor did it prescribe any special procedure for determining a matter of contempt. Under that statute the question whether particular acts constituted a contempt, as well as the mode of proceeding against the offender, was left to be determined according to such established rules and principles of the common law as were applicable to our situation. The Act of 1881, however, materially modified that of 1789, in that it restricted the power of the courts to inflict summary punishments for contempt to certain specified cases, among which was misbehavior in the presence of the court, or misbehavior so near thereto as to obstruct the administration of justice. *Ex parte Robinson* 86 U. S. 19 Wall. 505, 511 [22: 205, 208.] And although the word "summary" was, for some reason, not repeated in the present Revision, which invests the courts of the United States with power "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority" in certain cases defined in section 725, we do not doubt that the power to proceed summarily, for contempt, in those cases, remains, as under the Act of 1831, with those courts. It was, in effect, so adjudged in *Ex parte Terry*, above cited.

The question then arises, whether the facts recited in the final order in the District Court as constituting the contempt—which facts must be taken in this collateral proceeding to be true—make a case of misbehavior in the presence of that court, or misbehavior so near thereto as to obstruct the administration of justice therein. There may be misbehavior in the presence of a court amounting to contempt that would not, ordinarily, be said to obstruct the administration of justice. So there may be misbehavior, not in the immediate presence of the

court, but outside of and in the vicinity of the building in which the court is held, which, on account of its disorderly character, would actually interrupt the court, being in session, in the conduct of its business, and consequently obstruct the administration of justice.

Flores, we have seen, was in attendance upon the court in obedience to a subpoena commanding him to appear as a witness in behalf of one of the parties to a case then being tried. While he was so in attendance, and when in the jury room, temporarily used as a witness room, the appellant endeavored to deter him from testifying in favor of the Government in whose behalf he had been summoned; and, on the same occasion, and while the witness was in the hallway of the court room, the appellant offered him money not to testify against Goujon, the defendant in that case. Was not this, such misbehavior upon the part of the appellant as made him liable, under section 725, to fine or imprisonment, at the discretion of the court? This question cannot reasonably receive any other than an affirmative answer. The jury room and hallway, where the misbehavior occurred, were parts of the place in which the court was required by law to hold its sessions. It was held in *Heard v. Pierce*, 8 Cush. 388, 841, that "The grand jury, like the petit jury, is an appendage of the court, acting under the authority of the court, and the witnesses summoned before them are amenable to the court, precisely as the witnesses testifying before the petit jury are amenable to the court." We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed "upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form" (*Ex parte Terry*, 128 U. S. 289, 309) [82: 405, 410]; whereas, in cases of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. 4 Bl. Com. 286. But this difference in procedure does not affect the question as to whether particular acts do not, within the meaning of the statute, constitute misbehavior in the presence of the court. If, while Flores was in the court room waiting to be called as a witness, the appellant had attempted to deter him from testifying on behalf of the Government, or had there offered him money not to testify against Goujon, it could not be doubted that he would have been guilty of misbehavior in the presence of the court, although the judge might not have been personally cognizant at the time of what occurred. But if such attempt and offer occurred in the hallway, just outside of the court room, or in the witness room, where Flores was waiting, in obedience to the subpoena served

upon him, or pursuant to the order of the court, to be called into the court room as a witness, must it be said that such misbehavior was not in the presence of the court? Clearly not.

We are of opinion that the conduct of the appellant, as described in the final order of the District Court, was misbehavior in its presence, for which he was subject to be punished without indictment, by fine or imprisonment, at its discretion, as provided in section 725 of the Revised Statutes. And this view renders it unnecessary to consider whether, as argued, the words "so near thereto as to obstruct the administration of justice" refer only to cases of misbehavior, outside of the court room, or in the vicinity of the court building, causing such open or violent disturbance of the quiet and order of the court while in session, as to actually interrupt the transaction of its business.

It is, however, contended that the proceedings in the District Court were insufficient to give that court jurisdiction to render judgment. This contention is based mainly upon the refusal of the court to require service of interrogatories upon the appellant, so that, in answering them, he could purge himself of the contempt charged. The court could have adopted that mode of trying the question of contempt, but it was not bound to do so. It could, in its discretion, adopt such mode of determining that question as it deemed proper, provided due regard was had to the essential rules that obtain in the trial of matters of contempt.

This principle is illustrated in *Randall v. Brigham*, 74 U. S. 7 Wall. 528, 540 [19: 285, 293], which was an action for damages against the judge of a court of general jurisdiction, who removed the plaintiff from his office as an attorney at law, on account of malpractice and gross misconduct in his office. One of his contentions was that the court never acquired jurisdiction to act in his case, because no formal accusation was made against him, nor any statement of the grounds of complaint, nor a formal citation against him to answer them. The court, after observing that the informalities of the notice did not touch the question of jurisdiction, and that the plaintiff understood from the notice received the nature of the charge against him said: "He was afforded ample opportunity to explain the transaction and vindicate his conduct. He introduced testimony upon the matter, and was sworn himself. It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause, or from what the court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties upon affidavit; and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation." So in the present case, if the appellant was entitled, of right, to purge

himself, under oath, of the contempt, that right was not denied to him; for it appears, from the proceedings in the District Court, made part of the petition for *habeas corpus*, not only that he was informed of the nature of the charges against him by the testimony of Flores, taken down by a sworn stenographer at the preliminary examination, but that he was present at the hearing of the contempt, was represented by counsel, testified under oath in his own behalf, and had full opportunity to make his defense.

Our conclusion is that the District Court had jurisdiction of the subject matter, and of the person; and that irregularities, if any, occurring in the mere conduct of the case, do not affect the validity of its final order. Its judgment, so far as it involved mere errors, cannot be reviewed in this collateral proceeding, and must be affirmed.

It is so ordered.

Ex parte:

In the Matter of THOMAS J. CUDDY,
Appt.

(See S. C. Reporter's ed. 280-287.)

Application for habeas corpus, contents of—return to—improperly influencing a jury, a contempt—jurisdiction of district court—contempts—presumption—evidence—general averment—error.

1. The application for a writ of *habeas corpus* must set forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known.
2. The return must specify the true cause of the detention; and the petitioner, or the party imprisoned may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case, so that the facts may be ascertained and the matter disposed of as law and justice require.
3. Approaching a person summoned as a juror with a view of improperly influencing his actions in the event of his being sworn as a juror in the case, if done in the presence of the court, is a contempt, punishable by fine or imprisonment, at the discretion of the court, without indictment.
4. The District Court of the United States possesses superior jurisdiction, and its judgments cannot be assailed collaterally, except upon grounds that impeach their jurisdiction; it is presumed to have jurisdiction to give the judgments it renders until the contrary appears.
5. Where its judgment is attacked collaterally and the record discloses a case of contempt, and does not show one beyond the jurisdiction of the court, it must be presumed that the case is within its jurisdiction to punish; such presumption may be overcome by the evidence, in proceedings for *habeas corpus*.
6. If the appellant had alleged such facts as indicated that the misbehavior with which he was charged was not such as, under section 725 of the Revised Statutes, made him liable to fine or imprisonment, at the discretion of the court, he would have been entitled to the writ, and, upon proving such facts, to have been discharged.

NOTE.—See preceding case, *Ex parte Savin*, and *note*.

7. The general averment, in the petition, that appellant was detained in violation of the Constitution and laws of the United States, and that the district court had no jurisdiction to try and sentence him, is an averment of a conclusion of law, and not of facts.
8. Where it is neither alleged nor proved that the contempt, which the appellant was adjudged, upon notice and hearing, to have committed, was not committed in the presence of the court, and his misbehavior, if it occurred in its presence, made him liable to fine or imprisonment, it must be held that the want of jurisdiction is not affirmatively shown; consequently, that it does not appear that error was committed in refusing the writ.

[No. 1552.]

Argued April 25, 1889. Decided May 13, 1889.

APPEAL from a judgment of the Circuit Court of the United States for the Southern District of California, denying an application for a writ of *habeas corpus*. *Affirmed.*

The facts are stated in the opinion.

Mr. J. A. Anderson for appellant.

Messrs. George J. Denis, United States Atty., and G. A. Jenks, Solicitor-Gen., for United States.

Mr. Justice Harlan delivered the opinion of the court:

This is an appeal from a final judgment in the Circuit Court of the United States for the Southern District of California, denying an application for a writ of *habeas corpus*.

The appellant, in his petition for the writ, represented that he was detained and imprisoned, contrary to the Constitution and laws of the United States, under and by virtue of a warrant of commitment based upon a pretended judgment of the District Court of the United States for the Southern District of California, adjudging him guilty of contempt of court, and sentencing him to six months' imprisonment in jail.

The petition purports to set out all the minutes, records, and files of the Court, in the proceedings for contempt, from which it appears that on the 12th day of February, 1889, the case of *United States v. W. More Young* coming on regularly for trial, a jury was ordered to be drawn and impaneled; that the names of twelve jurors were regularly drawn from the box, and they were sworn on their *voir dire*; that among the names so drawn was that of Robert McGarvin, who, being asked upon his examination if he had been approached or spoken to by anyone about the above case, replied that he had been approached and spoken to about it by the appellant, Cuddy; that, upon the testimony thus adduced, the court made an order directing a citation to be issued forthwith, requiring appellant to appear before the court, on the next day, to show cause why he should not be punished for contempt; and that such citation was accordingly at once issued.

It further appears from the minutes and orders, that the matter of contempt came on for hearing the next day, the appellant appearing in person and by counsel; that an exception to the proceedings was taken by him, "a general denial entered, and the hearing was proceeded with;" that after the witnesses on behalf

of the Government were examined, the appellant moved to dismiss the matter of contempt, and the motion was denied; that he testified, under oath, in his own behalf; and that upon the conclusion of all the testimony the matter was submitted. The court made the following order:

"Whereas, in the progress of the trial of the action of the *United States of America v. W. More Young*, on the 12th day of February, 1889, upon the examination of the term trial juror, Robert McGarvin, as to his qualification to sit as a trial juror in the said action, the said McGarvin testified, among other things, in effect that on the day previous he was approached by one Thomas J. Cuddy with the object on Cuddy's part to influence his, McGarvin's actions as a juror in the said case in the event that he should be sworn to try the said action; and

"Whereas, from the testimony, this court, on the said 12th day of February, 1889, entered an order directing the said Thomas J. Cuddy to show cause before this court, at the court room thereof, at 10 o'clock, on the 18th day of February, 1889, why he should not be adjudged guilty of a contempt of this court; and

"Whereas, in response to the said citation, said Thomas J. Cuddy did, on the said 18th day of February, 1889, appear before the said court; and

"Whereas, testimony was then and there introduced in respect to the matter both for and against him:

"The court, having duly considered the testimony, does now find the fact to be that the said Thomas J. Cuddy did, upon the 11th day of February, 1889, approach the said Robert McGarvin, at the time being a term trial juror duly impaneled in this court, with the view to improperly influence the said McGarvin's action in the case of the *United States of America* against the said Young in the event the said McGarvin should be sworn as a juror in said action.

"Now, it is here adjudged by the court that the said Thomas J. Cuddy did thereby commit a contempt of this court, for which contempt it is now here ordered and adjudged that the said Thomas J. Cuddy be imprisoned in the county jail of the County of Los Angeles for the period of six months from this date, and the marshal of this district will execute this judgment forthwith."

The petition for the writ sets out also the warrant of commitment, which recites that the appellant "was convicted of a contempt of the said court, committed on the 11th day of February, 1889, at the City of Los Angeles, County of Los Angeles, State of California, and within the jurisdiction of said court."

The appellant in his application claims "that said United States District Court had no jurisdiction or authority legally to try and sentence him in the manner and form above stated: 1. For the reason that the matters set out in said judgment do not constitute any contempt of court provided for by section 725 of the Revised Statutes of the United States. 2. For the reason that the proceedings in said court were insufficient to give the court jurisdiction to proceed

to judgment in said matter. 8. For the reason that said judgment is void, because not based or founded upon any proceedings in due course of law."

This is the whole case as made by the petition for the writ of *habeas corpus*.

Although the testimony given on the hearing of the question of contempt was taken down by a stenographer, under oath, no part of it except the evidence of McGarvin, the substance of which is recited in the above order, appears in the transcript.

We are unable from the record before us to say that the circuit court erred in denying the application for the writ of *habeas corpus*.

The statute requires the application for a writ of *habeas corpus* to set forth "the facts, concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known." R. S. § 754. The return must specify the true cause of detention, and the petitioner, or the party imprisoned "may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case." Such denials or allegations must be under oath, and amendments may be made, with leave of the court, "so that thereby the material facts may be ascertained," and the matter disposed of "as law and justice require." R. S. §§ 757, 760, 761.

The present application does show in whose custody and by virtue of what authority the appellant is detained; but it sets forth the facts concerning his detention so far only as they are disclosed, as above, by the minutes, files, and records of the district court. It is stated in the brief of appellant's counsel, and the statement was repeated at the bar, that the difference between the *Savin Case*, just determined [*ante*, p. 150], and the present case is, that the misbehavior constituting the contempt with which Savin is charged occurred in the court building and while the court was in session; whereas, the misbehavior with which Cuddy is charged did not occur in the court building, nor, so far as the record of the district court shows, while the court was in session. It was assumed in argument that, under no view of the facts, could the misbehavior of Cuddy be deemed to have occurred in the presence of the court or so near thereto as to obstruct the administration of justice, and therefore his offense, if punishable at all, was punishable only by indictment. But both the petition for *habeas corpus* and the record of the district court are silent as to the particular locality where the appellant approached McGarvin, with a view of improperly influencing his actions in the event of his being sworn as a juror in the case of *United States v. Young*. That which, according to the finding and judgment, the appellant did, if done in the presence of the court, that is, in the place set apart for the use of the court, its officers, jurors, and witnesses, was clearly a contempt, punishable, as provided in § 725 of the Revised Statutes, by fine or imprisonment, at the discretion of the court, and without indictment. *Ex parte Savin*, *ante*, p. 150.

The district court possesses superior jurisdiction, within the meaning of the familiar rule that the judgments of courts of that character

cannot be assailed collaterally, except upon grounds that impeach their jurisdiction. In *Kemp's Lessee v. Kennedy*, 9 U. S. 5 Cranch, 178, 185 [8: 70]. Chief Justice Marshall, after observing that the words "inferior court" apply to courts of special and limited authority, erected on such principles that their proceedings must show jurisdiction, said: "The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded." In *McCormick v. Sullivan*, 28 U. S. 10 Wheat. 192, 199 [6: 300], where the question was whether a decree in a suit in the Federal District Court of Ohio, which did not show that the parties were citizens of different States, was *coram non judice* and void, the court said that the reason assigned for holding that decree void "proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not, on that account, inferior courts in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities." And in *Galpin v. Page*, 85 U. S. 18 Wall. 350, 365 [21: 959, 962], the court said: "It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject matter of the action in which the judgment is given, but of the parties also." The general rule that, unless the contrary appears from the record, a cause is deemed to be without the jurisdiction of a Circuit or District Court of the United States—their jurisdiction being limited by the Constitution and Acts of Congress—has no application where the judgments of such courts are attacked collaterally.

Unless, therefore, the want of jurisdiction, as to subject matter or parties, appears, in some proper form, every intendment must be made in support of the judgment of a court of that character. The District Courts of the United States, invested with power to punish, without indictment, and by fine or imprisonment, at their discretion, contempts of their authority, are none the less superior courts of general jurisdiction, because the statute declares that such power to punish contempts "shall not be construed" to extend to any cases except misbehavior in the presence of the court, misbehavior so near thereto as to obstruct the administration of justice, and disobedience or resistance to its lawful writ, process, order, rule decree, or command. Rev. Stat. 725. The only effect of this limitation is to narrow the field for the exercise of their general power, as courts of superior jurisdiction, to punish contempts of their authority.

The record in the present case shows that the appellant was before the court; that testimony was heard in respect to the matter of contempt; and that the appellant testified in his own behalf. The judgment being attacked collaterally, and the record disclosing a case of contempt, and not showing one beyond the jurisdiction of the court, it must be presumed, in this proceeding, that the evidence made a case within its jurisdiction to punish in the mode pursued here. We do not mean to say that this presumption as to jurisdictional facts, about which the record is silent, may not be overcome by evidence. On the contrary, if the appellant had alleged such facts as indicated that the misbehavior with which he was charged was not such as, under section 725 of the Revised Statutes, made him liable to fine or imprisonment, at the discretion of the court, he would have been entitled to the writ, and, upon proving such facts, to have been discharged. Such evidence would not have contradicted the record. But he made no such allegation in his application, and so far as the record shows, no such proof. The general averment, in the petition, that he was detained in violation of the Constitution and laws of the United States, and that the district court had no jurisdiction or authority to try and sentence him, in the manner and form above stated, is an averment of a conclusion of law, and not of facts, that would, if found to exist, displace the presumption the law makes in support of the judgment. As it was neither alleged nor proved that the contempt, which the appellant was adjudged, upon notice and hearing, to have committed, was not committed in the presence of the court, and as his misbehavior, if it occurred in its presence, made him liable to fine or imprisonment, at the discretion of court, it must be held that the want of jurisdiction is not affirmatively shown; consequently, that it does not appear that error was committed in refusing the writ.

Whether the attempt to influence the conduct of the term trial juror, McGarvin, was or was not, within the meaning of the statute, misbehavior so near to the court "as to obstruct the administration of justice," however distant from the court building may have been the place where the appellant met him, is a question upon which it is not necessary to express an opinion.

For the reasons stated, the judgment below is affirmed.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY, *Appt.*,

THE KEOKUK AND HAMILTON BRIDGE COMPANY.

THE PENNSYLVANIA RAILROAD COMPANY, *Appt.*,

THE KEOKUK AND HAMILTON BRIDGE COMPANY.

(See S. C. Reporter's ed. 871-890.)

Ratification, by corporation, of agent's act—

NOTE.—See note to *Parsons v. Armor*, 8 Peters, 7 L. ed. 728, for collection of authorities.

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what sufficient—ultra vires—contracts for continuous line of transportation—bridge contract valid—contract of railroad companies valid—contract ultra vires does not become valid by being executed.

1. When the president of a corporation executes, in its behalf, and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his act.
2. When a contract is made by any agent of a corporation in its behalf, and for a purpose authorized by its charter, and the corporation receives the benefit of the contract, without objection, it may be presumed to have authorized or ratified the contract of its agent.
3. A lease made by one railroad corporation to another, neither of which is expressly authorized by law to enter into the lease, is *ultra vires* and void.
4. Where the charter of a railroad corporation, or the general laws applicable to it manifest the intention of the Legislature, for the purpose of securing a continuous line of transportation of which its road forms part, to confer upon it the power of making contracts with other railroad or steamboat corporations to promote that end, such contracts are not *ultra vires*.
5. The bridge contract, mentioned in the opinion, in regard to the bridge across the Mississippi River at Keokuk, was a lawful and valid contract as between the Bridge Company and the Indiana Central Company.
6. The laws of Pennsylvania authorized the Pittsburgh and Pennsylvania Companies to assume the obligation of that contract with the Bridge Company, either directly or through the intervention of the Indiana Central Company; the Bridge Company was a railroad company, and the bridge a railroad, within the meaning of the Pennsylvania statutes, its principal purpose and use being the passage of railroad trains.
7. A contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid; but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received the benefit of.

[Nos. 11, 18.]

Argued Jan. 25, 1888. Decided May 13, 1889.

APPEALS from a decree of the Circuit Court of the United States for the Northern District of Illinois, for the recovery by the complainant, the Keokuk and Hamilton Bridge Co., from the Pittsburgh, Cincinnati and St. Louis Railway Co., and the Pennsylvania Railway Company, of the sum of \$153,791.29, with costs for deficiencies in toll for the use of plaintiff's bridge under a contract executed at the request of these two railroad companies by the Columbus, Chicago and Indiana Central Railroad Company. *Affirmed.*

The facts are stated in the opinion.

Mr. George Hoadley, for appellants:

The C. C. & I. C. R. Co. was a corporation of Ohio, Indiana and Illinois. This made it a separate corporation of each of the States *quoad* the franchises conferred by and the property situate within such State.

Ohio & M. R. Co. v. Wheeler, 66 U. S. 1

Black, 286 (17: 180); *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 18 Wall. 270 (20: 571); *Muller v. Dows*, 94 U. S. 444, 447 (24: 207, 208); *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 414 (28: 794).

Neither party to the lease had legal authority to enter into the bridge contract or either of the amendments thereto.

Pa. R. Co. v. St. Louis, A. & T. H. R. Co. 118 U. S. 290, 680 (30: 83, 284); *York & M. L. R. Co. v. Winans*, 58 U. S. 17 How. 80 (15: 27); *Green Bay & M. R. Co. v. Union Steamboat Co.* 107 U. S. 98 (27: 418); *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331; *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653; *Macgregor v. Dover & D. R. Co.* 18 Q. B. 618; *East Anglian R. Co. v. Eastern Counties R. Co.* 11 C. B. 775; *Downing v. Mt. Washington Road Co.* 40 N. H. 230; *Pittsburg & S. R. Co. v. Allegheny Co.* 79 Pa. 210.

Neither lessor nor lessee authorized its officers to execute the bridge contract or either of the amendments thereto.

Thomas v. West Jersey R. Co. 101 U. S. 86 (25: 958); *Parish v. Wheeler*, 22 N. Y. 494.

The lease and amended lease, and with them all liability upon the bridge contracts, were determined by eviction, January 1, 1875.

Clark v. Lineberger, 44 Ind. 228; *Morse v. Goddard*, 18 Met. 180; *Beach, Receivers*, § 200, *et seq.*; *Herring v. New York, L. E. & W. R. Co.* 7 Cent. Rep. 308, 105 N. Y. 340, 377; *Trimble v. Strother*, 25 Ohio St. 378; *Brewer v. Maurer*, 38 Ohio St. 543, 550; *Emmitt v. Brophy*, 42 Ohio St. 82, 88; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650.

Mr. Lyman Trumbull and Melville W. Fuller, for appellee:

It is immaterial whether the C. C. & I. C. R. Co. had authority to enter into said bridge contracts. Persons disqualified to act for themselves may act as the agents of others.

Story, Agency, § 7; Angell & Ames, Corp. § 278.

If material, the statutes of Illinois and the United States gave it such authority.

1 Gross, Ill. Stat. 1818-1869, pp. 536, 537, 538; Act of Congress, June 15, 1866, R. S. § 5258; *Green Bay & M. R. Co. v. Union Steamboat Co.* 107 U. S. 100 (27: 418); Field, *Ultra Vires*, 112; *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123 (22: 837); *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 266 (24: 695).

The presidents of the appellant companies and of the C. C. & I. C. R. Co. had authority as such to execute said bridge contracts as the executive officers of their respective companies, charged with the duty of making running arrangements in connection with their roads for through traffic.

Story, Agency, §§ 184, 185, 188, 446; *Mitchell v. Deeds*, 49 Ill. 424; *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297; 2 Kent, Com. 12th ed. 291; *Anderson v. Tompkins*, 1 Brock. 462; *Bank of Columbia v. Patterson*, 11 U. S. 7 Cranch, 306 (3: 351).

Appellants are estopped by their acts from questioning their own authority or that of their presidents to enter into said bridge contract.

Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640, 644 (24: 648, 650); *Union Nat. Bank v. Matthews*, 98 U. S. 621

(25: 188); *Dimpfel v. Ohio & M. R. Co.* 9 Biss. 127; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258 (24: 698); *Zabriskie v. Cleveland, C. & C. R. Co.* 64 U. S. 28 How. 381 (16: 438); *Bradley v. Ballard*, 55 Ill. 418; *Ill. Pneumatic Gas Co. v. Berry*, 118 U. S. 827 (28: 1005); *Porter v. Graves*, 104 U. S. 171 (26: 691); *Chicago Bldg. Soc. v. Crowell*, 65 Ill. 459; *East St. Louis v. East St. Louis Gaslight & C. Co.* 98 Ill. 429; *Daniels v. Tearney*, 102 U. S. 415 (26: 187); *Wright v. Antwerp Pipe Line Co.* 101 Pa. 204; *Bloomington Mut. L. Ben. Assn. v. Blue*, 8 West. Rep. 642, 120 Ill. 128; *Union Trust Co. v. Ill. Midland R. Co.* 117 U. S. 434 (29: 968).

Contracts are properly called voidable, which are valid and effectual until they are avoided. *Prima facie* they are valid but they are subject to defects, of which some person has a right to take advantage by proper proceedings for that purpose.

Void and voidable, 7 Bac. Abr. 64; 22 Vin. Abr. 12; Green's Brice, *Ultra Vires*, ed. 1875, p. 38, note a; Pom. Cont. 77; *Woodruff v. Erie R. Co.* 98 N. Y. 609; Field, *Lawyers' Briefs*, Vol. 6, § 675; *Thomas v. West Jersey R. Co.* 101 U. S. 71 (25: 950); *Pa. R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 316 (30: 94); *Dubucque & S. C. R. Co. v. Richmond*, 86 U. S. 19 Wall. 584 (22: 173).

The making of the guarantying of the bridge contract was not *ultra vires*.

South Wales R. Co. v. Redmond, 10 C. B. N. S. 675; *Green Bay & M. R. Co. v. Union Steamboat Co.* 107 U. S. 100 (27: 418); 2 Sm. Lead. Cas. 6 Am. ed. 424-433; *Pittsburg, C. & St. L. R. Co. v. Columbus, C. & I. C. R. Co.* 8 Biss. 456.

Mr. Justice Gray delivered the opinion of the court:

This was a bill in equity, filed July 25, 1881, by the Keokuk and Hamilton Bridge Company against the Pittsburgh, Cincinnati and St. Louis Railway Company and the Pennsylvania Railroad Company, to recover deficiencies in tolls for the use of the plaintiff's bridge under a contract executed at the request of the presidents of those two railroad companies by the Columbus, Chicago and Indiana Central Railroad Company, which was made by amendment a party to the bill.

The Keokuk and Hamilton Bridge Company was a corporation organized under the laws of Iowa and of Illinois. The Pennsylvania Railroad Company was a corporation organized under the laws of Pennsylvania. The Pittsburgh, Cincinnati and St. Louis Railway Company was formed in 1868 by the consolidation of the Pan-Handle Company, a corporation organized under the laws of Pennsylvania, the Holiday's Cove Railroad Company, a corporation organized under the laws of West Virginia, and the Steubenville and Indiana Railroad Company, a corporation organized under the laws of Ohio. The Columbus, Chicago, and Indiana Central Railroad Company was a corporation formed in 1867 by the consolidation of the Columbus and Indiana Central Railroad Company, a corporation existing under the laws of Ohio and Indiana, and the Chicago and Great Eastern Railway Company, a corporation existing under the laws of Indiana and Illinois.

The railroads of the Pennsylvania Railroad Company from Philadelphia to Pittsburgh in Pennsylvania, of the Pittsburgh, Cincinnati and St. Louis Railway Company from Pittsburgh to Columbus in Ohio, of the Columbus, Chicago and Indiana Central Railroad Company from Columbus to the state line between Indiana and Illinois, and of the Toledo, Peoria and Warsaw Railway Company from that state line to Hamilton in Illinois, with the bridge of the Keokuk and Hamilton Bridge Company across the Mississippi River between Hamilton and Keokuk, and the road of the Des Moines Valley Railroad Company from Keokuk to Des Moines in the State of Iowa, form a continuous line of railroad transportation from Philadelphia, on the East, to Des Moines on the West. For the sake of brevity, we shall speak of those companies respectively as the Pennsylvania Company, the Pittsburgh Company, the Indiana Central Company, the Peoria Company, the Bridge Company and the Des Moines Company.

The bridge was built under a contract, dated January 19, 1869, made by the Bridge Company with the Indiana Central Company, the Peoria Company, the Des Moines Company, and a fourth railroad company (the Toledo, Wabash and Western Railway Company), whose railroad connected with the bridge at Hamilton. By that contract the Bridge Company agreed to begin to construct forthwith across the Mississippi River at Keokuk, and to complete by January 1, 1870, "a substantial wrought-iron bridge, suitable for the running of railway trains;" "to lay a track upon said bridge, and connect the same with railways belonging to the parties hereto, in such manner and at such points as may hereafter be agreed upon;" and "to maintain and keep in repair in perpetuity the said bridge and track, so that trains may safely cross at all times, except when repairs make it necessary that crossing should be temporarily suspended, or when it shall be necessary to have the draw open for the passage of boats;" and granted to those four railroad companies, in perpetuity, the right to use the bridge for the purpose of passing their trains across the Mississippi River; and they agreed to pay monthly stipulated rates for the transportation of passengers and freight, and, if the gross amount of the rates for freight for any one year should fall below the sum of \$80,000, making up the deficiency, each of the four railroad companies contributing in proportion to the tonnage passed by it over the bridge; for which, by a subsequent modification of the contract in June, 1871, was substituted one fourth of such deficiency.

This suit was brought to recover from the Pittsburgh Company and the Pennsylvania Company such deficiencies in the sums payable by the Indiana Central Company under the modified bridge contract since September 1, 1874, amounting to \$118,076.89 and interest. The circuit court entered a decree for the plaintiff, in accordance with the prayer of the bill; and the Pittsburgh and Pennsylvania Companies each appealed to this court.

The facts on which the Bridge Company sought to charge the Pittsburgh and Pennsylvania Companies for these sums were as follows:

After the original bridge contract had been drawn up, and before it had been executed, the Indiana Central Company entered into an indenture with the Pittsburgh and Pennsylvania Companies, by which it leased its franchises and road and all lands and property connected with the use thereof, to the Pittsburgh Company for ninety-nine years, and the Pennsylvania Company guaranteed the performance of all the covenants of the Pittsburgh Company as lessee.

The thirteenth and the sixteenth articles of that lease clearly manifest that one of its chief objects was to establish a continuous line for quick transportation from Pennsylvania to the West, and to procure freight and passengers at each end of the line; and they contain special provisions calling for action of the Pennsylvania Company, as well as of the Pittsburgh Company, so as to promote that object.

The sixteenth article of the lease declares that it is in consideration of the benefits so accruing to the Pennsylvania Company, by reason of the covenants of the lessor and of the lessee, "in the forming, maintaining and operating of a continuous line of railway in connection with the road or roads of" the Pennsylvania Company, that this company guarantees to the Indiana Central Company that the Pittsburgh Company will keep and perform all its covenants, and that, upon its failure or default to do so, the Pennsylvania Company will, upon written notice of the kind and nature of such failure or default, keep and perform those covenants; in which event it is agreed that it shall be entitled to all the benefits that might accrue therefrom to the Pittsburgh Company.

Among those covenants of the Pittsburgh Company, as lessee, which the Pennsylvania Company thus guaranteed the performance of, were the covenant in the sixth article to pay to or for the benefit of the Indiana Central Company three tenths of the gross earnings of the property leased, and the covenant in the ninth article, by which the Indiana Central Company assigns to the Pittsburgh Company certain existing contracts for transportation over other railroads not mentioned above, and the Pittsburgh Company "assumes and agrees at its own risk and expense to carry out each and all of said contracts, according to their respective tenors and legal liabilities, receiving and enjoying all benefits to be derived therefrom."

The lease was executed in behalf of each of the three companies parties thereto by its president and secretary, under its seal, and was approved by votes of the directors and of the stockholders of the Indiana Central Company and of the Pittsburgh Company, on or before February 1, 1869, so as to make it valid under the laws of Ohio, and the Pittsburgh Company forthwith took possession of and has since operated the railroad so leased.

The lease does not appear to have been approved by formal vote of the directors or stockholders of the Pennsylvania Company. But, immediately after its execution, the president and directors of this company, in their printed annual report to their stockholders of February 10, 1869, stated that the Pennsylvania Company controlled the railway of the Pittsburgh Company, "as an indispensable connection for the Pennsylvania Railway with the West and

Southwest," by means of the ownership by the Pennsylvania Company of more than five millions of the stock and bonds of the Pittsburgh Company, and of the lease from the Indiana Central Company to the Pittsburgh Company, "guaranteed by this company;" and expressed the settled policy of the Pennsylvania Company thereby to secure a continuous line of traffic to Kookuk and westward.

The bridge contract was not one of the transportation contracts specified in the ninth article of the lease. But on February 16, 1869, the presidents of the Pittsburgh and Pennsylvania Companies, in their behalf, jointly addressed a formal letter to the president of the Indiana Central Company, referring to the bridge contract as having been under negotiation, but unexecuted by the Indiana Central Company, at the date of the final execution of the lease, and requesting him, in his official capacity, to execute the bridge contract, "it being understood that the said lessee and Pennsylvania Railroad Company shall assume all the liabilities and obligations and be entitled to all the benefits of said bridge contract, the same as if it had been specifically named and made a part of the ninth article of the said lease."

The president of the Indiana Central Company thereupon, in its name and under its seal, executed the bridge contract, and reported to its board of directors at the next meeting, in March, 1869, that he had done so; and the board never in any way repudiated or disapproved his act, or took any action upon the subject.

On February 1, 1870, an amendment of the lease, defining the gross earnings to be accounted for as the annual gross earnings of the road, after deducting, among other things, "the *pro rata* bridge tolls" and "terminal expenses allowed to other railroad corporations on through business between the East and the West," was executed by the presidents of the three companies and approved by votes of the directors and stockholders of the Indiana Central Company and of the Pittsburgh Company.

This amendment, like the original lease, does not appear to have been approved by formal vote of the directors or stockholders of the Pennsylvania Company. But the annual report made in print by its president and directors to the stockholders a year after, on February 18, 1871, spoke of this company's control of the western traffic, through the Pittsburgh Company, and by means of the lease of the Indiana Central Railroad, as an established fact.

On June 6, 1871, the bridge contract was modified so as to have the deficiency in tolls paid to the bridge company by the Indiana Central Company and the three other railroad corporations, parties to that contract, one fourth each, instead of in proportion to tonnage; and the modification was executed by the president of the Indiana Central Company, pursuant to a request of the presidents of the Pittsburgh and Pennsylvania companies, similar in terms to their request upon which the original bridge contract had been executed.

It was on June 18, 1871, after all these transactions had taken place, that the bridge was accepted by the Bridge Company, and was opened for use; and thenceforward it was used by the Pittsburgh and Pennsylvania Compa-

nies, in the exercise of the control asserted by them under the various contracts above mentioned. From that time the Bridge Company, acting in accordance with the understanding expressed in the letters from the presidents of the Pittsburgh and Pennsylvania Companies to the president of the Indiana Central Company, upon which the latter, in behalf of his company, had executed the bridge contract and the modification thereof, as well as the original lease and the amendment thereof, demanded payment directly from the Pittsburgh Company, semi-annually, of the sums payable by the Indiana Central Company for tolls and deficiencies under the modified bridge contract; and for more than three years, from June, 1871, to September, 1874, the comptroller of the Pittsburgh Company, after examining the books of account of the Bridge Company, paid to the Bridge Company the amount both of such tolls and of such deficiencies. Since that time like payments were demanded by the Bridge Company of the Pittsburgh Company, and the tolls only were paid.

The principal positions taken in the argument for the appellants were, that the Indiana Central Company, the Pittsburgh Company and the Pennsylvania Company never authorized their officers to execute the bridge contract, or to bind them by it; and that the contract was beyond the scope of their corporate powers. But the court is of opinion that upon the facts of this case neither of these positions can be maintained.

When the president of a corporation executes, in its behalf, and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his act. *Indianapolis Rolling Mill v. St. Louis, F. S. & W. R. Co.* 120 U. S. 256 [80: 639]. And when a contract is made by any agent of a corporation in its behalf, and for a purpose authorized by its charter, and the corporation receives the benefit of the contract, without objection, it may be presumed to have authorized or ratified the contract of its agent.

Bank of Columbia v. Patterson, 11 U. S. 7 Cranch, 299 [8: 851]; *Bank of United States v. Dandridge*, 25 U. S. 12 Wheat. 64 [6: 552]; *Zabriskie v. Cleveland, C. & C. R. Co.* 64 U. S. 23 How. 381 [16: 488]; *Union Gold Mining Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640 [24: 648]; *Illinois Pneumatic Gas Co. v. Berry*, 113 U. S. 322, 327 [28: 1008, 1005]. This doctrine was clearly and strongly stated by Mr. Justice Story, delivering the judgment of this court, in each of the first two of the cases just cited.

In *Bank of Columbia v. Patterson*, which was an action brought against a corporation by an administrator to recover for work done by his intestate under contracts with the committee of the corporation, he said: "Wherever a corporation is acting within the scope of the legitimate purposes of its institution, all *parol* contracts, made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action

may well lie." 11 U. S. 7 Cranch, 306 [3: 353]. "Let us now consider what is the evidence in this case, from which the jury might legally infer an express or an implied promise of the corporation. The contracts were for the exclusive use and benefit of the corporation, and made by their agents for purposes authorized by their charter. The corporation proceeded, on the faith of those contracts, to pay money from time to time to the plaintiff's intestate. Although, then, an action might have lain against the committee personally, upon their express contract, yet, as the whole benefit resulted to the corporation, it seems to the court that from this evidence the jury might legally infer that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted their engagement." 11 U. S. 7 Cranch, 307 [3: 354].

In *Bank of United States v. Dandridge*, the point decided was that the approval of a cashier's bond by the board of directors of a bank, as required by statute, need not appear upon the records of the board, but might be proved by presumptive evidence, in the same manner as similar facts might be proved in the case of private persons, not acting as a corporation or as the agents of a corporation. The general doctrine was affirmed, that the presumptions, which, by the general rules of evidence, "are continually made, in cases of private persons, of acts even of the most solemn nature, when those are the natural result or necessary accompaniment of other circumstances," are equally applicable to corporations; and it was said: "Persons acting publicly as officers of the corporation, are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted; and slight acts on their part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed." 25 U. S. 12 Wheat. 70 [6: 554].

The original bridge contract was executed by the president of the Indiana Central Company, in its behalf, upon the formal request of the presidents of the Pittsburgh and Pennsylvania Companies, undertaking that these two corporations should assume all the liabilities and obligations of that contract and be entitled to all its benefits. The board of directors of the Indiana Central Company, having been informed by its president that he had executed the contract, never dissented, and must therefore be presumed to have concurred. The modification of the bridge contract was executed by the president of that company, in its behalf, upon a similar request and undertaking of the presidents of the Pittsburgh and Pennsylvania Companies in their behalf.

After all this, the bridge was opened for use, and was used by the Pittsburgh & Pennsylvania Companies. For more than three years, semi-annual accounts for the sums payable by the Indiana Central Company were rendered directly by the Bridge Company to the Pittsburgh Company, and settled by the latter, after examination by its comptroller. It must be presumed, although not affirmatively proved, that the comptroller reported his action in this respect to the board of directors, as well as to the stockholders at their annual or other meetings. There is no difficulty, therefore, in holding that the Pittsburgh Company was bound by the bridge contract and the modification thereof, if within its corporate powers.

The evidence that the directors or stockholders of the Pennsylvania Company authorized or ratified the action of its president in this regard is not so full and conclusive, but is quite sufficient to bind this company. After the execution of the original bridge contract, the directors of the Pennsylvania Company twice joined with the president in a printed annual report to the stockholders, declaring in unequivocal terms the settled policy of this company to secure a continuous line of traffic from Philadelphia to Keokuk and westward, and stating that this object had been accomplished through the Pittsburgh Company.

The reasonable inference from this evidence, which there is nothing in the record to control or qualify, is that the Pennsylvania Company had the benefit of the original bridge contract, and either authorized or ratified its execution; and, under the circumstances of this case, the president must be considered as having authority to procure and assent to the modification of that contract as to the proportion of the deficiency in tolls to be borne by the Pittsburgh Company as principal and the Pennsylvania Company as guarantor.

From all the facts of the case, the conclusion is inevitable that the Pittsburgh and the Pennsylvania Companies were the real, though not the formal, parties to the bridge contract executed by the Indiana Central Company at their request and for their benefit, and that this contract, as well as the lease, bound the Pittsburgh and Pennsylvania Companies, if within the scope of their corporate powers.

The outlines of the doctrine of *ultra vires*, and the reasons on which it rests, have been clearly stated in previous judgments of this court.

The reasons why a corporation is not liable upon a contract *ultra vires*, that is to say, beyond the powers conferred upon it by the Legislature, and varying from the objects of its creation as declared in the law of its organization, are: 1st. The interest of the public, that the corporation shall not transcend the powers granted. 2d. The interest of the stockholders, that the capital shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock. 3d. The obligation of every one, entering into a contract with a corporation, to take notice of the legal limits of its powers.

These three reasons are clearly brought out in the unanimous judgment of this court, delivered by *Mr. Justice Campbell*, in the leading

case of *Pearce v. Madison & I. R. Co.* 62 U. S. 21 How. 441 [16: 184], in which it was held that a railroad corporation was not liable to be sued upon promissory notes which it had given in payment for a steamboat received and used by it and running in connection with its railroad.

So it has been repeatedly adjudged by this court that a lease made by one railroad corporation to another, either of which is not expressly authorized by law to enter into the lease, is *ultra vires* and void. *Thomas v. West Jersey R. Co.* 101 U. S. 71 [25: 950]; *Pa. R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 630 [20: 88, 284]; *Oregon R. Co. v. Oregonian R. Co.* 180 U. S. 1 [32: 887].

But while the charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation, yet whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited. Accordingly, where the charter of a railroad corporation, or the general laws applicable to it, manifest the intention of the Legislature, for the purpose of securing a continuous line of transportation of which its road forms part, to confer upon it the power of making contracts with other railroad or steamboat corporations to promote that end, such contracts are not *ultra vires*. *Green Bay & M. R. Co. v. Union Steamboat Co.* 107 U. S. 98 [27: 418]. See also *Branch v. Jenup*, 106 U. S. 468, 478 [27: 279, 282].

Whether, in view of the previous decisions of this court, the lease from the Indiana Central Company could be upheld it is unnecessary to consider, because the validity of the bridge contract does not appear to us to depend upon the validity or invalidity of the lease.

The bridge contract and the lease were separate and distinct agreements. The bridge contract was in form between the Bridge Company and the Indiana Central Company. The lease was between the Indiana Central Company and the Pittsburgh and Pennsylvania Companies, and the Bridge Company was not a party to the lease.

The Bridge Company was organized under the laws of Iowa and Illinois, and was authorized by those laws and by the Act of Congress of July 25, 1866, chap. 246, § 7 (14 Stat. at L. 245), to construct and maintain the bridge; and its power to enter into the bridge contract is undoubted. The power of the Indiana Central Company, as an Illinois corporation to enter into that contract is made equally clear by the statutes of Illinois, collected in the brief of the appellee.

By the Statute of February 28, 1854, all railroad companies of Illinois, having their termini fixed by law, and their roads intersecting by continuous lines, are authorized to consolidate their property and stock with each other, or with companies out of the State, whose lines connect with theirs; and when, by reason of such consolidation, or of such extension into or through an adjoining State, it is necessary for the construction of any railroad to cross any stream of water, it may be done by bridges or

viaducts. By the Statute of February 12, 1855, all railroad corporations of Illinois have the power to make all necessary and convenient "contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads, or any part thereof," as well as the "right of connecting with each other and with the railroads of other States, on such terms as shall be mutually agreed upon by the companies interested." By the Statute of February 16, 1865, "it shall be lawful for the directors of any railroad company created by the laws of this State to contract for the use and operation of any railroad connecting with their line beyond the limits of the State; and in all contracts for the use and operation of any railroad by another corporation, it shall be lawful for the parties to provide for the use of any of the powers and privileges of either or both of the corporations parties thereto." And by the Statute of February 25, 1867, "railroads terminating or to terminate at any point, on any line of continuous railroad thoroughfare, where there now is or shall be a railroad bridge for crossing of passengers and freight in cars over the same as part of such thoroughfare, shall make convenient connections of such railroads, by rail, with the rail of such bridge; and such bridge shall permit and cause such connections of the rail of the same with the rail of such railroads, so that by reason of such railroads and bridge there shall be uninterrupted communication over such railroads and bridge as public thoroughfares." See also Stats. of February 12, 1855, March 6, 1867, and March 11, 1869. Gross, Stats. 8d ed. 536-539.

The bridge contract was therefore a lawful and valid contract as between the Bridge Company and the Indiana Central Company. Upon the question of its effect to bind the Pittsburgh and Pennsylvania Companies, some other facts attending its execution are worthy of consideration.

The bridge contract was not in existence as an executed and binding contract when the lease was made. But it was signed after the execution of the lease and the delivery of possession of the road by the Indiana Central Company to the Pittsburgh Company, and at the formal request of the Pittsburgh and Pennsylvania Companies, embodying an express agreement on their part with the Indiana Central Company to "assume all the liabilities and obligations, and be entitled to all the benefits of said bridge contract." The reference in that request and agreement to the ninth article of the lease was for the purpose of defining the extent of the liabilities and benefits assumed, and perhaps of indicating that the Pittsburgh Company alone was bound as principal, and the Pennsylvania Company as guarantor only; but it did not make the bridge contract a part of the lease.

The reasonable inference is that, according to the original intent and by the subsequent action of the parties, the Pittsburgh and Pennsylvania Companies were understood and treated as directly liable to the Bridge Company for the proportion of tolls and deficiencies, which, by the terms of the bridge contract, was chargeable to the Indiana Central Company.

By the laws of Illinois, as we have seen, the

bridge contract was valid, and might lawfully be made between the Bridge Company and the Indiana Central Company; and it appears to us equally clear that the laws of Pennsylvania authorized the Pittsburgh and Pennsylvania Companies to assume the obligation of that contract with the Bridge Company, either directly or through the intervention of the Indiana Central Company.

By the Statute of Pennsylvania of April 23, 1861, it is enacted that "It shall and may be lawful for any railroad company, created by and existing under the laws of this Commonwealth, from time to time to purchase and hold the stock and bonds, or either, of any other railroad company or companies chartered by, or of which the road or roads is or are authorized to extend into, this Commonwealth; and it shall be lawful for any railroad companies to enter into contracts for the use or lease of any other railroads upon such terms as may be agreed upon with the company or companies owning the same, and to run, use and operate such road or roads in accordance with such contract or lease: Provided, that the roads of the companies so contracting or leasing shall be, directly or by means of intervening railroads, connected with each other." Purdon, Digest, 11th ed. 1439.

While the first provision of that statute authorizes any railroad company of Pennsylvania to purchase and hold stock and bonds of such railroad companies as either are chartered by the State or have roads extending into it, the second clause makes it lawful for railroad companies of Pennsylvania to contract for the use or lease, not merely of railroads of the two classes defined in the first clause, but of any railroads whatever, provided only "the roads of the companies so contracting or leasing shall be, directly or by means of intervening railroads, connected with each other." The only reasonable construction of the words "any other railroads" in the second clause, is that it includes all railroads whether within or without the State, coming within the description of the proviso.

But any question of the construction of that statute in this regard is removed, or rendered immaterial, by the Statute of Pennsylvania of February 17, 1870 (passed more than a year before the modified bridge contract was executed, or the bridge completed or used), which, in the clearest terms, authorizes any railroad company of Pennsylvania to enter into a lease or any other contract on such terms and conditions as may be agreed upon, or to guarantee the payments or covenants thereof, as to any railroads, whether "within the limits of this State, or created by or existing under the laws of any other State or States", provided they are connected, either directly or by means of intervening lines, with its road, and form a continuous route for the transportation of persons and property. Purdon, Digest, 11th ed. 1441.

Nor can we have any doubt that the Bridge Company was a railroad company, and the bridge a railroad, within the meaning of these statutes. The principal purpose and use of the bridge was the passage of railroad trains. It was, in substance and effect, a railroad built over water, instead of upon land; and, strictly speaking, it was a railway viaduct rather than

a bridge. *Bridge Proprietors v. Hoboken Land & I. Co.* 68 U. S. 1 Wall. 116 [17:571].

The necessary conclusion from the foregoing considerations is that it was rightly held by the circuit court that the Bridge Company was entitled to recover from the Pittsburgh Company, and, it having declined to pay upon due demand, to recover from the Pennsylvania Company also, the amount of the deficiencies in tolls which, by the modified bridge contract, was payable by the Indiana Central Company.

It is proper to add that our judgment does not rest in any degree upon the ground suggested in argument, that the bridge contract and the lease having been executed, the Pittsburgh and Pennsylvania Companies, having received the benefits of them, are estopped to deny their validity; because, according to many recent opinions of this court, a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received the benefit of. *Louisiana City v. Wood*, 102 U. S. 294 [28:153]; *Parkersburg v. Brown*, 106 U. S. 487, 503 [27:288, 245]; *Chapman v. Douglas Co.* 107 U. S. 348, 360 [27:878, 888]; *Salt Lake City v. Hollister*, 118 U. S. 256, 263 [30:176, 178]; *Pa. R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 317, 318 [30:83, 95].

The sole ground of our decision is that the bridge contract is independent of the lease, and is valid and binding as between the parties to this suit, whether the lease is valid or invalid. This being so, the question argued at the bar, whether the appellants, by reason of eviction, are no longer liable on the lease, becomes immaterial; and the judgment of the circuit court in a former suit, affirming the validity of the lease, has no effect upon our decision, for the same reason, as well as because the Bridge Company was not a party to that judgment, and therefore neither bound by it nor entitled to the benefit of it.

Decree affirmed.

Mr Chief Justice Fuller and the late *Mr. Justice Matthews*, having been of counsel, took no part in the consideration or decision of this case.

JAMES M. VEACH ET AL., *Appts.*,

v.
ADA S. RICE ET AL.

(See S. C. Reporter's ed. 293-319).

Georgia Courts of Ordinary—effect of judgments of—discharge of administrator—administrator de bonis non—resigning administrator, accounting by—sureties on bond discharged.

1. The Courts of Ordinary in Georgia are courts of original, exclusive and general jurisdiction over decedents' estates, and their judgments are no more open to collateral attack than the judgments, decrees or orders of any other court.
2. The judgment of discharge of an administrator, made by the court of ordinary, operates as a dis-

charge from all liability on the part of the administrator, unless the same be impeached in that court, for irregularity, or in the superior court, for fraud.

3. Every administrator after the first is an administrator *de bonis non* in fact, and it is not important it should so appear of record.
4. Under the provisions of the Georgia Code, where there are more than one administrator and one resigns, he who resigns must account to his co-administrator, as his successor, who would in effect in such case be an administrator *de bonis non*; and such accounting is required before discharge.
5. Where such resigning administrator proceeded in conformity with the statute in such case made and provided, and, under the orders of the court of ordinary, ceased to be administrator, and was discharged from further liability as such and a new bond was given by his successor, the sureties who had signed the first bond of the two administrators were also discharged.

[No. 208.]

Argued March 15, 18, 1889. Decided May 13, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Georgia, that defendant Gray was liable on his several administration bonds for the sum of \$47,122.44; that the sureties on the bond of Erwin and Gray were liable for the whole amount, and the sureties on the other bond for different parts of said sum. *Reversed.*

Statement by Mr. Chief Justice Fuller:

James L. Rice and his wife, Ada S. Rice, citizens of the State of Tennessee, filed their bill of complaint, July 12th, 1881, in the Circuit Court of the United States for the Northern District of Georgia, against Frank P. Gray and his wife, Cora M., and also against said Gray as administrator of the estate of Lewis Tumlin, deceased, and also as guardian of the said Cora M., Napoleon B. Tumlin, George H. Tumlin, Lula T. Lyon, John S. Leake, John W. Gray, William T. Wofford, A. P. Wofford, Edwin M. Price, John G. B. Erwin, Henry C. Erwin, James M. Veach, Robert L. Rogers, W. I. Benham, John J. Howard, A. W. Mitchell, Mary L. Spencer, Francis M. Ford, Noah King, Thomas W. Leake, Henry C. Ramsauer, adm'r, and others, all citizens of the State of Georgia, alleging that on the second day of June, 1875, one Lewis Tumlin, of the County of Bartow, Georgia, died intestate, leaving as his heirs-at-law, his wife Mary L. Tumlin, now Mary L. Spencer; his sons Napoleon B. Tumlin and George H. Tumlin; his daughters, the said Ada S. Rice, formerly Ada S. Tumlin, Lula T. Lyon, formerly Lula T. Tumlin, Cora M. Gray, formerly Cora M. Tumlin; and one Lewis T. Erwin, the son of a deceased daughter, who has sold and conveyed his interest in said estate to John S. Leake, each of whom upon his death was entitled to one seventh part of his estate, his wife having elected to take a child's part in lieu of dower; that the estate was of the aggregate value of about \$300,000; that Frank P. Gray and Napoleon B. Tumlin obtained temporary letters of administration on said estate on the 11th day of June, 1875, giving bond in the sum of \$200,000, with Abda Johnson, William T. Wofford, John W. Gray, James M. Veach, and Edwin M. Price as sureties; that on the

second day of August, 1875, said Frank P. Gray and one John A. Erwin obtained permanent letters of administration on said estate, and gave bond as such, in the sum of \$600,000, with Abda Johnson, William T. Wofford, John W. Gray, James M. Veach, Edwin M. Price, Noah King, A. C. Trimble, Joel H. Dyer, William W. Rich, James C. Wofford, Nelson Gilreath, J. J. Howard, Robert L. Rogers, William I. Benham, John S. Leake, A. W. Mitchell, J. G. B. Erwin, Henry C. Erwin, and Lewis R. Ramsauer, intestate of Henry C. Ramsauer, and one Thomas Stakley and one Thomas Tumlin as sureties; that John A. Erwin had since that time removed from the State of Georgia to the State of Tennessee, and the said Thomas Tumlin had removed to Alabama; that Stakley had died intestate and no letters of administration had been granted on his estate until within less than twelve months before the filing of this bill; that said Abda Johnson died July 10, 1881, and his estate is now unrepresented, and for these reasons said Erwin, Tumlin, Stakley, and Johnson are not made parties; that said Lewis R. Ramsauer died intestate, and Henry C. Ramsauer has qualified as his administrator, and as such is made a party, and "that the joint administration of said Frank P. Gray and John A. Erwin continued from the second day of August, 1875, until the second day of May, 1876, when the said John A. Erwin resigned, and his resignation was accepted by the Court of Ordinary of the County of Bartow." Complainants are informed and believe that Erwin resigned to avoid "the consequences of said Gray's waste and mismanagement," and thereupon "said Gray became sole administrator, against the consent and at the protest of all the heirs except Cora M. Gray and Mary L. Spencer, and gave bond as sole administrator in the sum of \$140,000, with the said Abda Johnson, William T. Wofford, Edwin M. Price, Noah King, William W. Rich, John W. Gray, Nelson Gilreath, James C. Wofford, John S. Leake, and Thomas W. Leake as sureties;" that on the 18th day of October, 1877, said William T. Wofford, James C. Wofford, and William W. Rich applied to be relieved from their suretyship on the bond aforesaid on account of their want of confidence in the said Gray, and were so relieved, and said Gray gave a new bond as such administrator for the same sum, "with the said Abda Johnson, Nelson Gilreath, Noah King, John S. Leake, Thomas W. Leake, Thomas Tumlin, John W. Gray, Absalom P. Wofford, and Francis M. Ford as sureties;" "that on the sixth day of May, 1878, said Noah King applied to be relieved on his bond last aforesaid, and was so relieved, and the said Frank P. Gray gave another bond as administrator in the sum of \$140,000, with the said Abda Johnson, Nelson Gilreath, John W. Gray, Absalom P. Wofford, John S. Leake, Thomas W. Leake, and Francis M. Ford as sureties;" and "that since that time said Gray has continued to act as administrator under the bond last aforesaid, and is still in possession of the effects of said estate not heretofore disposed of."

Complainants show that Lewis Tumlin had made some advancements to some of his children, and on the second day of October, 1875, a distribution of property in kind was made,

each of the heirs receiving \$24,000, including the advancements; that since that time there has been no distribution, but some amounts have been received by some of the heirs; that Tumlin's estate was abundantly solvent and his liabilities should have been long since discharged and the estate wound up and the balance distributed, "which said Gray undertook and promised to do by his several bonds aforesaid," but he has not done it, and has refused to account or to pay over to complainants their distributive share; that Gray has been guilty of negligence, waste, and fraud, which complainants proceed to charge in detail; and that said Lula T. Lyon heretofore filed her bill against said Gray as administrator, in the Superior Court of Bartow County, Georgia, seeking an account of her distributive share in said estate, and praying for an injunction to restrain said Gray from selling the real estate of said Tumlin, which he was, on or about the first day of January last, seeking to do, which injunction "had been granted by the judge of said court and had duly issued." After charging further acts of fraud and waste, the bill proceeds: "Complainants are unable to state in many instances the date at which the waste of said estate was committed by said Gray, but they are informed and believe that most of it occurred after the resignation of said Erwin, and after his present bond was given, to wit: the one bearing date the 6th of May, 1878;" that Gray is insolvent; that A. P. Wofford, John W. Gray, and Nelson Gilreath are insolvent; that Abda Johnson left considerable property, but his affairs are embarrassed; that John S. and Thomas W. Leake and Francis M. Ford are not worth exceeding \$20,800; that large sums are due Tumlin's estate, which also owns several thousand dollars worth of real estate; that many suits are pending in favor of the estate for the recovery of money and property, and also many suits against the estate, all of which should have been tried and disposed of long since; that the estate is solvent and Gray has ample means in his hands to pay off any recovery against it, but Gray has purposely delayed bringing the suits to trial in order to postpone the final settlement of the estate; that Gray has for several years been absent from Georgia, much of his time in Mississippi, and has declared his purpose to remove to that State; that on the 18th day of June, 1881, he filed in the office of the ordinary of said county his resignation as administrator; that the heirs will be forced to suggest some other person as his successor, and whoever may be appointed the decision may be appealed from, and pending that, "a temporary administrator with limited powers would be the only representative of said estate;" and "that unless they can have the immediate aid of a court of equity by such suitable injunction and restraining order, and the early appointment of a receiver, the interests of said estate will suffer great and immediate loss, and complainants and the other heirs-at-law of Lewis Tumlin will be injured beyond remedy." They pray for answer but not upon oath, and for an injunction and an account, "and that complainants may have a decree for their distributive share in said estate against the said Frank P. Gray and his sureties on his administration bonds aforesaid, and that the respective liabilities

of said several securities may be ascertained and fixed by said decree;" and for general relief.

Copies of the various bonds were filed as exhibits with the bill and also a copy of Gray's petition to resign as administrator, with citation to the heirs of Tumlin to appear before the ordinary on the first Monday in July, 1881, to show cause why the resignation should not be allowed and James C. Wofford appointed administrator in Gray's stead, with return of service on several of the heirs and on Wofford.

September 5th, 1881, defendants Napoleon B. Tumlin, George H. Tumlin, Mary L. Spencer, and Lula T. Lyon filed their answer, admitting the allegations of complainants' bill, and saying that they have a common interest with complainants in Tumlin's estate, and join in the charges and allegations of the bill against their codefendants, and unite in the prayers in said bill contained, and pray an account and for a decree against Gray and his securities.

October 8d, 1881, Gray and "his securities" answered, denying waste or maladministration by Gray; and on the same day "the securities upon the alleged administration bond of John A. Erwin and Frank P. Gray" answered, denying any maladministration by Erwin and Gray, or either of them, during the period of their joint administration, and setting up Erwin's discharge, the giving of a new bond by Gray, and the settlement and accounting by Erwin. A demurrer for want of jurisdiction was also filed, and, having been argued, the circuit judge delivered an opinion assigning grounds for retaining the cause, the demurrer was overruled, a receiver appointed, and an injunction issued.

On the 20th of March, 1882, the case was referred to a special master to report upon the questions of law and fact raised by, or included in, the pleadings, and to state an account.

May 19th, 1888, complainants filed a petition stating that when the original bill was filed, they were informed and believed "the following state of facts to exist, to wit: That John A. Erwin had, in April, 1878, applied to the Ordinary of Bartow County, Georgia, for leave to resign his office as a coadministrator on the estate of Lewis Tumlin, deceased; that orators in connection with N. B. Tumlin, G. H. Tumlin, Mary L. Spencer, and Lula T. Lyon had objected to said resignation, and upon the trial of their caveat to said application for leave to resign the ordinary had allowed said resignation, and all the other caveators heard had appealed from that decision, except orators, who gave the matter no further attention, and were informed and believed that said resignation had been allowed, and they have all the time, until the filing of their bill, thought and believed that said Erwin had resigned his trust and his resignation had been allowed and accepted by the court;" that they believed said resignation could not release the sureties on the bond of Gray and Erwin, and since the reference of the case and during the hearing before the master defendants have put in evidence the record of said Erwin's resignation and the proceedings on appeal, from which it appears that Erwin's resignation has never been in fact or in law al-

lowed; that "not being parties to said appeal, they had not given any attention to it, and did not know what had been done in it, except that the jury had found against the appeal, and they believed that all other legal steps had been taken to give effect to the verdict," which they now learn was not the case; and they ask to amend: "By an averment that John A. Erwin, though not a party to said bill by reason of the fact that he resided without the jurisdiction of the court, is not only bound as the security of said Frank P. Gray in common with all the other sureties of said Gray and Erwin on the first administration bond, as claimed in the original bill, and is still in law one of the administrators of said estate, and has never legally resigned his trust as a coadministrator with Frank P. Gray on said estate, and that complainants are entitled to relief accordingly against them and all the sureties on all the administration bonds on said estate, and they pray relief accordingly." Leave to amend was granted on the same day, and the bill as amended referred to the special master.

On the 18th of September 1888, the joint and several answer of H. C. Erwin and J. G. B. Erwin, two of the defendants, was filed, by leave of court, averring that they never had become sureties on the bond of Erwin and Gray, because they had only authorized their names to be signed to the bond of Erwin.

On the 4th of October, 1888, Ramsauer, administrator, answered, stating that he is the administrator of L. R. Ramsauer, who signed a power of attorney authorizing respondent to sign his name as one of the sureties to Erwin's bond, and he was also authorized by H. C. Erwin and J. G. B. Erwin to sign such bond for them as attorney in fact, and that the power of attorney was changed by interlineation so as to authorize the signing of the bond of Erwin and Gray.

October 9th, 1888, the answer of James M. Veach, Robert L. Rogers, A. O. Trimble, W. I. Benham, John J. Howard, and A. W. Mitchell was filed, by leave, stating that they had signed the bond made jointly by John A. Erwin and F. P. Gray as the administrators of the estate of Lewis Tumlin; that John A. Erwin resigned his administratorship in May, 1876, and he as well as his bondsmen were discharged, "by order of the Ordinary of Bartow County," and these respondents supposed that was the end of their connection with the administration of said estate. They insist that John A. Erwin is a necessary party to this bill as proposed to be amended; that they are informed that three of their cosureties, namely, H. C. and J. G. B. Erwin and L. R. Ramsauer, are seeking release on the ground that they only authorized their names to be signed to the bond of Erwin, and not of Erwin and Gray, and respondents say "that they were particular to make inquiry as to whether the Erwins and Ramsauer would go on said bond, and they agreed to sign said bond only upon condition that the others did." They set up Erwin's resignation upon notice to the heirs and distributees, and his discharge, which they insist discharged them from further liability; and say they know nothing of the alleged maladministration of Gray.

Replication was filed November 24, 1888.

September 22, 1888, the special master filed his report stating the death of Tumlin, the names of his heirs-at-law, the election of the widow to take a child's part, the removal of Erwin to Tennessee, and of Thomas Tumlin to Alabama; the death of Stakley, of L. R. Ramsauer, and of Abda Johnson, the appointment of Gray and Tumlin as temporary administrators and of Gray and Erwin as permanent administrators, on the second day of August, 1876, and the giving of a bond by them, in the usual form, in the penal sum of \$600,000, which "bond was joint and several and payable to the Ordinary of Bartow County, Georgia, for the time being, and his successors in office." The report sets forth the return of the inventory, which alleged that "there were some wild lands and evidences of debt left out to be appraised as soon as they could be definitely ascertained;" the sale of personal property; the award of support for widow and minor; the appointment of commissioners to divide land and their return; the application by the administrators for a commission of 8 per cent on \$114,456, as compensation for services in and about the division of the real estate; the allowance of the 8 per cent; the first annual return of Gray and Erwin and its approval; the application of Erwin for discharge; the order requiring the distributees to show cause; the order of discharge; the giving by Gray of a new bond; the final receipt of Gray to Erwin and the final discharge; and the appeal from the decision of the ordinary, permitting Erwin to resign and Gray to become sole administrator, to the Superior Court of Bartow County, where it was affirmed by verdict, August 4, 1876. The report says there is no record evidence that a judgment was entered upon said verdict. It further states that on June 16, 1876, Gray gave bond to Erwin reciting that Erwin transfers to Gray all commission and compensation which might be allowed Erwin for his services as administrator, and in consideration thereof Gray bound himself to pay any judgment against Erwin for any waste or loss occasioned by any act or failure of duty in any way by Erwin as administrator; sundry sales by Gray returned to the ordinary; the discharge of W. T. Wofford, Rich, and James C. Wofford, sureties on Gray's administration bond; the new bond given by Gray, October 18, 1877; the new bond given by Gray, May 6, 1878; the second return by Gray, administrator, August 6, 1877, further time having been granted to him to make it; the return of 1878, in accordance with time given to make it; the return for 1879, 1880, and 1881; and the appointment of the receiver in this case, November 14, 1881. Various charges for commissions on interest are considered, and the subject of the inventory of wild lands, the failure to make and perfect return thereof being held to be excusable and not to have damaged the estate. The master holds there was a valid resignation and discharge of Erwin from the office of administrator, dating from June 12, 1876, but that the sureties on the bond of Gray and Erwin were not discharged. He disallows the 8 per cent commission on division of land, amounting to \$3,433.68, as excessive, and reduces it to five hundred dollars, which was subsequently disallowed by the court. He

considers the state of the accounts elaborately, and holds the sureties on Gray and Erwin's bond liable "for the waste or default of the joint administration of Gray and Erwin, and since of the sole administration of Gray," and he refers to the claim, September 20, 1888, of two of the sureties on the bond of Gray and Erwin, to wit, Henry C. and J. G. B. Erwin, that they never signed nor authorized any one to sign their names to a joint bond of Gray and Erwin, but he refused to hear evidence because the issue was not involved in the pleadings as they then stood. To this report defendants Veach, Rogers, Trimble, Benham, Howard, Mitchell, H. C. and J. G. B. Erwin, and Ramsauer filed their exceptions, and they subsequently petitioned the court to be allowed to file amended answers, which was allowed, and which amendments have heretofore been given.

November 26, 1888, the report was recommended with directions, and sundry other reports made, and among them one, October 4, 1884, that H. C. Erwin, J. G. B. Erwin, and H. C. Ramsauer were not bound as sureties on the Gray and Erwin bond, because they had not authorized their names to be signed to it, and holding that Benham, Rogers, Trimble, Mitchell, Veach, and Howard were not thereby discharged. The master also reported that a judgment in the Bartow Superior Court had been entered February 16, 1884, *nunc pro tunc*, as of the July Term, 1876, upon the verdict upon appeal from the discharge of Erwin by the ordinary, but that his opinion remained unchanged that the release or discharge of Erwin as coadministrator with Gray did not discharge the sureties on said joint bond. The complainants excepted to the report of the master in favor of H. C. and J. G. B. Erwin, and Ramsauer. Defendants Veach, Howard, Trimble, Rogers, Benham, and Mitchell excepted to the master's report in discharging the two Erwins and Ramsauer and not discharging them, as well as to the forfeiture of certain commissions reported by him.

December 18, 1884, the defendant Cora M. Gray filed a supplemental answer, praying for a decree as a distributee, as did defendant John S. Leake, January 21, 1885.

Among the proofs in the case accompanying the master's reports was the petition of John A. Erwin for permission to resign his office of administrator, and the proceedings thereon. This petition was dated April 11, 1876, and set forth the issuing of letters of administration to Gray and Erwin; that Tumlin left as his heirs-at-law and distributees of his estate his widow, Mrs. Mary L. Tumlin, Napoleon Tumlin, Mrs. Lulu T. Lyon, Mrs. Cora Gray, George Henry Tumlin, a minor, and Lewis T. Erwin; that Mrs. Gray is a minor, and Frank P. Gray her guardian; that Erwin is guardian of George Henry Tumlin and Lewis T. Erwin; that Mrs. Ada S. Rice, of Tennessee, is also one of the heirs-at-law of said Lewis Tumlin, and a distributee of his estate; that "your petitioner is in bad health, and from his physical infirmity is unable to give that attention to the management of said estate that he otherwise would, and that he ought to give as administrator; that most of the real estate belonging to said estate and a great portion of the personalty

has been divided and delivered to the distributees of said estate; that Frank P. Gray, the coadministrator of your petitioner, is willing to give new bond and carry on said administration of said estate alone. Your petitioner, therefore, prays that he be permitted to resign his office as administrator on the estate of said Lewis Tumlin, upon a full and complete compliance with the law in such case made and provided, and your petitioner prays that each of said heirs-at-law of said Lewis Tumlin hereinbefore named may be cited by your honor to be and appear before your honor on the first Monday in May next, then and there to show cause, if any they have, why your petitioner should not resign his office of administrator as aforesaid, on his complying with the law in such case made and provided."

On the 12th of April, 1876, citation in due form was issued upon said petition by the ordinary to the heirs-at-law and distributees of the estate of Lewis Tumlin, deceased, and to the guardians of the minor heirs named in said petition, and it was "further ordered that each of said heirs-at-law who are of full age, and the guardians of the minor heirs, be served with a copy of the foregoing petition and this citation (unless they should acknowledge service) ten days before the time appointed for hearing said petition and passing on same." Service was acknowledged of the petition and citation and further service waived, April 13, 1876, by John A. Erwin as guardian for G. H. Tumlin and as guardian for L. T. Erwin, and by Frank P. Gray as administrator and as guardian for Cora Gray; service of petition and citation was also acknowledged by Mary L. Tumlin and N. Tumlin, April 17, 1876, and the petition and citation was served on Mrs. Lulu T. Lyon, April 20, 1876; affidavit was also made that on the 7th (17th) day of April, 1876, a copy of the petition of Erwin and a copy of the citation signed by the ordinary were handed to Mrs. Ada S. Rice in person, and that at the same time Mrs. Ada S. Rice wrote the following on the original, to wit: "I acknowledge service of the within petition this April 17, 1876."

On the 1st of May, 1876, Gray filed before the ordinary a written expression of his willingness for Erwin to resign, Gray retaining the sole administration in his own name, and proposing to file "such bond in furtherance of the same as the ordinary may deem proper in the premises."

May 1, 1876, the ordinary entered the following order in open court:

Court of Ordinary, Bartow County.
Regular Term, May 1, 1876.

John A. Erwin, one of the adm'rs
of Lewis Tumlin, deceased.

vs.
Frank P. Gray, adm'r; Frank P.
Gray, guardian; Mary L. Tumlin,
Napoleon Tumlin, et. al.,
heirs-at-law, &c.

Upon considering the above and foregoing application of John A. Erwin, one of the administrators on the estate of Lewis Tumlin, late of Bartow County, deceased, for leave to resign his said office of administrator, and all the heirs-at-law of Lewis Tumlin having been duly served with citation to show cause why

John A. Erwin should not be allowed to resign the office of administrator on the estate of Lewis Tumlin, deceased, and all of said heirs being represented now before the court, and no sufficient cause being shown why said Erwin should not be allowed to resign his trust, as administrator as aforesaid, and it appearing to the court that the bodily health, physical infirmities, and the health of his wife are such that he is unable to give his attention to the management of the business of said estate, and Frank P. Gray being cited to appear before the court, and having been served with said citation, and now coming before the court and expressing a willingness to accept the office of administrator of the estate of Lewis Tumlin, deceased, and it appearing to the court that the allowing of said Erwin to resign his office of administrator will not injure the interest of said estate in any way: Therefore, ordered and adjudged by the court, that the resignation of the said John A. Erwin of the office of administrator on the estate of Lewis Tumlin, deceased, be, and the same is hereby, allowed, and it is hereby further ordered and adjudged by the court that Frank P. Gray, the coadministrator of the said John A. Erwin upon the estate of the said Lewis Tumlin, deceased, be, and he is hereby, declared and appointed the sole administrator of the estate of the said Lewis Tumlin, deceased, and the said Frank P. Gray is hereby required to give a new bond and security, for the faithful administration of said estate, in the sum of one hundred and forty thousand dollars, and upon said bond and security being given, and the said John A. Erwin, upon his settling and accounting with said Frank P. Gray, the sole and remaining administrator of the estate of Lewis Tumlin, deceased, his successor, of his accounts as administrator, and the filing of the receipt of his successor in the ordinary's office, as provided by law, and upon so doing that the said John A. Erwin, as administrator and his securities, be, and they are hereby, discharged from any and all liability for any mismanagement of said estate in the future, but not from any past liability of the said John A. Erwin, as administrator as aforesaid.

Granted in open court, May Term, 1876.

J. A. HOWARD, *Ordinary*.

On the same day the petition of Gray and Erwin was filed, showing that they had distributed in kind real estate among the heirs-at-law of the deceased amounting to \$114,456, specifying the parcels and amounts, and setting up that "the responsibility and the trouble in effecting the transfer has been considerable. Your petitioners allege that they have received no compensation at all for this service thus rendered said estate, and pray your honor to pass an order allowing them three per cent on said sum of \$114,456, as commission on the same;" whereupon the court entered an order allowing the administrators "for extra compensation for delivering and dividing to the heirs-at-law the real estate in kind belonging to said deceased," 3 per cent on the above sum.

On the 6th of May a list and schedule of all the property which had come to the possession of Gray and Erwin as administrators, and which remained unadministered and in their

possession May 6, 1876, not embracing the wild lands, which "have not yet been fully located," was filed, and a receipt from Gray to Erwin for all of said property, which was acknowledged before the ordinary and filed in his office May 22, 1876. On the 2d of May, Gray gave a new bond, as required by the order of May 1, reciting the resignation of Erwin and its allowance, and the order for the new bond, the condition being: "Now, if the above bound Frank P. Gray shall well and truly administer the goods and chattels, rights and credits, lands and tenements of the said Lewis Tumlin, deceased, which remain to be administered, and which have come to the hands, possession or knowledge of the said Frank P. Gray, or in the hands or possession of any other person or persons for him," etc., etc., in the usual form; which bond was duly attested and approved by the ordinary, and "filed in office May 2d, 1876."

On the 12th of June, 1876, the following order was entered in open court by the ordinary: Court of Ordinary, Bartow County.

Adjourned Term.

John A. Erwin, Adm'r est. Lewis Tumlin, dec'd.
June 12, 1876.

Upon considering the above application of John A. Erwin, one of the joint administrators of the estate of Lewis Tumlin, late of Bartow County, deceased, for a discharge, and the said John A. Erwin, as administrator, having by order of this court been permitted to resign said trust, and which resignation has been accepted by the court, and Frank P. Gray, his co-administrator, having consented to accept the entire administration of said estate, and having given new bond and security, as ordered by the court, and the said John A. Erwin having filed a return showing the property that has been administered belonging to said estate, and having filed the said Frank P. Gray's receipt for all the unadministered property, belonging to said estate, and being satisfied that said return and receipt contain all the property administered and not administered belonging to said estate which has come into the hands of John A. Erwin, as administrator, it is therefore ordered that said John A. Erwin be, and he is hereby, fully discharged from the office of administrator on the estate of Lewis Tumlin, deceased, and that letters of dismission do issue to him.

Granted in open court, June adj'd Term, 1876.

J. A. HOWARD, *Ordinary*.

From this order Mrs. Mary L. Tumlin, Mrs. Lula T. Lyon, and Napoleon Tumlin appealed to the Superior Court of Bartow County, where the appeal was dismissed as to Mrs. Mary L. Tumlin at her request, and upon trial the jury returned the following verdict, August 4, 1876: "That the jury find in favor of John A. Erwin, and that his resignation be allowed."

An order appears of record in the superior court, headed as follows:

"Appeal to the Superior Court of Bartow Co., Ga., from the order in the ordinary's court of said county permitting John A. Erwin to resign and F. P. Gray to become sole adm'r of said estate, and required to give new bond, and Gray to become sole adm'r of said estate, and refusing to allow Theodore Smith

to be coadm'r of said estate. Appeal from the above decision of the ordinary made May 1st, 1876, and carried to the Superior Court of said Co., by whom the decision of said ordinary was affirmed at the July Term, 1876."

This order granted thirty days to the appellants to perfect their motion for a new trial and agree upon the evidence, the motion to be heard in vacation, so that if the motion for a new trial be refused the appellants can take the case to the Supreme Court of Georgia at the next January Term. Nothing further appears to have been done in the premises, but at the January Term, 1884, of the Bartow Superior Court, due notice having been given to the heirs and distributees and to the receiver in this case, the superior court entered judgment *nunc pro tunc* upon the verdict rendered in 1876, affirming the allowance of Erwin's resignation.

On the 22d day of January, 1885, a final decree was rendered, by which, after overruling the various exceptions to the reports of the special master, it was among other things adjudged and decreed that Gray was liable on his several administration bonds for the sum of \$47,122.44, the sureties on the bond of Erwin and Gray being held liable for the whole amount, and the sureties on the other bonds for different parts of said gross sum, and from that decree appeal was prosecuted to this court by James M. Veach, J. J. Howard, W. I. Benham, R. L. Rogers, A. C. Trimble, and A. W. Mitchell, a special order being entered allowing the appeal to the above named, as being those only of the sureties on the joint bond of Gray and Erwin, who excepted to the reports of the special master upon the grounds taken by them, and they alone of the defendants being interested in the questions made by their exceptions, and it being made to appear to the court that they had notified all the other defendants of their purpose to appeal.

The following sections from the Code of Georgia, third edition, 1882, were in force at the time of the transactions in question:

§ 331. Courts of ordinary have authority to exercise original, exclusive and general jurisdiction of the following subjects-matter:

1. Probate of wills. 2. The granting of letters testamentary, of administration, and the repeal or revocation of the same. 3. Of all controversies in relation to the right of executorship or administration. 4. The sale and disposition of the real property belonging to, and the distribution of, deceased persons' estates. 5. The appointment and removal of guardians and minors and persons of unsound mind. 6. All controversies as to the right of guardianship. 7. The auditing and passing returns of all executors, administrators and guardians. 8. The discharge of former, and the requiring of new surety from administrators and guardians. 9. The issuing commissions of lunacy in conformity to law. 10. Of all such other matters and things as appertain or relate to estates of deceased persons, and to idiots, lunatics and insane persons. 11. Of all such matters as may be conferred on them by the Constitution and laws. 12. [And concurrent jurisdiction with the county judge in the binding out of orphans and apprentices,

and all controversies between master and apprentice.]

§ 2150. The contract of suretyship is one of strict law, and his liability will not be extended by implication or interpretation.

§ 2490. Administration *de bonis non* is granted upon an estate already partially administered, and from any cause unrepresented.

§ 2499. If administration has been granted to more than one, upon the death of either the right of administration survives to the other.

§ 2500. Administration may be granted to other persons than him in whose name the citation issues, and without a new citation being published.

§ 2505. Every administrator, upon his qualification, shall give bond, with good and sufficient security, to be judged of by the ordinary, in a sum equal to double the amount of the estate to be administered; such bond shall be payable to the ordinary for the benefit of all concerned, and shall be attested by him or his deputy, and shall be conditioned for the faithful discharge of his duty as such administrator, as required by law. A substantial compliance with these requisitions for the bond shall be deemed sufficient, and no administrator's bond shall be declared invalid by reason of any variation therefrom, as to payee, amount, or condition, where the manifest intention was to give bond as administrator, and a breach of his duty as such has been proved.

§ 2510. If two or more administrators unite in a common bond, all the sureties are bound for the acts of each administrator, and the administrators themselves are mutual sureties for each other's conduct.

§ 2512. In all cases of removal of an administrator for any cause, the sureties on his bond are liable for his acts in connection with his trust, up to the time of his settlement with an administrator *de bonis non*, or the distributees of the estate.

§ 2514. If there are more administrators than one, and complaint is made against one only, and his letters are revoked, the entire trust remains in the hands of the other; and with him, as to an administrator *de bonis non*, the removed coadministrator must account.

§ 2610. Any administrator who, from age or infirmity, removal from the county, or for any other cause, desires to resign his trust, may petition the ordinary, stating the reasons, and the name of a suitable person qualified and entitled to and willing to accept the trust; whereupon the ordinary shall cite such person, and the next of kin of the intestate, to appear and show cause why the order should not be granted. If no good cause be shown, and the ordinary is satisfied that the interest of the estate will not suffer, the resignation shall be allowed, and the administrator shall be discharged from his trust whenever he has fairly settled his accounts with his successor and filed with the ordinary the receipt in full of such successor. Minors in interest shall be allowed five years from the time of their arrival at majority to examine into and open such settlement.

Messrs. P. L. Mynatt and N. J. Hammond for appellants.

Mr. W. K. Moore for appellees.

Mr. Chief Justice Fuller delivered the opinion of the court:

By the order of the ordinary of May 1, 1876, the resignation of John A. Erwin as administrator of the estate of Lewis Tumlin, deceased, was allowed, and Frank P. Gray was appointed sole administrator and required to give a new bond and security, which being given, and Erwin having settled and accounted with Gray, his successor in administration, and filed his receipt as provided by law, it was ordered that John A. Erwin as administrator and his securities be discharged from "any and all liability for any mismanagement of said estate in the future, but not from any past liability," and this settlement having been made and receipt filed and new bond given by Gray, and these successive acts approved, by order of June 12, 1876, the discharge of Erwin as administrator was made absolute.

From the judgment of the ordinary an appeal was prosecuted to the Superior Court of Bartow County by three of the heirs, one of whom dismissed her appeal, and, upon trial had, the decision of the court of ordinary was affirmed by the verdict of a jury, and time taken to perfect a bill of exceptions with the view of carrying the case to the supreme court, which was not done. Judgment appears not to have been entered upon the verdict until pending this cause, when it was so entered *nunc pro tunc* as of July Term, 1876. The superior court thus determined the order of the ordinary to have been a proper one, and passed upon the question of jurisdiction.

Mrs. Ada S. Rice was duly served with Erwin's petition to be discharged, and citation to appear, but acquiesced in said orders, and did not participate in the appeal therefrom, and paid no further attention thereto, as she says in her petition to amend of May 19, 1888. Something over five years afterwards she filed the bill in this case, and by amendment, some two years after that, sought to hold the sureties on the bond of Erwin and Gray for alleged maladministration of the latter after the discharge of the former.

The Courts of Ordinary in Georgia are courts of original, exclusive and general jurisdiction over decedents' estates and the subject matter of these orders, and its judgments are no more open to collateral attack than the judgments, decrees or orders of any other court. *Davis v. McDaniel*, 47 Ga. 195; *Barnes v. Underwood*, 54 Ga. 87; *Patterson v. Lemon*, 50 Ga. 231, 236; *Caujolle v. Ferrié*, 80 U. S. 18 Wall. 465 [20:507].

In *Jacobs v. Pou*, 18 Ga. 346, it was held that the "judgment of dismissal, by the court of ordinary, in such cases, must operate as a discharge from all liability on the part of the administrator, unless the same be impeached in that court, for irregularity, or in the superior court, for fraud;" and in *Bryan v. Walton*, 14 Ga. 186, that the order appointing an administrator, and in *Davis v. McDaniel*, 47 Ga. 195, and *McDade v. Burch*, 7 Ga. 559, that an order for sale of lands, could not be collaterally attacked.

It is argued, however, that upon Erwin's resignation the whole trust remained in Gray as survivor, and that the ordinary could not make a new appointment while the office was not vacant, and section 2514 of the Code is referred

to, providing that, upon the revocation of the letters of one administrator, the trust remains in the hands of the other. The well known case of *Griffith v. Frazier*, 12 U. S. 8 Cranch, 9 [8:471], is also cited as in point, where letters of administration were held invalid, there being a qualified executor capable of exercising the authority with which he had been invested by the testator. But we think the position taken is untenable. Under the Code, upon the death of an administrator, where there are more than one, the right of administration survives (§2499), but the ordinary may apparently grant letters to others (§2500); and upon the revocation of the letters of one administrator, where there are more than one, the trust remains in the hands of the other, "and with him, as to an administrator *de bonis non*, the removed administrator must account" (§2514), and his sureties are "liable for his acts in connection with his trust up to the time of his settlement with an administrator *de bonis non* or the distributees of the estate" (§2512). When an administrator resigns, and the resignation is allowed, he "shall be discharged from his trust whenever he has fairly settled his accounts with his successor and filed with the ordinary the receipt in full of such successor" (§2610). This section uses the singular number, but undoubtedly covers the case of more than one administrator. Paragraph 4 of section 4 of the Code reads: "The singular or plural number shall each include the other, unless expressly excluded." Code, 1882, p. 8.

Every administrator after the first is an administrator *de bonis non* in fact, and it is not important it should so appear of record. *Steen v. Bennett*, 24 Vt. 308; *Grande v. Herrera*, 15 Tex. 534; *Moeley v. Mastin*, 37 Ala. 219; *Ex parte Maxwell*, 37 Ala. 362.

The ordinary in accepting the resignation of Erwin treated the case as he would have done if Erwin's letters had been revoked by removal, and entered the orders in respect to Gray, as successor of Erwin and Gray, and so administrator *de bonis non*, and the new bond was accordingly conditioned to secure the administration of the property which remained to be administered. It is said by counsel that prior to 1854 there was no provision in the laws of Georgia for the resignation of an administrator, but it would seem that if an administrator had resigned, and his resignation had been accepted, such action on the part of the ordinary would have been held equivalent to a revocation of his letters in the exercise of the power of removal. *Marsh v. People*, 15 Ill. 284.

As already stated, under the provisions of the Georgia Code, where there are more than one administrator, and the letters of one are revoked, he must account to his coadministrator "as to an administrator *de bonis non*," and as, in the instance of the resignation of a sole administrator, he must account to his successor, so where there are more than one, he who resigns must account to his coadministrator, as such successor, who would in effect in such case be an administrator *de bonis non*.

Irrespective of statutory regulation an administrator *de bonis non* could only administer upon the assets remaining unadministered, *in specie*; but under these provisions the retiring administrator must account to his successor,

and such accounting is required before discharge.

It is urged that, as Erwin applied only for his own discharge as administrator and not as surety for Gray, and as the sureties made no application in their own behalf, the effect of Erwin's discharge was not to release the sureties. By section 2509 of the Code, the provisions where a surety on a guardian's bond desires to be relieved as surety are made applicable to sureties on administrators' bonds; and by section 1817 a mode is provided for obtaining such relief on complaint made by the surety to the ordinary, citation to the guardian, hearing, and order of discharge. And in *Dupont v. Mayo*, 56 Ga. 806, it was held that, where there was no petition, citation, or hearing, an order accepting a new bond already executed by the guardian, and declaring a former surety discharged, could not be sustained. But those sections apply to a different state of case, namely: where the sureties are asking to be relieved from liability, and not where the administrator himself is requesting leave to retire.

Erwin proceeded in conformity with the statute in such case made and provided, and under the orders of May 1 and June 12, 1876, ceased to be administrator, and was discharged from further liability as such, as were the sureties who had signed the bond of Erwin and Gray.

In *Justices of Inferior Court of Morgan County v. Selman*, 6 Ga. 432, the second section of an Act of 1812 came under consideration, which read as follows: "Any executor, executrix, administrator, administratrix or guardian, whose residence may be changed from one county to another, either by the creation of a new county, removal or otherwise, shall have the privilege of making the annual returns required of them by this Act, to the court of ordinary of the county in which they reside, by having previously obtained a copy of all the records concerning the estates for which they are bound as executors, executrix, administrators, administratrix or guardian, and having had the same recorded in the proper office in the county in which they then reside, and having given new bond and security, as the law directs, for the performance of their duty.

The court held, Lumpkin, J., delivering the opinion, "that the mere taking of a new bond does not necessarily release the old sureties, and especially when the new bond is taken by authority of law, for the purpose of strengthening the existing security," but that when the second or subsequent bond is given for a new and different undertaking, it operates, *ipso facto*, as a discharge of the prior parties, and hence that when the provisions of the Act are fully complied with the sureties on the first bond are discharged from all further liability on account of their principal.

We are of opinion that the court erred in rendering a decree against the sureties on the joint bond of Erwin and Gray for a *devastavit* committed after June 12, 1876.

Counsel for appellees contend that the sureties on this bond were not discharged because the service of the petition and citation on the three minor heirs, on Erwin's petition to resign, was insufficient, and guardians *ad litem* should

have been appointed; that the resignation was not effectual as to them, and therefore not as to any of the others. This point was not passed upon by the special master or the circuit court, nor was a cross bill filed on behalf of either of these defendants. They asked no relief as against complainants but affirmative relief against their codefendants, these sureties, and under such circumstances cross bills are necessary.

If, however, cross bills were filed, as all the defendants are citizens of Georgia, and the complainants are citizens of Tennessee, it is questionable whether the relief which complainants could not obtain on their own case, could be properly awarded by the circuit court, even though it could be successfully contended that these particular defendants were entitled to relief upon the ground suggested, and that their codistributees could avail themselves of such conclusion; in respect to which we express no opinion, as these questions are not before us for decision in the present condition of the record.

It is assigned as error that the court decreed in accordance with the special master's report that the discharge of J. G. B. Erwin, H. C. Erwin, and L. R. Ramsauer, because their names had been improperly signed to the joint bond of Erwin and Gray, did not discharge their cosureties; but this was not urged on the argument. The master proceeded upon the ground that it was appellants' duty to see for themselves that the signatures of their cosureties were binding upon them if they intended to rely upon their being bound; and that it was the ordinary's duty to see that valid signatures were made to the bond, but not to protect anyone as surety, and that no fraud, concealment, or want of good faith could be charged on the ordinary.

We do not regard the overruling of the exception, based as it is on the assumption of knowledge on the part of the ordinary, and concealment misleading the other sureties, as erroneous. *Dair v. United States*, 88 U. S. 16 Wall. 1 [21: 491]; *Lewis v. Gordon County Road & Rev. Comrs.* 70 Ga. 486; *Mathis v. Morgan*, 72 Ga. 517; *Trustees v. Sheik*, 119 Ill. 579 [5 West. Rep. 526].

It is further objected by appellants that the court erred in disallowing any commissions to Erwin and Gray, and particularly the commissions of \$3,438.68 for distribution in kind. Upon a careful consideration of the proofs in the printed record and the various reports of the special master bearing upon this subject, we do not find such evidence of mismanagement on the part of Erwin and Gray as requires the forfeiture of all commissions, and, without entering upon any discussion of the details, we approve of the conclusions reached by the master in his first report, and direct a modification of the decree accordingly, if upon the return of the case to the circuit court, it is found, in view of our decision in respect to the discharge of Erwin and the sureties on the bond of Erwin and Gray, that Mrs. Rice is not concluded by the accounting at the time of such discharge.

Decree reversed, and cause remanded with directions to proceed in conformity with this opinion.

G. W. EMBREY, *Plff. in Err.*,

v.

E. S. JEMISON.

(See S. C. Reporter's ed. 336-352.)

Wagering contract, void—contract for "cotton futures"—when broker cannot recover for money advanced—note given for same, not collectible—knowledge—Virginia Statute of Limitations—absence from State before action accrued.

1. A contract with a broker to purchase for defendant "cotton futures" on a margin, by which the purchase or delivery of actual cotton was never contemplated by either party, but the settlement was to be made between the parties by one party paying to the other the difference between the contract price and the market price of said cotton futures, according to the fluctuations in the market, is a wagering contract and void.
2. When the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself in forwarding the transaction.
3. The original payee cannot maintain an action on a note, the consideration of which is money advanced by him upon or in execution of a contract of wager, he being a party to that contract, or having directly participated in the making of it in the name of or on behalf of one of the parties.

4. That the defendant executed the note with full knowledge of all the facts is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law.

5. The provision in the Virginia Statute of Limitations that the time during which a suit shall be obstructed by a resident of the State removing and remaining out of the State, shall not be computed as part of the time within which the suit should be brought, does not apply where the removal from the State occurred before the contract sued upon was made, and, therefore, before any cause of action thereon accrued.

6. The statute means that the defendant shall not, in computing the time in which he must be sued, have the benefit of any absence caused by his departure after such right of action accrued, and before the expiration of the period limited for the bringing of suit.

[No. 285.]

Argued April 3, 1889. Decided May 13, 1889.

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia, to review a judgment in favor of plaintiff upon promissory notes given for losses sustained on a purchase of "cotton futures." *Reversed.*

The facts are stated in the opinion.

Messrs. Joseph Christian and James M. Matthews, for plaintiff in error:

A contract alleged by the defendant is a contract of wager, and null and void.

See *Benj. Sales*, §§ 514, 542; *Cook, Law of Stocks and Stockholders*, § 347; *Irwin v. Williar*, 110 U. S. 499 (23: 225).

NOTE.—Contracts for the future delivery of goods; grain options; wager contracts; see *Irwin v. Williar*, 110 U. S., 23 L. ed. 225 and note.

Disabilities under Statute of Limitations.—When statute has commenced to run, an intervening disability does not stop it.

When the statute begins to run, it is not arrested by any subsequent disability, unless expressly so provided in the statute. *Hogan v. Kurtz*, 94 U. S. 773 (24: 817); *Hodges v. Darden*, 51 Miss. 199; *Bozeman v. Browning*, 31 Ark. 364; *Watts v. Gunn*, 53 Miss. 502; *Hogg v. Ashman*, 83 Pa. 80; *Smith v. Newby*, 13 Mo. 159; *Pendergrast v. Foley*, 3 Ga. 1.

When the statute began to run during the life of the devisee, it is not arrested by any disability in the devisee; so where it begins to run against the ancestor, is not suspended by any statutory disability in the heir at the time of the descent cast. *Meeks v. Vassault*, 3 Sawy. 206; *Bozeman v. Browning*, 31 Ark. 364; *Rogers v. Brown*, 61 Mo. 187; *Swearingen v. Robertson*, 39 Wis. 462.

The statute, unless otherwise provided, applies only to a disability or disabilities existing at the time the right accrues, and no after-accruing disability will stop its operation. *Jackson v. Johnson*, 5 Cow. 74; *Jackson v. Wheat*, 18 Johns. 40; *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Bunce v. Wolcott*, 2 Conn. 82; *Davis v. Cooke*, 3 Hawks (N. C.) 606; *Smith v. Burtis*, 9 Johns. 174; *Wilson v. Kilcannon*, 4 Hayw. (Tenn.) 182; *Wilson v. Betts*, 4 Denio, 201.

But if at the time when the right accrued a party is under two or more disabilities, as if she is a married woman, an infant, and insane, she may avail herself of either of them. See authorities last cited.

In those States where infancy is within the saving clause of the statute, the statute does not begin to run against him or her, even though he or she has a guardian who might sue the claim in question; nor even though other persons are joint-

ly interested in the claim, who are of full age, until he or she attains the age of majority. *Moore v. Wallis*, 18 Ala. 458; *Pendergrast v. Gullatt*, 10 Ga. 218; *Milner v. Davis*, Litt. Sel. Cas. (Ky.) 433; *Thomas v. Machir*, 4 Bibb (Ky.) 412; *Moore v. Capps*, 9 Ill. 815; *Merrill v. Tevis*, 2 Dana (Ky.) 162; *Shannon v. Dunn*, 8 Blackf. (Ind.) 128; *Hawkins v. Hawkins*, 28 Ind. 66.

Where the statute excepts from its operation claims in favor of a person who is insane, it does not begin to run until he or she is restored to sanity and knowledge of the existence of the claim. *Dicken v. Johnson*, 7 Ga. 484; *Clark v. Trall*, 1 Met. (Ky.) 35; *Little v. Downing*, 37 N. H. 355; *Sasser v. Davis*, 27 Tex. 650.

If the statute began to run upon the claim before the plaintiff became *non compos*, its operation is not checked because he subsequently became insane. Upon his restoration to sanity the statute attaches to the claim, and having once begun to run thereon, it is not checked by the circumstance that before the bar became complete his lunacy returned. *Clark v. Trall*, 1 Met. (Ky.) 35; *Allis v. Moore*, 2 Allen, 306; *Adamson v. Smith*, 2 Mill, Const. Rep. (S. C.) 269.

Where coverture is made a disability, the Statute of Limitations never begins to run against a married woman while she is covert. *Jones v. Reeves*, 6 Rich. L. (S. C.) 132; *Sledge v. Clopton*, 6 Ala. 589; *Wilson v. Wilson*, 36 Cal. 447; *McLane v. Moore*, 6 Jones, L. (N. C.) 520; *Miohan v. Wyatt*, 21 Ala. 613; *McLean v. Jackson*, 12 Ired. L. (N. C.) 149; *Fatheree v. Fletcher*, 31 Miss. 285; *Fearn v. Shirley*, 31 Miss. 301; *Meegan v. Boyle*, 60 U. S. 19 How. 180 (15: 577); *Gage v. Smith*, 27 Conn. 70; *Watson v. Watson*, 10 Conn. 77; *Drennen v. Walker*, 21 Ark. 539; *Caldwell v. Black*, 5 Ired. L. (N. C.) 463; *Randall v. Raab*, 2 Abb. Pr. 307; *Willson v. Betts*, 4 Denio, 201; *Dunham v. Sage*, 62 N. Y. 229.

Where a cause of action accrues to the wife before marriage, her subsequent coverture does not bar the Statute of Limitations. *Cole v. Runnells*, 6

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The removal from Virginia cannot be regarded as obstructing the action in Virginia, where the contract was entered into after the removal, and in another State, for at the time of removing there was no contract in existence.

Ficklin v. Carrington, 81 Gratt. 219.

The consideration of the notes was founded on a wagering contract, which is invalid in law and void.

Benj. Sales, §§ 541, 542, and cases there cited; *Irwin v. Williar*, 110 U. S. 499 (28:225); *Pickering v. Cense*, 79 Ill. 928; Dos Passos, Stock Brokers, 477; *Baldwin v. Flagg*, 86 N. J. Eq. 48-9.

Mr. Henry M. Herman, for defendant in error:

A party cannot prove verbally that another contract (in itself illegal) existed, and thus get rid of a written contract on its face unexceptionable.

Porter v. Viets, 1 Biss. 179, 180; *Burnes v. Scott*, 117 U. S. 585 (29:992).

Where an agent who advances money to his principal to pay losses incurred in an illegal transaction, and takes his note for the money so advanced, the contract between the principal and agent, made after the illegal transactions are closed, is a binding contract.

Lehman v. Strassberger, 2 Woods, C. C. 554; *Hentz v. Jewell*, 4 Woods, C. C. 656; *Durant v. Burt*, 98 Mass. 167; *Petrie v. Hannay*, 3 Term Rep. 418; *Owen v. Davis*, 1 Bailey, L. 315; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 274 (6:468); *Warren v. Hewitt*, 45 Ga. 501; *Clarke*

v. Foss, 7 Biss. 540; *Wolcott v. Heath*, 78 Ill. 433; *Faikeney v. Reynolds*, 4 Burr. 2069; *Farmer v. Russell*, 1 Bos. & P. 296; *Wyman v. Fiske*, 8 Allen, 238.

When parties, having mutual matters of account between them growing out of a contract, deliberately come together and state a balance, and the party who on such accounting is found indebted to the other gives a written obligation for its payment, this settlement is so far conclusive between the parties that it cannot be reopened or gone into either at law or equity except upon clear proof of fraud or mistake, or of an express understanding that certain matters were left open for settlement.

Knox v. Whalley, 1 Esp. 159; *Bull v. Harris*, 81 Ill. 489; *Lee v. Reed*, 4 Dana, 111; *Hodges v. Hosford*, 17 Vt. 615; *Darlington v. Taylor*, 8 Grant Cas. 195; *Martin v. Beckwith*, 4 Wis. 220; *Gibson v. Hanna*, 12 Mo. 165; *Cogswell v. Whittlesey*, 1 Root, 384; *Sergeant v. Ewing*, 36 Pa. 156; *Nicholson v. Pelanne*, 14 La. Ann. 514; *Standard Oil Co. v. Van Etten*, 107 U. S. 325 (27:319); *Perkins v. Hart*, 24 U. S. 11 Wheat. 237 (6:468); *Toland v. Sprague*, 37 U. S. 12 Pet. 309 (9:1098); *Wiggins v. Burkham*, 77 U. S. 10 Wall. 129 (19:884); *Lockwood v. Thorne*, 11 N. Y. 170; *Hager v. Thompson*, 66 U. S. 1 Black, 80 (17:41).

A party to a negotiable instrument is not a competent witness to prove any fact existing at the time of his accrediting the paper, tending to invalidate it.

Bank of U. S. v. Dunn, 31 U. S. 6 Pet. 51

Tex. 272; *Chevallier v. Durst*, 6 Tex. 239; *Den v. Richards*, 15 N. J. L. 347; *Peck v. Randall*, 1 Johns. 165; *Lynch v. Cox*, 23 Pa. 265; *Pearce v. House*, Taylor, Term. Rep. (N. C.) 305; *McCoy v. Nichols*, 4 How. (Mass.) 81; *Fewell v. Collins*, 3 Brev. (S. C.) 236; *Fitzhugh v. Anderson*, 2 Hen. & M. (Va.) 239; *Faysoux v. Prather*, 1 Nott & McC. (S. C.) 236; *Parsons v. McCracken*, 9 Leigh (Va.) 495; *Stowel v. Zouch*, 1 Plovod. 856; *Durooure v. Jones*, 4 T. R. 300; *Cottrell v. Dutton*, 4 Taunt. 89; *Bunce v. Wolcott*, 2 Conn. 27. Where the husband sues in right of his wife, he cannot avail himself of her disability. *McDowell v. Potter*, 8 Pa. 139; *Watson v. Kelty*, 16 N. J. L. 517; *Thorpe v. Corwin*, 20 N. J. L. 311; *Carter v. Cantrell*, 16 Ark. 154.

The statute does not prevent a person under a disability from suing if he elects to do so; nor is he obliged to sue simply because he can. *Piggott v. Rush*, 4 Ad. & El. 912; *Chandler v. Vilett*, 2 Saund. 117 (5).

A mere temporary absence of the defendant from the State when the right of action accrued, as, for a day or week, constitutes such an absence as prevents the statute from attaching in his favor, unless the circumstances existing during the period of such temporary absence were such that the service of legal process against him could have been made so that the plaintiff could obtain a judgment against him personally. *Ward v. Cole*, 22 N. H. 453; *Penley v. Waterhouse*, 1 Iowa, 498; *Hill v. Bellows*, 15 Vt. 727; *Palmer v. Shaw*, 16 Cal. 93; *Vanlandingham v. Huston*, 9 Ill. 125; *Chenot v. Lefevre*, 8 Ill. 637.

Occasionally coming into the State is held not to put the statute in motion, where a person, after the cause of action accrues, is absent from and resides out of the State. *Hacker v. Everett*, 57 Maine, 543; *Lane v. Nat. Bank of Metropolis*, 6 Kan. 74; *Seymour v. Street*, 5 Neb. 55; *Bennett v. Cook*, 43 N. Y. 537, 3 Am. Rep. 727.

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Except where the statute otherwise so provides, one disability cannot be tacked to another, nor the disabilities of an ancestor to those of the heir, to protect a party from the operation of the statute; nor can a party avail himself of several disabilities, unless they all existed at the time when the right of action accrued. *Clark v. Jones*, 16 B. Mon. (Ky.) 121; *Parsons v. McCracken*, 9 Leigh (Va.) 495; *Martin v. Letty*, 18 B. Mon. (Ky.) 573; *Boyce v. Dudley*, 8 B. Mon. 511; *Jackson v. Wheat*, 18 Johns. 40; *McDonald v. Johns*, 4 Yerg. (Tenn.) 258; *Fritz v. Joiner*, 54 Ill. 101; *Mercer v. Selden*, 42 U. S. 1 How. 37 (11: 33); *Thorp v. Raymond*, 57 U. S. 16 How. 247 (14: 923); *Ashbrook v. Quarles*, 15 B. Mon. (Ky.) 20; *White v. Latimer*, 12 Tex. 61; *Currier v. Gale*, 3 Allen, 328; *Deessauier v. Murphy*, 38 Mo. 184; *Bunce v. Wolcott*, 2 Conn. 27.

If a right of action accrues to a female infant, and she afterwards marries, the coverture does not create an additional disability, but, notwithstanding the coverture, an action must be brought within the specified period after she becomes of age, or the claim will be barred. *Fewell v. Collins*, *Treadway*, Const. Rep. (S. C.) 202; *Wellborn v. Weaver*, 17 Ga. 287; *Mitchell v. Berry*, 1 Met. (Ky.) 602; *Parsons v. McCracken*, 9 Leigh (Va.) 495; *Martin v. Letty*, 18 B. Mon. (Ky.) 573; *Manion v. Titsworth*, 18 B. Mon. (Ky.) 532; *Billon v. Larmore*, 37 Mo. 375; *Carlisle v. Stittler*, 1 Penr. & W. 6; *Dugan v. Gittings*, 3 Gill. (Md.) 138; *Finley v. Patterson*, 2 B. Mon. (Ky.) 76; *Riggs v. Dooley*, 7 B. Mon. (Ky.) 236.

In *Duckett v. Crider*, 11 B. Mon. (Ky.) 188, it was held that a woman under age was entitled to her action to recover possession of a slave. She married before she came of age, and it was held that the two disabilities of nonage and coverture could be joined for the purposes of deferring the bar of the Statute of Limitations. See *Boyce v. Dudley*, 8 B. Mon. 511, where a contrary rule was adopted. *Martin v. Letty*, 18 B. Mon. 573; and *Clark v. Jones*,

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(8:816); *Bank of the Metropolis v. Jones*, 88 U. S. 8 Pet. 12 (8:850); *Scott v. Lloyd*, 87 U. S. 12 Pet. 145 (9:1038); *Henderson v. Anderson*, 44 U. S. 8 How. 73 (11:499); *Smyth v. Strader*, 45 U. S. 4 How. 404 (11:1081); *Saltmarsh v. Tuthill*, 54 U. S. 13 How. 229 (14:124); *Sweeney v. Easter*, 68 U. S. 1 Wall. 166 (17:681); *Davis v. Brown*, 94 U. S. 423 (24:204).

A continued recognition of a debtor's liability and his agreement to discharge it, after he has full knowledge of all the facts, estops himself from pleading a want of consideration or setting up fraud as a defense to an action on the promise.

Fitzpatrick v. Flannagan, 106 U. S. 648 (27:211); *McCreary v. Parsons*, 31 Kan. 447; *Stebbins v. Crawford Co.* 92 Pa. 289; *Davis v. Gray*, 17 Ohio St. 330; *Negley v. Lindsey*, 67 Pa. 217.

The promissory notes are evidence of an account stated.

Burmester v. Hogarth, 11 Mees. & W. 97; *Feesenmayer v. Adcock*, 16 Mees. & W. 449; *Curtis v. Rickards*, 1 Scott, N. R. 155; Chitty, Cont. 8th ed. pp. 562, 567; *Hughes v. Thorpe*, 5 Mees. & W. 656; *Bernasconi v. Anderson*, Mood. & M. 183; *Gould v. Coombe*, 1 C. B. 548; *Payne v. Jenkins*, 4 Car. & P. 324; *Buck v. Hurst*, L. R. 1 C. P. 297.

The promise of Embrey as evidenced by his notes was a new contract, not affected by the illegality of the original transaction.

Tenant v. Elliott, 1 Bos. & P. 8; *Farmer v. Russell*, 1 Bos. & P. 296; *Fiskney v. Reynolds*,

16 B. Mon. 121. See also *Wellborn v. Finley*, 7 Jones, L. (N. C.) 223, where it was held that the disability of nonage and coverture could not be joined to prevent the operation of the statute.

In *Keil v. Healey*, 84 Ill. 104, it was held that the operation of the statute is not arrested by cumulative disabilities.

The disability which arrests the running of the statute must exist at the time when the right of action accrued. *Hinde v. Whitney*, 81 Ohio St. 53; *Hogan v. Kurts*, 94 U. S. 773 (24:317); *Bozeman v. Browning*, 81 Ark. 384; *Den v. Moore*, 8 Wall. Jr. 232; *Hull v. Deatly*, 7 Bush (Ky.) 697; *Frits v. Joiner*, 54 Ill. 101; *Harris v. McGovern*, 2 Sawy. 515; *Rogers v. Brown*, 61 Mo. 187; *Swearingen v. Robertson*, 39 Wis. 463; *Coomens v. Farnan*, 30 Ohio St. 491; *McCoy v. Nichols*, 4 How. (Miss.) 31; *Bunce v. Wolcott*, 2 Conn. 32.

No after-accruing disability can stop the statute after it has once commenced to run. *Parsons v. McCracken*, 9 Leigh (Va.) 495; *Fitzhugh v. Anderson*, 2 Hen. & M. (Va.) 239; *Hudson v. Hudson*, 6 Munf. (Va.) 352; *McDonald v. Johns*, 4 Yerg. (Tenn.) 258; *Demarest v. Wynkoop*, 3 Johns. Ch. 129.

When the statute once begins to run, no subsequent disability can stop its operation, unless specially so provided in the statute. *Crozier v. Gano*, 1 Bibb (Ky.) 257; *Faysoux v. Prather*, 1 Nott & McC. (S. C.) 296; *Rogers v. Hillhouse*, 3 Conn. 398; *Peck v. Randall*, 1 Johns. 165; *Buff v. Bull*, 7 Har. & J. 14; *Dillard v. Philson*, 5 Strobb. L. (S. C.) 213; *Stevenson v. McReary*, 12 Sm. & M. 9; *Byrd v. Byrd*, 23 Miss. 144; *Pendergrast v. Foley*, 8 Ga. 1; *Smith v. Newby*, 13 Mo. 159; *Parsons v. McCracken*, 9 Leigh (Va.) 495; *Hudson v. Hudson*, 6 Munf. (Va.) 352.

Disabilities which bring a person within the exceptions of the statute cannot be tacked one upon another, and a party can only avail himself of such disability or disabilities as existed when the right

4 Burr. 2069; *Petrie v. Hannay*, 8 T. R. 414; *Thomson v. Thomson*, 7 Ves. Jr. 473; approved in *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258 (6:468); *McBlair v. Gibbs*, 58 U. S. 17 How. 232 (15:182); *Brooks v. Martin*, 69 U. S. 2 Wall. 70 (17:732); *Planters' Bank v. Union Bank*, 88 U. S. 16 Wall. 488 (21:478); *Cook v. Sherman*, 20 Fed. Rep. 167.

A nonresident cannot avail himself of the benefit of the statutes of another State than the one he is a citizen of.

Jones v. Andrews, 77 U. S. 10 Wall. 327 (19:935); *McMicken v. Webb*, 36 U. S. 11 Pet. 25 (9:618); *Ober v. Gallagher*, 98 U. S. 199 (23:829); *Toland v. Sprague*, 87 U. S. 12 Pet. 300 (9:1093); *Boswell v. Otis*, 50 U. S. 9 How. 336 (13:164); *Levy v. Fitzpatrick*, 40 U. S. 15 Pet. 167 (10:699); *Kendall v. U. S.* 37 U. S. 13 Pet. 524 (9:1181); *Harris v. Hardeman*, 55 U. S. 14 How. 384 (14:444).

Mr. Justice Harlan delivered the opinion of the court:

This is an action of debt to recover from the plaintiff in error, who was the defendant below, the amount of four negotiable notes executed by him, January 21, 1878, and payable at the office of E. S. Jemison & Co., in the City of New York, to the order of Moody & Jemison, by whom they were indorsed, before maturity, to the plaintiff, Jemison. Each note was for the sum of \$7,594.15, two of them payable six months, and the remaining two twelve months, after date. There was a trial before a jury,

of action accrued. *McFarland v. Stone*, 17 Vt. 105; *Meroer v. Selden*, 42 U. S. 1 How. 37 (11:38); *White v. Latimer*, 12 Tex. 61; *South v. Thomas*, 7 T. B. Mon. (Ky.) 59; *McDonald v. Johns*, 4 Yerg. (Tenn.) 258; *Thorp v. Raymond*, 57 U. S. 16 How. 247 (14:323); *Starke v. Starke*, 3 Rich. L. (S. C.) 438; *Rankin v. Tenbrook*, 6 Watts, 338; *Doe v. Barksdale*, 2 Brook. 436; *Scott v. Haddock*, 11 Ga. 238; *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Dease v. Jones*, 23 Miss. 128; *Den v. Richards*, 15 N. J. L. 347; *Bradstreet v. Clarke*, 13 Wend. 608; *Jackson v. Wheat*, 13 Johns. 40.

If a debtor is within the State at the time a cause of action for injury to personal property from negligence accrues, the six years limited is not extended by temporary absences from the State on business, each for less than a year, and with no intention of acquiring a new residence. *Ullner v. Butterfield*, 17 Jones & S. 515.

A debtor who, after absence from the State, such as is contemplated by the Statute of Limitations, comes into the State with the design of continuing therein, concealed under a fictitious name to avoid pursuit by his creditors, and so continues, is not to be regarded as having come within the State within the meaning of the statute, until the day that he is discovered. *Engel v. Fischer*, 15 Abb. N. C. 72, S. C. 19 Jones & S. 71, citing *Fowler v. Hunt*, 10 Johns. 464; *Cole v. Jessup*, 10 N. Y. 90, 108; *Randall v. Wilkins*, 4 Denio, 577; *Ford v. Babcock*, 2 Sandf. 513; *White v. Bailey*, 3 Mass. 271; *Little v. Blunt*, 16 Pick. 359; *Poillon v. Lawrence*, 77 N. Y. 207; and distinguishing *Troup v. Smith*, 20 Johns. 33.

The nonresidence of the heirs at law of a deceased mortgagor, against whom no personal demand is made, saves an action to foreclose a mortgage from the running of the twenty years' Statute of Limitations. *Whalley v. Eldridge*, 24 Minn. 361; *Osborne v. Randall*, 7 Civ. Pro. Rep. (N. Y.) 323.

resulting in a verdict and judgment in favor of the plaintiff for the amount demanded in the declaration. The case has been brought here for review, the defendant contending that the court committed such errors of law as entitles him to a reversal of the judgment and to a new trial.

In addition to a plea of *nil debet*, the defendant filed a special plea of wager, in which it was averred, in substance, that on the last of February, or the first of March, in the year 1877, he contracted with the firm of Moody & Jemison, brokers and commission merchants of the City of New York, and members of the Cotton Exchange, to purchase for him, through the plaintiff, one of that firm, "on a margin," in said Cotton Exchange, not actual cotton, but four thousand bales of "future-delivery" cotton, for May delivery, commonly called "futures," which he did; that at the time of the purchase the defendant had in the hands of Moody & Jemison about eight thousand dollars as a margin to protect said purchase against fluctuations in the market; that in the first few days of the month of March the plaintiff, as a member of the firm of Moody & Jemison, reported that the margin was about exhausted by a decline in the market, and called for more margin, which defendant informed him he was unable to put up; that no agreement or contract was at that time, or afterwards, made with the firm of Moody & Jemison to have the said "cotton futures" carried for his account; that no report was afterwards made to him of any sale of such futures; that on the 21st day of January, 1878, in the City of New York, the plaintiff called on him for his four notes for losses which he alleged the firm of Moody & Jemison had sustained by carrying said "cotton futures," which notes the defendant executed, and which are the identical notes described in the declaration; "that the purchase or delivery of actual cotton was never contemplated, either by the defendant or the said Moody & Jemison, and it was understood between them that the settlement was to be made between said parties by one party paying to the other the difference between the contract price and the market price of said cotton futures, according to the fluctuations in the market; and, therefore, the defendant says that the said contract was a wagering contract, and that it and the said four notes for the consideration aforesaid are void and of no force in law."

A demurrer to this plea was sustained, the defendant taking his exception in proper form.

On the trial of the case on the plea of *nil debet* the plaintiff, to maintain the issue upon his part, gave in evidence the four notes described in the declaration, and the defendant testified to the facts set forth in the above special plea of wager. And this was all the evidence before the jury. Thereupon the defendant asked the court to instruct the jury as follows: "If the jury shall believe from the evidence that it was not the intention of either party that a contract should be made by the plaintiff to buy and hold the bales of cotton for delivery to the defendant, but that it was the real intention and understanding of the parties that a contract should be made which should be closed at a future day, not by delivery of the cotton and payment of purchase price, but

by payment of money to the one party or the other, the party to receive the same and the amount to be paid to be determined upon a basis of the difference between the agreed purchase price on the day of—, 18—, and the actual market value of the cotton on the day when the contract was to be closed, then the jury are instructed that such a contract is invalid in law and void, and that they must find for the defendant." The court refused to give this instruction, and the defendant duly excepted.

Although the notes in suit are dated at the City of New York, and were payable at the office of E. S. Jemison & Co., in that city, it does not clearly appear whether the original contract between Embrey and the firm of Moody & Jemison, referred to in the special plea of wager, and in the above instruction, was made in Virginia, or in New York. There was, consequently, some discussion as to whether the statute of Virginia or that of New York should control the determination of the question as to the illegality of that contract. The statute of Virginia provides that "every contract, conveyance, or assurance, of which the consideration, or any part thereof, is money, property, or other thing won or bet at any game, sport, pastime or wager, or money lent or advanced at the time of any gaming, betting or wagering, to be used in being so bet or wagered (when the person lending or advancing it knows that it is to be so used), shall be void." Code of Va. 1873, p. 984, § 2. By the statute of New York it is provided that "all wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful. All contracts for or on account of any money or property, or thing in action, so wagered, bet, or staked, shall be void." 1 Rev. Stat. N. Y. Title 8, art. 8, § 8, p. 663.

Whether the validity of the original contract for the purchase of future-delivery cotton must depend upon the New York statute or upon the Virginia statute, it is not important to determine; for, if such contract, as alleged, is a wagering contract, it is void under the law of either State. The plea makes a case of money advanced by the plaintiff's firm solely for the purpose of carrying "cotton futures," for which he or they contracted, when, according to the averments of the rejected plea, neither party contemplated the purchase or delivery in fact of cotton, and when it was understood that any settlement, in respect to such purchases, should be exclusively upon the basis of one party paying to the other only "the difference between the contract price and the market price of said cotton futures, according to the fluctuations of the market." If this be not a wagering contract, under the guise of a contract of sale, it would be difficult to imagine one that would be of that character. The mere form of the transaction is of little consequence. If it were, the statute against wagers could easily be evaded. The essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties. Mr. Benjamin, in his *Treatise on Sales* (Vol. 2, 6th Am. ed. by Corbin, p. 716, § 828), after stating that at common law wagers

that did not violate any rule of public decency or morality, or any recognized principle of public policy, were not prohibited, says: "It has already been shown that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them." "But such a contract," he proceeds to say, "is only valid where the parties really intend and agree that the goods are to be delivered to the seller, and the price to be paid by the buyer. If, under guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void under the statute." The statute referred to by the author is that of 8 and 9 Vict. chap. 109, § 18, which provides "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which should have been deposited in the hands of any person, to abide the event on which any wager should have been made."

In *Irwin v. Williar*, 110 U. S. 499, 508, 510 [28: 225, 229, 230], the general subject of wagering contracts was carefully considered, and in the opinion, delivered by Mr. Justice Matthews, we expressed approval of the doctrine as announced by Mr. Benjamin, observing that generally, in this country, all such contracts are held to be illegal and void as against public policy. It was there said: "It makes no difference that a debt or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade." Referring to the decision in *Rountree v. Smith*, 108 U. S. 269 [27: 722], it was further said: "It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." In the present case, according to the averments in the plea of wager, the plaintiff was the broker who effected the purchases of future-delivery cotton. He was privy to the unlawful design of the parties; represented one of them in all the transactions; and advanced the money necessary to carry, and for the express purpose of carrying, these cotton "futures" on account of the defendant. His position, therefore, was not that of a person merely advancing money to or for one of the parties to a wager, without

having himself any direct connection with the making or execution of the contract of wager itself. He was, in every sense, *particeps criminis*.

In *Bigelow v. Benedict*, 70 N. Y. 202, 206, the Court of Appeals of New York said that "where an optional contract for the sale of property is made, and there is no intention on the one side to sell or deliver the property, or on the other to buy or take it, but merely that the difference should be paid according to the fluctuation in market values, the contract would be a wager within the statute." In *Story v. Salomon*, 71 N. Y. 420, 422, which was an action upon a written contract for an option to buy or sell certain shares of stock, and the defense was that it was illegal and void under the statute of New York against gaming, the court said: "If it had been shown that neither party intended to deliver or accept the shares, but merely to pay differences according to the rise or fall of the market, the contract would have been illegal." The same principle was announced in *Kingsbury v. Kivan*, 77 N. Y. 612. "There are many other authorities to the same effect, but in view of our decision in *Irwin v. Williar*, with which we are entirely satisfied, it is not necessary to cite them.

The plaintiff relies upon *Brown v. Speyers*, 20 Gratt. 296, as expressing a different view of this question. But we do not so understand that case. The Supreme Court of Appeals of Virginia did not there indicate its opinion as to the validity of a contract for the purchase of "futures," the settlement in respect to which was to be upon the basis of paying simply the difference, according to the fluctuations in the market, between the contract price and the market price.

It is contended that this is not an action upon the original contract, but upon the notes executed by Embrey after the business transacted for him by Moody & Jemison was closed, and with full knowledge, upon his part, of all the facts. In such a case, it is argued, the principles announced in *Irwin v. Williar* cannot be applied. This argument concedes, at least for the purposes of the present case, that, as the law, for the protection of the public, and in the interest of good morals, declares a wagering contract to be void, the plaintiff could not maintain an action for the moneys advanced in execution of the original contract to carry these "futures." And yet it is insisted that he ought to have judgment on the notes in suit, although it appears they have no other consideration than the moneys so advanced. A judgment upon the notes would, in effect, be one for the amount claimed by the plaintiff, under the original contract, at the time he demanded their execution by the defendant. Indeed, it has been held that a note could not of itself discharge the original cause of action, unless, by express or special agreement, it was received as payment. *Sheehy v. Mandeville*, 10 U. S. 6 Cranch, 253, 264 [3: 215]; *Peter v. Beverly*, 35 U. S. 10 Pet. 532, 568 [9: 522]; *The Kimball*, 70 U. S. 3 Wall. 37, 45 [18: 50, 54].

While there are authorities that seem to support the position taken by the defendant in error, we are of opinion that, upon principle, the original payee cannot maintain an action on a note the consideration of which is money

advanced by him upon or in execution of a contract of wager, he being a party to that contract, or having directly participated in the making of it in the name of or on behalf of one of the parties.

In *Steers v. Lashley*, 6 T. R. 61, it appeared that the defendant was engaged in stock-jobbing transactions with different persons, in which one Wilson was employed as his broker, and had paid the "differences" for him. A dispute having arisen as to their amount, the matter was referred to the plaintiff and others, who awarded a certain sum as due from the defendant. For a part of that sum the broker drew a bill on the defendant, and after it had been accepted indorsed it to the plaintiff. Lord Kenyon said: "If the plaintiff had lent this money to the defendant to pay the differences, and had afterwards received the bill in question for that sum, then, according to the principle announced in *Petrie v. Hannay*, 8 T. R. 418, he might have recovered. But here the bill on which the action was brought was given for these very differences; and therefore Wilson himself could not have enforced payment of it. Then the security was indorsed over to the plaintiff, he knowing of the illegality of the contract between Wilson and the defendant; for he was the arbitrator to settle their accounts; and under such circumstances he cannot be permitted to recover on the bill in a court of law."

In *Amory v. Meryweather*, 2 Barn. & C. 578, 578, which was an action of debt on bond, conditioned for the payment of money by installments, the plea in substance was that the bond was given in place of a promissory note previously executed in payment for moneys advanced by an agent of the obligor in discharge of differences arising upon contracts for buying and selling shares in the public stocks, against the form of the statute; the plaintiff having knowledge, when he received the bond, that the note had been made by the defendant on the occasion and for the purpose stated. Abbott, C. J., after observing that there was no period of time when the plaintiff could have maintained an action upon the note, said: "We are all of opinion that as it appears upon the plea that the bond was given as a substitute for a note which was taken by the plaintiffs subject to an infirmity of title of which they had full notice before the bond was taken, the latter instrument is void. In *Fisher v. Bridges*, 3 El. & Bl. 642, 649, which was an action upon a covenant in a deed to pay a certain sum, and which covenant was given as security for payment of a part of the purchase money of real estate sold by the plaintiff to the defendant, to be by the latter disposed of by lottery, as the plaintiff knew, the court said: "It is clear that the covenant was given for the payment of the purchase money. It springs from and is the creature of the illegal agreement, and as the law would not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase money, which, by the original bargain, was tainted with illegality." See, also, *Farrera v. Gabell*, 89 Pa. 89; *Griffiths v. Sears*, 112 Pa. 528 [8 Cent. Rep. 239]; *Flagg v. Baldwin*, 88 N. J. Eq. 219, 227; *Cunningham v. Nat. Bank of Augusta*, 71 Ga. 400; *Tenney v. Foote*, 95 Ill. 100; *Rudolf v.* 181 U. S. U. S., Book 38.

Winters, 7 Neb. 126; *Louvy v. Dillman*, 59 Wis. 197; S. C. 18 N. W. Rep. 4.

Assuming the averments of the plea of wager to be true, it is clear that the plaintiff could not recover upon the original agreement without disclosing the fact that it was one that could not be enforced or made the basis of a judgment. He cannot be permitted to withdraw attention from this feature of the transaction by the device of obtaining notes for the amount claimed under that illegal agreement; for they are not founded on any new or independent consideration, but are only written promises to pay that which the obligor had verbally agreed to pay. They do not, in any just sense, constitute a distinct or collateral contract based upon a valid consideration. Nor do they represent anything of value, in the hands of the defendant, which, in good conscience, belongs to the plaintiff or to his firm. Although the burden of proof is on the obligor to show the real consideration, the execution of the notes could not obliterate the substantive fact that they grew immediately out of, and are directly connected with, a wagering contract. They must, therefore, be regarded as tainted with the illegality of that contract, the benefits of which the plaintiff seeks to obtain by this suit. That the defendant executed the notes with full knowledge of all the facts is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law. *Coppell v. Hall*, 74 U. S. 7 Wall. 542, 558 [19: 244, 248.]

We are of opinion that the special plea of wager presented a good defense to the action, and ought not to have been rejected; also, that the instruction asked by the defendant should have been given.

The case presents another question which it is necessary to consider. The defendant in one of his pleas alleged that the plaintiff's cause of action did not accrue within five years next before the commencement of suit. That is the time within which, by the general Statute of Limitations of Virginia, actions like the present one must be brought. Va. Code, 1878, p. 999, §§ 8 and 14. To this plea the plaintiff replied, specially, that he ought not to be bound by anything therein alleged, because when the several causes of action in the declaration mentioned, and each of them, accrued to him, the defendant "had before resided in the State of Virginia," and by departing without the same obstructed him in the prosecution of his several causes of action, for several, to wit, two or more years next after the same accrued as aforesaid; that the time such obstruction continued is not to be computed as any part of the period within which his causes of action, and each of them, ought to have been prosecuted; and that, excluding such time, the plaintiff brought this action within five years next after the accruing of his several causes of action. This replication was based upon the following provision in the Virginia Statute of Limitations: "Where any such right as is mentioned in this chapter shall accrue against a person who had before resided in this State, if such person shall, by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means, obstruct the prosecution of such right,

the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted. But this section shall not avail against any other person than him so obstructed, notwithstanding another might have been jointly sued with him if there had been no such obstruction. And upon a contract which was made and was to be performed in another State or country, by a person who then resided therein, no action shall be maintained after the right of action thereon is barred by the laws of such State or country." Code of Va. 1878, p. 1002, chap. 146, § 20. The defendant rejoined that the plaintiff ought not, by reason of anything in the replication alleged, to have and maintain his action, because by his removal from the State of Virginia and departing without the same, as alleged, he did not obstruct the plaintiff in the prosecution of his suit upon the alleged causes of action in the declaration mentioned, because such removal occurred in the year 1859, a long time before any of the alleged causes of action existed or accrued, and that, when said causes of action accrued to the plaintiff, the defendant was, and still considers himself, a citizen of the State of Louisiana.

Upon plaintiff's motion, the rejoinder of the defendant was rejected upon the ground that the above section excepted from the general Act of limitation a case in which the cause of action accrued against a person previously, no matter how long before, residing in Virginia, although he may have left the State before the contract sued upon was made, and, therefore, before any cause of action thereon accrued. This construction of the statute was supposed to be required by the decision in *Ficklin v. Carrington*, 81 Gratt. 219. We are satisfied, upon a careful examination of that case, that it was misinterpreted by the learned District Judge who presided at the trial below. That was an action of assumpsit to recover the amount of a note dated April 1, 1865. The defendant Carrington pleaded the Statute of Limitations. The plaintiff replied that he ought not to be bound by reason of anything in that plea alleged, because "on the first day of April, 1865, when the said several promises and undertakings in the plaintiff's declaration mentioned were made and entered into, and previous thereto, the defendant was and had been a resident of the State of Virginia, and that afterwards, to wit, on or before the 15th day of November, 1866, the said defendant departed without the State, and thereafter resided in the State of Maryland, and thereby the said defendant obstructed the said B. F. Ficklin, deceased, in his lifetime, and the plaintiff since his death, in the prosecution of his suit upon the said several promises and undertakings, until the 18th day of June, 1874, when this suit was instituted." The defendant replied, specially, that by his removal he had not obstructed, etc. The court held that the removal of the defendant, as stated in the replication, did, within the meaning of the statute, obstruct the bringing of the suit, and, consequently, the time subsequent to such removal was not to be counted in his favor. It also held that the above statute, although somewhat different in its phraseology and structure from

previous enactments, made no substantial change in the previous statutes, one of which (that of 1819, 1 Rev. Code of Va. p. 491, § 14) provided that "if any defendant shall abscond or conceal himself, or by removal out of the country or the county where he resides when the cause of action accrued, or by any other indirect ways or means, defeat or obstruct the plaintiff, then the defendant shall not be admitted to plead the Statute of Limitations."

We are of opinion that the defendant's rejoinder to the plaintiff's replication to the plea of limitations was improperly rejected. It shows upon its face that the defendant's removal from Virginia occurred nearly twenty years before the contract in question was made, and that when the plaintiff's cause of action accrued he was not a citizen or resident of Virginia, but of Louisiana. The statutory provision upon which the plaintiff based his replication has no application to this case, if, as shown by the rejoinder, the defendant removed from Virginia before he made any contract with the plaintiff. We cannot suppose that his removal from that State, nineteen years before that contract was made, can be regarded, under the statute of Virginia, as an obstruction to the plaintiff's prosecution of his action. The statute, so far as it relates to obstructions caused by a defendant having departed from the State, means that, being a resident of Virginia when the cause of action accrues against him, and being then suable in that State, the defendant shall not, in computing the time in which he must be sued, have the benefit of any absence caused by his departure after such right of action accrued, and before the expiration of the period limited for the bringing of suit. The plaintiff was at liberty to sue the defendant wherever he could find him. Having elected to sue him in Virginia, the courts sitting there must give effect to the limitation prescribed by her law, without any saving in favor of the plaintiff on account of the defendant's removal prior to the making of any contract whatever with the plaintiff.

The judgment is reversed, with directions to grant a new trial, and for further proceedings in conformity with this opinion.

WILLIAM S. MELLE, Trustee, ET AL.,
Appts.,
v.

THE MOLINE MALLEABLE IRON
WORKS ET AL.

(See S. C. Reporter's ed. 352-371.)

Insolvent corporation—property a trust fund—Act of March 3, 1875—action to subject property to debts and to remove a lien—decree not collaterally assailed—immediate sale—irregularity—notice to appear and plead—purchaser pendente lite.

1. When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors.
2. A court of equity, at the instance of the proper parties, will then make those funds trust funds.

which, in other circumstances, are as much the absolute property of the corporation as any man's property is his.

3. A suit against an insolvent corporation to subject its property to the payment of its debts and to remove a lien on it created by a trust deed and chattel mortgage is one within the Act of March 3, 1875.
4. Whether the suit to remove such lien could be brought before plaintiff had exhausted his legal remedies by judgment and execution was one of the questions necessary to be determined in the suit and any error in deciding it would not authorize even the same court, in an original, independent suit, to treat the decree as void.
5. If the court erroneously ruled upon any such question its decree could not for that reason be assailed in a collateral proceeding as void for want of jurisdiction. An adjudication that a particular case is of equitable cognizance, cannot be disturbed by an original suit. Such adjudication is not void, even if erroneous.
6. Whether the condition of the property was such as to require, for the protection of the parties, that it be sold, was a matter for the court, in its discretion, to determine. If the circumstances justified immediate action, the court had power to order a sale in advance of a final decree.
7. If the sale was irregular, by reason of its being ordered and made before a defendant was directed to appear and plead, answer or demur, that does not affect the jurisdiction of the court to render a final decree in respect to his interest in the property.
8. The proceedings conformed to the Act of March 3, 1875, where, before the final decree was rendered, such defendant had been served with a copy of the several orders requiring him to appear and plead, answer and demur, to the original and supplemental bills and to the cross bill, and was in default in respect to each order.
9. A purchaser *pendente lite* cannot relitigate, in an original, independent suit, the matters determined in the suit to which his vendor was a party.

[No. 250.]

Argued April 16, 1889. Decided May 13, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, sustaining a plea in bar to a suit brought by the appellants and dismissing their bill of complaint for want of equity, the suit being brought for the foreclosure of a trust deed and chattel mortgage, the sale of the property, and the disposition of the proceeds according to the rights of the parties in interest. *Affirmed.*

Statement by *Mr. Justice Harlan*:

This is an appeal from a final decree sustaining a plea in bar to a suit brought by the appellants, and dismissing their bill of complaint for want of equity.

On the 23d of June, 1888, the Moline Malleable Iron Works, an Illinois corporation doing business at Moline, in that State, executed a deed, which was duly acknowledged and recorded, conveying to Charles F. Hemenway several lots or parcels of land in that city. The deed recites that S. W. Wheelock and A. L. Carson had been induced by the grantor, which was in need of money to carry on its business, to guarantee, by indorsing, its commercial paper to the extent of \$49,000 (of which \$48,500 was then outstanding and unpaid), by

the promise to protect the same by a lien on those premises; and that George H. Hill, of Ohio, and the J. S. Keator Lumber Company had been induced by it to guarantee, in the same way, other of its commercial paper, the former to the extent of \$20,000, and the latter to the extent of \$1,000. It also recites that the grantor had agreed with each of the guarantors to meet said paper as it fell due, so that neither of them should be subjected to any liability, loss, cost, damage, or expense by reason of having severally made such guaranties or indorsements. The conveyance to Hemenway was in trust to secure and protect said guarantors, respectively, against all liability arising from such indorsements, with power in the trustee, upon the request of either guarantor, or of his legal representatives—if, at the time of such request, there existed any liability upon the part of the person so requesting—to foreclose the deed and sell and convey the property and, out of the proceeds, after paying the expenses of foreclosure and sale and reasonable solicitors' fees, to pay the guarantors all costs, damages and expenses to which they may have been subjected; "it being the intention that the property conveyed hereby shall be understood to be for and shall stand for security to each of the parties aforesaid, viz.: Wheelock, Carson, Hill, and Keator Lumber Company, alike in proportion to the ultimate liability to which each may be subjected; and that they shall receive the benefit and protection *pro rata*, according to the extent of their liability and in proportion thereto."

As part of the same transaction, the Moline Malleable Iron Works executed its chattel mortgage, which was duly acknowledged and recorded, conveying to Hemenway, upon like trusts and conditions, certain personal property in Illinois, consisting, in part, of malleable iron, manufactured and in process of manufacture by the grantor.

The Moline Malleable Iron Works made default in the payment of the notes, and in the performance of its obligations as set forth in the trust deed and chattel mortgage.

On the 12th of April, 1884, George H. Hill sold and conveyed his entire interest in the trust deed and chattel mortgage, and in the said indebtedness of \$20,000, to the appellant Mellen, in trust for the sole use and benefit of the appellant Sophia H. Boyd.

The present suit was commenced by an original bill exhibited, May 5, 1884, by said Mellen and Boyd, citizens of Ohio, against the Moline Malleable Iron Works, Hemenway, Wheelock, Stephen T. Walker, Carson, and Jeremiah S. Keator and Ben. C. Keator, late partners as J. S. Keator & Son, all citizens of Illinois. The bill shows that Hill was compelled to pay and did pay off the debt of \$20,000, with the interest accruing on the several notes aggregating that sum.

It states that in a suit in equity, instituted in the Circuit Court of the United States for the Northern District of Illinois, on the 2d day of July, 1888, by the National Furnace Company, a corporation of Wisconsin, in behalf of itself and other general, unsecured creditors of the Moline Malleable Iron Works against the last named corporation, George H. Hill, and others, the said trust deed and chattel mortgage were

assailed as null and void, as against the general creditors of the Moline Malleable Iron Works, upon the following grounds:

"*First.* Because they constitute a partial assignment for the benefit of creditors by which said corporation seeks to prefer the indorsers therein named in preference to the other creditors of the corporation, which said attempt your orator is advised and believes is fraudulent and unlawful under the statutes of the State of Illinois.

"*Second.* Because the said assignment does not purport to put the said assignee in possession of said property, and the said assignee has not actually taken possession thereof and has not given bond to the County Court of Rock Island County, as provided by law in the case of assignments for the benefit of creditors, and it is not intended to file such bond or distribute the said assigned property under the provisions of the statutes in such cases made and provided.

"*Third.* That the two assignments constitute a part of the same transaction, and that the chattel mortgage upon the personal property therein described is void as against the creditors of the said corporation, because the said corporation has been and still is allowed by the said assignee to manage, control, and use the property therein described in the usual and ordinary course of business to the same extent and in the same manner as the same were used by the said corporation before the execution of the said chattel mortgage.

"*Fourth.* Because the said documents operate, and were designed to operate, to hinder and delay the creditors of the said Moline Malleable Iron Works in the collection of their debts.

"*Fifth.* Because, as against the fair and honest creditors of the said corporation, the preference sought to be given to the said Hill and the said Carson, two of the directors of the said corporation, is null and void.

"*Sixth.* For divers other reasons your orator has been advised that all of the aforesaid acts and doings of the said Moline Malleable Iron works, as against your orator and the other *bona fide* creditors of said corporation, are null and void."

The object of that suit, as the bill in the present case avers, was to obtain a decree dissolving the Moline Malleable Iron Works as a corporation, closing up its business, ascertaining the amount, as well of its assets applicable to the payment of debts, as the extent to which its directors and officers were liable to creditors, and adjudging that the said conveyances executed by that corporation were fraudulent and void as to the National Furnace Company and other creditors.

It is further alleged that the debt of the last named corporation was not, nor was any part of it, due when it brought said suit, and was not secured by any attachment or other process against the property of the debtor corporation; that it had not exhausted its legal remedies for the collection of its debt, and had no lien or claim to the property covered by said trust deed or mortgage; and, consequently, that the court could not and did not acquire jurisdiction to make any valid decree affecting the interest of said Hill.

The relief sought in the present suit, by original bill, was the foreclosure of said trust deed and chattel mortgage, the sale of the property, and the disposition of the proceeds according to the rights of the parties for whose protection those instruments were executed; and this, without reference to the proceedings and final decree in the suit of *National Furnace Company v. Moline Malleable Iron Works*, 18 Fed. Rep. 863.

The defendants Stillman W. Wheelock, A. L. Carson, Charles F. Hemenway, J. S. Keator, and Ben. C. Keator filed a plea in bar of this suit. As the correctness of the decree below depends entirely upon the sufficiency of that plea, it is here given in full:

"That long prior to the time when said George H. Hill sold and conveyed to said complainant Mellen, in trust for the use and benefit of said Sophia H. Boyd, his interest in said trust deed and chattel mortgage, as alleged in said bill of complaint, to wit, on the 2d day of July, 1883, the said National Furnace Company, in its own behalf and on behalf of all the creditors of the Moline Malleable Iron Works, exhibited its original bill of complaint in this honorable court and made parties defendant thereto said Moline Malleable Iron Works, Stillman W. Wheelock, George H. Hill, Amaziah L. Carson, Charles F. Hemenway, Henry H. Hill, Stephen T. Walker, Walter J. Entriken, and the J. S. Keator Lumber Company, thereby stating, among other things, that said National Furnace Company was a creditor of said Moline Malleable Iron Works, and that at the time when the said Moline Malleable Iron Works executed the said trust deed and chattel mortgage it was insolvent and its indebtedness was largely in excess of its capital stock, and that its officers and directors had assented to the creation of its indebtedness, and that the said conveyances were fraudulent and void as against creditors of said Moline Malleable Iron Works, and therein and thereby prayed, among other things, that a receiver might be appointed to take charge of and manage the property of the said corporation under the orders of this court, and that the said trust deed and chattel mortgage might be held and adjudged fraudulent and void as against said National Furnace Company and creditors of said Moline Malleable Iron Works; to which said bill these defendants put in their several answers, and said Moline Malleable Iron Works, Henry H. Hill, and Stephen T. Walker interpose their several demurrers; that after exhibiting said bill of complaint, to wit, on the first day of August, 1883, upon the application of said National Furnace Company, for the preservation of the property of the said corporation pending the said suit, and for the benefit of all parties interested therein and in the proceeds thereof, this honorable court entered an order in said cause, as appears of record in this court, appointing one Robert E. Jenkins receiver of the said Moline Malleable Iron Works, and of its property, and directing him to take and hold possession thereof under the orders of this honorable court, and directing the said Moline Malleable Iron Works to transfer and convey to said receiver its entire property, both real and personal, and to deliver up to said receiver the

possession thereof; and that thereupon the said Moline Malleable Iron Works did transfer, convey, and deliver up to said receiver its property and the possession thereof, and said receiver did enter into and take possession thereof.

"That thereafter and long prior to the time when said George H. Hill sold and conveyed to said complainant Mellen his interest in said trust deed and mortgage, to wit, on the 28th day of November, 1883, the defendant Stillman W. Wheelock, by leave of this honorable court, filed his cross bill of complaint in the aforesaid cause, made parties defendant to said cross bill said Moline Malleable Iron Works, the National Furnace Company, George H. Hill, Charles F. Hemenway, and said Carson, and therein stated, among other things, that in the year 1880 the said Moline Malleable Iron Works requested that he and the said Carson should become guarantors for it upon its commercial paper, and promised to give them security from any liability to loss by reason thereof by liens on its property, and that at this request and in reliance upon this promise they became guarantors for it from time to time to the amount of about fifty thousand dollars (\$50,000); that afterwards, on November 12, 1882, a resolution was adopted by said corporation authorizing its officers to execute proper instruments to secure them from loss, and that thereafter, at the request of said Wheelock, said corporation executed said trust deed and mortgage, and that neither Wheelock nor Carson were in any way interested in or connected with said company when they incurred this liability at its request; that after the said resolution of November 12, 1882, was adopted by said company said George H. Hill, who was a stockholder and director, became a guarantor for said company, and that by and through his influence as an officer of said company he was named a beneficiary under said trust deed and mortgage; that the said company was then largely indebted in excess of its capital stock, and that said George H. Hill had assented to the creation of this indebtedness and was liable to its creditors for this excess, and that said trust deed and mortgage were a valid security to said Carson and the J. S. Keator Lumber Company, but that said Hill was not entitled to have and receive the security thereof; that the said property covered by the said trust deed and chattel mortgage was rapidly depreciating in value and should be sold as soon as possible; and praying, among other things, that the said trust deed and chattel mortgage might be declared valid; that the said receiver might be directed to sell immediately the property described in said trust deed and mortgage, together with the other property of said company, and the proceeds of the sale of the property described in said trust deed and mortgage might be applied in satisfaction of and to relieve said Wheelock, Carson, and J. S. Keator Lumber Company from the liabilities assumed by them as indorsers for said Moline Malleable Iron Works, and the balance disbursed *pro rata* among the creditors of said company; that thereupon, to wit, on the 28th day of November, 1883, it was ordered by this honorable court, as appears of record in this court in said cause, that said National Furnace Company, the Moline Malleable Iron Works, Hemenway, Carson, and George H. Hill plead, answer, or

demur to the said cross bill on or before the 20th day of December, 1883, and that a copy of said order be served on said Hill on or before December 5, 1883, and that in case said Hill did not appear and plead, answer, or demur to said cross bill as aforesaid the same should be taken as confessed by him; that said order was duly served on said Hill on the 1st day of December, 1883, to wit, long prior to the making of the said assignment to said Mellen; that the said defendants, the National Furnace Company, Hemenway, and Carson, answered said cross bill, as directed by said order, but that said Hill and said Moline Malleable Iron Works failed to appear in said cause and to plead, answer, or demur to said cross bill therein, as directed by said order; that thereafter, to wit, on the 22d day of December, 1883, the said receiver filed his petition in said cause, alleging, among other things, that the property of said Moline Malleable Iron Works in his possession as such receiver (and including therein the said property covered by said trust deed and chattel mortgage) was rapidly depreciating in value, and that for the interests of all persons who might be interested therein, and to realize anything for the creditors therefrom, it should be sold at once, and praying that he might be authorized to offer the said property for sale, and that thereupon it was ordered, on said petition being filed, by this honorable court, as appears of record in said cause in this court, that the said receiver should offer and advertise for sale, in the manner directed by said order, all of said property, and should report bids therefor to this court.

"That thereafter, to wit, on the 20th of February, 1884, said receiver filed in said cause his report, stating therein, in substance, that he had advertised and offered said property for sale in the manner and as directed by said order, and that the highest bid received by him therefor was that of Stillman W. Wheelock, in the amount of thirty thousand dollars (\$30,000); that it was thereupon ordered by this honorable court, as appears of record in this court, that all persons should show cause, by the 28th day of February, 1884, why said bid of said Wheelock should not be accepted; and that thereafter, to wit, on the 3d day of March, 1884, it was ordered by this honorable court in said cause, as appears of record in this court, that the said bid of said Wheelock for said property be accepted, and that said receiver sell and convey the same to him, and that thereupon said receiver did sell and convey the said property to said Wheelock in accordance with said order.

"That thereafter, to wit, on the 3d day of March, 1884, it appearing to this honorable court that said George H. Hill resided beyond the jurisdiction of this court, it was ordered by this honorable court, as appears of record in this court, that said George H. Hill do appear and plead, answer or demur to the said original and supplemental bill of complaint in said cause on or before the 15th day of April, 1884, and that a copy of said order should be served upon said Hill on or before the 15th day of March, 1884, and that in case he did not appear, plead, answer, or demur to said bill as directed the same should be taken as confessed by him; and that thereafter, to wit, long prior

to the time when said Hill sold and conveyed to said Mellen his interest in said trust deed and mortgage, a certified copy of said order was served on said Hill; and thereafter, to wit, on the 22d day of April, 1884, said Hill not appearing and pleading, answering, or demurring to said original and supplemental bill, as directed by said order, it was ordered by this honorable court in said cause, as now appears of record therein in this court, that said original and supplemental bill be taken as confessed by said Hill.

"That thereafter, to wit, on the 28d day of April, 1884, long prior to the filing of the said bill of complaint by said William S. Mellen, said Hill not having appeared and pleaded, answered or demurred to said cross bill, by the order of this court entered in said cause, and now appearing of record in this court, it was ordered that the said cross bill of said Wheelock be taken as confessed by said George H. Hill, and afterwards, to wit, on the 26th day of June, 1884, the said cause came on to be heard upon the said original and supplemental bills of complaint and answers and replications thereto, and upon the said cross bill of said Wheelock and the answers and replications thereto, and upon the testimony taken in said cause, and a final decree was then rendered therein, which now appears of record in this court, and it was therein found by this honorable court, among other things, that the indebtedness of said Moline Malleable Iron Works was in excess of its capital stock in the sum of \$75,000; that the said trust deed and chattel mortgage were valid in so far as they gave to said Wheelock, Carson, and the J. S. Keator Lumber Company a first lien on the property therein described; and that said George H. Hill was not entitled to any lien or security by reason of said trust deed and mortgage; and that the same were invalid as to him, because the liabilities of said company in excess of its capital stock were incurred while he was one of the directors and its vice president, and with his knowledge and assent thereto, and because he was named in said trust deed and chattel mortgage as a beneficiary thereunder through his influence and control over said corporation as an officer thereof; and it was thereby decreed, among other things, that said Wheelock, Carson, and the J. S. Keator Lumber Company were entitled to have and receive the proceeds derived from the sale of the property conveyed by said trust deed and mortgage in part satisfaction of the sums paid by them for said company.

"All of which matters and things these defendants do aver and plead in bar to said bill of complaint, and do pray judgment of this honorable court whether they should make any further answer to said bill of complaint, and to be hence dismissed with their costs and charges in this behalf most wrongfully sustained."

This plea was sustained, the present bill was taken for confessed by the Moline Malleable Iron Works and Walker, for want of plea, demurrer or answer, and the suit was dismissed for want of equity.

Mr. Thos. McDougall for appellants.
Messrs. Charles M. Osborn and Samuel A. Lynde for appellees.

Mr. Justice Harlan delivered the opinion of the court:

Was the decree in the suit instituted by the National Furnace Company (to be hereafter called the Furnace Company) against the Moline Malleable Iron Works (to be hereafter called the Iron Works) and others, declaring that Hill was not entitled to a lien or security by reason of the trust deed and chattel mortgage of June 28, 1883, void for want of jurisdiction in the court that rendered it? This is the principal question in the present case. Its solution depends upon the construction of the eighth section of the Act of March 3, 1875, determining the jurisdiction of the Circuit Courts of the United States. 18 Stat. at L. 472, chap. 187, § 8.

That section authorizes an order to be made directing an absent defendant in any suit brought in a Circuit Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property *within the district where such suit is brought*—such defendant not being an inhabitant of or found therein, and not voluntarily appearing in the suit—to appear, plead, answer or demur, by a designated day. The order must be served upon the absent defendant, if practicable, wherever found, and upon the person, if any, in charge or possession of the property. If such personal service be not practicable, the order must be published in such manner as the court may direct, not less than once a week for six consecutive weeks. If the defendant does not appear, plead, answer or demur within the time limited, or within such further time as may be allowed, the court—proof being made of service or publication of the order and of the performance of the directions therein contained—may "entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district." "But," the Act declares, "said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district." A defendant, not personally notified as provided in the Act, may within one year after final judgment enter his appearance in the suit; whereupon the court must make an order setting aside the judgment and permitting him to plead, on payment of such costs as shall be deemed just; the suit then to proceed to final judgment, according to law. The previous statute gave the above remedy only in suits "to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought," while the Act of 1875 gives it also in suits brought "to remove any incumbrance or lien or cloud upon the title to" such property. R. S. § 788; 18 Stat. at L. 472, chap. 187, § 8.

We are of opinion that the suit instituted by the Furnace Company against the Iron Works and others belonged to the class of suits last described. The trust deed and chattel mortgage in question embraced specific property within the district in which the suit was brought. The Furnace Company, in behalf of itself and other

creditors of the Iron Works, claimed an interest in such property as constituting a trust fund for the payment of the debts of the latter, and the right to have it subjected to the payment of their demands. In *Graham v. La Crosse & M. R. Co.* 102 U. S. 148, 161 [26: 106, 111], this court said that "when a corporation became insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his." See also *Mumma v. Potomac Co.* 83 U. S. 8 Pet. 281, 286 [8: 945]; *Morgan County v. Allen*, 108 U. S. 498, 509 [26: 498, 502]; *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S. 587, 594 [29: 235, 238]; 2 Story, Eq. Jur. § 1252; 1 Perry, Trusts, § 242. The trust deed and chattel mortgage executed by the Iron Works created a lien upon the property in favor of Wheeler, Carson, Hill, and the Keator Lumber Company, superior to all other creditors. The Furnace Company, in behalf of itself and other unsecured creditors, as well as Wheelock, denied the validity of Hill's lien as against them. That lien was therefore an incumbrance or cloud upon the title, to their prejudice. Until such lien or incumbrance was removed, they could not know the extent of their interest in the property or in the proceeds of its sale. The case made by the original as well as cross suit seems to be within both the letter and the spirit of the Act of 1875.

It is, however, contended that the Furnace Company could not rightfully invoke the aid of a court of equity to remove this lien or incumbrance until it had, by obtaining judgment for its debt and suing out execution, exhausted its legal remedies. *Jones v. Green*, 68 U. S. 1 Wall. 830 [17: 553]; *Van Weel v. Winston*, 115 U. S. 228, 245 [29: 884, 887]. But that was one of the questions necessary to be determined in the suit brought by that company, and any error in deciding it would not authorize even the same court, in an original, independent suit, to treat the decree as void. Besides, the removal of alleged liens or incumbrances upon property, the closing up of the affairs of insolvent corporations, and the administration and distribution of trust funds, are subjects over which courts of equity have general jurisdiction.

It is also suggested that the court proceeded in the suit instituted by the Furnace Company upon the theory that it was maintainable under the provisions of the Illinois statute giving courts of equity "full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor who shall have authority, by the name of the receiver of such corporation, to sue in all courts and do all things necessary to closing up its affairs, as commanded by the decree of such court." 1 Starr & Curtis, R. S. Ill. 618, title "Corporations," chap. 82, § 25. The appellants earnestly insist that no case was made that would bring that suit within these provisions of the Illinois statute, or that would give the Furnace Company any right to have the Iron Works dissolved as a corporation, and its business closed up. And on behalf of the ap-

pellees it is contended that the suit brought by the Furnace Company was not an ordinary creditor's suit, but one for the administration and distribution of a trust fund. In the view we take of the case it is not necessary to determine the soundness of any of these propositions; for, if the court erroneously ruled upon any of them, its decree could not for that reason be assailed in a collateral proceeding as void for want of jurisdiction. An adjudication that a particular case is of equitable cognizance, cannot be disturbed by an original suit. Such adjudication is not void, even if erroneous.

This brings us to the question whether the steps taken in the suit brought by the National Furnace Company were such as authorized a decree that would affect Hill's interest in the property covered by the trust deed and chattel mortgage. We lay out of view the fact that Hill was a citizen of Ohio, and neither appeared, nor was served with process within the district in which the suit was brought. He was personally served with copies of the orders requiring him to plead, answer, or demur, and the decree only affects his interest in property within the territorial limits of that district.

It appears from the plea, upon which the cause was heard, that on the 1st of August, 1888, after the present appellees had answered the original bill in most part, and after the Iron Works had demurred, the court, upon the application of the Furnace Company, appointed a receiver to take possession of the property of the first named company, including that covered by the trust deed and chattel mortgage, for the benefit of all parties interested in it; and that, on the 28th of November, 1888 Wheelock, by leave, filed his cross bill against the Iron Works, the Furnace Company, Geo. H. Hill, Hemenway, and Carson, asking a decree declaring said trust deed and mortgage valid as to himself, Carson, and the Keator Lumber Company, and void as to Hill. He alleged that the property embraced in the trust deed and chattel mortgage was rapidly depreciating in value, and ought to be sold, and the proceeds applied, primarily, to relieve himself, Carson, and the Keator Lumber Company from the liabilities assumed by them as indorsers for the Iron Works. On the same day an order was entered requiring the defendants to the cross bill to plead, answer, or demur to the same on or before December 20, 1888, and providing that if Hill (being served with a copy of the order on or before December 5, 1888) did not appear, plead, answer, or demur to the cross bill, by the time fixed, the same would be taken as confessed by him. Hill was served—presumably in Ohio, where he resided—on the 1st of December, 1888, with such copy; but neither he nor the Iron Works appeared, pleaded, answered, or demurred to the cross bill. It appearing from the petition of the receiver, filed December 22, 1888, that the property covered by the trust deed and mortgage was rapidly depreciating in value, he was authorized by an order of court to advertise and sell it. He did sell it, and, February 20, 1889, reported a sale, by him, to Wheelock, pursuant to and in the manner directed by the court. That sale was approved, time being given to show cause why it should not be confirmed. The property was conveyed by the receiver to

Wheelock. On the 8d of March, 1884, Hill was required by order of court to appear on or before April 15, 1884, and plead, answer, or demur to the original and supplemental bill, and it was ordered that if he did not, on or before the latter day, being previously served with a copy of such order, appear and plead, answer or demur, the bill would be taken as confessed by him. Long prior to the sale to Mellen of Hill's interest in the trust and mortgage the latter was served with a copy of the order of March 8, 1884, and on the 22d of April, 1884, the original and supplemental bills, Hill not having appeared, and answered, pleaded or demurred, were taken as confessed by him. On the succeeding day a like order was entered against him as to the cross bill, he not having appeared, pleaded, answered or demurred thereto. The cause came on to be heard on the 26th of June, 1884, upon the original and supplemental bill, upon the cross bill, upon the answer and replications thereto, and upon the testimony taken in the cause, when the final decree was rendered as set forth in the plea embraced in the statement of facts preceding this opinion.

A large part of the argument on behalf of the appellants is in support of the proposition, that, as the order requiring Hill to appear and plead, answer or demur, to the original and supplemental bills was not made until after the receiver had, by order of the court, sold the property, the sale was a nullity. We do not assent to this view. Whether the condition of the property was such as to require, for the protection of the parties, that it be sold, was a matter for the court, in its discretion, to determine. There is nothing to show that the order of sale was even improvidently made, much less that it was procured by fraud, or that the property was sacrificed. If the circumstances justified immediate action, the court had power to order a sale in advance of a final decree. The sale was not ordered or made until after Hill had been duly served with a copy of the order of November 28, 1883, to appear and plead, answer or demur, to the cross bill by the day fixed in that order. If the sale was irregular, by reason of it being ordered and made before Hill was directed to appear and plead, answer or demur, to the original and supplemental bills, that is not a matter affecting the jurisdiction of the court to render a final decree in respect to his interest in the property; for the proceeds took the place of the property, and whatever rights Hill had in the latter were transferred to the former.

So that the real question, upon this part of the case, is whether the proceedings in question conformed to the Act of March 3, 1875. We are of opinion that they did. Before the final decree was rendered, Hill had been served with a copy of the several orders requiring him to appear and plead, answer and demur, as well to the original and supplemental bills as to the cross bill, and was in default in respect to each order. It may not have been in accordance with the usual or proper practice to take the cross bill for confessed before he had been duly served with the order to appear and plead, answer or demur, to the original and supplemental bills. But if that was an irregularity it was one that did not affect the power

of the court to make a final decree, and constitutes no ground for disregarding that decree in this collateral proceeding.

We have considered the case just as if the present suit had been brought by Hill. The appellants have no greater rights than he would have, if the present suit had been instituted by him; for Mellen, the trustee for Sophia H. Boyd, acquired his rights *pendente lite*. Hill sold and conveyed to him, after he had been personally served with copies of the order to appear and plead, answer or demur, to the original and supplemental bills, and only three days before the time fixed for his appearance to the original suit. His sale was more than three months after he was required to appear, and plead, answer, or demur to the cross bill. That sale and conveyance could not affect the power of the court to proceed to a final decree, so far as his interest in the property was concerned. Nor by such sale and conveyance did Mellen and his *cestui que trust* acquire any absolute right to become a party to the suit instituted by the Furnace Company. Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, nor can they complain if they are compelled to abide by whatever decree the court may render, within the limits of its power, in respect to the interest their vendor had in the property purchased by them *pendente lite*. *Eyster v. Gaff*, 91 U. S. 521, 524 [28:403, 404]; *Union Trust Co. v. Inland Navigation and Improvement Co.* 130 U. S. 565 [82:1043]; 1 Story, Eq. Jur. § 406; *Murray v. Ballou*, 1 Johns. Ch. 566. As said by Sir William Grant, in *Bishop of Winchester v. Paine*, 11 Ves. 194, 197, "the litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed. Otherwise, such suits would be indeterminable; or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined." The present proceeding is an attempt, upon the part of a purchaser *pendente lite*, to relitigate, in an original, independent suit, the matters determined in the suit to which his vendor was a party. That cannot be permitted, consistently with the settled rules of equity practice.

There is no error in the decree, and it is affirmed.

WILLIAM J. HAWKINS, *Plff. in Err.*,
v.

JOHN GLENN, Trustee of the NATIONAL
EXPRESS AND TRANSPORTATION COMPANY.

(See S. C. Reporter's ed. 319-336.)

*Stockholder bound by decree against corporation,
making assessment on stock—call by court of*

NOTE.—Demand, when necessary to put Statute of
Limitations in motion.

An action will not lie against a bank for a deposit until after a demand has been made therefor. *Downes v. Phoenix Bank*, 6 Hill (N. Y.) 297.

The engagement of a bank with its depositors is not to pay absolutely and immediately, but when payment shall be required at the banking house.

*equity—subscriptions to stock, when assets—
Statutes of Limitation—liability of stock-
holders in Virginia.*

1. A stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company.
2. A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member.
3. A decree against a corporation making an assessment on its stock in the discharge of a duty resting on the corporation, binds its members in the absence of fraud, although it has assigned its property and rights in trust for the payment of its debts, and has ceased to exist.
4. When stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it.
5. When a creditor has exhausted his legal remedies against the corporation which fails to make an assessment, he may, by bill in equity or other appropriate means, subject such subscriptions to the satisfaction of his judgment.
6. Unpaid subscriptions to stock are assets and the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds held in trust, and Statutes of Limitation do not commence to run in respect to them until after a call and assessment has been made.
7. By the Code of Virginia of 1860, a person in whose name shares of stock stand on the books of a company shall be deemed the owner thereof

as it regards the company and if the money, which any stockholder has to pay upon his shares, be not paid as required, the same, with interest thereon from the date of the call, may be recovered.

[No. 266.]

Argued April 22, 23, 1889. Decided May 13, 1889.

IN ERROR to the Circuit Court of the United States for the Eastern District of North Carolina, to review a judgment in favor of plaintiff in an action against a stockholder of a company to recover on a subscription of stock to pay a demand against the company. *Affirmed.*

Statement by Mr. Chief Justice Fuller:

John Glenn, trustee of the National Express and Transportation Company, brought an action at law, November 5, 1888, against William J. Hawkins, in the Circuit Court of the United States for the Eastern District of North Carolina, alleging that Hawkins, on or about November 1, 1885, subscribed for two hundred and fifty shares of the capital stock of that company, a body corporate of the State of Virginia, and thereby undertook and promised to pay for each and every share so subscribed for by said defendant the sum of one hundred dollars, in such installments and at such times as he might be lawfully called upon and required to pay the same, according to the law under which the company was incorporated; that on the 20th day of September, 1886, the express company, by its deed of that date, assigned and transferred to Hoge, O'Donnell, and Kelly, for the benefit of its creditors, all its

and therefore it is not in default or to respond in damages until demand and refusal; nor does the Statute of Limitations begin to run until demand has been duly made. *Girard Bank v. Bank of Penn Township*, 30 Pa. 22; *Adams v. Orange County Bank*, 17 Wend. 514.

But if the bank has rendered an account claiming the deposit as its own, or if it has suspended payment and closed its doors against its creditors, or has done any act that operates as a notice of its intention not to pay the deposit, a demand is dispensed with, and the statute begins to run from the date of such act. *Bank of Mo. v. Benoist*, 10 Mo. 519; *Watson v. Phoenix Bank*, 8 Met. (Mass.) 217; *Farmers & M. Bank v. Planters Bank*, 10 Gill. & J. (Md.) 422.

Where an attorney collects money for his client, the statute begins to run from the time of its receipt, and that too, without regard to notice to, or a demand by, the client. *Campbell v. Boggs*, 48 Pa. 524; *Alexander v. Westmoreland Bank*, 1 Pa. 395; *Fleming v. Culbert*, 46 Pa. 496; *Glenn v. Cuttle*, 2 Grant Cas. (Pa.) 273.

But where the attorney has fraudulently concealed the fact that the claim is collected from his client, as where a claim had been sent by an attorney to an agent in another State, and upon inquiry by his client he informed him that the claim was not collectible, when in fact it had been collected by such agent, it was held that the statute did not begin to run until the time of the discovery of the fraud. *Morgan v. Tener*, 83 Pa. 305; *Wickersham v. Lee*, *Id.* 418.

In all cases where a demand is necessary to fix the liability of a party, the Statute of Limitations is not put in motion until such demand is made. *Codman v. Rogers*, 10 Pick. (Mass.) 112; *Wolfe v. Whitman*, 4 Harr. (Del.) 248.

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Upon a promise to deliver goods on demand, an action will not lie until a demand is made therefor; consequently the statute begins to run from the date of the demand. *Brewster v. Hobart*, 15 Pick. (Mass.) 302.

Where a demand is requisite before a specific performance can be sought, the statute begins to run from the date of the demand, and a new cause of action cannot be created by a new demand. *Bruee v. Tilson*, 26 N. Y. 194; *Taylor v. Rowland*, 26 Tex. 238.

A certificate of deposit issued by a banker, payable on demand, is due from its date, and no special demand is necessary. *Brummagin v. Tallant*, 29 Cal. 508.

Courts of law will presume that such demand was made from the lapse of time, especially where the situation and relation of the parties are such as to render it improbable that it should be neglected. *Stanford v. Tuttle*, 4 Vt. 82; *Collard v. Tuttle*, *Id.* 491; *Raymond v. Simonson*, 4 Blackf. (Ind.) 77.

But where delay in making the demand is expressly contemplated, even though the obligation is in terms payable on demand, there is no rule of law that requires that demand should be made within the statutory period for bringing an action. *Jameson v. Jameson*, 72 Mo. 640.

A demand must be made in a reasonable time, otherwise the claim is considered stale, and no relief will be granted in a court of equity. What is considered a reasonable time does not seem to be settled by any precise rule. It must depend on circumstances. If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. *McDonnell v. Branch Bank*, 20 Ala. 313; *Wright v. Paine*, 62 Ala. 340, 34 Am. Rep. 24; *Phillips v. Rogers*, 12 Met. (Mass.) 405.

property, rights, credits, and effects of every kind, in trust for the payment of the debts of said company; that afterwards, in a certain cause instituted in the Chancery Court of the City of Richmond, in the State of Virginia, in which the official administrator of W. W. Glenn, deceased, and other persons, claiming to be creditors of the express company, were complainants, and said company, Kelly and Hoge, surviving trustees, and other persons, officers of said company, were defendants, it was, on the 14th day of December, 1880, decreed that plaintiff be, and he thereby was, appointed trustee to execute the trusts of the deed of trust in the room and stead of the trustees originally created by said deed; and it was further decreed that a large amount of the debts of the express company remained unpaid, and that, of the sum of one hundred dollars for each and every share of the stock of the company undertaken and promised to be paid for by the subscribers for said stock and their assigns, the sum of eighty dollars per share had never been called for or required to be paid by the president and directors of said company, and remained liable to be called for and required to be paid by the subscribers for said stock and their assigns; and it was further decreed that it was necessary and proper for a call of thirty per cent to be made, which call and assessment was accordingly ordered; and that, by force of his subscription and said call, the defendant was liable to pay the sum of \$7,500 on his shares of stock, with interest.

Hawkins filed his answer January 28, 1884, in which he said that he subscribed for two

hundred of the two hundred and fifty shares for other persons than himself, and that he was not liable thereon. He denied that he owed anything on account of any of said shares, and averred that the plaintiff was not the proper plaintiff, and "that the plaintiff's cause of action did not accrue within three years before the commencement of this action."

Upon the trial of the cause the plaintiff adduced evidence tending to show that in March, 1861, a corporation had been chartered by the Legislature of the State of Virginia, to be known as the Southern Express Company, but that no organization was had thereunder; that in 1865 it was proposed to adopt the said charter as the basis of action for the formation of a new and larger enterprise of the same kind; that, accordingly, in November of that year, subscriptions having been made to the capital stock in many States, a provisional organization was effected in which the defendant Hawkins was named as one of the directors, and the business of the company was commenced and actively prosecuted; that on the 12th day of December, 1865, a new and amended charter was granted by the Legislature of Virginia for a company to be known as the "National Express and Transportation Company," the defendant being named therein as one of the incorporators; that the capital stock was authorized to be five million dollars, divided into shares of one hundred dollars each, of which a part was payable at the time of subscribing and the balance as called for by the president and directors; that in January, 1866, the provisions of the charter having been complied with, the

A demand made within six years, where a demand is necessary, is made within a reasonable time, and the statute begins to run from the time when the demand was made. *Thrall v. Mead*, 40 Vt. 540.

An obligation for the payment of money one day after date contained a condition that if the payee should demand payment during her natural life it should be due and payable and it was held that a demand made more than ten years after the obligation was executed was in season, and that an action brought immediately thereafter was not barred by the statute. *Laforge v. Jayne*, 9 Pa. 410.

Where a promissory note payable three months after demand was sought to be enforced more than twenty years after its date, and the Statute of Limitations was interposed as a bar thereto, it was held that, as no demand had been made until within six years from the bringing of the action, the statute had not run thereon. *Brown v. Rutherford*, L. R. 14 Ch. Div. 687; 42 L. T. N. S. 650; *Thorpe v. Booth*, Ry. & Mood. 388; *Holmes v. Kerrison*, 2 Taunt. 323.

In *Stanton v. Stanton*, 87 Vt. 411, a note was made payable "in produce or wood from the farm on demand as the payee may want to use the same." A demand for the payment of the note was delayed for twelve years, and the court held that the statute did not run upon the note in the absence of proof, when a reasonable time for making the demand expired.

Where, however, a note or other obligation, involving only the payment of money, is made payable at sight or on demand, as an action thereon can be commenced at once, and the service of the writ is a sufficient demand, it becomes due instantan, and the statute begins to run thereon from the date of the note. *Cook v. Cook*, 19 Tex. 434; *Hall v. Letts*, 21 Iowa, 506; *Darnall v. Magruder*, 1 Harr. & G. (Md.) 430; *Easton v. McAllister*, 1 Mo. 662; *Wilks v. Robinson*, 3 Rich. L. (S. C.) 182; *Larason v. Lam-*

bert, 12 N. J. L. 247; *Hill v. Henry*, 17 Ohio, 9; *Newman v. Kettelle*, 13 Pick. 418; *Hirst v. Brooks*, 50 Barb. 384; *Wenman v. Mohawk Ins. Co.* 13 Wend. 267; *Caldwell v. Bodman*, 5 Jones, L. (N. C.) 139; *Taylor v. Witman*, 8 Grant Cas. (Pa.) 128; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320; *White's Bank v. Ward*, 35 Barb. 637; *Little v. Blunt*, 9 Pick. 488; *Norton v. Ellam*, 2 Mees. & W. 461; *Peaslee v. Breed*, 10 N. H. 489; *Wheeler v. Warner*, 47 N. Y. 519.

Upon a certificate of deposit payable on demand and bearing interest the statute does not begin to run until a demand is made. *Payne v. Gardiner*, 29 N. Y. 146; *Meador v. Dollar Sav. Bank*, 56 Ga. 606; *Tripp v. Curtin*, 36 Mich. 494; *Holland v. Clark*, 32 Ark. 697.

A note or bill payable at sight is payable immediately, and neither presentment nor demand is a condition precedent to payment; consequently the statute attaches thereto from the day of its date. *Byles, Bills*, 842, 11th Eng. ed.

Where money is loaned "to be paid when called for," it is treated as payable on demand, and the statute begins to run from the date of the loan; and the same is true as to money loaned to be paid "when called on to do so." *Ware v. Hewey*, 57 Me. 391; *Darnall v. Magruder*, 1 Harr. & G. (Md.) 430.

Where, however, a note or bill is payable after sight, no debt accrues thereon until presentment. Therefore the statute is no bar to an action on such a note, unless it has been presented for payment six years before the action, the expressions "after date" and "after sight" not being synonymous. *Hathaway v. Patterson*, 45 Cal. 294; *Holmes v. Kerrison*, 2 Taunt. 323; *Sturdy v. Henderson*, 4 Barn. & Ald. 562; *Sutton v. Toomer*, 7 Barn. & C. 418; *Topham v. Braddick*, 1 Taunt. 572; *Stanton v. Stanton*, 87 Vt. 411; *Thrall v. Mead*, 40 Vt. 540; *Wenman v. Mohawk Ins. Co.* 13 Wend. 267; *Wolfe v. Whiteman*, 4 Harr. (Del.) 246.

corporation was duly organized, the defendant being one of the directors; that in September, 1866, having contracted many debts, and finding itself much embarrassed, it executed a deed of assignment, conveying and assigning in trust to trustees, for the benefit of all its creditors, all of its property, including the unpaid subscriptions to the capital stock, of which only twenty per cent had been called for by the president and directors; and that the trustees took possession of the assets November 1, 1866, and the business of the company ceased. Plaintiff further put in evidence the transcript of the record of the proceedings in the Chancery Court of the City of Richmond, referred to in plaintiff's declaration, in which, upon a general creditor's bill brought in 1871, against the said company, and its president and directors, and the surviving trustees in said deed of assignment, the court had, by a decree entered on the 14th day of December, 1880, adjudicated the indebtedness of the said company to require an assessment of thirty per cent of the unpaid subscriptions for the payment of the same, and the necessity and propriety of an assessment of thirty per cent upon the unpaid subscriptions for the payment of the said indebtedness, and the substitution of the plaintiff as trustee to receive and collect the said assessment; and then the plaintiff introduced in evidence the stock books of said company showing the following entries as to the defendant Hawkins:

The defendant testified that he subscribed for two hundred and fifty shares under the following circumstances: That at the instance of three other citizens of North Carolina, viz., K. P. Battle, J. M. Hoge, and B. P. Williamson, he went to Richmond in the fall of 1865, and proposed to the parties superintending the reception of subscriptions, to take fifty shares each for the above named persons, and one hundred shares for himself, having in contemplation other parties who might wish to take fifty shares of this one hundred; that the superintendent suggested that it would be more convenient to place his name only upon the books as subscriber for the whole two hundred and fifty shares, and this was done, the initials of the three persons being at the same time indorsed as a memorandum on the subscription paper; that in January, 1866, when the company was organized, he, being one of the directors, informed the board of directors of the terms of his subscription as above, and no objection was made thereto; that he instructed the officer of the company whose business it was to issue certificates of stock to issue five for fifty shares each, three of them in the names of the above parties and two to himself, and at the same time paid two hundred and fifty dollars which had been assessed upon the two hundred and fifty shares, one hundred and fifty dollars of which he had received from his principals, but that he had receipted for such certificates upon the books of the company; that

To whom transferred.		Transfer No.	Certificate No.	No. of shares.	Requisition drawn.		From whom transferred.	Certif. No.	No. of shares.	Requisition paid.
1866.						1865.				
Feb. 5.	M. Bowes.....	436	302	10	50	Nov. 1	Company.	299 to 308	250	\$1,250
" "	Geo. B. Waterhouse.....	437	302	10	50					
" "	B. P. Williamson.....	438	302	10	50					
" "	R. H. Battle, Jr.....	439	302	10	50					
" "	Wm. E. Anderson.....	440	302	10	50					

A bill or note payable after demand or after notice is not payable till demand made or notice given. *Thorpe v. Booth*, Ry. & Mood. 388; *Clayton v. Gosling*, 5 Barn. & C. 360 [but see *Palmer v. Palmer*, 36 Mich. 487, 24 Am. Rep. 606, *contra*]; *Howland v. Edmunds*, 24 N. Y. 307; *Jones v. Eisler*, 8 Kan. 134; *Emery v. Day*, 1 Cramp. M. & R. 245.

In *Webster v. Kirk*, 17 Q. B. 944, it was held that a payee who had been sued by a subsequent holder of a dishonored bill could not in turn sue the drawer more than six years after the dishonor of the paper, although a much less time had elapsed since his own liability had been enforced.

Where a note or contract is payable or to be performed a certain number of days, weeks, months, or years after demand, a right of action does not accrue, or the statute begin to run, until after demand. *Thorpe v. Booth*, Ry. & Mood. 388; *Sutton v. Toomer*, 7 Barn & C. 418; *Sturdy v. Henderson*, 4 Barn. & Ald. 592; *Clayton v. Gosling*, 5 Barn. & C. 360; *Wolfe v. Whiteman*, 4 Harr. (Del.) 246; *Wenman v. Mohawk Ins. Co.* 13 Wend. 207; *Wright v. Hamilton*, 2 Bailey, L. (S. C.) 51; *Little v. Blunt*, 9 Pick. 468; *Brown v. Rutherford*, L. R. 14 Ch. Div. 637, 42 L. T. N. S. 659; *Rhind v. Hyndman*, 54 Md. 527.

Where goods are consigned to an agent for sale, 181 U. S.

on commission or otherwise, in the absence of any special contract relative thereto, the statute does not begin to run against the owner, until an account has been rendered or a demand has been made. *Clark v. Moody*, 17 Mass. 145; *Topham v. Braddick*, 1 Taunt. 572; *Collins v. Benning*, 12 Mod. 444; *Baird v. Walker*, 12 Barb. 208; *Halden v. Crafts*, 4 E. D. Smith, 490; *Sawyer v. Tappan*, 14 N. H. 362; *Hutchins v. Gilman*, 9 N. H. 360; *Taylor v. Bates*, 5 Cow. 379; *Paschall v. Hall*, 5 Jones, Eq. (N. C.) 108; *Hays v. Stone*, 7 Hill (N. Y.) 128; *Krause v. Dorrance*, 10 Pa. 462.

In all cases of an open, continuing agency, a demand must either be proved or presumed. *Topham v. Braddick*, 1 Taunt. 572; *Johnson v. Humphreys*, 14 Serg. & R. 304; *Judah v. Dyott*, 3 Blackf. (Ind.) 324; *Armstrong v. Smith*, *Id.* 251; *Halden v. Crafts*, 4 E. D. Smith, 490; *Ferris v. Paris*, 10 Johns. 235; *Sawyer v. Tappan*, 14 N. H. 362; *Buchanan v. Parker*, 5 Ired. L. (N. C.) 697; *Staples v. Staples*, 4 Maine, 532; *Buchan v. James*, 1 Speers, Eq. (S. C.) 375; *Batterlee v. Frazer*, 2 Sandf. (N. Y. Super. Ct.) 142; *Walradt v. Maynard*, 3 Barb. 584; *MacNair v. Kennon*, 3 Murph. (N. C.) 144; *Lever v. Lever*, 1 Hill, Eq. (S. C.) 67; *Taylor v. Spears*, 8 Ark. 429; *Staniford v. Tuttle*, 4 Vt. 82; *Collard v. Tuttle*, *Id.* 491.

shortly afterwards the five certificates were transmitted to him in North Carolina, all five being made out in his name only; that he did not return either of them to the company, but immediately transferred each of the three in question to the party for whom it was intended; and that only one of the certificates was ever transferred upon the books of the company.

The court instructed the jury to find for the plaintiff, and the defendant excepted. The jury returned a verdict in favor of plaintiff for \$9,508.75, "of which \$7,500 is principal, and bears interest from June 1, 1885," upon which judgment was rendered and a writ of error prosecuted to this court.

The record of the Chancery Court of the City of Richmond shows that W. W. Glenn recovered judgment in the Superior Court of Baltimore City, against the express company, by default, June 8, 1869, which was entered up for \$42,501.81, on assessment of damages, June 24, 1870, and that, on the 4th day of December, 1871, Glenn filed his bill on his own behalf and that of such other creditors of the express company as might become parties to the suit, against the express company, its president and directors, and the trustees named in the deed of trust, subpoenas having issued on the 28th of November, 1871, which were served on two directors of the company.

The bill sets forth the recovery of the judgment; that the trustees had collected little or nothing; that the visible property of the company had been seized by creditors in various States; that only twenty per cent had been called for from the stockholders, of which the trustees had collected but little; that the validity and legal effect of the deed had been drawn in question in the courts of various States, and the operations of the trustees hindered; that it would be necessary to resort to the remainder

of the subscription to pay the company's debts, and stockholders could not be sued until a call had been made by the company; that doubts had been expressed whether the subscriptions passed by the deed; that, if they did, the trustees could not sue without a call; and that equity demanded that money should be collected by a call and assessment upon all the stockholders. The bill prayed for a construction of the deed, the appointment of a receiver, an account, and the ascertainment of the amount necessary to be assessed for the purpose of paying the debts, etc., and for general relief.

Nothing further was done until August 4, 1879, when an amended and supplemental bill was filed asking that the trustees be removed and a new trustee be appointed, and that if the company should make no assessment upon the stockholders the court might make one. This amended bill charged that nothing had been done by the company or the trustees in execution of the trust, or to pay creditors; that the books of the company had been retained by one of the two surviving trustees, who were nonresidents, the third trustee being dead, etc. It does not appear that process was issued against the company upon the original bill, but upon the amended and supplemental bill, a subpoena was issued against it, its officers, directors, and trustees, and this was served upon two directors and a cashier of the company, and published for four weeks in a newspaper in the City of Richmond.

The surviving trustees, Hoge and Kelly, filed answers setting forth in detail a variety of causes which had operated to delay and impede their proceedings, and furnished excuses for their apparent *laches*, particularly litigation in Maryland and New York, in which injunctions were granted, and, in one of the suits, a

In the case of a collecting agent, the cause of action arises from the time when a demand is made upon the agent, and not from the time when the money is received by him. *Merle v. Andrews*, 4 Tex. 200; *Gardner v. Peyton*, 5 Cranch, C. C. 561; *Buchanan v. Parker*, 5 Ired. L. (N. C.) 597; *Judah v. Dyott*, 3 Blackf. (Ind.) 324; *Lever v. Lever*, 1 Hill, Eq. (S. C.) 62; *Taylor v. Spears*, 8 Ark. 429; *Hyman v. Gray*, 4 Jones, L. (N. C.) 155; *Topham v. Braddick*, 1 Taunt. 572; *Green v. Johnson*, 3 Gill & J. (Md.) 389; *Dodds v. Vannoy*, 61 Ind. 89; *Egerton v. Logan*, 81 N. C. 172; *Green v. Williams*, 21 Kan. 64.

In other cases, it has been held that, in the case of an ordinary collecting agent, whose only duty is to receive and pay over the money to his principal, the statute begins to run immediately upon the receipt of the money, regardless of the question whether a demand has been made or not, unless he has fraudulently concealed the fact of its receipt by him, or in any event after the lapse of a reasonable time after he has received it, in which to notify his principal. *Campbell v. Boggs*, 48 Pa. 324; *Emmons v. Hayward*, 6 Cush. (Mass.) 501; *East India Co. v. Paul*, 1 Eng. L. & Eq. 44; *Estes v. Stokes*, 2 Rich. L. (S. C.) 138; *Hopkins v. Hopkins*, 4 Strobb. Eq. (S. C.) 207; *Cagwin v. Ball*, 2 Ill. App. 70; *Dodds v. Vannoy*, 61 Ind. 89; *Mitchell v. McLeomore*, 9 Tex. 151.

In case property is sold or money loaned, to be retained without interest until called for or demanded, and no note is given therefor, the statute does not begin to run until demand is made. *Sweet v. Irish*, 36 Barb. 467; *Thorpe v. Coombe*, 8 Dowl. & R. 347; *Taylor v. Wittman*, 8 Grant Cas. (Pa.) 188

188; *Codman v. Rogers*, 10 Pick. (Mass.) 120; *Richman v. Richman*, 10 N. J. L. 114.

The statute begins to run against the holder of a bill of exchange, upon protest and notice for non-acceptance, although the bill is not then due, and he does not acquire a fresh right of action on the nonpayment of the bill when due. *Miller v. Hackley*, 5 Johns. 384; *Weldon v. Buck*, 4 Johns. 144.

Where a note is made payable in specific articles on demand, an action cannot be maintained thereon until a demand is made for payment. *Stanton v. Stanton*, 37 Vt. 411; *Harbor v. Morgan*, 4 Ind. 158.

Where, as is the case with notes given to mutual insurance companies, premium notes are given, subject to assessment by the company, at such times and in such sums, not exceeding in all the sum for which the note is given, but not payable in full, at all events, the statute does not attach to the note at all, until an assessment is made by the company for the purposes contemplated and a demand is made therefor, or the method of notice provided by statute has been complied with, and then it attaches only to the amount assessed, and begins to run thereon from the date of notice or demand, leaving the balance unaffected by the statute. *Hope Mut. Ins. Co. v. Perkins*, 2 Abb. App. Dec. 383; *Hope Mut. L. Ins. Co. v. Weed*, 28 Conn. 51; *Howland v. Edmonds*, 24 N. Y. 307; *Howland v. Cuykendall*, 40 Barb. 330; *Sands v. St. John*, 36 Barb. 623; *Savage v. Medbury*, 19 N. Y. 32; *Sands v. Lillenthal*, 46 N. Y. 541.

But, in case the statute does not provide the manner in which notice of such assessment shall be given, the statute does not begin to run thereon

receiver was appointed, to whom the books and papers of the company were consigned, and when returned, on the disposition of that case, after the lapse of some years, they were carried to New York.

A decree *pro confesso* was taken against the company in September, 1879, and an interlocutory order entered on the 6th of October following, referring the case to one of the commissioners of the court to take an account of the debts due by the company and the priorities thereof, and an account of its assets, etc., upon giving due notice by publication, which he did. The commissioner made report ascertaining the total of indebtedness, and the whole amount of unpaid stock; and he recommended an assessment of twenty per cent. By a supplemental report an increase of the assessment was recommended, and a decree was finally rendered, December 14, 1880, sustaining the deed of trust, substituting John Glenn as trustee, holding that the power to make assessment remained with the company after the deed was executed, finding the amount of the indebtedness and that there was no property to pay the debts except the eighty per cent unpaid of the capital stock, and ordering an assessment of thirty per cent, payable to Glenn, trustee, who was thereby authorized to collect and receive the same.

Messrs. Samuel F. Phillips, W. H. Lamar, I. G. Zachry, Wilbur F. Boyle and John W. Dryden, for plaintiff in error:

Interest upon the call accrued only from actual demand upon the defendant, and not from the date of the decree; the decree for a call was made in a suit begun against the company nearly thirteen years after it had stopped business.

Sanger v. Upton, 91 U. S. 56 (26: 220); *Hunt v. Nevers*, 15 Pick. 506; *Glenn v. Saxton*, 68 Cal. 353.

The defendant is not responsible for the sub-

scription to the 150 shares taken by him for solvent and named principals.

Scovill v. Thayer, 105 U. S. 153 (26: 973); *Wisner v. Brown*, 122 U. S. 214 (30: 1205) 2 Sm. Lead. Cas. 8th ed. 415.

The cause of action did not accrue within three years.

Williams v. Bankhead, 86 U. S. 19 Wall. 571 (22: 187); *Richmond v. Irons*, 121 U. S. 27, 51 (30: 864, 873); *Clayton v. Cagle*, 97 N. C. 300; *Wood, Lim. § 208*; *Re Welsh Flannel & Tweed Co. L. R. 20 Eq. 360*; *Re Glen Iron Works*, 20 Fed. Rep. 674; *Diefenthaler v. New York*, 111 N. Y. 331; *Borst v. Corey*, 15 N. Y. 505; *Ogilvie v. Knox Ins. Co.* 63 U. S. 23 How. 380 (16: 349); *Payne v. Bullard*, 29 Miss. 88; *Curry v. Woodward*, 53 Ala. 371; *Allibone v. Hager*, 46 Pa. 48; *Glenn v. Williams*, 60 Md. 95; *Glenn v. Howard*, 2 Cent. Rep. 643, 65 Md. 40; *McKim v. Glenn*, 5 Cent. Rep. 776, 66 Md. 480; *Glenn v. Soule*, 22 Fed. Rep. 417; *Scovill v. Thayer*, 105 U. S. 143 (26: 968); *Glenn v. Semple*, 80 Ala. 159; *Atchison, T. & S. F. R. Co. v. Burlingame Township*, 36 Kan. 628; *Pittsburgh & C. R. Co. v. Byers*, 32 Pa. 23; *Morrison v. Millen*, 34 Pa. 13; *Keithler v. Foster*, 23 Ohio St. 37; *Palmer v. Palmer*, 36 Mich. 487.

All persons materially interested, either legally or beneficially, in the subject matter of a suit, however numerous they may be, are to be made parties to it, either as plaintiffs or defendants, or should at least have notice of it, in order to bind them.

1 Dan. Ch. Pr. 190; *Story*, Eq. Pl. §§ 76-80; *Pom. Eq. Jur. § 114*; *McVeigh v. U. S.* 78 U. S. 11 Wall. 259 (20: 80); *Rison v. Chicago, R. I. & P. R. Co.* 83 U. S. 16 Wall. 446, 450 (21: 367, 368); *Windsor v. McVeigh*, 98 U. S. 274 (23: 914).

The stockholder who is required to pay may compel his stockholders to refund or contribute to him their prospective *pro rata* or share of liability for the corporate debt he has paid.

until demand is made therefor. *Sands v. Annesley*, 56 Barb. 536; *Howland v. Cuykendall*, 40 Barb. 320.

When a check is given upon a bank in which the drawer has no funds, and in which he had none during the ensuing six years, the Statute of Limitations begins to run from the time when the check was given; and in such cases no demand or presentment need be shown. *Brust v. Barrett*, 16 Hun. 406; *Mohawk Bank v. Broderick*, 10 Wend. 304; *Fitch v. Redding*, 4 Sandf. 120; *Healy v. Gilman*, 1 Bosw. 233; *Johnson v. Bank of N. A.* 5 Robt. 554.

The lapse of six years is not a bar to an action to recover a deposit; the Statute of Limitations only begins to run from the time payment is demanded and refused. *Thomson v. Bank of British N. A.* 32 N. Y. 1.

On a special deposit, the Statute of Limitations does not begin to run, until a demand has been made for the sum deposited. *Smiley v. Fry*, 1 Cent. Rep. 510, 100 N. Y. 232.

A cause of action by a depositor against a bank to recover the amount of a check drawn by him upon it, arises upon a demand and refusal of payment on presentation by the payee, and an action for such amount is barred after the lapse of six years therefrom. *Bank of British N. A. v. Merchants Nat. Bank*, 91 N. Y. 106, 111; *Van Allen v. Am. Nat. Bank*, 52 N. Y. 1; *Viets v. Union Nat. Bank*, 2 Cent. Rep. 751, 101 N. Y. 553 [reversing S. C. 31 Hun. 484].

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Where a husband is custodian of the funds of his wife, investing her funds and making over the securities to her when demanded, the Statute of Limitations will not commence to run in his favor until demand and refusal. *Hitchcock v. Wiltse*, 6 Dem. 235; S. C. 12 N. Y. State Rep. 144.

The Statute of Limitations does not begin to run in favor of the indorser of a promissory note payable on demand, at a place specified, until demand is made in compliance with the terms of the contract and due notice of nonpayment; a demand by letter is insufficient. *Merritt v. Todd*, 23 N. Y. 28; *Wolcott v. Van Santvoord*, 17 Johns. 243; *Woodworth v. Bank of Am.* 19 Johns. 303; *Ferner v. Williams*, 37 Barb. 10; *Pardee v. Fish*, 60 N. Y. 233; *Herrick v. Woolverton*, 41 N. Y. 551; *Wheeler v. Warner*, 47 N. Y. 519; *Crim v. Starkweather*, 38 N. Y. 339; *Pierce v. Whitney*, 29 Maine, 188; *Lookwood v. Crawford*, 18 Conn. 361; *King v. Crowell*, 61 Maine, 244; 1 Dan. Neg. Inst. 518; *Chitty, Bills*, 12th Am. ed. 415; 1 Pars. Bills & Notes, 371; *Barnes v. Vaughan*, 6 R. I. 259; *Stuckert v. Anderson*, 3 Whart. (Pa.) 116; *Gillespie v. Hannahan*, 4 McCord, L. 503; *Hartford Bank v. Green*, 11 Iowa, 476; *Parker v. Stroud*, 98 N. Y. 379 [reversing S. C. 31 Hun. 573]; *Tredlok v. Wendell*, 1 N. H. 80; *Doubleday v. Kress*, 50 N. Y. 410.

See also, as to individual liability of stockholders for corporate debts, note in *Hatch v. Dana*, 101 U. S., 25 L. ed. 835.

Ogilvie v. Knox Ins. Co. 68 U. S. 22 How. 890 (16:849); *Pollard v. Bailey*, 87 U. S. 20 Wall. 520 (22:876); *Godfrey v. Terry*, 97 U. S. 171 (24:944); *Hatch v. Dana*, 101 U. S. 205, 211 (25:885, 886); *Lamar Ins. Co. v. Hildreth*, 55 Iowa, 248; *Erickson v. Nesmith*, 46 N. H. 871.

The relation between the company and its stockholders with respect to the liability under his subscription contract, is the relation of debtor and creditor.

Hatch v. Dana, 101 U. S. 205 (25:885); *Ogilvie v. Knox Ins. Co.* 68 U. S. 22 How. 892 (16:858); *Stephens v. Fox*, 88 N. Y. 318, 817.

Notice by publication has no force or effect against persons or property in jurisdictions beyond the limits of the State.

Pana v. Bowler, 107 U. S. 529 (27:424); *St. Clair v. Coz*, 106 U. S. 350 (27:222); *Pennoyer v. Neff*, 95 U. S. 714 (24:585); *Windsor v. McVeigh*, 98 U. S. 274 (28:914); *D'Arcy v. Ketchum*, 52 U. S. 11 How. 165 (18:648); *Thompson v. Whitman*, 85 U. S. 18 Wall. 457 (21:897); *Galpin v. Page*, 85 U. S. 18 Wall. 350 (21:959).

Plaintiff's suit was barred by limitation.

The obligation to pay money subscribed to the stock of corporations as called for or required by the president and directors, is that of a debt payable on demand.

Goshen & M. Turnpike Road Co. v. Hurtin, 9 Johns. 217; *Howland v. Edmonds*, 24 N. Y. 810; *Stillwell v. Craig*, 58 Mo. 24, 31; *Upton v. Tridilcock*, 91 U. S. 45 (23:203).

No actual demand is necessary to set the statute in motion as to notes payable on demand, and also as to other money obligations.

Angell, Lim. 6th ed. 93, 94, 95; 2 Dan. Neg. Inst. 1st ed. § 1215; *Andrews App.* 99 Pa. 421, 11 W. N. C. 294; *McMullen v. Rafferty*, 89 N. Y. 458; *Easton v. McAllister*, 1 Mo. 662; *Codman v. Rogers*, 10 Pick. 119.

As between the creditors of an insolvent corporation and the stockholders, the unpaid stock is a debt due at once, without further demand.

Henry v. Vermillion & A. R. Co. 17 Ohio, 187; *Hatch v. Dana*, 101 U. S. 205 (25:885); *Marsh v. Burroughs*, 1 Woods, 464; *Holmes v. Sherwood*, 16 Fed. Rep. 725; *Crawford v. Rohrer*, 59 Md. 600; *Re Glen Iron Works*, 20 Fed. Rep. 674; *Sagory v. Dubois*, 3 Sandf. Ch. 466, 492; *Glenn v. Dorsheimer*, 23 Fed. Rep. 696, 24 Fed. Rep. 586; *Glenn v. Priest*, 23 Fed. Rep. 908.

Whenever the corporation ceases to do business, the liability of the stockholders becomes absolute.

Thompson, Stockholders, § 291; *Payne v. Bullard*, 23 Miss. 91; *Terry v. Anderson*, 95 U. S. 686 (24:367).

The beneficial operation of the statute could not be stayed during the long period between the assignment of 1866 and the decree of 1880, by the mere neglect of the assignee to make a call or demand.

Codman v. Rogers, 10 Pick. 119; *Baker v. Atlas Bank*, 9 Met. 198; *Laforge v. Jayne*, 9 Pa. 410; *Pittsburgh & O. R. Co. v. Byers*, 83 Pa. 22; *Pittsburgh & O. R. Co. v. Graham*, 86 Pa. 77; *Morrison v. Mullin*, 84 Pa. 12, 17; *Shackamaxon Bank v. Dougherty*, 20 W. N. O. 297; *Franklin Sav. Bank v. Bridges*, 20 W. N. C. 48; *Baker v. Johnson Co.* 88 Iowa, 154;

Prescott v. Gonser, 84 Iowa, 175; *Hintrager v. Hennessey*, 46 Iowa, 600; *First Nat. Bank v. Greene*, 64 Iowa, 445; *Palmer v. Palmer*, 86 Mich. 488; *Wright v. Pusine*, 63 Ala. 340.

A trustee for the creditors of an insolvent corporation could, soon after his appointment, have sued the plaintiff in error directly by bill in equity without the necessity of a call.

Hatch v. Dana, 101 U. S. 205 (25:885); *Ogilvie v. Knox Ins. Co.* 68 U. S. 22 How. 890 (16:849).

Messrs. Charles Marshall and John Howard, for defendant in error:

This decree was binding upon the stockholders of the company, so far as the unpaid subscription to the capital stock of the company, in their hands, was concerned.

Morgan Co. v. Allen, 108 U. S. 496 (26:493); *Sawyer v. Hoag*, 84 U. S. 17 Wall. 610 (21:731); *Ex parte Schollenberger*, 96 U. S. 374 (24:853); *Vallee v. Dumergue*, 4 Exch. 390; *Bank of Australasia v. Harding*, 9 M. G. & S. 661; *Ogilvie v. Knox Ins. Co.* 68 U. S. 22 How. 387 (16:851); *Sanger v. Upton*, 91 U. S. 58 (23:221); *Hall v. U. S. Ins. Co.* 5 Gill, 484; *Sagory v. Dubois*, 3 Sandf. Ch. 500.

The necessity for a call to enable the trustees to sue, is established by the decree and by repeated decisions.

Robertson v. Sibley, 10 Minn. 330, 381; *Ohandler v. Siddle*, 3 Dill. C. C. 477; *Scovill v. Thayer*, 105 U. S. 153 (26:973).

The power to make calls became itself a trust, and its execution became enforceable by a court of equity as any other trust. After executing the deed of trust, the company could not use its power to make calls on its stockholders for any other purpose, not even for its own corporate purposes, until it first exercised that power to effectuate the trusts of the deed.

Perry, Trusts, § 248 and note; *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Cas. 323-4; *Ogilvie v. Knox Ins. Co.* 68 U. S. 22 How. 387 (16:851); *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 414 (28:794).

In Virginia, when a deed of trust is made by a debtor in favor of his creditors, the Statute of Limitations does not run against a creditor, so far as the trust fund created by the deed is concerned.

Smith v. Washington City, F. M. & G. S. R. Co. 83 Gratt. 617; *Bowie v. Poor School Soc.* 75 Va. 800; *Hambleton v. Glenn*, 13 Va. L. J. 242.

When the chancery court decreed that this assessment upon the stock should be paid to the trustee, the assumpsit created by the decree was as complete on the part of the stockholder as if he had been personally present in court.

2 Greenl. Ev. § 102; *Hawkes v. Saunders*, Cowp. 290; *Second Nat. Bank v. Grand Lodge, F. & A. Masons*, 98 U. S. 124 (25:76); *Gaines v. Miller*, 111 U. S. 895 (28:466).

The following decisions involve all the questions presented by this record:

Vanderwerken v. Glenn, 13 Va. L. J. 91; *Glenn v. Semple*, 80 Ala. 159; *Lehman v. Glenn*, 18 Va. L. J. 302; *Semple v. Glenn*, 18 Va. L. J. 305; *Sayrr v. Glenn*, 13 Va. L. J. 307; *Morris v. Glenn*, 18 Va. L. J. 224; *Glenn v. Williams*, 60 Md. 94; *Glenn v. Clabaugh*, 7 Cent. Rep. 891, 65 Md. 67; *Glenn v. Howard*, 2 Cent. Rep. 643, 65 Md. 40; *McKim v. Glenn*, 5 Cent. Rep. 778, 66 Md. 479; *Glenn v. Orr*, 96 N. C. 418; *Glenn v. Saxton*, 68 Cal. 353.

Mr. Chief Justice Fuller delivered the opinion of the court:

Counsel for plaintiff in error contends that the decree of the Richmond Chancery Court making the call and assessment was void as against him, because he was not a party to the suit; that the cause of action was barred by the Statute of Limitations; that he was not responsible upon one hundred and fifty shares of the stock; and that interest should not have been allowed from the date of the call, but only from the time of the filing of the complaint.

The jurisdiction of the Richmond Chancery Court to settle the construction of the deed of trust, to remove the original trustees and substitute another, and to ascertain the extent of the liabilities and assets of the corporation, is not denied. It is conceded that the balance remaining unpaid on subscriptions to stock is a trust fund for the payment of corporate debts, and that a judgment obtained against a corporation cannot be impeached except for fraud.

But it is said that a binding assessment cannot be levied without the presence of the stockholders or service of process or notice upon them.

Under the charter of this company a call could only be made by the president and directors, and was a corporate question merely, and in the situation of the company's affairs it was a duty to make it, failing the discharge of which by the president and directors, creditors could set the powers of a court of equity in motion to accomplish it.

Executing in that regard a corporate function for a corporate purpose, it is difficult to see upon what ground it could be held that the court could not order an assessment operating upon stockholders, who would be bound if the president and directors had ordered it.

Sued after such an order of court, the defendant does not deny the existence of any one of the facts upon which the order was made, but contends that there has been no call as to him, because he was not a party to the cause between creditor and corporation. We understand the rule to be otherwise, and that the stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company.

A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member. *Sanger v. Upton*, 91 U. S. 56, 58 [28: 220, 221], in which case it is also said: "It was not necessary that the stockholders should be before the court when it (the order) was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree; and for the same reasons she could not draw into question the validity of the order. She could not be heard to question either, except by a separate and direct proceeding had for that purpose." As against creditors there is no difference between unpaid stock "and any other assets which may form a part of the property and effects of the corporation;" *Morgan County*

v. Allen, 108 U. S. 498, 500 [26: 498, 502]; and "the stockholder has no right to withhold the funds of the company upon the ground that he was not individually a party to the proceedings in which the recovery was obtained." *Glenn v. Williams*, 60 Md. 93, 116. In the last cited case, which was an action to recover upon the assessment controverted here, the Court of Appeals of Maryland passed upon the question now before us, and held, in an able opinion by Alvey, J., that the Richmond Chancery Court acquired jurisdiction over the express company and the trustee; that that court had power and jurisdiction to make assessments upon the unpaid subscriptions to raise funds to pay the corporation's debts, and its decree making such assessment was binding and effective "upon the stockholders who were not in their individual capacities parties to the cause;" that Glenn was legally appointed trustee; and that the Statute of Limitations began to run only from the time the assessment was made by the decree of the court in Virginia, and could form no bar to the right to recover in the action. *Sanger v. Upton*, *supra*, is quoted from, and it is correctly stated that that decision "was made not in pursuance of any express provision of the bankrupt law, but in analogy to the powers and procedure of a court of equity, and to meet the requirements and justice of the case."

In *Hambleton v. Glenn*, 18 Va. L. J. 242, the rejection by the Circuit Court of Henrico County, Virginia, to which the suit in the Richmond Chancery Court had been removed, of a petition of certain stockholders to be made parties, and for a rehearing of the cause, came under review in the Supreme Court of Appeals of Virginia, and that court among other things said: "The first question raised in this court is that the appellants are entitled to be made parties to the suit of *Glenn v. National Express and Transportation Company*, because the relief sought is against them. The suit of *Glenn v. The National Express and Transportation Company* is a creditors' suit against a corporation, and, by the terms of its charter and the laws of this State applicable to said company, it was lawfully sued as such by its corporate name, and the individual stockholders were not proper parties to such a suit, the president and directors being by their selection their representatives for this purpose. The appellants admit this as to any live and going corporation, and claim, as the corporation is dead, that by its deed of trust it assigned to trustees and ceased to exist; that in a suit by a creditor, or by creditors generally, the suit against the corporation is in fact one not against the corporation, but against them as stockholders, and they are not represented by the company nor by the trustees. By the law of this State (Code of 1878, chap. 56, § 81), 'when any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property, and debts due to it, shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities, and distributing the proceeds of its works, property and debts, among those en-

titled thereto.' By which it is provided that, notwithstanding its death, it stands, for the purpose of being sued by creditors, just as it did while alive and going, and may sue and be sued as before, and that the directory has assigned to trustees alters the case only so far as to make the trustees necessary parties."

The section quoted from the Code of 1878 is identical with section 80 of chapter 56 of the Code of 1860; and as the corporation, notwithstanding it may have ceased the prosecution of the objects for which it was organized, could still proceed in the collection of debts, the enforcement of liabilities, and the application of its assets to the payment of its creditors, all corporate powers essential to these ends remained unimpaired. We concur in the decision to this effect of the highest tribunal of the State where the corporation dwelt, in reference to whose laws the stockholders contracted, *Canada Southern R. Co. v. Gebhard*, 109 U. S. 537 [27: 1020], and in whose courts the creditors were obliged to seek the remedy accorded. *Barclay v. Taiman*, 4 Edw. Ch. 128; *Bank of Virginia v. Adams*, 1 Par. Sel. Cas. 534; *Patterson v. Lynde*, 112 Ill. 196.

We think it cannot be doubted that a decree against a corporation in respect to corporate matters, such as the making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members in the absence of fraud, and that this is involved in the contract created in becoming a stockholder.

The decree of the Richmond Chancery Court determined the validity of the assessment; and that the lapse of time between the failure of the company and the date of the decree did not preclude relief, by creating a bar through Statutes of Limitation or the application of the doctrine of laches. And so it has been held in numerous cases referred to on the argument. The court may have erred in its conclusions, but its decree cannot be attacked collaterally, and, indeed, upon a direct attack, it has already been sustained by the Virginia Court of Appeals. *Hambleton v. Glenn, supra*.

Some further observations may not inappropriately be added. Unpaid subscriptions are assets, but have frequently been treated by courts of equity as if impressed with a trust *sub modo*, upon the view that, the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds to be accounted for as held in trust, and that therefore Statutes of Limitation do not commence to run in respect to them, until the retention of the money has become adverse by a refusal to pay upon due requisition.

But the conclusion as to the statute need not be rested on that ground; for although the occurrence of the necessity of resorting to unpaid stock may be said to fix the liability of the subscriber to respond, he cannot be allowed to insist that the amount required to discharge him became instantly payable though unascertained, and though there was no request, or its equivalent, for payment.

And here there was a deed of trust made by the debtor corporation for the benefit of its creditors, and it has been often ruled in Virginia, that the lien of such a trust deed is not barred by any period short of that sufficient to raise a presumption of payment. *Smith v.*

Washington City, V. M. & G. S. R. Co. 38 Gratt. 617; *Bowie v. The Poor School Soc.* 75 Va. 300; *Hambleton v. Glenn*, 18 Va. L. J. 242. This deed was not only upheld and enforced by the decree of December 14, 1880, but also the power of the substituted trustee to collect the assessment by suit in his own name, was declared by the Court of Appeals of Virginia, in *Lewis v. Glenn*, 6 S. E. Rep. 866. See also *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287.

By the deed the subscriptions, so far as uncalled for, passed to the trustees, and the creditors were limited to the relief which could be afforded under it, while the stockholders could be subjected only to equality of assessment; and as the trustees could not collect except upon call, and had themselves no power to make one, rendering resort to the president and directors necessary, or, failing their action, then to the courts, it is very clear that the Statute of Limitations could not commence to run until after the call was made.

The rule laid down in *Scott v. Thayer*, 105 U. S. 143, 155 [26: 968, 978], applies. In that case it was said by Mr. Justice Woods, speaking for the court: "There was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant owed the creditors nothing, and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company, his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete," and it was held, "that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do. But, under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call of the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment; and it is clear the Statute of Limitations does not begin to run in his favor until such order or demand."

Constituting, as unpaid subscriptions do, a fund for the payment of corporate debts, when a creditor has exhausted his legal remedies against the corporation which fails to make an assessment, he may, by bill in equity or other appropriate means, subject such subscriptions to the satisfaction of his judgment, and the stockholder cannot then object that no call has been made. As between creditor and stockholder, "it would seem to be singular if the stockholders could protect themselves from paying what they owe by setting up the default of their agents." *Hatch v. Dana*, 101 U. S. 205, 214 [25: 885, 887]. The condition that a call shall be made is, under such circumstances, as Mr. Justice Bradley remarks in the matter

of *Glen Iron Works*, 20 Fed. Rep. 674, 681, "but a spider's web, which the first breath of the law blows away." And as between the stockholder and the corporation, it does not lie in the mouth of the stockholder to say, in response to the attempt to collect his subscription, for the payment of creditors, that the claim is barred because the company did not discharge its corporate duty in respect to its creditors earlier. *County of Morgan v. Allen*, 103 U. S. 498 [26: 498].

These considerations dispose of the alleged error in not sustaining the defense of the statutory bar.

By § 26, chap. 57, title 18, "Chartered Companies," of the Virginia Code of 1878 (p. 551), it is provided that "no stock shall be assigned on the books without the consent of the company, until all the money which has become payable thereon shall have been paid; and on any assignment the assignee and assignor shall each be liable for any installments which may have accrued, or which may thereafter accrue, and may be proceeded against in the manner before provided." And this was the provision of the Code of 1860 (chap. 57, title 18, § 24); and in *Hamblen v. Glenn*, *supra*, it was held "that under that section the assignee and assignor are liable for any installment which may have accrued or which may hereafter accrue," and to the same effect is *McKim v. Glenn*, 66 Md. 479 [5 Cent. Rep. 776].

Defendant claims that of the two hundred and fifty shares for which he subscribed he took one hundred and fifty shares for three other persons. The stock ledger shows that five certificates of fifty shares each were sent to defendant, made out in his name; and it appears from his evidence that he transferred three certificates for fifty shares each to Hoge, Battle and Williamson, though they failed to have them transferred to their own names on the books of the company. Of the remaining one hundred shares, defendant retained fifty and transferred the other fifty to five other persons whom he had anticipated, when he subscribed, might take them. So far as appears from the stock register the plaintiff remained the original owner of two hundred shares and the assignor of fifty, and no error is assigned as to this fifty.

Sec. 25 of chap. 57, title 18, of the Code of Virginia of 1860, is as follows: "A person in whose name shares of stock stand on the books of a company shall be deemed the owner thereof as it regards the company." Code of 1878, title 18, chap. 57, § 27.

So far as creditors were concerned, Hawkins remained a shareholder as to the two hundred shares. *Pullman v. Upton*, 96 U. S. 828 [24: 818]; *Richmond v. Irons*, 121 U. S. 27 [80: 864]; *Upton v. Tribblecock*, 91 U. S. 45 [23: 208].

The judgment of the circuit court cannot be disturbed because the defendant was held liable on two hundred and fifty shares.

It is also objected that interest upon the amount called should have been allowed from the date of the commencement of the suit and not from the date of the decree, but the difficulty with this contention is, that there was no motion for a new trial in the case. The court, so far as appears, gave no instruction on the subject of the amount of the interest, and the

exception to the instruction to find for the plaintiff does not question the amount found by the jury. The Code of Virginia of 1860 provides: "If the money which any stockholder has to pay upon his shares be not paid as required by the president and directors, the same, with interest thereon, may be recovered by warrant, action or motion as aforesaid." Code of 1860, title 18, chap. 57, § 21; Code of 1878, title 18, chap. 57, § 23. Interest would therefore seem chargeable from the date of the call.

The judgment of the Circuit Court is affirmed.

DAVID FREELAND, *Plff. in Err.*,

v.

JOSEPH V. WILLIAMS.

(See S. C. Reporter's ed. 405-423.)

Judgment for tort is not a contract—Constitution of W. Virginia—liability for act done during late war—bill in chancery is due process of law.

1. A judgment in an action of tort, is not protected by the provision of the Federal Constitution which forbids a State passing a law impairing the obligation of contracts.
2. A judgment for a tort is not a contract nor evidence of a contract within the meaning of the constitutional provision.
3. The Constitution of West Virginia of 1872, in its provision that the property of a citizen shall not be sold on a judgment for an act done during the late civil war, does not violate the obligation of a contract where the judgment was founded on a tort committed as an act of public war.
4. No civil liability attached to officers or soldiers for an act done, in accordance with the usages of civilized warfare, in our late civil war, under and by military authority of either party.
5. A bill in chancery is one of the recognized processes of law for re-examining a judgment and enjoining its execution, and is, in its form, due process of law.

[No. 267].

Argued April 17, 1889. Decided May 13, 1889.

IN ERROR to the Supreme Court of Appeals of the State of West Virginia, to review a judgment denying an appeal from a decree of the Circuit Court of Preston County enjoining the collection of a judgment. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. C. Cole and W. L. Cole, for plaintiff in error:

It does not appear from this record what matters of law or fact were involved in the trial of the original case.

Hedges v. Price, 2 W. Va. 192; *Williams v. Freeland*, 2 W. Va. 306; *Lively v. Ballard*, 2 W. Va. 496.

The judgment in this case, affirmed by the highest court in the State, must be held conclusive of all matters of law and fact involved.

Cooley, Const. Lim. 409; *Delmas v. Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 661 (20: 757).

Plaintiff's judgment was a contract.

1 Pow. Contr. 6; 2 Bl. Com. 443; *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 513 (4: 629); *Fletcher v. Peck*, 10 U. S. 6 Cranch,

87 (8: 162); *Green v. Biddle*, 21 U. S. 8 Wheat. 1 (5: 547).

The judgment in question was the property of the plaintiff of which he could not be deprived but by due process of law.

2 Bl. Com. chap. 29, §§ 1, 2, 3; *Arnold v. Kelly*, 4 W. Va. 646; *Gunn v. Barry*, 82 U. S. 15 Wall. 622 (21: 214); *Cooley*, Const. Lim. 862; *Dash v. Van Kleeck*, 7 Johns. 477; *Westervelt v. Gregg*, 12 N. Y. 211; *Kendall v. Dodge*, 8 Vt. 860.

The suit in equity, grounded solely upon the constitutional provision, is not "due process of law."

Murray v. Hoboken Land & Imp. Co. 59 U. S. 18 How. 272 (15: 879); *Johnson v. Jones*, 44 Ill. 142; *Bloomer v. McQueenan*, 55 U. S. 14 How. 589 (14: 582); *Martin v. Snowden*, 18 Gratt. 100; *Reichert v. Felps*, 78 U. S. 6 Wall. 160 (18: 849); *Atkinson v. Dunklap*, 50 Maine, 111; *Burch v. Newbury*, 10 N. Y. 894; *Lawson v. Jeffries*, 47 Miss. 686, 12 Am. Rep. 842; *Westervelt v. Gregg*, 12 N. Y. 202.

The State cannot prevent by constitutional provision the enforcement of a judgment theretofore obtained.

Delmas v. Merchants Mut. Ins. Co. 81 U. S. 14 Wall. 661 (20: 757); *White v. Hart*, 80 U. S. 18 Wall. 646 (20: 685); *Gunn v. Barry*, 82 U. S. 15 Wall. 610 (21: 212); *Mississippi & M. R. Co. v. McClure*, 77 U. S. 10 Wall. 511 (19: 997).

Messrs. Robert White and C. J. Faulkner, for defendant in error:

The defense of "belligerent rights" should have fully protected the defendant.

Dow v. Johnson, 100 U. S. 169 (25: 636); *Coleman v. Tenn.* 97 U. S. 509 (24: 1118); *Ford v. Surget*, 97 U. S. 594 (24: 1018); *Williams v. Bruffy*, 96 U. S. 176 (24: 716); Hal. Int. Law, p. 343, § 23; p. 352, §§ 9-10; Vattel, Law of Nations, chap. 12, §§ 190, 191.

Equity can interfere if there is accident, inadvertence, mistake, fraud, newly discovered testimony, or abuse of process at law, without the intervention of a statute to help it.

Chestnut v. Shane, 16 Ohio, 599; *Weister v. Hade*, 52 Pa. 480; *State v. Newark*, 27 N. J. L. 197.

This court will adopt such construction of a state law or state Constitution as may have been given it by the highest tribunal of the State.

Cooley, Const. Lim. 4th ed. pp. 15-16; *New Orleans Water Works Co. v. La. Sugar Ref. Co.* 125 U. S. 29 (31: 611); *Church v. Kelsey*, 121 U. S. 284 (30: 961); *Williams v. Freeland*, 19 W. Va. 601.

The judgment in this case was rendered in an action of trespass for an alleged tort, and is not a contract.

La. v. New Orleans, 109 U. S. 236 (27: 986); *Garrison v. New York City*, 88 U. S. 21 Wall. 208 (22: 614); *Edwards v. Kearzey*, 96 U. S. 599 (24: 796); *Fletcher v. Peck*, 10 U. S. 6 Cranch. 187 (8: 162); *Blount v. Windley*, 95 U. S. 176 (24: 425); *Charles River Bridge v. Warren Bridge*, 86 U. S. 11 Pet. 573 (9: 778); *Balt. & S. R. Co. v. Nesbit*, 51 U. S. 10 How. 398 (18: 469); *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 197 (4: 529); *Todd v. Orumb*, 5 McLean, 172.

This court has no right to pronounce an Act of the State Legislature void, or contrary to

the Constitution of the United States, from the mere fact that it devests antecedent right of property.

Watson v. Mercer, 33 U. S. 8 Pet. 110 (8: 876); *Hepburn v. Curtis*, 7 Watts, 800; *Balt. & S. R. Co. v. Nesbit*, 51 U. S. 10 How. 398 (18: 469); *Leland v. Wilkinson*, 85 U. S. 10 Pet. 294 (9: 480); *Vance v. Vance*, 108 U. S. 514 (27: 808); *Gross v. U. S. Mortgage Co.* 108 U. S. 477 (27: 795); *McGruder v. Lyons*, 7 Gratt. 238; *Wyatt v. Morris*, 2 W. Va. 575; *Benner v. Porter*, 50 U. S. 9 How. 235 (18: 119).

Mr. Justice Miller delivered the opinion of the court:

This case is brought before us by a writ of error directed to the Judges of the Supreme Court of Appeals of the State of West Virginia.

We can, perhaps, best present the questions of federal cognizance, which are supposed to give this court jurisdiction, by a short statement of its history.

David Freeland, the present plaintiff in error, brought in the Circuit Court of Preston County, in the State of West Virginia, against Joseph V. Williams and his brother Charles Williams, an action of trespass *de bonis asportatis* for the taking and conversion of cattle which were the property of the plaintiff; and on the 22d day of December, 1865, he recovered a judgment in that court against Joseph V. Williams, for \$1,110, with interest and costs, there being a verdict in favor of the other defendant. From that judgment the defendant took a writ of error, on which it was affirmed in the Supreme Court of Appeals of the State of West Virginia. *Williams v. Freeland*, 2 W. Va. 806. The trespass took place while the late civil war was flagrant in that part of the country. The records of the Circuit Court of Preston County, in which this judgment was rendered, have been destroyed by fire, and no transcript of the proceedings of that case is to be found in the record presented to us, except that a certified copy of the judgment of the supreme court of appeals, affirming the judgment of the circuit court, is appended as an exhibit to the answer of Freeland made in the suit now under consideration.

The judgment thus recovered remaining unsatisfied, the defendant in that case, Joseph V. Williams, on the 15th day of August, 1888, filed his bill in chancery in the Circuit Court of Preston County, which, as it is short and contains the matter which we are called upon to review, will be here inserted as follows:

"The bill of complaint of Joseph V. Williams, plaintiff, against David Freeland, defendant, filed in the Circuit Court of Preston County.

"To the Honorable Wm. T. Lee, Judge of the Circuit Court of Preston County:

"The plaintiff complains and says that the defendant instituted in the circuit court of said county his action of trespass against the plaintiff and a certain Charles Williams, and on the 22d day of December, 1865, recovered a judgment therein against the plaintiff alone for \$1,110, with interest thereon from the 4th day of January, 1864, and for the costs of the plaintiff therein expended. The record of said judgment has been destroyed by the burning of the court house of said county. From said

judgment the plaintiff obtained a writ of error and supersedeas, and the said judgment was by the Supreme Court of Appeals, at the July Term thereof, in the year 1867, affirmed; and thereafter, on the ---- day of ----, 1875, the said defendant sued out an execution on said sum of \$-----, with interest from the ---- day of ----, and for costs and damages as was in said case then provided for by law; that the plaintiff then proceeded to invalidate and have said judgment set aside, according to an Act of the Legislature of the State of West Virginia, on the ---- day of ----, and said judgment was by the circuit court of said county, by order entered in said proceedings, set aside, and a new trial ordered in said original action; that from said order an appeal was taken by said Freeland, and said order was reversed and said proceedings to set aside said judgment were dismissed; and so, therefore, the said original judgment is apparently in force, although in fact void for reasons hereinafter stated. The plaintiff further states that said action in which said judgment was obtained was not an action *ex contractu*, but was an action *ex delicto*; that it was, in fact, for cattle or other personal property alleged by the defendant to belong to him taken by the military authorities of the Confederate States, and taken by the soldiery and military authorities aforesaid during the late war between the Government of the United States and a part of the people thereof; and the plaintiff says that said judgment was for acts done according to the usages of civilized warfare in the prosecution of said war by the said Confederate States and the military power and authority thereof. The plaintiff further states that during said war he was a citizen of the State of Virginia until the formation of the State of West Virginia, and thereafter was and has been continually since a citizen of the State of West Virginia, and is now a citizen of the State of West Virginia; that he aided and participated in said war in the armies of the said Confederate States from the time he entered the service thereof, in the year 1862, until the termination thereof. The plaintiff further states that he resides in the County of Grant, and is the owner of real estate therein; that said judgment has been docketed in his said county, as he believes, and has occasioned a cloud upon his title to said property. The plaintiff further says that he is advised that said judgment is void, and that his property is not liable to be seized or sold therefor, and, notwithstanding said judgment is void, he is threatened and is in danger of having his property so seized and sold to satisfy said judgment, and the value and salable character of his said real estate by reason of the cloud on the title thereof as aforesaid is greatly impaired. The plaintiff further states that he has not full or adequate relief against said judgment, except by this his bill and the due process of law thereby, and by the enforcement of the protection afforded by the 85th section of the 8th article of the Constitution of this State in his behalf, and to have said judgment by judicial authority declared void and inoperative. The plaintiff therefore prays that said judgment be declared void; that the defendant be perpetually enjoined and restrained from collecting the same and every part thereof,

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whether of principal, interest, cost, or damages, and from suing out execution thereon; and that he may have such other relief as the court may see fit to grant.

"JOSEPH V. WILLIAMS,
"By Counsel."

To this bill there was a demurrer by Freeland, and also an answer. The demurrer relies upon the proposition that the 85th section of article 8 of the Constitution of the State, which the plaintiff in that case sets up as the foundation of his relief, is in conflict with the 10th section of the first article of the Constitution of the United States, and also with the 1st section of the 14th article of amendment to that Constitution, and is therefore null and void. The answer sets out the same matter, and also says that the judgment was for a lot of cattle owned by Freeland and taken and converted by the plaintiff, but *not* in accordance with the usages of civilized warfare; and that Williams went to trial on the plea of not guilty to the action of trespass for the recovery of the value of these cattle, though the plaintiff might have waived the trespass and declared in assumpsit.

To this there was a replication, and testimony by way of depositions was taken on the issue as to whether the taking, on which the original judgment for the plaintiff rested, was an exercise of belligerent rights, and was done according to the usages and principles of public war. There can be no question that these depositions establish the fact that Williams, the defendant in the original action, was a soldier under the command of General Fitzhugh Lee, whose force was dominant in that part of West Virginia in January, 1864, and that it was under his orders that the cattle were seized while Lee was on a raid through that county, the object of which was to get beef cattle, and the order of the commanding officer was to take beef cattle and surplus horses.

Upon the final hearing the circuit court rendered its decree in the following language:

"It is therefore considered by the court that the judgment in the bill mentioned in favor of the defendant, against the plaintiff, described as a judgment rendered by the Circuit Court of Preston County, on the 32d day of December, 1865, for \$1,110, with interest thereon from the 4th day of January, 1864, and the costs, is void, and that the defendant be perpetually enjoined and restrained from the enforcement and collection of the same and every part thereof, and that the defendant do pay to the plaintiff his costs herein."

Thereupon Freeland, the present plaintiff in error, made application, according to the laws of West Virginia, by a petition, for an appeal, which petition was denied. This denial, as in the case of similar proceedings in the State of Virginia, this court has held to be a final judgment of the highest court of the State, which can be reviewed in this court in a proper case.

The errors assigned and the questions presented by counsel and by this record, are, substantially, two: 1st. That the new Constitution of West Virginia, relied on as the foundation of relief by the defendant in error, is a violation of that clause of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of con-

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tracts. Sec. 10, art. I, of the original Constitution. 2d. That it violates the provision of the 1st section of the 14th article of amendment, viz.: that no State shall "deprive any person of life, liberty or property without due process of law."

It is proper to observe that counsel have commented upon the fact that the defendant Williams, in the original action of trespass, filed certain pleas setting up the fact that what he did in the way of seizing the cattle was under order of superior military authority and in the exercise of belligerent rights, and that, therefore, he was not personally liable to the plaintiff for the alleged trespass. But there is no evidence in this record that any such pleas were ever offered to be filed, or were rejected by the trial court; nor is any such fact stated by Williams in the bill which is the foundation of the suit now before us.

It is very true that this circumstance is mentioned in some of the opinions of the supreme court of appeals of the State, in one of the cases where this matter was before it, but this could not be received as evidence of a fact not found in the record, even if those opinions and judgments had been made a part of this case by reference or otherwise. But this matter is, we think, immaterial in regard to the issue presented here. The defense which Williams now says he offered to make by those pleas was competent under the plea of not guilty, on which the case was tried; and in the depositions taken in the present case on the bill for an injunction, it is made quite clear that such a defense was offered, but held to be insufficient by the court.

The constitutional provision of the State of West Virginia, adopted by vote of the people on the 22d of August, 1872, on which the defendant in error mainly relies in support of the decree rendered in this case, is the 85th section of the 8th article of that instrument, and reads as follows:

"No citizen of this State who aided or participated in the late war between the Government of the United States and a part of the people thereof, on either side, shall be liable in any proceeding, civil or criminal; nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act done, according to the usages of civilized warfare, in the prosecution of said war, by either of the parties thereto. The Legislature shall provide by general law for giving full force and effect to this section by due process of law."

The Legislature of West Virginia undertook to discharge the duty imposed by this constitutional provision, by section 8 of chapter 56 of the Acts of 1872-8, which is in the following language:

"That if it shall be alleged by petition, under oath of the defendant, or his personal representative, to the court in which any judgment or decree shall have been rendered, or to any court to which such judgment or decree shall be transferred, that such judgment or decree was secured or rendered by reason of an act done by the defendant according to the usages of civilized warfare in the prosecution

of said war, a copy of which having been served on the plaintiff, his agent or attorney at law, or, if he be dead, upon his personal representative, ten days prior to filing the same, the court shall suspend proceedings upon such judgment or decree; and, being satisfied of the truth of said allegation, or if it appears by the record that a plea, setting forth that the matters complained of were done in accordance to the usages of civilized warfare in the prosecution of said war, was filed or offered to be filed by the defendant, and rejected or overruled by the court, *shall set aside the judgment or decree and award a new trial therein*, which shall be governed by the provisions of this Act; and in case the judgment or decree upon the new trial be in favor of the defendant, and he shall have paid the said judgment or decree or any part thereof, the court shall render a judgment or decree that the same shall be restored to the defendant, with interest, and shall enforce such restitution by execution or other proper process."

The Supreme Court of Appeals of the State of West Virginia, in the case of *Peerce v. Kittlemiller*, 19 W. Va. 564, held in a case precisely similar to this, that while the constitutional provision of that State was not in violation of any provision of the Constitution of the United States, the mode prescribed by the Legislature for obtaining the relief which the new Constitution authorized was not due process of law, and that the statute was void. But it also held that the provisions of the Constitution and the relief which it intended to give might be carried into effect by proceedings in courts which would be due process of law, and intimated that a proceeding in chancery for an injunction against the execution of the original judgment might be such due process of law. We are therefore relieved from any further consideration of the special provisions of this statute, and are remitted to the question of conflict between the constitutional provision of 1872 of the State of West Virginia and the Constitution of the United States.

As we have already said, the first of the questions thus presented is whether that constitutional provision, in its application to a judgment like the present, in existence when this State Constitution was adopted, impairs the obligation of a contract.

On this question the court has very little difficulty. The proposition that a judgment, duly rendered in a court of law, in an action of tort, is protected by this provision of the Federal Constitution, has been before us more than once in recent years, and was before this court also many years ago.

In the case of *Louisiana v. Mayor of New Orleans*, 109 U. S. 235 [27: 986], the precise question was presented and very fully considered. In that case a judgment was recovered against the City of New Orleans for injuries received by the riotous proceedings of a mob. At the time when this judgment was rendered the laws of Louisiana authorized taxes to be levied to pay all judgments rendered against the city. Afterwards changes were made in the laws on the subject of taxation, so that the power of the city to levy taxes was limited in such a manner that no taxes could be raised

that could be appropriated to the payment of this judgment. An application was made to the Supreme Court of Louisiana to compel the city authorities of New Orleans to levy taxes to pay this judgment, which was denied by that court. The case was brought here on a writ of error, on the ground that the statute under which the court of Louisiana denied the writ of mandamus impaired the obligation of the contract found in the judgment in favor of the plaintiffs against the city. This court held, however, that that judgment was not a contract, and was not evidence of a contract within the meaning of the constitutional provision. The whole question of the nature of judgments, as being founded upon torts, or founded upon contracts, as they relate to that provision, was very fully discussed; and, while it was conceded that such a judgment might be declared upon as a specialty or a contract of record, under the old authorities, such a proposition could not "convert a transaction wanting the assent of parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest. The prohibition of the Federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition. *Garrison v. City of New York*, 88 U. S. 21 Wall. 208 [22: 614]. There is, therefore, nothing in the liabilities of the city, by reason of which the relators recovered their judgments, that precluded the State from changing the taxing power of the city, even though the taxation be so limited as to postpone the payment of the judgments."

The case of *Garrison v. City of New York*, 88 U. S. 21 Wall. 196 [22: 612], above referred to, sustains the proposition for which it is quoted. In that case a proceeding to condemn certain real estate in the City of New York, for the purpose of widening Broadway, had been carried to its end, and an assessment was made in favor of Garrison for taking his property to the amount of \$40,000. On this a judgment or order of confirmation was entered in the proper court. The Legislature of New York subsequently passed a statute authorizing an appeal from the order of confirmation, to be taken by the city at any time within four months, and made it a duty of the court to which such application should be made that, if it should appear there was any error, mistake, or irregularity at any stage of the proceedings, or that the assessments or awards had been unfair and unjust, to vacate the order of confirmation and refer the matter back to new commissioners, who should proceed to amend and correct the report.

This court said in reviewing the judgment of the Circuit Court for the Southern District of New York on that question, that "the objection to the Act of 1871, that it impairs the vested rights of the plaintiff, and is, therefore, repugnant to the Constitution of the State, is already disposed of by what we have said upon

the first objection. There is no such vested right in a judgment, in the party in whose favor it is rendered, as to preclude its re-examination and vacation in the ordinary modes provided by law, even though an appeal from it may not be allowed; and the award of the commissioners, even when approved by the court, possesses no greater sanctity." The language there used, and the circumstances of that case, are eminently applicable to the one now before us.

In the earlier case of *Satterlee v. Matthewson*, 27 U. S. 2 Pet. 380 [7: 458], in an action of ejectment between the parties, twice tried before the Supreme Court of the State of Pennsylvania, that court had held the law to be, as it undoubtedly was in that State, that the doctrine that the tenant was estopped to deny the title of his landlord was inapplicable to cases where the title originated under the claim of the State of Connecticut to lands in the State of Pennsylvania. While a third trial of the same case, between the same parties, was pending, the Legislature of the State of Pennsylvania passed a statute to the effect that the "relation of landlord and tenant shall exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between other citizens of this Commonwealth, on the trial of any cause now pending, or hereafter to be brought within this Commonwealth, any law or usage to the contrary notwithstanding."

The Supreme Court of the State of Pennsylvania conformed its judgment to this statute, which was at variance with the rights established by the two former judgments. The case came to the Supreme Court of the United States, and was argued before that court on the ground that the statute impaired the obligation of the contract between the tenant and the landlord, and also the obligation of the contract by which one party derived his title from the Connecticut claim. The court held that no such question was raised; that there was no contract in the case affected by this provision of the statute. The opinion, however, is more remarkable, and more pertinent to the present case, in its discussion of the doctrine of vested rights under judgments of a court, and under the condition of the title to the property existing at the time the statute was passed.

We are of opinion that the Constitution of West Virginia of 1872, in its provision for this class of cases, does not violate the obligation of a contract, where the judgment was founded on a tort committed as an act of public war.

The other question which we are called upon to decide presents more difficulty. Ever since the case of *Dow v. Johnson*, 100 U. S. 158 [25: 632], the doctrine has been settled in the courts, that in our late civil war each party was entitled to the benefit of belligerent rights, as in the case of public war, and that, for an act done in accordance with the usages of civilized warfare, under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority. The case as it is now presented to us shows that the trespass for which the original judgment was rendered was of that character; and it is argued with much force that the court

which rendered that judgment had no jurisdiction of the case, or, at all events, had no jurisdiction to render such a judgment, and that it is therefore void.

It follows from this view of the subject that the court in which it was originally rendered had jurisdiction to set it aside or annul it without the aid of the constitutional provision of the State of West Virginia, and that, on that ground alone, the decree we are called upon to review must be affirmed. In this view of the subject some of the judges of this court concur.

On the other hand, it is argued that, from what appears to have been done in that court, it was an action of which the court had jurisdiction when it was brought; that the case presented to it by the pleadings was a simple act of trespass *de bonis asportatis*, in which the defendant wrongfully seized and carried off the cattle of the plaintiff. On the issue of not guilty, judgment was rendered for the plaintiff. Whether the question of belligerent rights was there presented and tried is not to be ascertained from its records, 1st, because no record of the proceeding exists in that court; and 2dly, because it does not appear from anything of record now to be found that the question of belligerent rights was there considered. Nor are we prepared to admit, if it was considered and decided against the defendant, that the judgment is wholly and absolutely void. It is not here denied that the doctrine of *Dow v. Johnson* is correct, and that parties are protected by that doctrine from civil liability for any act done in the prosecution of a public war. But one of the very things to be decided, when an act like this is brought in question, and the defense is that it was done in the exercise of belligerent rights, is whether this defense is established by the evidence.

As regards the case now before us, we are of opinion that the judgment rendered by the Circuit Court of Preston County in this case is *prima facie* a valid judgment. On the face of the record, if the record now existed, as set forth in the case before us, it would be *prima facie* valid. It is only the facts proved by the evidence taken in the present case which impeach that judgment, and establish that it was rendered on account of acts done in pursuance of the powers of a belligerent in time of war.

Without, therefore, considering whether this judgment is absolutely void, or whether there existed any rule of law known to the court by which its validity could be inquired into before the adoption of the constitutional provision of the State of West Virginia, we proceed to inquire how the matter stands with the aid of that provision, and under all the circumstances of this case. The proposition of the plaintiff in error is that by the judgment of the Circuit Court of Preston County he had acquired a vested right in that judgment; that the judgment was his property; and that any Act of the State which prevents his enforcing that judgment, in the modes which the law permitted at the time it was recovered, is depriving him of property without due process of law, and, therefore, forbidden by the 14th Amendment of the Federal Constitution. This right of the plaintiff to enforce that judgment is insisted upon as a vested right with which no authority can lawfully interfere.

It is to be observed, in the first place, that the language of the prohibition against State interference with life, liberty, or property is that the deprivation of these precious rights shall not be had without due process of law. This phrase, "due process of law," has always been one requiring construction; and as this court observed long ago, never has been defined, and probably never can be defined, so as to draw a clear and distinct line, applicable to all cases, between proceedings which are by due process of law, and those which are not.

Judgments, however solemn, however high the court which rendered them, and however conclusive in a general way between the parties, have been subject to review, to reconsideration, to reversal, and to modification by various modes. Among these are motions for new trials, appeals, writs of error, and bills of review; and these have always been held to be due process of law. So, also, judgments of courts of law have been subject to be set aside, to be corrected, and the execution of them enjoined, by bills in chancery, under circumstances appropriate to such relief. This also must be held to be due process of law.

The present case is a bill in chancery to enjoin the execution of a judgment, and such was the relief granted by the decree of the court. In that respect it is one of the recognized processes of law for re-examining the matters on which a judgment is founded, and making such corrections, even to setting aside the whole judgment or perpetually enjoining its execution, as by the rules of equity jurisprudence are just and appropriate to the occasion. Undoubtedly the mode pursued in this case of obtaining relief against the judgment of the Circuit Court of Preston County is in its form due process of law. It is by an appeal to the courts in their regular course of procedure, and is not by any summary or unusual process applied to the determination of the rights of parties.

If it be true that, when the original action was presented to the Circuit Court of Preston County, the thing complained of was found to be an act in accordance with the usages of civilized war, during the existence of a war flagrant in that part of the country, that court should have proceeded no further, and its subsequent proceedings may be held to have been without authority of law. While it is not necessary to hold that the judgment, as presented by the record, is absolutely void, it may be conceded that a court of equity, in a proper case, can prevent the enforcement of it. But the application of this remedy may have been, and probably was, embarrassed in this case by circumstances which would render it unavailing. There might be raised against it the proposition that the defense had been presented and considered by the court in which the case was tried. Lapse of time might have prevented a court of equity from redressing the wrong inflicted by the judgment. It may have been doubtful whether the case was one of equitable cognizance; it may have been insisted that the jury passed upon the facts of the case adversely to the defendant; and it is undoubtedly true that the Supreme Court of Appeals of the State of West Virginia had decided, in this class of cases, that the defense that the party was acting

in accordance with belligerent rights was not a sufficient defense.

These reasons, and probably the latter one mainly, were those upon which the Constitutional Convention of West Virginia acted in framing the provision which we have already cited on this subject. Was it competent for that convention to establish a rule of law which is now the recognized rule of this court, and perhaps of all the courts of the United States, which is commended by the highest authorities, and which is eminently adapted to the purpose of quieting strife and securing repose after the turmoils of a civil war, although the principle asserted was in opposition to that held by the supreme court of appeals of the State? That this principle would govern all cases where the act for which the party was sued occurred after its establishment does not admit of question. That it was the law of the country before its adoption by the State Constitution there is as little doubt. Shall it be held to be incapable of enforcement and forbidden by the Constitution of the United States because it is made to cover judgments already rendered in violation of the principle asserted? The Constitution of the State remedies the defects of the proceeding by bill in chancery; it creates no new process of law; it makes that which has always been due process of law efficient by removing objections and obstructions to its operation. It simply declares that a judgment for a wrong or tort, which in itself was erroneous, is a voidable judgment, and may be avoided, if it can be brought within the due processes of the law already existing, and shall by this means be inquired into, and if it is against right, justice, and law, shall be no longer in force, and the judgment plaintiff shall be forever enjoined from putting it into execution.

Prior to the adoption of the 14th Amendment the power to provide such remedies, although they may have interfered with what were called vested rights, seems to have been fully conceded. The cases in which this has been decided in this court are *Calder v. Bull*, 3 U. S. 8 Dall. 386 [1: 648]; *Satterlee v. Matthewson*, 27 U. S. 2 Pet. 380 [7: 458]; *Sampye v. United States*, 83 U. S. 7 Pet. 222 [8: 665]; *Watson v. Mercer*, 88 U. S. 8 Pet. 88 [8: 876]; and *Freeborn v. Smith*, 69 U. S. 2 Wall. 160 [17: 922]. In the latter case, *Mr. Justice Grier*, when the Congress of the United States had allowed an appeal where the judgment would have otherwise been final, used this language: "If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment." And he thus quotes the language of *Chief Justice Parker*, in *Forster v. Essex Bank*, 16 Mass. 245: "The truth is there is no such a thing as a vested right to do wrong; and a Legislature, which, in its Acts not expressly authorized by the Constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty or exceeding its authority."

Many other cases might be cited in which it was held that retrospective statutes, when not of a criminal character, though affecting the

rights of parties in existence, are not forbidden by the Constitution of the United States.

We do not think that the Supreme Court of Appeals of West Virginia—which seems to have carefully considered the question of due process of law in the case of *Peerce v. Kitzmiller*, and held that the statute of the State in carrying out the provisions of the Constitution did not provide due process of law—was in error when it also held that the remedy provided by the Constitution of the State, as carried out by the ancient proceeding of a bill in a court of equity, was not void for want of due process of law, nor in conflict with the Constitution of the United States.

Its judgment is therefore affirmed.

Mr. Justice Harlan, dissenting:

In *Ford v. Surget*, 97 U. S. 594, 605 [24: 1018, 1020], this court, speaking by the writer of this opinion, said that to the Confederate army was "conceded, in the interest of humanity, and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged under the laws of nations to the armies of independent governments engaged in war against each other—that concession placing the soldiers and officers of the rebel army, as to all matters directly connected with the mode of prosecuting the war, on the footing of those engaged in lawful war, and exempting them from liability for acts of legitimate warfare." It necessarily results from this doctrine, without reference to the provision of the Constitution of West Virginia, that Williams was not civilly responsible for the value of the cattle in question, if at the time he took them, he was regularly enlisted as a soldier in the Confederate army, and if his taking of them was consistent with the usages of civilized warfare. If the taking was not an act of war, but a mere trespass, his being a soldier in the Confederate army would not have constituted a defense. But whether he was or was not a soldier in that army, and whether his act was or was not one of legitimate warfare, were questions determinable in the action of trespass instituted against him in the Circuit Court of Preston County. It is not disputed that it was open to him, in that action, to prove every fact relied upon in the present suit as establishing immunity from civil responsibility for the taking of Freeland's cattle. There was a verdict and judgment against him, and that judgment, upon writ of error to the Supreme Court of Appeals of West Virginia, was affirmed in 1867. No writ of error was prosecuted to this court.

If the taking of the cattle was illegal, the right to recover from the wrong-doer their reasonable value was an absolute one, of which the owner could not be deprived by a legislative enactment of the State, or by an amendment of its Constitution. The judgment obtained by Freeland was an adjudication that the taking was illegal. He acquired by that judgment a vested right to have and demand the amount named in it, as well as the benefit of such remedies as the law gave for the enforcement of personal judgments for money. The judgment was, therefore, property of which the State could not deprive him, except by due process of law. And a constitutional provision, subsequently enacted, declaring that the defendant's

property should not be seized or sold under final process on such judgment, is not due process of law. I cannot agree that a State may, by an amendment of its fundamental law, prevent a citizen from recovering the value of property, of which, according to the final judgment of its own courts, he has been illegally deprived by a mere trespasser. That would be sheer spoliation under the forms of law. If the amendment in question had, in terms, given the defendant a right to a new trial of the action of trespass in the same court, after the time had passed within which, according to the settled modes of procedure, he could, of right, apply for a new trial, it would have accomplished, in respect to the judgment against him, precisely what, in effect, has been held in this case to be consistent with the Fourteenth Amendment.

The present case is unlike *Louisiana v. Mayor of New Orleans*, 109 U. S. 285 [27: 986], where the court sustained the validity, so far as the Constitution of the United States was concerned, of a state enactment so changing the laws for raising money by municipal taxation as to prevent, for the time, the enforcement of a judgment obtained against the City of New Orleans, for damages done to private property by a mob. But, even in that case, the court was careful to say that the relator was not deprived of his judgment, or of the right of himself or assignee to use it as a set-off against any demands of the city. It is also said: "The question of the effect of legislation upon the means of enforcing an ordinary judgment for damages for a tort rendered against the person committing it, in favor of the person injured, may involve other considerations, and is not presented by the case before us." The radical difference between that and the present case is, that the right to sue the City of New Orleans for damages on account of private property destroyed by a mob was given by statute; whereas, the right to claim compensation from a wrong-doer for his illegal conversion of private property to his own use is inherent in the owner, and cannot be taken from him by the State.

Nor, in my opinion, is the ruling in the present case sustained by *Dow v. Johnson*, 100 U. S. 158 [25: 632]. That was an action in the Circuit Court of the United States for the District of Maine, upon a judgment rendered by default in 1863 against General Dow while he was in the active discharge, within the lines of military operations, of his duties as a brigadier-general in the army of the United States. The judgment was rendered in a court of the City and Parish of New Orleans. That officer was sued in the latter court for the taking of certain personal property by soldiers under his command. He was served with process, but did not appear and make defense. "The condition of New Orleans," this court said, "and of the district connected with it, at the time of the seizure of the property of the plaintiff and the entry of judgment against Dow, was not that of a country restored to its normal relations to the Union, by the fact that they had been captured by our forces, and were held in subjection. . . . The country was under martial law, and its armed occupation gave no jurisdiction to the civil tribunals over the officers

and soldiers of the occupying army. They were not to be harassed and mulcted at the complaint of any person aggrieved by their action. The jurisdiction which the district court was authorized to exercise over civil causes between parties, by the proclamation of General Butler, did not extend to cases against them. The third special plea alleges that the court was deprived by the general government of all jurisdiction except such as was conferred by the commanding general, and that no jurisdiction over persons in the military service for acts performed in the line of their duty was ever thus conferred upon it. It was not for their control in any way, or the settlement of complaints against them, that the court was allowed to continue in existence. It was, as already stated, for the protection and benefit of the inhabitants of the conquered country and others there not engaged in the military service." General Dow, when thus sued in a local tribunal, existing by military sufferance in a country governed by martial law, was not bound, as this court said, to leave his troops and attend upon that tribunal, for the purposes of justifying his military orders, by showing that the acts complained of were authorized by the necessities of war. It was consequently held that the New Orleans Court was without jurisdiction to proceed against him. There is no analogy between that case and the present one; for the action of trespass against Williams was brought in a superior court of general jurisdiction, after the war closed, and when he was at liberty to appear and make defense. And it was determined by a court whose existence was independent of military authority.

The only possible ground upon which the judgment below can be sustained, consistently with the law of the land, is to hold that no court of any State had jurisdiction, in the year 1867, even with the parties before it, to inquire, in an action of trespass, whether an alleged taking of the private property of a citizen was a mere trespass, or was an act of war upon the part of the defendant, a Confederate soldier, and to give judgment according to the result of that inquiry.

But as the primary object in creating judicial tribunals is to provide a mode for the determination of controversies between individuals, and between individuals and the government, can it be said that no court had jurisdiction to inquire whether Freeland's cattle were taken by Williams without authority of law? Was the mere averment that the latter was a Confederate soldier, and that what he did was an act of war, sufficient to preclude all investigation as to the truth of that averment? If not, how was such an investigation to be had, in any effective mode, except in a court of justice? It is suggested that when the Preston Circuit Court ascertained that the taking of these cattle was legitimate warfare upon the part of Williams as a Confederate soldier, it ought to have dismissed the action, or directed a verdict to be rendered in his favor. But even if it erred in this respect, the judgment was not void. Its error, if any there was, could have been corrected in an appellate court. The affirmance of the judgment by the highest court of the State is to be taken as conclusive that no error was committed by the inferior state court in respect

to any matter put in issue, or which was embraced by the issue tried. So, if Williams failed to prove, under his plea of not guilty, that he *was* a Confederate soldier, and that his taking the cattle *was* an act of legitimate warfare, it was not in the power of the State, by an amendment of its Constitution, and after a final judgment against him, to give a new trial. In legal effect, that is what was done.

According to the doctrines announced by the court, if the present and similar suits in West Virginia had been decided adversely to the several defendants therein, and such decisions had been affirmed by the highest court of that State, it would be consistent with "due process of law" for the people of that State to make a further amendment of their Constitution, and give the unsuccessful litigants still another opportunity to retry the very questions of law and fact determined against them in previous actions. And so on, indefinitely, until the alleged trespasser obtained a decision in his favor. I had supposed that a final judgment, and the right of the party in whose behalf it was rendered to have the benefit of it, rested upon a firmer basis than the popular will, expressed either in a constitutional amendment or in a legislative enactment.

Without considering whether the judgment obtained by Freeland is not "a contract of the highest nature, being established by the sentence of a court of judicature" (8 Bl. Com. 465; *Taylor v. Root*, 4 Keyes, 344), I place my dissent from the opinion and judgment in this case upon the ground that the state court, in the action of trespass, had jurisdiction as to person and subject matter, and that the Constitutional Amendment of 1872, taking from Freeland, upon the identical grounds involved in that action, the benefit of his judgment against the defendant, after it had been affirmed in the highest court of the State, deprived the former of his property without due process of law.

D. H. WILLIAMS.

v.

E. D. CONGER ET AL.

(See S. C. Reporter's ed. 390-391).

Motion for rehearing.

Leave to file a motion for rehearing after the close of the term at which judgment was rendered, and upon the same reasons once overruled, will not be given.

[No. 105 of October Term, 1887.]

Decided October 22, 1888.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas.

On petition for leave to file a motion for rehearing. *Denied.*

(See 125 U. S. 397, and this edition 31:778, for report of case.)

The facts are stated in the opinion.

Mr. Eugene Williams, for the plaintiff in error, in favor of motion.

Mr. Justice Bradley delivered the opinion of the court:

Leave to file a motion for rehearing in this case is asked for on the ground of clerical error

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in the opinion. A motion for rehearing was made at the last term upon precisely the same brief now sought to be filed, and, notwithstanding the alleged misconception in the opinion of the point made by the plaintiff in error, the court was satisfied with the conclusion it had reached, and that no modification of the judgment was required, and no rehearing was necessary or called for. The motion was therefore denied. The persistent renewal of the application at this time, after the close of the term at which judgment was rendered, and especially upon the same reasons once overruled, is not in order, and does not recommend itself to the favorable consideration of the court.

FOSTER R. WARREN, Substituted for
JOEL W. KELLEY, Treasurer of LUCAS
COUNTY, OHIO, *App't.*

THE FIRST NATIONAL BANK OF TOLEDO.

SAME

THE SECOND NATIONAL BANK OF TOLEDO.

SAME

THE TOLEDO NATIONAL BANK OF TOLEDO.

SAME

THE MERCHANTS NATIONAL BANK OF TOLEDO.

SAME

THE NORTHERN NATIONAL BANK OF TOLEDO.

(See S. C. Reporter's ed. 450.)

Jurisdictional amount.

In an action to restrain the enforcement of a tax, where the decree enjoined the collection of less than \$5,000 of the tax, this court has no jurisdiction, although the bill alleged that certain United States bonds should also be exempted from taxation, but no attempt was made to obtain any relief on this ground and the controversy in respect to the bonds was settled by the payment of the taxes thereon and they were not a matter in dispute at the time of the decree.

[Nos. 356, 357, 358, 359, 360.]

Submitted Nov. 19, 1888. Decided Nov. 26, 1888.

APPEALS from decrees of the Circuit Court of the United States for the Northern District of Ohio, restraining defendant from enforcing a tax illegally assessed.

On motions to dismiss. *Dismissed.*

In these cases, decrees were taken restraining the defendant from enforcing a tax which the court found was, as to the amount involved in the decrees, illegally assessed against the banks.

The issues in the five cases are identical, and the testimony in the first case entitled above was used in the trial of each of the others.

In each of the cases a motion is made to dismiss the appeal, because the matter in dispute does not exceed the sum or value of five thousand dollars.

The decree in each case is:

"That the defendant be, and he is hereby, perpetually enjoined from collecting any taxes upon the increased valuation made by the state board of equalization aforesaid, and it being made to appear to the court that the complainant has paid all taxes charged upon the duplicate, against the shares in said bank as assessed by the county auditor for taxation, and upon the valuation made by said auditor, and that the only taxes charged against the complainant upon the bank shares aforesaid, on the tax duplicate for the year 1888, which remains unpaid, is the amount which was assessed upon the increase made by the state board of equalization, which the court finds to be illegal.

"It is therefore ordered, that the injunction aforesaid granted be held to restrain the defendant from collecting, or attempting to collect, any part of the said unpaid taxes, or any penalty or interest because of their nonpayment."

All taxes upon the valuation of the bank shares made by the auditor, were paid by the plaintiffs as appears by the decree, and hence the only matter in dispute was the tax upon the increase, over the auditor's valuation, made by the state board of equalization.

The allegation of the bill in the first above entitled case is:

"Complainant says that the auditor of Lucas County aforesaid certified to the auditor of state and the said board for the equalization of bank shares the assessment so by him placed upon the shares of complainant bank, and thereupon the said state board of equalization of bank shares added to the valuation made by the auditor aforesaid of the shares of the complainant bank the sum of \$74,858, making the aggregate value for taxation the sum of \$476,482."

In said first above entitled case the assessment by the auditor was \$401,624; the total amount of taxes for all purposes on the \$74,858, which was added by the state board, was \$1,826.58.

The allegations of the bill in said case show that a tender was made to the treasurer before the commencement of the suit, and a copy of the treasurer's acknowledgment of such tender copied into the bill shows the amount in dispute very clearly. It is as follows:

"The First National Bank of Toledo has tendered to me all taxes charged against it and on its bank shares except \$1,826.58, being the tax on \$74,858 the increase made over the auditor's valuation by the state board of equalization for bank shares, which tender was refused. The bank offers to pay the same, leaving the said \$1,826.58 to be litigated. Refused.

"Joel W. Kelsey, Treasurer."

The prayer of the bill is:

"That a provisional injunction may be granted restraining and enjoining said defendant from proceeding to collect the taxes so unlawfully assessed as aforesaid, or any part

thereof, until the further order of this court, and that upon the final hearing of this cause the said injunction may be made perpetual, and for all other proper relief in the premises."

The preliminary injunction granted in the case restrained the collection of nothing but the \$1,826.58 which is specifically named; and nowhere in the case is any other or additional relief sought.

In the order granting the preliminary injunction it is by consent provided:

"That the treasurer may, and he is hereby authorized to, receive from the complainant the balance of the taxes charged upon the duplicate against the complainant in the semi-annual installments provided by law, without prejudice to his right to collect the said sum of \$1,826.58 or any part thereof, if upon final hearing it shall be adjudged that the same or any part thereof is legally and equitably chargeable against the complainant."

The decree in this case was limited to the amount of tax placed upon the increased valuation, to wit, \$1,826.58, and that was the only thing at any time in controversy.

All other taxes were paid in pursuance of the consent of the order made at the time of the preliminary injunction.

The bills in these cases, contained allegations that the government bonds held by the bank to secure its circulation should also be exempted from taxation, and the amount of such bonds was stated in the bills; but no attempt was ever made in the cases to obtain any relief on this ground, and the payment of the taxes by the plaintiff effectually settled any controversy between the parties on that subject. It was not a matter in dispute at the time of the decree, and is not a matter in dispute in this court.

The case of *The First National Bank*, first above named, involves the largest amount, the other cases involving precisely the same principles, the allegations and proof being in all of them identical, except as to the amount, which is as follows in the cases respectively:

Second National Bank.....	\$772.69
Merchants National Bank..	773.45
Toledo National Bank.....	298.02
Northern National Bank...	290.45

Mr. John H. Doyle, for appellees, for motions to dismiss:

It is not material how much relief was demanded if the actual matter about which the parties are now disputing is less than \$5,000.

The treasurer has got all the money he ever claimed from the bank, except \$1,826.58; and all that he is now claiming, and all that we are resisting his claim to, is that \$1,826.58.

Tynnetman v. First Nat. Bank, 100 U. S. 6 (25:580); *Russell v. Stansell*, 105 U. S. 808 (26:989).

If the judgment is for a sum less than \$5,000, the defendant cannot sue out a writ of error, although the plaintiff claims an amount larger than that sum.

Gordon v. Ogden, 28 U. S. 3 Pet. 33 (7:592); *Cooke v. Woodrow*, 9 U. S. 5 Cranch, 18 (3:22); *Smith v. Honey*, 28 U. S. 3 Pet. 469 (7:744); *Lee v. Watson*, 68 U. S. 1 Wall. 887 (17:557); *Pierce v. Wade*, 100 U. S. 444 (25:785); *Balth-*

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more & P. R. Co. v. Trook, 100 U. S. 112 (25: 571); *Lamar v. Micou*, 104 U. S. 465 (26: 774).

The expression, sum or value of the matter in dispute, has reference to the date of the decree in the circuit court. *Bank of U. S. v. Daniel*, 87 U. S. 12 Pet. 82 (9: 989); *Terry v. Hatch*, 98 U. S. 44 (28: 796).

This is an appeal by the defendant against whom the decree is only \$1,826.53. The plaintiff does not appeal. It is not material, therefore, what claim is made in its bill, even if it had insisted upon the exemption of its government bonds upon the trial, as the decree did not give it any relief upon that claim. But, in fact, it did not insist upon that claim.

The rule as established by this court in *Hilton v. Dickinson*, 108 U. S. 165 (27: 688), is decisive of that question.

Mr. Isaac P. Pugsley for appellant.

The Court ordered the several above cases to be dismissed for want of jurisdiction.

EVAN RANDOLPH, *Appt.*,

v.

THE QUIDNECK COMPANY ET AL.

(See S. C. Reporter's ed. 444.)

Death of party—practice under Rule 15.

Where an appeal has been dismissed, pursuant to Rule 15, § 1, the decree of dismissal may, on cause shown, be rescinded upon the proper representatives of the deceased party being made parties to the suit and their appearance being entered under the rule.

[No. 491.]

Submitted Nov. 19, 1888. Decided Nov. 26, 1888.

APPEAL from the Circuit Court of the United States for the District of Rhode Island. *Dismissed.*

On April 9, 1888 (the death of Evan Randolph, the appellant in this cause, having been suggested on the record by the appellees, under the 15th Rule), on motion by the appellees to make the proper representatives of appellant parties, the court made an order that unless the proper representatives of the deceased appellant should voluntarily become parties within the first ten days of the ensuing term of the court, the appellees should be entitled to have the appeal dismissed, provided however that a copy of the order should be printed in some newspaper of general circulation within the State of Rhode Island for three successive weeks, at least sixty days before the beginning of the term of this court then next ensuing.

On May 1, 1888, Mr. Benjamin F. Butler wrote to the clerk of this court a letter in which he stated that his attention had been called to the notice in the paper stating that the death of the appellant had been suggested on the record and inviting his proper representatives to appear, in which letter he asked the clerk to enter his appearance for such representatives, in obedience to the notice. The clerk on the 3d of May, 1888, replied to Mr. Butler, that it would be necessary for him to make a motion

in open court within the first ten days of the next term and obtain an order to make said representatives parties appellant in place of the deceased, and informing him that after the order to make the new parties was obtained, he could enter his appearance for them.

On November 19, 1888, Mr. C. Frank Parkhurst, for appellees, moved to dismiss the appeal on showing to the court that the terms of the first order had been duly complied with, by causing a copy of said order to be printed as therein directed, and that the proper representatives of the deceased party had not become parties to the cause, in pursuance of said order.

On November 26, 1888, the appeal was dismissed with costs.

On December 3, 1888, Mr. Benjamin F. Butler, in behalf of the executors of the deceased party and as counsel of appellant, moved the court to rescind and annul the decree of November 26, 1888, of dismissal, and restore the cause to the docket, on the ground that the clerk's letter had never been seen or heard of by said Butler until December 3, 1888, and that no notice of the motion for an order dismissing said appeal was ever served on said Butler, and that he had no knowledge of the pendency of any such motion until after said order of dismissal had been made.

On December 10, 1888, the court granted such motion to rescind and annul the decree of dismissal of November 26, 1888, upon the executors of Evan Randolph, deceased, being duly made parties and their appearance entered under the rule within 80 days and the payment of the costs.

On December 12, 1888, John S. Jenks, William H. Jenks and Charles Rhoades, said executors of Evan Randolph, deceased, were made parties appellants in the cause and the decree of dismissal of November 26, 1888, was vacated and set aside and the cause restored to the docket.

Messrs. A. D. Payne and Benj. F. Butler for appellant.

Messrs. C. Frank Parkhurst and Thos. H. Parkhurst for appellees:

GEORGE W. RADFORD, Assignee, etc.,
Appt.,

v.

AGNES FOLSOM, Admr., etc., ET AL.

(See S. C. Reporter's ed. 892-894.)

Appeal, when taken—conditional decree.

1. A decree of the circuit court cannot be reviewed here on appeal unless the appeal is taken within two years after the entry of such decree.
2. Where the decree was entered October 10, 1885, and the appeal was not taken until December 30, 1887, the appeal will be dismissed although the appeal was taken within two years from the time the decree took full effect.

[No 1014.]

Submitted Nov. 5, 1888. Decided Nov. 26, 1888.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Iowa, whereby it was decreed that

there was due from the complainant to the defendant Agnes Folsom, as administratrix of the estate of Jeremiah Folsom, deceased, \$14,645.82, with interest, and that the complainant, George W. Radford, as assignee in bankruptcy of the estate and effects of Simeon Folsom and Frank Folsom, bankrupts, pay to the defendant Agnes Folsom, as such administratrix, the said sum with interest, and that execution issue therefor; and whereby it was further decreed that if the complainant shall satisfy the court within ninety days from this date (October 10, 1885) that the amounts paid by Simeon Folsom for the purchase of incumbrances and notes specified in the master's report amounting to \$14,084.77 or any part thereof have inured to the benefit of Jeremiah Folsom or his estate, by the production and cancellation or discharge of said incumbrances and notes, then there shall be credited on the first named amount above ordered to be paid by complainant the amount of such incumbrances and notes so produced and canceled or discharged.

On motion to dismiss appeal. *Dismissed.*

The decree was entered October 10, 1885; the appeal was not taken until December 30, 1887, more than two years after the entry of the decree.

Mr. Joseph G. Anderson and H. H. Trimble, for appellees, in favor of motion to dismiss:

The foregoing motion is based on section 1008 of the Revised Statutes, providing that no decree of a circuit court, in equity, shall be reviewed in the supreme court on appeal unless the appeal is taken within two years after the entry of such decree.

That the appeal in this case was taken more than two years after the entry of the decree is plain. The decree was entered October 10, 1885. The appeal was not taken until December 30, 1887. This is clearly not within two years.

Messrs. Walter H. Smith and W. F. Sapp, for appellant, in opposition:

This decree must be construed as an entirety. Taken as a whole, it shows that it was not to go into effect until the period of ninety days had expired from the time of its rendition.

If the decree had expressly provided that it should not take effect until the expiration of ninety days from its date, we think there can be no doubt but that the two years of limitation would not begin to run until the expiration of that period. The statute should receive a construction that will carry out its spirit rather than its letter. It was intended to give the parties two full years from the time their liability was conclusively fixed by a decree, in which to appeal.

See *Radford v. Folsom*, 128 U. S. 725 (81:292).

Appellee's counsel in reply:

Upon this motion, it is sufficient under the rule to print the material parts of the record.

St. Louis Nat. Bank v. U. S. Ins. Co. 100 U. S. 43 (25:547); *Waterville v. Van Slyke*, 115 U. S. 290 (29:406).

Under the statute the two years' limitation begins to run, not from the taking effect of the decree, but from "entry of such decree."

Rev. Stat. U. S. § 1008; *Scarborough v. Pargoud*, 108 U. S. 567 (27:824).

The directions in the decree were not in-

tended to prevent the enforcement of the decree by execution against the administrator, for such executions were expressly allowed.

Stovall v. Banks, 77 U. S. 10 Wall. 538-587 (19:1036-1038).

The appellant does not show that he ever had any such notes and incumbrances as are specified, or that he ever produced or offered to produce same to be canceled or discharged.

Stovall v. Banks, 77 U. S. 10 Wall. 538-585 (19:1036).

The Court ordered the appeal to be dismissed for want of jurisdiction.

THE PACIFIC EXPRESS COMPANY,

Plff. in Err.,

v.

SAM. MALIN.

(See S. C. Reporter's ed. 394-395.)

Jurisdiction as to amount.

1. Where the defendant below sues out the writ of error, the matter in dispute is the judgment rendered against him.
2. Where the damages claimed by plaintiff below was \$5,850, and he recovered a judgment for \$3,000 and defendant sued out the writ of error, this court is without jurisdiction.

[No. 1208.]

Submitted Nov. 19, 1883. Decided Nov. 26, 1883.

IN ERROR to the Circuit Court of the United States for the Western District of Texas, to review a judgment in favor of plaintiff in an action for an injury to his property in which he claimed damages in the sum of \$5,850, and judgment was entered on a verdict by a jury for \$3,000, on which plaintiff, at the suggestion of the court, entered a remittitur of \$350, thus reducing the judgment from \$3,000 to \$2,650.

On motion to dismiss. *Dismissed.*

Mr. W. Hallett Phillips, for defendant in error, in favor of motion, cited *Walker v. U. S.* 71 U. S. 4 Wall. 168 (18:319).

No one opposing.

Mr. A. S. Lathrop entered for plaintiff in error.

The court ordered the case dismissed for want of jurisdiction.

THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY,

Plff. in Err.,

v.

THE SWITZERLAND MARINE INSURANCE COMPANY.

(See S. C. Reporter's ed. 440.)

Drummer's baggage—liability of railroad company.

A judgment against a railroad company for the value of a trunk and the jewelry contained therein, checked to a traveling agent or drummer, but belonging to his principal, and destroyed by fire

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through the company's negligence, affirmed by reason of a divided court, the judgment being in favor of an insurer of the property to whom the claim for the loss was assigned.

[No. 111.]

Argued Dec. 6, 1888. Decided Dec. 10, 1888.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio, to review a judgment in favor of plaintiff, for the loss, by fire, of a trunk and jewelry contained therein, through the negligence of defendant. *Affirmed by reason of a divided court.*

This suit was brought to recover a claim for lost baggage. The petition alleges that on the 10th day of December, 1880, one C. G. Megrue, who was a traveling agent for the firm of Aiken, Lambert & Co., of New York City, became a passenger on one of the trains of the defendant, bound for Louisville; that he purchased a first class ticket and that he had checked by the defendant as his baggage a certain trunk belonging to Aiken, Lambert & Co., containing jewelry samples of the value of about \$6,000; that said trunk, and also a valise containing his personal baggage and other samples, were received by the defendant as baggage on the said train and that the defendant undertook to carry them safely to the City of Louisville, but that through the negligence of the defendant, the baggage car and its contents, including the trunk and valise above specified, were consumed by fire. The plaintiff below was an insurer of said property under a policy which subrogated it to the rights of the insured and required the assignment of such claims. The claim in suit was assigned actually to the insurance company.

The answer was that the defendant received the trunk and valise, supposing them to be the personal baggage of the said C. G. Megrue and without any knowledge that they contained merchandise. It admits that the said Megrue became a passenger as alleged, and that it, said defendant, was a common carrier and that the trunk and valise were checked as baggage, but denies every other allegation of the petition, and, among other things, the negligence charged.

The case was removed to the federal court from the Superior Court of Cincinnati. After the case was removed to the United States Circuit Court, a motion was made to transfer the case to the equity calendar, on the ground that the plaintiff's title was equitable. The motion was granted. But afterwards, upon application of counsel, it was retransferred to the law docket, where it came on for hearing before a jury. The jury rendered a general verdict in favor of plaintiff and a special verdict in answer to certain questions put to them by the court which were as follows:

Q. 1. What was the value of the contents of the trunk destroyed, after deducting salvage? *Ans. \$4,955.68.*

Q. 2. Did the checking agent have notice when he checked the trunk that it contained jewelry or property other than the personal baggage of Megrue? *Ans. No.*

Q. 3. At the time of the checking of said trunk, and prior thereto, was it the custom of the defendant to carry as baggage and without extra charge, excepting on account of extra

weight, drummers' trunks containing merchandise, knowing that they were drummers' trunks and that they contained merchandise? *Ans. Yes.*

Q. 4. Was the loss of said trunk occasioned by the gross negligence of the defendant? *Ans. Yes.*

Q. 5. Did the defendant exercise ordinary care as to the trunk which with its contents was lost?—that is, such care as a prudent man would exercise in like circumstances with reference to his own property? *Ans. No.*

Defendant filed a motion for a new trial, which the court overruled and rendered judgment upon the general verdict, but set aside the fourth special finding.

The cause is now here on the bill of exceptions setting out all the evidence, and a writ of error.

The assignments of error are as follows:

1. The court erred in setting aside the entry, transferring the case to the chancery docket, and compelling the defendant to try the case before a jury.

2. The court erred in permitting evidence to go before the jury, objected to by the plaintiff in error, then defendant.

3. The court erred in excluding evidence offered by the plaintiff in error, then defendant.

4. The court erred in its general charge to the jury in the matters excepted to by the plaintiff in error, then defendant.

5. The court erred in refusing to charge the jury as requested by the plaintiff in error, then defendant.

6. The court erred in entering judgment upon the verdict and special findings against the plaintiff in error, then defendant.

7. There are other errors in the proceedings and judgment of said court in said cause prejudicial to the rights of the plaintiff in error.

The second assignment of error related to certain evidence offered by the plaintiff below to show that the sample trunks of jewelry salesmen were of peculiar construction and build, and so peculiar that their character and contents were discernible at once by anybody called upon to handle them. The object of this class of testimony was to show notice to the railroad company of the general character of the contents of the trunk.

The second class of testimony objected to was the testimony of witnesses tending to show the custom, extending over years, to carry drummers' trunks as baggage without extra charge except for overweight.

Mr. T. D. Lincoln, for plaintiff in error:

The court erred in refusing to charge the jury that the plaintiff, upon the evidence, was not entitled to recover.

In every case before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the parties producing it, upon whom the *onus* of proof is imposed.

Pleasants v. Fant, 89 U. S. 22 Wall. 120, 121 (22: 782); *Randall v. Balt. & O. R. Co.* 109 U. S. 482 (27: 1005).

If there is evidence from which the jury can

properly find the question for the party on whom the burden of proof rests, it should be submitted; if not, it should be withdrawn from the jury.

Hyatt v. Johnston, 91 Pa. 200, 201; *Dwight v. Germania L. Ins. Co.* 4 Cent. Rep. 529, 103 N. Y. 859; *Ryder v. Wombwell*, L. R. 4 Exch. 89; *Wittkowsky v. Wasson*, 71 N. C. 455; *Bagley v. v. Cleveland Rolling Mill Co.* 21 Fed. Rep. 159.

The facts did not authorize a verdict for the plaintiff.

Dunlap v. International Steamboat Co. 98 Mass. 378, 379; *Alving v. Boston & A. R. Co.* 126 Mass. 131, 132; *Blumande v. Fitchburg R. Co.* 137 Mass. 824; *Haines v. Chicago, St. P. M. & O. R. Co.* 29 Minn. 161; *Michigan Cent. R. Co. v. Carrow*, 78 Ill. 358, 359; *Gardner v. New Haven & N. Co.* 51 Conn. 148; *Macrow v. Great Western R. Co.* L. R. 6 Q. B. 620; *Cahill v. London & N. W. R. Co.* 10 C. B. N. S. 171; *Great Northern R. Co. v. Shepherd*, 8 Exch. 87.

The custom or usage, to be effective, must be one to carry the merchandise of other persons not passengers for the baggage of the passenger, thus checking the baggage.

Michigan Cent. R. Co. v. Carrow, 78 Ill. 350; *Cahill v. London & N. W. R. Co.* 10 C. B. N. S. 172.

Custom and usage must be general, uniform, notorious, reasonable and consistent with the rules of law.

Blanchard v. Isaacs, 3 Barb. 888, 389; 1 Duer, Ins. 277, 278, 279.

Mr. C. B. Matthews, for defendant in error:

This is not an assignment in equity through the doctrine of subrogation, but an actual assignment.

Section 4998, of the Revised Statutes of the State of Ohio, provides that every suit shall be brought by the real party in interest.

Whitman v. Keith, 18 Ohio St. 134; *Masury v. Southworth*, 9 Ohio St. 340; *Hayward v. Andrews*, 106 U. S. 672 (27: 271); *New York Guaranty Co. v. Memphis Water Co.* 107 U. S. 205 (27: 484).

Should merchandise in a passenger's trunk be put on a train, it may be presumed the carrier was misled and could claim the privileges of a gratuitous bailee. But where the conduct of the passenger was fair and open to the carrier, or his proper agent must have known what he accepted, the case is different.

Schouler, Bailm. 349; *Story*, Bailm. § 571; 2 Redf. R. R. 149, 151; 2 Kent, Com. 608.

The ordinary liability of a common carrier with reference to baggage is one of insurance of its safety.

Where merchandise is knowingly received and checked as baggage, the same liability attaches.

Macrow v. Great Western R. Co. L. R. 6 Q. B. 619; *Cahill v. London & N. W. R. Co.* 10 C. B. N. S. 168; Redf. Carriers, 78 and notes; 2 Redf. R. R. 46 and notes; *Hutch. Carriers*, 685; *Thomp. Carriers*, 520, 528; *Great Northern R. Co. v. Shepherd*, 8 Exch. 80; *Haines v. Chicago, St. P. M. & O. R. Co.* 29 Minn. 160; *Ravson v. Mo. R. R. Co.* 4 Mo. App. 582; *Hoeger v. Chicago, M. & St. P. R. Co.* 63 Wis. 100; *Stoneman v. Erie R. Co.* 52 N. Y. 429; *Sloman v. Great Western R. Co.* 67 N. Y. 208; *Minter v. Pacific R. Co.* 41 Mo. 508; *Waldron v. Chi-*
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cago & N. W. R. Co. 1 Dak. 386; *Pa. Co. v. Miller*, 85 Ohio St. 541; *Jacobs v. Tutt*, 33 Fed. Rep. 412; *Chicago, R. I. & P. R. Co. v. Conklin*, 32 Kan. 55; *Pfister v. Cent. Pac. R. Co.* 70 Cal. 169; *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 262 (20: 423); *N. Y. Cent. & H. R. R. Co. v. Fratoff*, 100 U. S. 24 (25: 581); *Ill. Cent. R. Co. v. Tronstine*, 64 Miss. 834; *Coward v. East Tenn., V. & G. R. Co.* 16 Lea (Tenn.) 225; *Spooner v. Hannibal & St. J. R. Co.* 23 Mo. App. 408; *Texas R. R. Co. v. Kapp*, 28 Am. Law. Reg. N. S. 876; *Butler v. Hudson River R. Co.* 3 E. D. Smith, 571; *Hellman v. Holladay*, 1 Woolw. 865.

It is not necessary to establish gross negligence.

Curtis v. Delaware, L. & W. R. Co. 74 N. Y. 116; *Western U. Teleg. Co. v. Griswold*, 37 Ohio St. 301; *Wilson v. Brett*, 11 Mees. & W. 113; *Pinton v. Dibbin*, 2 Q. B. 648.

It may well be doubted whether between gross negligence and negligence merely, any intelligible distinction exists.

Beal v. South Devon R. Co. 3 Hurl. & C. 337; *Austin v. Manchester S. & L. R. Co.* 11 Eng. L. & Eq. 513; *Wyld v. Pickford*, 8 Mees. & W. 448; *Duff v. Budd*, 8 Brod. & B. 177; *Grill v. General I. S. Collier Co.* L. R. 1 C. P. 600; *Giblin v. McMullen*, L. R. 2 Pr. C. 817; *Shearm. & Redf. Neg.* 4th ed. § 47; *Pa. R. Co. v. Coon*, 2 Cent. Rep. 323, 111 Pa. 480, 440; *N. Y. Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357 (21: 627); *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 493 (23: 374, 376); *The New World v. King*, 57 U. S. 16 How. 474 (14 L. ed. 1019); *Lake Shore & M. S. R. Co. v. Foster*, 2 West. Rep. 299, 104 Ind. 293.

Where a baggage man, with general authority to receive the baggage of persons intending to go upon the company's trains, receives the baggage in violation of the rules of the company, the latter will be liable for the loss of such baggage, unless the existence of such rule is brought to the knowledge of the owner.

Quimit v. Henshaw, 85 Vt. 605.

If the agent of the company received it without knowing its contents, but the passenger was guilty of no fraud or deception, then the company is liable for its loss where not exercising such care as a prudent man would exercise in like circumstances with reference to his own property.

N. J. Steam Nav. Co. v. Merchants Bank, 47 U. S. 6 How. 844 (12: 465); *Pa. Co. v. Miller*, 85 Ohio St. 541; *Sloman v. Great Western R. Co.* 67 N. Y. 208.

If the action is grounded on negligence, the contract becomes immaterial.

Pollock, Torts, 448, 449; *Pippin v. Sheppard*, 11 Price, 400; *Marshall v. York, N. & B. R. Co.* 11 C. B. 655; *Collett v. London & N. W. R. Co.* 16 Q. B. 984.

In regard to the evidence of custom, rights are measured frequently by the understanding of the parties arising out of a course of business.

Story, Agency, 45, 50, 54, 55, 56, 84, 85, 102, 103; 2 Greenl. Ev. §§ 60, 61; *Elkins v. Macklish*, Ambler, 184; *Washington Mut. F. Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480; *Olcott v. Tioga R. Co.* 27 N. Y. 548; *Hoyt v. Thompson*, 19 N. Y. 208; *Bank of U. S. v. Dandridge*, 26 U. S. 12 Wheat. 64 (6: 552); *Cobb v. Lunt*, 4

Me. 508; *Dow v. Greene*, 16 Barb. 72; Lawton, Usage, 215, 216, 217; Hutch. Carriers, § 87; 2 Rorer, R. R. 1097, 1098; *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 32 Am. & Eng. R. R. Cas. 627; *Great Western R. Co. v. Bunch*, L. R. 13 App. Cas. 81; *Pickford v. Grand Junction R. Co.* 12 Mees. & W. 766; *Kuter v. Michigan Cent. R. Co.* 1 Biss. 85.

It is immaterial that the railroad company received no extra pay for the trunk; it could have charged it.

Parmelee v. Louisa, 74 Ill. 116; *Lemon v. Chancellor*, 68 Mo. 840; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291 (28: 896); *Lake Shore & M. S. R. Co. v. Foster*, 2 West. Rep. 299, 104 Ind. 293; *McGill v. Rowand*, 8 Pa. 452; *Giles v. Fawcett*, 18 Md. 127; *Graffax v. Boston & M. R. Co.* 67 Maine, 284.

Judgment affirmed with costs, by reason of a divided court.

THE COUNTY OF JACKSON, IN THE
STATE OF MISSOURI, *Pff. in Err.*,
v.
THE NINTH NATIONAL BANK OF
NEW YORK.

(See S. C. Reporter's ed. 439.)

Judgment upon coupons of bonds of Jackson County, Missouri, issued on behalf of Van Buren Township to the Lexington, Lake and Gulf Railroad Company, rendered in favor of plaintiff for the amount of the coupons, affirmed by operation of law, this court being divided.

[No. 102.]

Argued Dec. 3, 4, 1888. Decided Dec. 17, 1888.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri, to review a judgment in favor of plaintiff for the amount of certain coupons of bonds of Jackson County, Missouri, issued on behalf of a township in said county. *Affirmed by reason of a divided court.*

This suit was upon coupons attached to bonds issued by the County Court of Jackson County, in the State of Missouri, on behalf of Van Buren Township, in said county, under the provisions of what is known as the "Township Aid Act of 1868." The following is the form of the bonds:

"No. \$1,000.

United States of America.

State of Missouri, County of Jackson.

Issued pursuant to articles of consolidation, in payment of stock due the Lexington, Lake and Gulf Railroad Company, consolidated October 4, A. D. 1870.

Know all men, by these presents, that the County of Jackson, in the State of Missouri, acknowledges itself indebted and firmly bound to the Lexington, Lake and Gulf Railroad Company in the sum of one thousand dollars, which sum the said County of Jackson, for and in behalf of Van Buren Township therein promises to pay in gold to said Lexington, Lake and Gulf Railroad Company, or bearer, 181 U. S.

at the Bank of America, in the City and State of New York, on the... day of...., A. D. 187...., together with interest in gold thereon from the....day of...., 187...., at the rate of six per cent per annum, which interest shall be payable semi-annually on the presentation and delivery at said Bank of America of the coupons of interest hereto attached.

This bond being issued under and pursuant to an order of the County Court of Jackson County, by virtue of an Act of the General Assembly of the State of Missouri, approved March 28, 1868, entitled "An Act to Facilitate the Construction of Railroads in the State of Missouri," and authorized by a vote of the people taken August 30, 1870, as required by law, upon the proposition to subscribe fifty thousand dollars to the capital stock of the Pleasant Hill Division of the Lexington, Chillicothe and Gulf Railroad Company, which said Railroad Company last aforesaid and the former Lexington, Chillicothe and Gulf Railroad Company were on the 4th day of October, 1870, consolidated as required by law, into one company, under the name of the Lexington, Lake and Gulf Railroad Company.

And which said last named railroad company, as provided by law, and under the terms of said consolidation thereof, possesses all the powers, rights and privileges, and owns and controls all the assets, subscriptions, bonds, money and properties whatsoever of the two said several companies forming said consolidation or either of them.

In testimony whereof, the said County of Jackson has executed this bond by the presiding justice of the County Court of said County, under the order thereof, signing his name hereto, and by the Clerk of said Court, under the order thereof, attesting the same and affixing the seal of said court. This done at the City of Independence, County of Jackson, this....day of...., A. D. 187...."

These bonds were issued in aid of the same enterprise as those passed on by this court in *Harshman v. Bates County*, 92 U. S. 569 (28: 747) and *Bates County v. Winters*, 97 U. S. 83 (24: 933) and 112 U. S. 835 (28: 744), but under different circumstances as to the terms and conditions of the petition upon which the vote was taken and the facts constituting the alleged subscription. The vote was taken upon a proposition to subscribe to the stock of the Pleasant Hill Division of the Lexington, Chillicothe and Gulf Railroad Company, and the bonds were issued by the county court to the Lexington, Lake and Gulf Railroad Company. The bonds contain the same recitals, and are in all material respects similar, upon their face, with those in the *Bates County Cases*; and one of the questions presented is, whether—upon the facts in this case, as it was upon the facts in those cases—there was a valid contract of subscription to the stock of the company proposed in the vote, before it was extinguished by the consolidation. The other question presented is, whether the bonds are not void because issued contrary to the terms and conditions of the proposition made by the voters of the township.

Assignment of errors.

The plaintiff in errors assigns the following errors:

First. The findings of the court are not sufficient to support a judgment for defendant in error.

Second. Upon the findings of the court, the judgment should have been for the plaintiff in error, instead of the defendant in error.

Third. The court erred in finding, as a conclusion of law, upon the facts found, that the defendant in error was entitled to a judgment.

Fourth. The judgment is against the law and the facts found.

And for a more particular assignment of errors, the plaintiff in error says:

First. It does not appear from the special finding of facts by the circuit court that the Township of Van Buren, or the County Court of Jackson County in its behalf, made any contract of subscription to the capital stock of the Pleasant Hill Division of the Lexington, Chillicothe and Gulf Railroad Company, or the Lexington, Lake and Gulf Railroad Company, or any other company; nor was there in fact or law any subscription or contract of subscription by said Van Buren Township, or the County Court of Jackson County in its behalf, to the capital stock of any company; and the court therefore erred in rendering judgment for the defendant in error on the special finding of facts.

Second. It appears from the special finding of facts by the circuit court that neither the Pleasant Hill Division of the Lexington, Chillicothe and Gulf Railroad, nor the Lexington, Chillicothe and Gulf Railroad Company, nor the Lexington, Lake and Gulf Railroad Company ever located or built, or had any power or authority under their charters to locate or build, a railroad in compliance with the terms and conditions of the petition or proposition voted on by the voters of Van Buren Township, in this, that said petition and proposition called for a railroad to commence at the Town of Chillicothe, which is in the second tier of counties north of the Missouri River, and none of said companies had any power or authority to build a railroad north of the Missouri River. Therefore the County Court of Jackson County could not, in behalf of Van Buren Township, make any valid subscription to the capital stock of either of said companies; and the court, for this reason, also erred in rendering judgment for the defendant in error upon the special finding of facts.

Messrs. C. O. Tichenor and Edward P. Gates, for plaintiff in error:

There was no subscription, or contract of subscription, to the stock of the Pleasant Hill Company.

Bates Co. v. Winters, 112 U. S. 325 (28: 744); *Bates Co. v. Winters*, 97 U. S. 83 (24: 983); *Aspinwall v. Daviess Co.* 68 U. S. 22 How. 364 (16: 296); *Buffalo & J. R. Co. v. Falconer*, 108 U. S. 821 (26: 471); *State v. Garrouette*, 67 Mo. 458; *Weil v. Greens Co.* 69 Mo. 284-5; *Carlisle v. Saginaw Valley & St. L. R. Co.* 27 Mich. 816; *Sevall v. Eastern R. Co.* 9 Cush. 12; *Gray v. Portland Bank*, 8 Mass. 864; *Park v. Northern Cent. Mich. R. Co.* 38 Mich. 23; *Hopper v. Covington*, 10 Biss. 488, 118 U. S. 148 (80: 190);

Hannibal v. Fauntleroy, 105 U. S. 408 (26: 1108); *Harshman v. Knox Co.* 122 U. S. 806 (30: 1152); *Cowdrey v. Canaadea*, 16 Fed. Rep. 582; *Gilson v. Dayton* 123 U. S. 59 (31: 74); *Wilson v. Salamanca*, 99 U. S. 504 (25: 831); *Scotland Co. v. Thomas*, 94 U. S. 691 (24: 220); *Marsh v. Fulton Co.* 77 U. S. 10 Wall. 676 (19: 1040); *Dixon Co. v. Field*, 111 U. S. 83 (28: 860); *Daviess Co. v. Dickinson*, 117 U. S. 657 (29: 1026).

The following cases show that the bonds in question were made and delivered without authority because of the failure and inability of the company to comply with the condition of the proposition voted on by the taxpayers:

Concord v. Portsmouth Sav. Bank, 92 U. S. 625 (23: 628); *Buffalo & J. R. Co. v. Falconer*, 108 U. S. 821 (26: 471); *Chicago, B. & Q. R. Co. v. Aurora*, 99 Ill. 205; *Thomas v. Lansing*, 14 Fed. Rep. 618; *Mellen v. Lansing*, 11 Fed. Rep. 829; 20 Blatchf. 278; *Virginia & T. R. Co. v. Lyon Co.* 6 Nev. 68; *State v. Daviess Co. Ct.* 64 Mo. 30; *Wagner v. Meely*, 69 Mo. 150; *State v. Minneapolis*, 32 Minn. 501; *Memphis, K. & O. R. Co. v. Thompson*, 24 Kan. 170; *Lawson v. Schnellen*, 33 Wis. 288; *Portland & O. C. R. Co. v. Hartford*, 58 Maine, 23; *Aurora v. West*, 22 Ind. 89; *Foot v. Mount Pleasant*, 1 McCrary, 101; *Cowdrey v. Canaadea*, 16 Fed. Rep. 582.

If the bonds are void for want of authority to issue them, the levy and collection of taxes and payment of interest on them for a time by the county court cannot make them valid.

Katzenberger v. Aberdeen, 121 U. S. 172 (30 911); *Leslie v. Urbana*, 8 Biss. 435 (affirmed in supreme court); *Thomas v. Lansing*, 14 Fed. Rep. 618; *Lewis v. Shreveport* 108 U. S. 232 (27: 725); *Marsh v. Fulton Co.* 77 U. S. 10 Wall. 676 (19: 1040); *State v. Daviess Co. Ct.* 64 Mo. 30. *Mr. J. B. Henderson*, for defendant in error:

Where the constituent company has express authority to consolidate with some other designated company, the subscription and bonds may be given to either the original or the consolidated company.

Washburn v. Cass Co. 8 Dill. 251; *Harter Trop. v. Kernochan*, 108 U. S. 562 (26: 411); *Menasha v. Hazard*, 102 U. S. 95 (26: 85); *Scotland Co. v. Thomas*, 94 U. S. 682 (24: 219); *Wilson v. Salamanca*, 99 U. S. 499 (25: 830); *Taylor v. Ypsilanti*, 105 U. S. 60 (26: 1008).

In the pending case there was an actual subscription of the stock to the constituent company before consolidation.

Nugent v. Putnam Co. 86 U. S. 19 Wall. 241 (22: 88); *Cass Co. v. Gillett*, 100 U. S. 585 (25: 585); *Warren Co. v. Marcy*, 97 U. S. 107 (24: 981); *Moultrie Co. v. Rockingham Sav. Bank*, 92 U. S. 631 (23: 631); *Clarke Co. Ct. v. Paris W. & K. R. Turnpike Co.* 11 B. Mon. 143; *Western Sav. Fund Soc. v. Philadelphia*, 81 Pa. 175; *Logansport v. Blakemore*, 17 Ind. 818; *Sacramento v. Kirk*, 7 Cal. 419.

Under the express statute law of Missouri and the repeated decisions of its courts, the act of Tilton Davis, the attorney and agent of the company, in declaring, as a matter of record, the company's assent to and approval of the order of subscription, is binding on the company even as between the original parties.

Preston v. Mo. & P. Lead Co. 51 Mo. 43; *Lungstrass v. German Ins. Co.* 57 Mo. 107. See Mer-

chants Nat. Bank v. State Nat. Bank, 77 U. S. 10 Wall, 644 (19: 1018); *State v. Kupferle*, 44 Mo. 154; *Kitchen v. Cape Girardeau & S. L. R. Co.* 59 Mo. 514.

The words "powers," "rights," "privileges," and "immunities," had been defined and construed by the Supreme Court of Missouri. Under that construction the power to subscribe by a municipality is a "right" or "privilege" of the original company, which passes by virtue of consolidation to the new company.

Hannibal & St. J. R. Co. v. Marion Co. 86 Mo. 294; *New Buffalo Twp. v. Cambria Iron Co.* 105 U. S. 78 (26: 1024); *Wilson v. Salamanca*, 99 U. S. 499 (25: 830); *Tipton Co. v. Rogers Locomotive & Mach. Works*, 103 U. S. 533 (26: 844); *Schuyler Co. v. Thomas*, 98 U. S. 169 (25: 88); *Scotland Co. v. Thomas*, 94 U. S. 682 (24: 219); *Harter Twp. v. Kernochan*, 103 U. S. 562 (26: 411).

The township is estopped from asserting the invalidity of the bonds involved in this case.

Smith v. Clark Co. 54 Mo. 58; *Ranney v. Baeder*, 50 Mo. 600; *Johnson Co. v. January*, 94 U. S. 202 (24: 110); *Jordan v. Cass Co.* 8 Dill. 245; *Reardon v. St. Louis Co.* 36 Mo. 560; *Steines v. Franklin Co.* 48 Mo. 167, 188.

Is it possible that any principle of honest dealing can be invoked to avoid these securities?

Jordan v. Cass Co. 8 Dill. 185, 245; *Moultrie Co. v. Rockingham Sav. Bank*, 92 U. S. 631 (23: 631); *Oregon v. Jennings*, 119 U. S. 74 (30: 328); *East Lincoln v. Davenport*, 94 U. S. 801 (24: 322); *Nugent v. Putnam Co.* 86 U. S. 19 Wall. 241 (22: 83); *Tipton Co. v. Rogers Locomotive & Mach. Works*, 103 U. S. 538 (26: 846); *Harter Twp. v. Kernochan*, 103 U. S. 562 (26: 411); *Walnut v. Wade*, 103 U. S. 688 (26: 526); *Marcy v. Oswego*, 92 U. S. 637 (23: 748).

Judgment affirmed with costs and interest, by reason of a divided court.

FREDERICK W. BAUER, A Minor, By
His Next Friend, WILLIAM BAUER, ET
AL., Plffs. in Err.,
v.

THE TEXAS & PACIFIC RAILROAD
COMPANY.

(See S. C. Reporter's ed. 430.)

Action for death—negligence of railroad company.

In a suit against the above named railroad company to recover for the death of plaintiff's intestate, caused by the negligence of the company and its servants, the court below, after the evidence was in, instructed the jury to bring in a verdict for the defendant and the judgment on the verdict is affirmed by reason of a divided court.

[No. 186.]

Argued Dec. 19, 1888. Decided Jan. 7, 1889.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas, to review a judgment on a verdict for the defendant directed by the Court in an action to recover for the death of the plaintiff's intestate caused by defendant's negligence. *Affirmed by reason of a divided court.*

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This suit was begun in the Circuit Court of the United States, Eastern District of Arkansas. The cause of action alleged in the complaint was the injury and death of the plaintiff's intestate caused by the negligence of defendant's servants in the particulars set forth in the declaration. The defenses set up in the answer were: (1) a denial of negligence on the part of the defendant or its agents; and (2) an averment that the injury was caused by the negligence of the plaintiff's intestate. The court below, after the evidence was in, instructed the jury to bring in a verdict for the defendant.

The case is brought to this court on a writ of error. The alleged errors are, the refusal by the court below to give to the jury certain instructions which the plaintiff requested it to give, and the giving of the instruction that the plaintiff had failed to make out a case for the jury to pass upon, and directing the jury to render a verdict for the defendant.

The plaintiff's intestate, Bauer, was a car inspector in the employ of the St. Louis, Iron Mountain and Southern Railway Company, and his place of work was the railroad yard of that company in Texarkana, where he was at the time he was killed. The defendant company used that yard and the round-house therein in common with the St. Louis, Iron Mountain and Southern Railroad Company. The plaintiff's intestate, Bauer, was run over and killed in that yard by a locomotive belonging to and operated by the defendant company.

J. C. Atkinson, the engineer who was in charge of the defendant's locomotive at the time, testified:

"This engine had been taken out of the defendant's round-house that morning to the south end of the yard to take a train out to Texas, but the purpose of taking the trains out was abandoned and the engine ordered back, when the accident happened. The way we were going the tender was ahead and first struck him."

Willis McDoniel, a witness for the plaintiff, testified:

"I saw Bauer when he stepped on the track ahead of the engine, coming towards me or in my direction. He was about the length of the tender ahead of the engine when he stepped on the track, coming in my direction, with his back to the engine. He came from the east side. I 'hollered' at him and tried to make him hear, but he paid no attention. I called to him to look out, as I saw he was in danger, but he did not seem to notice it. He did not seem to know that the engine was behind him. After he got on the track he walked forty or fifty feet before the engine struck him. I called to him all the time but he did not seem to hear me. I was from thirty to forty steps from him when the engine struck him."

Measrs. Sol. F. Clark and Sam. W. Williams, for plaintiff in error:

Negligence by the defendant being established, contributory negligence is always a question for the jury where there are any paliating circumstances whatever.

Filer v. N. Y. Cent. R. Co. 49 N. Y. 47; *Greenleaf v. Ill. Cent. R. Co.* 29 Iowa, 14; *Herrick v. Sullivan*, 120 Mass. 576.

And this is always to be solved according to

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the circumstances attendant upon the transaction.

Pa. Canal Co. v. Bentley, 66 Pa. 80; *Haight v. N. Y. Cent. R. Co.* 7 Lans. 11; *Jenkins v. Little Miami R. Co.* 2 Disney (Ohio), 49; *Newhouse v. Miller*, 35 Ind. 463; 6 Wait, Act. & Def. 584, 596 and cases there cited; *Hoye v. Chicago & N. W. R. Co.* 62 Wis. 666; *Kaples v. Orth*, 61 Wis. 531; *Mark v. St. Paul, M. & M. R. Co.* 32 Minn. 208; *Townley v. Chicago, M. & St. P. R. Co.* 53 Wis. 626; *Johnson v. Chicago & N. W. R. Co.* 49 Wis. 529; *Ireland v. Oswego, H. & S. Plank Road Co.* 18 N. Y. 583; *Pa. R. Co. v. Barnett*, 59 Pa. 263; *Texas & P. R. Co. v. Murphy*, 46 Tex. 366; *Smith v. Fletcher*, L. R. 9 Exch. 64; *Kenworthy v. Ironton*, 41 Wis. 647; *Langhoff v. Milwaukee & P. du O. R. Co.* 19 Wis. 489.

Negligence is a conclusion of fact to be drawn by the jury, under proper instructions from the court. It is always so where the facts, or rather the conclusion, is fairly debatable or rests in doubt.

Roll v. Northern Cent. R. Co. 15 Hun, 496; *Steele v. Iowa Cent. R. Co.* 43 Iowa, 109; *Farley v. Chicago, R. I. & P. R. Co.* 56 Iowa, 887; *Chicago, R. I. & P. R. Co. v. Dignan*, 56 Ill. 487; *Schultz v. Chicago & N. W. R. Co.* 44 Wis. 688; *Burns v. Chicago, M. & St. P. R. Co.* 69 Iowa, 450; *Hunter v. Wanamaker (Pa.)*, 2 Cent. Rep. 70; *Thompson v. N. Y. Cent. & H. R. R. Co.* 13 Cent. Rep. 240, 110 N. Y. 636; *Blaiser v. N. Y., L. E. & W. R. Co.* 13 Cent. Rep. 281, 110 N. Y. 688; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439 (24:506).

Messrs. John F. Dillon and W. S. Pierce, for defendant in error:

The court did not err in directing a verdict for the defendant.

The rule is well established that when the evidence given at the trial, with all the inferences that the jury may reasonably draw from it, is insufficient to support a verdict for the plaintiff, then the court ought to nonsuit the plaintiff or direct a verdict for the defendant.

Pleasants v. Fant, 89 U. S. 22 Wall. 121 (22:782); *Randall v. Balt. & O. R. Co.* 109 U. S. 482 (27:1005); *Baylis v. Travellers Ins. Co.* 118 U. S. 820 (28:990); *Bowditch v. Boston*, 101 U. S. 16, 18 (25:980, 981); *Anderson Co. v. Beal*, 118 U. S. 227, 241 (28:966, 971); *Littlefield v. Internal Imp. Fund*, 117 U. S. 419 (29:930); *North Pa. R. Co. v. Commercial Bank*, 128 U. S. 738 (31:288).

The law is settled in England to the same effect.

Giblin v. McMullen, L. R. 2 Pr. C. 885; *Wakelin v. London & S. W. R. Co.* L. R. 12 App. Cas. 41; *Metropolitan R. Co. v. Jackson*, L. R. 3 App. Cas. 193; *Davey v. London & S. W. R. Co.* L. R. 11 Q. B. Div. 218; *S. C.* on appeal, L. R. 12 Q. B. Div. 70; *Ryder v. Wombwell*, L. R. 4 Exch. 32.

The evidence given at the trial, with all the inferences that a jury might reasonably draw from it, was insufficient to support a verdict for the plaintiff.

Ellis v. Great Western R. Co. L. R. 9 C. P. 557; *Culhane v. N. Y. Cent. & H. R. R. Co.* 60 N. Y. 183, 187.

The plaintiff's intestate brought the injury on himself by his own negligence.

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Dublin, W. & W. R. Co. v. Slattery, L. R. 3 App. Cas. 1166.

Judgment affirmed with costs, by reason of a divided court.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK, *Plff. in Err.*,

DAVID WRIGHT.

THE FIRE ASSOCIATION OF PHILADELPHIA, *Plff. in Err.*

DAVID WRIGHT.

(See S. C. Reporter's ed 482, 485.)

Policies of fire insurance—liability upon.

The judgments in these actions in favor of plaintiff below—for loss by fire of his hotel building insured by the companies above named, affirmed by reason of a divided court.

[Nos. 139, 140.]

Argued Dec. 19, 1888. Decided Jan. 7, 1889.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois, to review judgments in actions brought by the defendant in error, David Wright, upon policies of insurance issued by the above named companies against loss by fire of a hotel building, in favor of David Wright, the plaintiff below, for the amount of the loss.

Statement from brief for plaintiff in error.

The actions in the above stated cases were brought in the Circuit Court of Greene County, State of Illinois, upon two policies of insurance issued by the defendant companies. The first policy was in the Continental Insurance Company, was issued at Las Vegas, New Mexico, and covered \$5,000 on "two-story adobe and wood-stuccoed shingle-roof hotel building, to be occupied for hotel purposes," from July 11, 1881, to July 11, 1882. The policy was dated July 11, 1881.

The conditions of this policy provided that the policy should be void "if in said premises there be kept gunpowder," etc.

The second policy was in the Fire Association of Philadelphia, and was concurrent with that in the Continental. Under the sixth condition, it was provided that the policy should be void "if any of the following named articles, or compounds containing any of them, be kept, stored, or used in or on the premises herein described, any custom or usage of trade or manufacture to the contrary notwithstanding; gunpowder," etc.

This policy was also issued at Las Vegas, New Mexico, on July 11, 1881.

The property covered by these policies was destroyed by fire on January 19, 1882, more than six months after they were issued.

The defendant companies failing to pay, actions were brought therein in the Circuit Court of Greene County, State of Illinois. The cases were removed to the Circuit Court of the United States for the Southern District of Illinois, the petition in each case stating "that the subject matter and controversy in said suit is

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not upon a claim or cause of action arising out of any business or transaction in fact done in the State of Illinois, but is upon a claim or cause of action arising out of business and transactions in fact done in the Territory of New Mexico."

The cases came on for trial January, 1885, and resulted in verdicts for the plaintiff for \$5,750.

Mr. Henry Jackson for plaintiffs in error.

Messrs. L. H. Bisbee, John B. Ahrens and Henry Decker for defendant in error.

Affirmed with costs and interest, by a divided Court.

MARY WALL, *Appt.*,

v.

THE DISTRICT OF COLUMBIA ET AL.

(See S. C. Reporter's ed. 449.)

Appeal when dismissed.

Motion to dismiss the appeal in this case, on the ground that the decree from which the appeal was taken is not a final decree and that no notice of the appeal was given nor any citation issued, granted.

[No. 506.]

Submitted Jan. 14, 1889. Decided Jan. 21, 1889.

A PPEAL from a decree of the Supreme Court of the District of Columbia, sustaining demurrer to the bill with leave to the complainant to amend.

On motion to dismiss. *Dismissed.*

Mr. Henry E. Davis, for the appellees, moves to dismiss the appeal, because the decree, from which the appeal was taken, is not a final decree; but if the said decree be deemed final no sufficient appeal therefrom was taken. for the only subsequent proceedings were that on the 5th day of November, 1885, there was filed in said court in the said cause a certain paper writing, as follows:

"Notice is hereby given of the plaintiff's intention to appeal this case to the Supreme Court of the United States, being an appeal from the decision of the general term of the above District Court entered on the 26th day of November, 1885.

"(Signed) J. W. Douglass,
Solicitor for plaintiff."

And an appeal bond, in the usual form, approved by D. K. Carter, *Chief Justice*, on the 17th day of November, 1885, was on said day filed in said court; but no notice of said supposed appeal was given to the District of Columbia, nor was any citation thereon ever issued.

By the decree, the defendant's demurrer to the original and amended bill was sustained, with leave to the complainant to amend as she may be advised.

Mr. J. W. Douglass, for the appellant, in opposition to the motion to dismiss:

It appears by the affidavits filed herewith, and the stipulation contained in the transcript of record, that the appellees' solicitor had actual notice on the 28th of September, 1886,

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that the case was to be appealed to this court, and that the transcript would be filed during the following month of October, 1886. The transcript was filed in this court on the 20th of October, 1886. This gave the appellees' solicitor twenty-two days' notice, before the transcript was filed.

Notice of an appeal to this court from the decree of November 26, 1885, of the court below, was entered of record below on the 4th of November, 1885, and the appeal bond approved by the Chief Justice below, on the 17th of November, 1885.

The affidavits herewith also show, that twice, subsequent to the filing of the transcript of record in this court, the appellees having advertised for sale, the same pieces of property embraced in the bills filed in the case, on account of the same arrears of taxes, or parts of them, which the appellant claimed had been paid, and had asked an injunction to restrain the sale on account of, the solicitor for the appellant called upon the solicitor for the appellees, and requested that the said sales should not be attempted, because the case upon these very taxes and pieces of property was depending in this court. That any attempt to sell under the circumstances would be disrespectful and out of order. In each instance the solicitor for the appellees had the sales postponed indefinitely, upon notice and request.

The facts above stated disclose just such a case as this court has always held to render a citation unnecessary.

"The object of a citation on appeal being notice, no citation was necessary in a case where, in point of fact, by agreement of parties, actual and full knowledge of the party appellee of the other side's intentions to appeal appeared of record."

68 U. S. 1 Wall. 690 (17: 677.)

"An appeal, although allowed out of term, is not avoided by the nonservice of a citation; but this court will impose such terms as may be legal and proper."

94 U. S. 112 (24: 83).

When the parties have had notice, in fact, that an appeal has been taken, the citation is held to be unnecessary.

Phillips, Pr. 181.

The stipulation of September 28, 1886, shows just such an agreement, and knowledge of the intention to appeal, as the above quotation from the case in 68 U. S. 1 Wall. 690 (17: 677), contemplates. If citation is simply notice, then the appellees in this case have all the notice that any party could demand or require.

If however, notwithstanding the above consideration, the court should think a more formal notice or citation is required, then the appellant asks that a citation be issued out of this court, to be served upon the solicitor of the appellees, upon terms as contemplated by the case in 94 U. S. 112 (24: 83), if any terms are considered necessary. This appeal has been here now two years, and actual knowledge of it had by the appellees and their solicitor for all that time, but no motion until now.

The demurrer was general to the entire bill, and the decree of November 26, 1885, sustained the demurrer. That was the end of our bill of course. The court below, however, added the gratuitous language "with leave to amend."

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French v. Shoemaker, 79 U. S. 12 Wall. 98 (30: 271).

Stipulation signed by counsel for each party.

It is hereby agreed and stipulated that the deed of December 15, 1880 (filed in this case), made by the defendants (District of Columbia), for subdivision in No. 1, in square No. 88, may be taken and considered in evidence for all purposes in the above entitled case.

The case dismissed, with costs.

CHARLES E. MILLER ET AL., EXRS.
Plffs. in Err..
v.

CHARLES B. RICHARD ET AL.

(See S. C. Reporter's ed. "*Arthur's Executors v. Richard and Boas*," 429.)

Duties illegally exacted.

Judgment in favor of plaintiffs for duties illegally exacted by the Collector of the Port of New York, affirmed by a divided court.

[No. 1179.]

Submitted Jan. 3, 1889. Decided Jan. 28, 1889.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment in favor of plaintiffs below for the amount of duties illegally exacted.

Statement from brief for plaintiffs in error.

This is an action to recover back the sum of \$2,496.70, with interest from June 29, 1878, the said sum representing an alleged illegal exaction of duties by the testator of the plaintiffs in error, then Collector of the Port of New York.

In June, 1876, one A. M. Sutton duly imported into the United States from Liverpool, in the ship "Lord Clive," eight cases of beads, or rosaries, marked respectively M. F. P. 500, 508-509. The vessel and merchandise were entered at the Port of Philadelphia.

One case was entered for consumption and delivered to the importer on payment of the duties assessed against it.

The other seven cases were entered for warehouse.

On December 13, 1876, the said seven cases were withdrawn for transportation, and were transported in bond from Philadelphia to the City of New York, consigned to C. B. Richard & Boas.

On the arrival of the packages in New York, the plaintiffs below, Richard & Boas, made a re-warehouse and withdrawal entry of the packages, and thereupon paid the Collector at New York City the duties and charges on said goods, as the same had been liquidated by the Collector of the Port of Philadelphia, and thereupon all of the packages, except one, were delivered to Richard & Boas. One package or case was retained for examination and comparison, and was sent to the appraiser, who found that there had been an undervaluation, and the amount sued for is made up of the duty of 50 per cent on the difference between the valuations and 20 per cent *ad valorem* on the entire value claimed by the Collector of the

Port of New York to be the value of the goods.

The plaintiffs duly protested, but the collector's decision was affirmed by the Secretary of the Treasury.

Upon this state of facts, the defendants, having offered no testimony, the judge directed the jury to find for the plaintiffs to the whole extent of their claim, to which ruling the defendants excepted.

Messrs. A. H. Garland, Atty-Gen., and Wm. A. Maury, Assist. Atty-Gen., for plaintiffs in error:

The collector could re-appraise. The payment was voluntary.

U. S. v. Schlesinger, 120 U. S. 109 (30: 607).

Mr. Stephen G. Clarke, for defendants in error:

Duties can only be assessed at the port of original entry. No enhanced duty could accrue except by the action of the appraiser at Philadelphia.

Spring v. Russell, 1 Low. 258.

Judgment affirmed with costs and interest, by a divided court.

CHICAGO, BURLINGTON AND QUINCY
RAILWAY COMPANY, *Plff. in Err.,*

v.

GEORGE M. GRAY.

(See S. C. Reporter's ed. 396-397.)

A writ of error to review a decree of the Circuit Court remanding the cause to the State Court: dismissed for want of jurisdiction.

[No. 876.]

Submitted March 11, 1889. Decided March 18, 1889.

IN ERROR to the Circuit Court of the United States for the Southern District of Iowa, to review a decree of that Court remanding the cause to the State Court:

On motion to dismiss. *Dismissed.*

Mr. John F. Lacey, for defendant in error, in support of motion:

There is but one question involved in the motion to dismiss in this cause.

On the 16th day of November, 1886, in a suit pending between Geo. M. Gray as plaintiff and the Chicago, Burlington & Quincy R. Co. et al., as defendants, a motion to remand the cause to the District Court of Monroe County, Iowa, was sustained by the United States Circuit Court for the Southern District of Iowa, and said cause duly remanded. The cause had been removed to the United States Circuit Court prior to the Act of March 3, 1887. It was also remanded prior to the passage of that Act; but the writ of error was not sued out until the 28th of September, 1887, after the passage of said Act.

Defendant in error moves to dismiss the writ of error on the following grounds:

1. Said writ of error was sued out on the 28th day of September, 1887, subsequent to the Act of Congress approved the 3d day of March, 1887.

2. The writ is sued out in a cause where the circuit court remanded the cause to the state court and no writ of error to this court will lie in such a cause.

8. The writ of error is unauthorized and forbidden by statute where a cause has been remanded.

4. The writ of error raises no question except the alleged error of the circuit court in remanding this cause.

There is only one point involved in this motion. The plaintiff in error caused the removal of the cause from the District Court of Iowa to the United States Circuit Court.

The defendant in error moved to remand the cause to the state court. This motion was submitted and the motion sustained. The cause was removed and also remanded prior to the Act of March 3, 1887, but the writ of error was not sued out until after the passage of that Act. It follows that when the right to sue out a writ of error in a cause that had been remanded was cut off by the statute, there being no reservation in relation to any past orders, the jurisdiction was cut off and no writ of error will lie.

This is no longer an open question and the motion must be sustained, under the following decisions of this court:

Morey v. Lockhart, 128 U. S. 56 (81: 68);
Wilkinson v. Nebraska, 128 U. S. 286 (81: 152);
Sherman v. Grinnell, 128 U. S. 679 (81: 278);
(no one opposing).

Messrs. Wirt Dexter and J. J. Herrick entered for plaintiff in error.

Cause dismissed for want of jurisdiction.

S. B. ARBUCKLE, *Pff. in Err.*,
v.

P. J. QUIGLEY, Clerk of the COUNTY COURT
OF SHELBY COUNTY, Tennessee.

(See S. C. Reporter's ed. 428.)

Case reversed on stipulation on the authority of
Asher v. Texas (82: 368), and *Stoutenburgh v. Hennick* (82: 687).

[No. 1125.]

Decided March 18, 1889.

IN ERROR to the Supreme Court of the State of Tennessee, to review a judgment of that Court reversing a judgment of the Circuit Court of Shelby County, Tennessee, in favor of Arbuckle, plaintiff, against Quigley, clerk of said County, defendant, for the sum of \$6.00 paid under protest by said Arbuckle to said clerk, for the privilege of selling fruit trees as agent of Franklin Davis & Co., citizens of Virginia and doing business in said State. *Reversed.*

The following stipulation was entered into between the parties to this cause:

"In this cause it is stipulated and agreed that upon the facts of the case it falls within the principles decided by this court, at this term, in the cases of *Asher v. Texas*, 128 U. S. 129 (82: 368), and *Stoutenburgh, Intendant of Washington Asylum, v. Hennick*, 129 U. S. 141 (82: 687). It is accordingly agreed that the case may be reversed and remanded with instructions to enter judgment for the plaintiff in error. March 19, 1889."

Messrs. T. B. Turley and Luke E. Wright for plaintiff in error.

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Mr. Isham G. Harris for defendant in error.

Judgment reversed with costs, and cause remanded with instructions to enter judgment for the plaintiff in error, pursuant to stipulation.

THE DISTRICT OF COLUMBIA *et al.*,
Appts.,
v.

JOHN H. BREWER.

(See S. C. Reporter's ed. 484.)

Dismissed for want of jurisdiction.

This case dismissed on the ground that the matter in dispute does not exceed \$5,000, and because it does not involve any federal question.

[No. 1431.]

Submitted April 22, 1889. Decided May 13, 1889.

APPEAL from a decree of the Supreme Court of the District of Columbia, enjoining the sale of real estate for taxes and discharging said real estate therefrom.

On motion to dismiss. *Dismissed.*

A suit in equity was brought by said Brewer to remove an alleged lien on property for a special tax of \$790.23 and interest and certain general taxes amounting to \$89.15 with interest. The court decreed that the property should stand relieved from the lien of said taxes on the complainant's depositing in the registry of the court \$2,400 which, it was agreed, was sufficient to satisfy a final decree; the court directed that the money so deposited should be held in lieu of the taxes and subject to the disposition of the court in final decree.

Upon final hearing (November 2, 1886,) the court decreed that the said real estate should be free from and discharged of all taxes which had been assessed and were in arrears against the same prior to January 3, 1876, the date of the sale mentioned in the deed of the District of Columbia to Albert G. Hall, and perpetually enjoined the said District from attempting to sell said real estate for the enforcement of the collection of said taxes; also, that the \$2,400 so deposited be returned to the complainant. An appeal to this court was brought. Record filed on appeal October 31, 1888.

The appellee now moves to dismiss said appeal for want of jurisdiction.

Messrs. A. L. Merriman and W. Willoughby, for appellee in support of motion:

This motion is predicated upon the Act of Congress of March 3, 1885, which is as follows:

"That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the supreme court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of \$5,000.

"Sec. 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States; but in all such cases an appeal

or writ of error may be brought without regard to the sum or value in dispute."

28 Stat. at L. 443.

Inasmuch as the amount involved does not exceed \$2,400, the amount deposited in court to stand in lieu of the lien claimed, it is clear that the jurisdiction of this court is not conferred by the first section of the Act.

And it is insisted that the case does not come within any of the exceptions contained in the second section of the Act; it does not involve the validity of any patent or copyright, neither was there drawn in question the validity of any treaty or statute of, or an authority exercised under, the United States in order to give jurisdiction to this court under the second section of the Act. The question of validity of some Act of Congress exercised under the United States must have been raised in the court below and decided by that court.

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Adams v. Crittenden, 106 U. S. 576 (27:99); Rev. Stat. § 709; *Oswell v. Randell*, 35 U. S. 10 Pet. 368 (9: 458); *Armstrong v. The Treasurer*, 41 U. S. 16 Pet. 281 (10: 965); *Brown v. Colorado*, 106 U. S. 95 (27: 182); *Detroit City R. Co. v. Guthard*, 114 U. S. 133 (29: 118).

It may be urged that there are other cases pending, or which have gone to judgment in the court below involving the principles of the case at bar.

The question is one of jurisdiction, and if the amount involved in this case does not confer jurisdiction, it cannot be supplemented by other cases.

Adams v. Crittenden, 106 U. S. 576 (27: 99); *Ex parte Balt. & O. R. R. Co.* 106 U. S. 5 (27: 78).

(No one appeared in opposition.)

The case dismissed for the want of jurisdiction.

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FOLLOWING ARE MEMORANDA

OF

ALL CASES DISPOSED OF AT OCTOBER TERM, 1888,

WITHOUT OPINIONS, AND NOT ELSEWHERE OR OTHERWISE REPORTED IN THIS EDITION.

THE WESTERN UNION TELEGRAPH COMPANY
v. THE BALTIMORE AND OHIO RAILROAD
COMPANY. [No. 7.]

Appeal from the Circuit Court of the United
States for the District of Maryland.

Messrs. Wager Swayne and O. J. M. Guinn for
appellant. *Mr. John K. Cowen* for appellee.

October 18, 1888. Dismissed with costs pur-
suant to the 19th Rule.

THE AMERICAN RAILWAY IMPROVEMENT
COMPANY v. SEYMOUR D. CARPENTER
AND SMITH H. MALLORY, Composing the
Firm of Carpenter and Mallory. [No. 9.]

In error to the Circuit Court of the United
States for the Eastern District of Louisiana.

Messrs. W. W. Howe and J. H. Kennard for
plaintiff in error. *Mr. A. H. Leonard* for de-
fendants in error.

April 22, 1889. Dismissed, with costs, per
stipulation, on motion of *Mr. William A. Mc-
Kenney* in behalf of counsel.

CLARENCE P. HUNT v. SALLIE S. BLACK-
BURN *et al.* [No. 16.]

Appeal from the District Court of the United
States for the Eastern District of Arkansas.

October 22, 1888.

Mr. Chief Justice Fuller:

On consideration of the motion to vacate the
decree of dismissal entered herein on April 9th,
1888, it is now here ordered by the court that
said decree be, and the same is hereby, vacated,
and the cause restored to the docket.

[See Bk. 82, pp. 328 and 488.]

THE VACUUM OIL COMPANY v. THE BUFFALO
LUBRICATING OIL COMPANY (Limited).

[No. 25.]

Appeal from the Circuit Court of the United
States for the Northern District of New York.

*Messrs. Theodore Bacon and William F.
Cognell* for appellant. *Mr. James A. Allen*
for appellee.

October 16, 1888. Dismissed as per stipula-
tion.

THE WESTERN UNION TELEGRAPH COMPANY
v. THE BALTIMORE AND OHIO TELEGRAPH
COMPANY. [No. 27.]

Appeal from the Circuit Court of the United
States for the District of Indiana.

Messrs. J. E. McDonald, J. M. Butler and
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Wager Swayne for appellant. *Messrs. John K.
Cowen and W. H. H. Miller* for appellee.

October 16, 1888. Dismissed with costs pur-
suant to the 19th Rule.

PULLMAN'S PALACE CAR COMPANY v. THE
COMMONWEALTH OF PENNSYLVANIA.

[No. 82.]

In Error to the Supreme Court of the State of
Pennsylvania.

*Messrs. E. S. Isham, William Burry and
M. E. Olmsted* for plaintiff in error. *Messrs.
W. S. Kirkpatrick and John F. Sanderson* for
defendant in error.

October 18, 1888. Judgment reversed, with
costs, as per stipulation.

E. C. MARSHALL and ROBERT CHAPIN,
Admsrs., v. UNITED STATES. [No. 57.]

Appeal from the Court of Claims. (On re-
hearing. See Book 82, p. 329.)

November, 19, 1888. Judgment affirmed on
authority of opinion delivered at the last term
by *Mr. Justice Harlan* (See Book 81, p. 47b)

— announced by *Mr. Chief Justice Fuller*.
Mr. Justice Harlan announced that he now
dissented from that opinion.

FREDERICK MYERS v. EDWARD C. SMITH.
[No. 62.]

Appeal from the Circuit Court of the United
States for the Eastern District of New York.

*Messrs. John A. Grow and George Ticknor
Curtis* for appellant. *Mr. Samuel A. Duncan*
for appellee.

November 5, 1888. Dismissed as per stipula-
tion, on motion of *Mr. George Ticknor Curtis*,
of counsel for the appellant.

JOSEPH ZIHLMANN v. THE LABELLE GLASS
COMPANY. [No. 64.]

Appeal from the Circuit Court of the United
States for the Southern District of Ohio.

Mr. John F. Kelly for appellant. *Mr. G. H.
Christy* for appellee.

November 2, 1888. Dismissed with costs,
pursuant to the 10th Rule.

GEORGE L. EAMES v. SARAH J. SAVAGE.

[No. 83.]

In Error to the Supreme Judicial Court of
the State of Maine.

No counsel appearing for defendant in error.

November 15, 1888. Dismissed with costs on the authority of counsel for the plaintiff in error.

GEORGE L. EAMES v. SAMUEL A. BICKFORD.
[No. 84.]

In Error to the Supreme Judicial Court of the State of Maine.

Mr. George F. Holmes for the plaintiff in error, no counsel appearing for defendant in error.

November 15, 1888. Dismissed with costs on the authority of counsel for the plaintiff in error.

THE NASHUA MANUFACTURING COMPANY v. THE SOUTH CAROLINA RAILWAY COMPANY.
[No. 87.]

In Error to the Circuit Court of the United States for the District of South Carolina.

Mr. Wm. E. Earle for plaintiff in error. Messrs. Wm. Allen Butler, Samuel Lord and Theodore G. Barker for the defendant in error.

November 16, 1888. Dismissed with costs pursuant to the 16th Rule, on motion of Mr. Theodore G. Barker, of counsel for the defendant in error.

THE NATCHEZ, JACKSON & COLUMBUS RAILROAD Co. v. JOHN M. STONE et al., Railroad Comrs. [No. 89.]

In Error to the Supreme Court of the State of Mississippi.

Mr. Wm. L. Nugent for plaintiff in error. No counsel entered for defendants in error.

November 20, 1888. Dismissed with costs, on authority of counsel for plaintiff in error.

ABRAHAM SHENFIELD v. SOLOMON SCHIRMER and JACOB BETTA. [No. 91.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. E. N. Dickerson for appellant. Mr. Edmund Wetmore for appellees.

November 21, 1888. Dismissed with costs, pursuant to the 10th Rule.

WILLIAM J. ADAMS v. WM. B. HATCH et al.
[No. 108.]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. W. G. Griffith for appellant. Mr. F. P. Prichard for appellees.

December 4, 1888. Dismissed with costs pursuant to the 10th Rule.

SAMUEL CHRIST et al. v. ANDREW FITZSIMMONS. [No. 104.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Mr. H. C. Parsons for plaintiffs in error. No counsel entered for defendant in error.

December 4, 1888. Dismissed with costs pursuant to the 10th Rule.

THE UNION TUBING COMPANY et al. v. THE PATTERSON COMPANY, Limited, et al.
[No. 112.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. Edmund Wetmore for appellants. Mr. B. F. Thurston for appellees.

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December 7, 1888. Dismissed with costs pursuant to the 10th Rule.

MARIA C. PILLA et al. v. THE GERMAN SCHOOL ASSOCIATION and FREE COMMUNITY of ST. LOUIS AND BREMEN.
[No. 120.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Messrs. W. H. Olopton and W. Hallett Phillips for appellants. Messrs. Henry Hitchcock and G. A. Finkelnburg for appellee.

December 19, 1888. Dismissed with costs pursuant to the 10th Rule, on motion of Mr. Linden Kent in behalf of counsel for appellee.

CHARLES C. PINCKNEY, JR., v. THE STATE OF SOUTH CAROLINA. [No. 124.]

In Error to the Supreme Court of the State of South Carolina.

Mr. John F. Ficken for plaintiff in error. No counsel entered for defendant in error.

December 12, 1888. Dismissed with costs pursuant to the 10th Rule.

THE KENTUCKY CENTRAL RAILROAD COMPANY v. THE COUNTY OF BOURBON IN THE STATE OF KENTUCKY. [No. 126.]

In Error to the Court of Appeals in the State of Kentucky.

Mr. J. W. Stevenson for plaintiff in error, Mr. Alvin Duvall for defendant in error.

December 12, 1888. Dismissed with costs, pursuant to the 16th Rule, on motion of Mr. Alvin Duvall of counsel for the defendant in error.

JAMES M. SEIBERT, Collector of CAPE GIRARDEAU COUNTY, Missouri v. THE UNITED STATES ex rel. VALENTINE WINTER.
[No. 131.]

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Messrs. Jeff. Chandler, E. John Ellis, John Johns and D. A. McKnight for plaintiff in error. Mr. Clinton Rowell for defendant in error.

January 21, 1889. Dismissed with costs, pursuant to the 10th Rule.

WILLIAM H. OSMER v. THE J. B. SICKLES SADDLERY COMPANY. [No. 138.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Messrs. William H. Bliss and Paul Bakewell for appellant, no counsel appearing for appellee.

November 16, 1888. Dismissed with costs, on motion of Mr. R. A. Bakewell in behalf of counsel for the appellant.

LEILA BRYANT et al. v. CHARLES E. WHITE et al., Exrs. etc. [No. 141.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Messrs. O. H. Horton and Hugh L. Mason for appellants. Messrs. Thomas Dent and Robert T. Lincoln for appellees.

December 19, 1888. Dismissed with costs, pursuant to the 10th Rule.

Ex parte: In the Matter of MAX ROSENGARTEN, Appellant. [No. 143.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

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Messrs. Robert Hervey and O. Stuart Beattie for appellant.

December 20, 1888. Dismissed with costs, on authority of counsel for appellant.

THE AMERICAN DIAMOND DRILL COMPANY
v. THE SULLIVAN MACHINE COMPANY.

[No. 146.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. E. G. Thompson for appellant. *Mr. H. T. Rice* for appellee.

December 20, 1888. Dismissed with costs, pursuant to the 16th Rule; on motion of *Mr. E. T. Rice* of counsel for appellee.

MARIE F. DUBOIS v. WILLIAM W. BOARDMAN *et al.*, Trustees, *et al.* [No. 153].

Appeal from the Supreme Court of the District of Columbia.

Mr. S. S. Henkle for appellant. No counsel entered for appellees.

December 20, 1888. Dismissed with costs, pursuant to the 10th Rule.

SAMUEL C. SCHAEFFER v. BISHOP GOODRICH and MARY GOODRICH. [No. 155.]

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Mr. John C. Gage for appellant. No counsel entered for appellees.

January 8, 1889. Dismissed with costs, pursuant to the 10th Rule.

JOHN A. DAVEY and FRANK J. DAVEY v. MICHAEL DUGGAN *et al.* [No. 156.]

Appeal from the Supreme Court of the Territory of Dakota.

Mr. Wm. R. Steele for appellants. No counsel entered for appellees.

January 8, 1889. Dismissed with costs, pursuant to the 10th Rule.

HOLLON PARKER v. ELIZABETH DENNY, Executrix of TIMOTHY P. DENNY, Deceased. [No. 158.]

Appeal from the Supreme Court of the Territory of Washington.

Mr. John H. Mitchell for appellant. No counsel entered for appellees.

January 8, 1889. Dismissed with costs, on motion of *Mr. John H. Mitchell*, of counsel for appellant.

THE GRAIN DRILL MANUFACTURING Co. v. SQUIRE B. RUDE *et al.* [No. 160.]

Appeal from the Circuit Court of the United States for the District of Indiana.

Messrs. E. E. Wood and Edward Boyd for appellant. *Mr. Arthur Stem* for appellees.

November 19, 1888. Dismissed with costs, on motion of *Mr. Edward Boyd*, for the appellant.

WILLIAM B. DAVIS v. THE STATE OF SOUTH CAROLINA. [No. 161.]

In Error to the Supreme Court of the State of South Carolina.

Mr. James Lowndes for plaintiff in error. No counsel entered for defendant in error.

January 10, 1889. Dismissed with costs, pursuant to the 10th Rule.

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THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY v. ABEL DENNISON.

[No. 171.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Wm. Armstrong for appellant. *Mr. Edwin Walker* for appellee.

January 22, 1889. Dismissed with costs, pursuant to the 10th Rule.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY v. JOSEPH T. SANGER.

[No. 172.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. William Armstrong for appellant. *Mr. Edwin Walker* for appellee.

January 22, 1889. Dismissed with costs, pursuant to the 10th Rule.

R. S. GRANT v. THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* [No. 177.]

Appeal from the Circuit Court of the United States for the District of Indiana.

Mr. Buford Wilson for appellant. *Mr. R. G. Ingersoll* for appellee.

January 25, 1889. Dismissed with costs, pursuant to the 10th Rule.

J. W. LEONARD *et al.* v. WILLIAM H. CHATFIELD, Trustees. [No. 184.]

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. T. W. Brown for appellants. *Messrs. Van H. Manning, John B. Jones and J. W. C. Watson* for appellee.

(See Book 29, p. 445.)

March 6, 1889. Dismissed with costs, pursuant to the 10th Rule.

J. W. LEONARD *et al.* v. THE OZARK LAND COMPANY. [No. 185.]

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. T. W. Brown for appellants. *Messrs. Van H. Manning, Jno. B. Jones and J. W. C. Watson* for appellee.

(See Book 29, p. 445.)

Dismissed with costs, per stipulation.

ANDRE N DE LA MOTHE v. WILLIAM ANGUS. [No. 192.]

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Messrs. A. L. Merriman and J. H. Graham for the appellant. *Messrs. David Fales, F. W. Hackett and Guy C. Noble* for appellee.

March 12, 1889. Dismissed with costs, pursuant to the 10th Rule.

ALVIN T. SIMPKINS v. E. A. C. PETERSEN *et al.* [No. 212.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Mr. Paul Bakewell for appellant, no counsel appearing for appellees.

November 16, 1888. Dismissed with costs, on motion of *Mr. R. A. Bakewell*, in behalf of counsel for the appellant

D. B. BALDWIN v. MORTON MARTE *et al.* [No. 216.]

In Error to the Circuit Court of the United

States for the Eastern District of Virginia.
Mr. Wm. L. Royall for plaintiff in error.
Mr. R. A. Ayers for defendants in error.
 March 19, 1889. Dismissed with costs, on authority of counsel for plaintiff in error.

JOHN C. WRIGHT *et al.* v. FATINA O. MILLER *et al.* [No. 217.]
 Appeal from the Circuit Court of the United States for the Middle District of Tennessee.
Mr. Thomas L. Dodd for appellants. *Mr. John P. Murray* for appellees.
 March 19, 1889. Dismissed with costs, pursuant to the 10th Rule.

THE AMERICAN NATIONAL BANK OF NASHVILLE v. THE MAYOR AND CITY COUNCIL OF NASHVILLE. [No. 228.]
 Appeal from the Circuit Court of the United States for the Middle District of Tennessee.
Mr. Ed. Baxter for appellant. No counsel entered for appellees.
 March 29, 1889. Dismissed with costs, pursuant to the 10th Rule.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as reorganized) v. JOHN OVERTON, JR., Trustee, *et al.* [No. 237.]
 Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.
Messrs. John F. Dillon and *B. C. Brown* for appellant. *Mr. U. M. Rose* for appellees.
 April 5, 1889. Dismissed with costs pursuant to the 10th Rule.

HERBERT G. MACKINNEY v. JACOB ROSENBAUM *et al.* [No. 242.]
 In Error to the Circuit Court of the United States for the Southern District of New York.
Mr. S. F. Kneeland for plaintiff in error. No counsel entered for defendants in error.
 April 10, 1889. Dismissed with costs pursuant to the 10th Rule.

THE NORTHERN PACIFIC RAILROAD COMPANY v. IRVIN W. GATES. [No. 248.]
 In Error to the Supreme Court of the State of Wisconsin.
Mr. James McNaught for plaintiff in error. No counsel entered for defendant in error.
 December 3, 1888. Dismissed with costs, on motion of *Mr. James McNaught*, of counsel for the plaintiff in error.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY *et al.* v. G. H. CANDEE. [No. 251.]
 Appeal from the Circuit Court of the United States for the Northern District of Iowa.
Mr. C. H. Gatch for appellants. *Mr. George Oran* for appellee.
 April 16, 1889. Dismissed with costs, per stipulation.

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY *et al.* v. THE UNITED STATES *ex rel.* CLARENCE F. MOULTON. [No. 252.]
 In Error to the Circuit Court of the United States for the District of Kansas.
Mr. B. W. Perkins for plaintiffs in error. No counsel entered for defendant in error.
 April 16, 1889. Dismissed with costs, pursuant to the 10th Rule.

CONRAD KAHLER v. RICHARD M. HOE and STEPHEN D. TUCKER. [No. 257.]
 Appeal from the Circuit Court of the United States for the Southern District of New York.
Mr. B. F. Lee for appellant. *Mr. M. B. Philipp* for appellees.
 January 23, 1889. Dismissed, per stipulation, on motion of *Mr. B. F. Lee*, of counsel for appellant.

THE NATIONAL FEATHER DUSTER COMPANY v. THE DEARBORN FEATHER DUSTER COMPANY *et al.* [No. 258.]
 Appeal from the Circuit Court of the United States for the Northern District of Illinois.
Messrs. J. A. Sleeper and *H. K. Whiton* for the appellant. *Messrs. J. H. Peirce* and *G. P. Fisher, Jr.*, for the appellees.
 April 17, 1889. Dismissed with costs, pursuant to the 10th Rule.

JEROME C. TAFT v. ALANSON STEERE *et al.* [No. 259.]
 Appeal from the Circuit Court of the United States for the District of Rhode Island.
Mr. A. K. P. Joy for the appellant. No counsel entered for appellees.
 April 17, 1889. Dismissed with costs, pursuant to the 10th Rule.

THE FRANKFORT AND STATE LINE RAILROAD COMPANY v. EDWARD F. LEONARD *et al.* [No. 270.]
 Appeal from the Circuit Court of the United States for the District of Indiana.
Messrs. A. C. Harris, W. H. Calkins and *Clarence Brown* for appellant. *Mr. E. G. Ingersoll* for appellees.
 April 23, 1889. Dismissed with costs, on authority of counsel for appellant.

W. W. CREHORE v. THE OHIO AND MISSISSIPPI RAILWAY COMPANY. [No. 272.]
 In Error to the Circuit Court of the United States for the District of Kentucky.
 Motion to modify judgment submitted Apr. 25, 1889—Denied May 18, 1889.
 See opinion by *Harlan, J.*, *ante*, 144.
Messrs. John Mason Brown, Alexander Pope Humphrey and *George M. Davis* for plaintiff in error. *Messrs. W. M. Ramsey, Lawrence Maxwell, Jr.*, and *Mortimer Matthews* for defendant in error.
 April 24, 1889. Judgment reversed with costs and cause remanded with directions to remand the case to the state court.

WILLIAM H. POST *et al.* v. THE T. O. RICHARDS HARDWARE COMPANY. [No. 274.]
 Appeal from the Circuit Court of the United States for the District of Connecticut.
Mr. Wm. E. Simonds for appellants. *Mr. C. E. Mitchell* for appellee.
 April 23, 1889. Dismissed with costs, per stipulation of counsel.

GEORGE S. SMITH *et al.* v. A. A. OVERTON. [No. 275.]
 Appeal from the Circuit Court of the United States for the Southern District of Iowa.
Mr. N. M. Hubbard for appellants. No counsel entered for appellees.

April 24, 1889. Dismissed with costs, pursuant to the 10th Rule.

HENRY WAGNER et al. v. J. G. LEMEN et al. [No. 276.]

Appeal from the Circuit Court of the United States for the Southern District of Iowa. *Mr. N. M. Hubbard* for appellants. No counsel entered for appellees.

April 24, 1889. Dismissed with costs, pursuant to the 10th Rule.

CALVIN YOUNG et al. v. CHARLES L. SHELTON et al., etc. [No. 277.]

Appeal from the Circuit Court of the United States for the Northern District of New York. *Mr. F. I. Allen* for appellants. *Mr. Jno. R. Bennett* for appellees.

April 24, 1889. Dismissed with costs, pursuant to the 10th Rule.

THE REPUBLICAN VALLEY RAILROAD COMPANY v. THE STATE OF NEBRASKA ex rel. FRANK W. MATTOON et al. [No. 286.]

In Error to the Supreme Court of the State of Nebraska.

Mr. T. M. Marquette for plaintiff in error. *Mr. T. F. Burke* for defendants in error.

April 25, 1889. Dismissed with costs, pursuant to the 10th Rule.

BERNARD ARNSEN et al. v. EDWIN A. MERRITT, late Collr., etc. [No. 289.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. Stephen G. Clarke for plaintiffs in error. *The Attorney-General* for defendant in error.

March 5, 1889. Dismissed on motion of *Mr. Edwin B. Smith*, for the plaintiffs in error.

THE CITY OF EVANSVILLE v. WILLIAM H. MOULTON. [No. 297.]

In error to the Circuit Court of the United States for the District of Indiana.

Mr. John M. Butler for plaintiff in error. *Mr. T. C. Mather* for defendant in error.

January 24, 1889. Dismissed with costs, per stipulation, on motion of *Mr. Walter H. Smith*, in behalf of counsel.

THE CITY OF EVANSVILLE v. AUGUSTUS T. POST. [No. 298.]

In Error of the Circuit Court of the United States for the District of Indiana.

Mr. John M. Butler, for the plaintiff in error. *Mr. T. C. Mather*, for defendant in error.

April 26, 1889. Dismissed with costs, pursuant to the 10th Rule.

THE CITY OF EVANSVILLE v. THE AUGUSTA SAVINGS BANK. [No. 299.]

In Error to the Circuit Court of the United States for the District of Indiana.

Mr. John M. Butler, for the plaintiff in error. No counsel entered for defendant in error.

April 26, 1889. Dismissed with costs, pursuant to the 10th Rule.

DUMONT CLARKE v. WM. S. REYBURN et al. [No. 301.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

States for the Northern District of Illinois.

Mr. Geo. W. Smith, for appellant. *Mr. C. M. Osborn*, for appellees.

December 10, 1888. Dismissed per stipulation, on motion of *Mr. C. M. Osborn*, of counsel for appellees.

THE PHILADELPHIA AND READING RAILROAD COMPANY v. MATTHIAS PATENT. [No. 312.]

In Error to the Court of Common Pleas of the City of Philadelphia, State of Pennsylvania.

Mr. Thomas Hart, Jr., for plaintiff in error. No counsel entered for defendant in error.

January 7, 1889. Dismissed with costs, on motion of *Mr. William A. McKenney*, in behalf of counsel for the plaintiff in error.

SAMUEL R. C. MATTHEWS et al. v. GEORGE FLOWER et al., as Exrs. etc. [No. 314.]

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

Mr. George L. Roberts, for appellants. *Mr. E. J. Hill*, for appellees.

January 10, 1889. Dismissed with costs, per stipulation, on motion of *Mr. George L. Roberts*, of counsel for the appellants.

THE GRAIN DRILL MANUFACTURERS CO. v. HENRY REINSTEDLER. [No. 328.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Messrs. H. E. Wood and Edward Boyd, for appellant. *Mr. Arthur Stem* for appellee.

November 19, 1888. Dismissed with costs, on motion of *Mr. Edward Boyd* for appellant.

FREEMAN A. FISHER et al. v. THE UNION TRUST COMPANY. [No. 332.]

Appeal from the Circuit Court of the United States for the District of Minnesota.

Messrs. F. B. Hart and F. H. Boardman for appellants. *Messrs. H. C. Whitney and Consider H. Willett* for appellee.

April 22, 1889. Dismissed with costs, per stipulation, on motion of *Mr. William A. McKenney*, in behalf of counsel.

RACHAEL S. GAFF et al. v. HENRY KIEFER. [No. 337.]

In error of the Circuit Court of the United States for the Eastern District of New York.

Mr. Miron Winslow for plaintiff in error. *Mr. M. L. Towns*, for defendant in error.

March 15, 1889. Dismissed with costs, on motion of *Mr. N. Dumont*, in behalf of counsel for the plaintiffs in error, as per stipulation.

JOHN E. HOCKETT v. THE STATE OF INDIANA. [No. 368.]

In Error to the Supreme Court of the State of Indiana.

Mr. John M. Butler, for plaintiff in error, no one appearing for defendant in error.

March 15, 1889. Dismissed with costs, on motion of *Mr. Joseph E. McDonald*, for the plaintiff in error.

NICHOLAS S. DEVRIES v. FREDERICK H. MARSH, Marshal, etc., et al. [No. 424.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The following stipulation was filed:

"Whereas, all the rights and interests of the United States in the subject matter of this litigation have been adjusted by the acceptance by the Secretary of the Treasury of an offer in compromise, made by the complainants, Nicholas S. DeVries and Stephen G. DeVries, of twenty-five hundred dollars (\$2,500.00) and all costs of this suit and the suit of the United States v. John T. Harper, Nicholas S. DeVries *et al.*, upon the official bond of the said Harper as Collector of Internal Revenue for the Eighth Collection District of Illinois, out of which this litigation was developed;

"And whereas, the said sum of money in compromise has been paid into the Treasury, and the costs of said suits amounting to the sum of three hundred and eleven dollars and sixty cents (\$311.60), have been paid to the Clerk of the Circuit Court of the United States, for the Northern District of Illinois;

"And whereas, it is necessary, in order to remove the cloud upon the complainant's land, that the decree rendered by the said circuit court in the above entitled cause should be reversed by the supreme court and the cause remanded to the circuit court, in order that the injunction prayed for in the bill may be granted and made perpetual:

"Therefore, it is hereby stipulated and agreed that the supreme court may reverse the decree of the circuit court in said cause, and remand said cause for such order as the circuit court may see fit to make in the premises.

N. T. N. ROBINSON,
J. S. STEVENS,
Solsrs. for Nicholas S. DeVries et al.
W. H. H. MILLER,
Attorney-General.
W. G. EWING,
Attorney for the United States.

Whereupon,

May 13, 1889. Decree reversed and cause remanded for such order as the Circuit Court may see fit to make in the premises.

JULIUS K. GRAVES *et al.* v. CHESTER C. CORBIN. [No. 490.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. J. M. Flower, for appellants. *Mr. Wm. J. Manning*, for appellee.

October 29, 1888. Appeal of James M. Flower, Curtis H. Remy and Stephen S. Gregory, three of the appellants in this cause, dismissed with costs, as per stipulation, on motion of *Mr. J. M. Flower*, for appellants.

J. P. SMITH *et al.* v. WILLIAM T. HOLT. [No. 494.]

In Error to the Circuit Court of the United States for the Northern District of Texas.

Mr. Jno. D. Templeton, for plaintiffs in error. *Mr. L. S. Dixon*, for defendant in error.

March 11, 1889. Dismissed with costs, on motion of *Mr. W. Hallett Phillips*, for the plaintiffs in error.

FRANCIS ADAMS v. THE TOWN OF LANSING. [No. 509.]

In Error to the Circuit Court of the United States for the Northern District of New York.

Mr. James R. Cox for plaintiff in error. *Mr. Francis Kernan* for defendant in error.

January 4, 1889. Dismissed with costs, per stipulation, on motion of *Mr. Clarence A. Seward*, in behalf of counsel.

THE FIRST NATIONAL BANK OF ST. JOHNSBURY v. GEORGE W. HENDREE, Receiver, etc. [No. 588.]

In Error to the Circuit Court of the United States for the District of Vermont.

October 18, 1888. Judgment affirmed for the sum of twenty-nine thousand four hundred and fifty-four dollars and eighty-four cents, without costs, on motion of *Mr. J. D. Rouse*, in behalf of the parties, as per stipulation signed by the parties.

H. H. GOODELL v. GEORGE KRIECHBAUM, Sheriff of DES MOINES COUNTY, IOWA. [No. 587.]

In Error to the Supreme Court of the State of Iowa.

Mr. Wirt Dexter, for plaintiff in error. *Mr. A. J. Baker*, for defendant in error.

December 14, 1888. Judgment reversed with costs, per stipulation, on motion of *Mr. J. M. Wilson*, in behalf of counsel, and cause remanded with an instruction to enter a judgment discharging the plaintiff in error from custody.

ROBERT J. HUBBARD v. GEORGE CRANE, Admr., etc. [No. 601.]

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

Messrs. C. H. Gatch and William Connor, for appellant. *Mr. George Crane*, for appellee.

December 18, 1888. Dismissed with costs, per stipulation, on motion of *Mr. D. B. Henderson*, in behalf of counsel.

EMILY S. WOLCOTT v. GEORGE CRANE, Admr., etc. [No. 608.]

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

Messrs. C. H. Gatch and William Connor, for appellant. *Mr. George Crane*, for appellee.

December 18, 1888. Dismissed with costs, per stipulation, on motion of *Mr. D. B. Henderson*, in behalf of counsel.

HENRY BIER v. THE CITY OF NEW ORLEANS. [No. 654.]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Messrs. E. H. Farrar and E. B. Kruttschnitt, for plaintiff in error. *Mr. Henry C. Miller*, for defendant in error.

October 22, 1888. Dismissed with costs, as per stipulation, on motion of *Mr. E. B. Kruttschnitt*, for plaintiff in error.

ROBERT R. PRENTISS v. THE CITY OF NEW ORLEANS. [No. 655.]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Messrs. E. H. Farrar and E. B. Kruttschnitt, for plaintiff in error. *Mr. Henry C. Miller*, for defendant in error.

October 22, 1888. Dismissed with costs, as per stipulation, on motion of *Mr. E. B. Kruttschnitt*, of counsel for the plaintiff in error.

JOHN B. WHITEHEAD v. THE CITY OF NEW ORLEANS. [No. 656.]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Messrs. E. H. Farrar and E. B. Kruttschnitt, for plaintiff in error. *Mr. Henry C. Miller*, for defendant in error.

October 22, 1888. Dismissed with costs, as per stipulation, on motion of *Mr. E. B. Kruttschnitt*, of counsel for the plaintiff in error.

WM. H. ROBERTSON, Collector of the Port of New York v. FREDERICK S. PINKUS. [No. 671.]

In Error to the Circuit Court of the United States for the Southern District of New York.

The Attorney-General, for plaintiff in error. *Mr. S. G. Clarke*, for defendant in error.

November 19, 1888. Dismissed with costs, on motion of *Mr. Assistant Attorney-General Maury*, for plaintiff in error.

FRITZ MENKEN v. THE CITY OF ATLANTA. [No. 674.]

In Error to the Supreme Court of the State of Georgia.

Mr. Hoke Smith, for plaintiff in error. *Mr. S. W. Packard*, for defendant in error.

April 18, 1889. The death of Fritz Menken, the plaintiff in error in this cause, having been suggested by *Mr. Pope Barrow* in behalf of *Mr. Hoke Smith*, of counsel for the said plaintiff in error, and it appearing to the court that this is a criminal case it is considered by the court that this cause has abated. Therefore, it is ordered and adjudged by the court that the writ of error in this cause be, and the same is hereby, dismissed.

ANDREW J. CROPEY v. THE COUNTY OF GAGE. [No. 696.]

In Error to the Circuit Court of the United States for the District of Nebraska.

Mr. J. M. Woolworth, for the plaintiff in error. *Messrs. Charles F. Manderson and Robert S. Bibb*, for defendant in error.

May 13, 1889. Dismissed, per stipulation, on motion of *Mr. William A. McKenney*, in behalf of counsel.

M. M. GREEN v. R. T. HAYES *et al.* [No. 702.]

In Error to the Supreme Court of the State of California.

Mr. W. J. Johnston, for plaintiff in error. *Messrs. G. Wiley Wells and Walter VanDyke*, for defendants in error.

March 6, 1889. Dismissed with costs, on motion of *Mr. W. J. Johnston*, for plaintiff in error.

CHRIS. BONN v. D. W. McLANE. [No. 781.]

In Error to the Supreme Court of the State of Iowa.

Mr. P. Henry Smyth, for plaintiff in error. *Messrs. W. E. Blake and S. W. Packard*, for defendant in error.

April 22, 1889. Dismissed with costs, pursuant to authority of counsel for plaintiff in error, on motion of *Mr. William A. McKenney*, in behalf of counsel.

THE AMERICAN DIAMOND ROCK BORING COMPANY v. CHARLES SHELDON *et al.* [No. 741.]

SAME v. THE RUTLAND MARBLE COMPANY. [No. 742.]

SAME v. EDSON P. GILSON *et al.* [No. 957.]

SAME v. THE SUTHERLAND FALLS MARBLE COMPANY. [No. 958.]

SAME v. CARLOS SHERMAN *et al.* [No. 959.]

SAME v. ELI J. HAWLEY *et al.* [No. 960.]

SAME v. WYMAN FLINT *et al.* [No. 961.]

SAME v. WILLIAM W. KELLEY. [No. 962.]

SAME v. JOSIAH B. HOLLISTER. [No. 963.]

SAME v. J. K. FREEDLEY *et al.* [No. 964.]

SAME v. THE COLUMBIAN MARBLE COMPANY. [No. 965.]

SAME v. THE CUTTER MARBLE COMPANY. [No. 966.]

Appeals from the Circuit Court of the United States for the District of Vermont.

Mr. E. G. Thompson, for appellant. *Mr. E. T. Rice*, for appellees.

December 20, 1888. Dismissed, with costs, pursuant to the 10th Rule.

THE CONTINENTAL LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, v. ANN ELIZA RHOADS, Admrx., *etc.* [No. 758.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. Samuel C. Perkins for the plaintiff in error. *Mr. R. T. Cornwell* for the defendant in error.

October 26, 1888. Dismissed as per stipulation, on motion of *Mr. J. K. McCammon*, in behalf of counsel for the plaintiff in error.

ELIJAH ROOKE *et al.*, *etc.*, v. H. D. SHREWSBURY *et al.* [No. 761.]

Appeal from the District Court of the United States for the District of West Virginia.

Mr. W. P. Hubbard for appellants. *Mr. E. B. Knight* for appellees.

April 22, 1889. Dismissed with costs, per stipulation, on motion of *Mr. William A. McKenney* in behalf of counsel.

CLARENCE H. VENNER v. THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY *et al.* [No. 783.]

Appeal from the Circuit Court of the United States for the District of Kansas.

Mr. W. A. Underwood for appellant. *Messrs. George R. Peck and Sigourney Butler* for appellees.

January 7, 1889. Dismissed per stipulation, on motion of *Mr. Sigourney Butler*, of counsel for the appellees.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *et al.* v. DENNIS LOURDEN. [No. 852.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Edwin Walker for plaintiffs in error. No counsel entered for defendant in error.

January 2, 1889. Dismissed with costs, on motion of *Mr. Edwin Walker* of counsel for plaintiffs in error.

THE WESTERN AIR LINE CONSTRUCTION COMPANY v. WILLIAM A. MCGILLIS *et al.* [No. 904.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Edwin Walker for plaintiff in error.
Mr. John S. Cooper for defendants in error.

January 2, 1889. Dismissed per stipulation, each party to pay its own costs in this court, on motion of *Mr. Edwin Walker*, of counsel for the plaintiff in error.

THE LOUISVILLE CITY RAILWAY COMPANY v. THE CENTRAL PASSENGER RAILROAD COMPANY. [No. 906.]

Appeal from the Circuit Court of the United States for the District of Kentucky.

Mr. Alexander Pope Humphrey for the appellant. *Mr. John Mason Brown* for the appellee.

April 22, 1889. Dismissed with costs, per stipulation, on motion of *Mr. John Mason Brown*, for the appellee.

JAMES W. RODGERS v. THE SEVENTH NATIONAL BANK OF PHILADELPHIA *et al.* [No. 980.]

Appeal from the Circuit Court of the United States for the Western District of Virginia.

Mr. J. Randolph Tucker for appellant, no counsel appearing for appellees.

January 31, 1889. Dismissed with costs, on motion of *Mr. J. Randolph Tucker*, for the appellant.

GEORGE B. LIST v. THE COMMONWEALTH OF PENNSYLVANIA. [No. 984.]

In Error to the Supreme Court of the State of Pennsylvania.

Mr. W. P. Potter for plaintiff in error. *Mr. W. D. Porter* for defendant in error.

December 10, 1888. The death of George B. List, the plaintiff in error in this cause, having been suggested in a communication from counsel for defendant in error to the clerk, and it appearing to the court that this is a criminal case, it is considered by the court that this cause has abated.

Therefore it is ordered and adjudged by the court that the writ of error in this cause be, and the same is hereby, dismissed.

JOHN A. SMITH v. M. D. DEWIRE. [No. 1063.]

In Error to the Supreme Court of the State of Kansas.

Mr. Oscar Foust for the plaintiff in error. *Messrs. A. T. Britton and A. B. Browne* for defendant in error.

March 18, 1889. Dismissed with costs, on motion of *Mr. A. B. Browne*, for the defendant in error, as per stipulation.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY v. CHARLES R. L. CROWN. [No. 1166.]

SAME v. HENRY M. KNIGHT. [No. 1167.]

SAME v. CHARLES C. ANDERSON. [No. 1168.]

SAME v. MARY H. ROWLAND. [No. 1169.]

SAME v. ELIZABETH STROEBEL. [No. 1170.]

SAME v. WILLIAM NEITZ. [No. 1171.]

SAME v. SARAH C. RICHARDS. [No. 1172.]

In Error to the Supreme Court of the District of Columbia.

Mr. Enoch Totten for the plaintiffs in error. *Messrs. Samuel Madox and S. S. Henkle* for defendants in error.

April 17, 1889. Dismissed for the want of jurisdiction on the authority of the decision of this court in the case of *The Baltimore and Po-*

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tomic Railroad Company v. Hopkins, No. 1173, on the docket for the present term, on motion of *Mr. S. S. Henkle*, of counsel for the defendants in error, as per stipulation.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY v. LINDEN KENT and JAMES LOWMEDES, Administrators, *etc.* [No. 1174.]
Appeal from the Supreme Court of the District of Columbia.

Mr. Enoch Totten, for appellant. *Mr. Linden, Kent*, for appellees.

April 1, 1889. Dismissed per stipulation, on motion of *Mr. William A. McKenney*, in behalf of counsel for appellant.

WALTER B. BROOKS v. ADOLPH AHRENS, Surviving Partner, *etc.* [No. 1200.]

In Error to the Court of Appeals of the State of Maryland.

Mr. Skipwith Wilmer, for plaintiff in error. No counsel entered for defendant in error.

November 26, 1888. Dismissed with costs, on motion of *Mr. Frank P. Clark*, in behalf of counsel for plaintiff in error.

F. A. WILDE v. DAVID BIRCHER *et al.*

[No. 1864.]

In Error to the Circuit Court of the United States for the District of Colorado.

Messrs. B. M. Hughes and Joseph W. Taylor, for the plaintiff in error. *Messrs. J. H. McGowan and Charles E. Gast* for defendants in error.

May 13, 1889. Dismissed per stipulation, on motion of *Mr. William A. McKenney*, in behalf of counsel.

HANSON E. LEWIS and C. S. L. LEACH, Assignees, *etc.* v. CHESTER W. WITTERS, Receiver, *etc.* [No. 1865.]

Appeal from the Circuit Court of the United States for the District of Vermont.

Mr. A. G. Safford, for the appellants. *Mr. Albert P. Cross*, for the appellee.

May 13, 1889. Dismissed per stipulation, on motion of *Mr. William A. McKenney*, in behalf of counsel.

R. T. WILSON *et al.*, Partners as R. T. WILSON AND COMPANY, v. B. L. HARDING *et al.*

[No. 1892.]

In error to the Circuit Court of the United States for the Southern District of Iowa.

Messrs. Charles A. Clark and N. M. Hubbard, for plaintiffs in error. *Mr. B. F. Kauffman*, for defendants in error.

January 7, 1889. Dismissed per stipulation, on motion of *Mr. William A. McKenney*, in behalf of counsel.

HORACE BOUGHTON *et al.* v. THE CHARTER OAK LIFE INSURANCE COMPANY *et al.*

[No. 1414.]

Appeal from the Supreme Court of the District of Columbia.

October 22, 1888. Docketed and dismissed with costs, on motion of *Mr. S. E. Bond*, for appellees.

No one opposing.

ERASMUS GEST v. THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY. [No. 1429.]

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Mr. George Hoadley, for plaintiff in error. No counsel entered for defendant in error.

March 28, 1889. Dismissed with costs, on motion of *Mr. George Hoadley*, for the plaintiff in error.

ALBERT J. SMITH *et al.* v. JAMES W. MILLER *et al.* [No. 1436.]

Appeal from the Circuit Court of the United States for the District of Rhode Island.

November 9, 1888. Docketed and dismissed with costs on motion of *Mr. Fillmore Beall*, of counsel for appellees.

No one opposing.

MARIA B. BATCHELDER v. JOHN BRICKELL. [No. 1438.]

In Error to the Supreme Court of the State of California.

November 19, 1888. Docketed and dismissed with costs on motion of *Mr. James Lowndes*, for defendant in error.

No opposition.

ADOLPH E. ROGÉ, Individually and as Admr., etc., v. ADOLPH E. BORIE *et al.* [No. 1447.]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

December 3, 1888. Docketed and dismissed with costs, on motion of *Mr. J. Hubley Ashton*, of counsel for the appellees.

No one opposing.

SARAH ALTHEA HILL v. WILLIAM SHARON. [No. 1452.]

Appeal from the Circuit Court of the United States for the Northern District of California.

December 14, 1888. Docketed and dismissed with costs, on motion of *Mr. Henry E. Davis*, of counsel for appellee.

No one opposing.

E. D. PACETTI v. JACOB FREY, Marshal of the City Court of Baltimore. [No. 1464.]

Appeal from the Circuit Court of the United States for the District of Maryland.

Mr. John H. Handy, for appellant. No counsel entered for appellee.

March 28, 1889. Dismissed with costs, on motion of *Mr. George Hoadley* in behalf of counsel for the appellant.

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GEORGE R. FARMER, Assignee, etc., v. WALTER H. COBBAN. [No. 1485.]

In error to the Supreme Court of the Territory of Dakota.

January 14, 1889. Docketed and dismissed with costs, on motion of *Mr. S. S. Burdett*, for defendant in error.

No one opposing.

HOLLON PARKER v. ELIZABETH DENNY, as Executrix of the Last Will of TIMOTHY P. DENNY, Deceased. [No. 1486.]

Appeal from the Supreme Court of the Territory of Washington.

January 15, 1889. Docketed and dismissed with costs, on motion of *Mr. James H. Hoffecker, Jr.*, for the appellee.

No one opposing.

VELASCO J. CASE v. ALLAN C. MCARTHUR *et al.* [No. 1528.]

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

March 21, 1889. Docketed and dismissed with costs, on motion of *Mr. Lawrence Maxwell, Jr.*, for the appellees.

No one opposing.

JEHU GRAY v. ALLAN C. MCARTHUR *et al.* [No. 1529.]

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

March 21, 1889. Docketed and dismissed with costs, on motion of *Mr. Lawrence Maxwell, Jr.* for appellees.

No one opposing.

OSCAR HUGO WEBBER v. THE COMMONWEALTH OF PENNSYLVANIA. [No. 1534.]

In error to the Supreme Court of the State of Pennsylvania.

March 28, 1889. Docketed and dismissed with costs, on motion of *Mr. George S. Graham*, for the defendant in error.

No one opposing.

CHARLES H. PRESCOTT *et al.* v. JOHN M. ADAMS. [No. 1554.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

April 22, 1889. Docketed and dismissed with costs, on motion of *Mr. William A. Mc Kenney*, for the defendant in error.

No one opposing.

CASES DISMISSED IN VACATION

PURSUANT TO

RULE 28.

BETWEEN THE FINAL ADJOURNMENT AT

OCTOBER TERM, 1887,

AND THE COMMENCEMENT OF

OCTOBER TERM, 1888.

J. W. AMBROSE *et al.* v. THE BOARD OF COMMISSIONERS OF PILOTS. [No. 78.]

In Error to the Supreme Court of the State of New York.

Messrs. Coles Morris and Michael H. Cardoso, for plaintiffs in error. *Mr. William Allen Butler*, for defendant in error.

May 19, 1888.

THE UNION PACIFIC RAILWAY COMPANY v. ALVIN D. BOWERS. [No. 151.]

In Error to the Supreme Court of the Territory of Utah.

Mr. John F. Dillon, for plaintiff in error. *Messrs. Arthur Brown, J. G. Sutherland and J. R. McBride*, for defendant in error.

August 10, 1888.

ELLEN D. RICHARDSON v. MAURICE V. BRESNAHAN *et al.* [No. 162.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Mr. William A. Macleod, for appellant. *Mr. Charles Allen Taber*, for appellees.

September 17, 1888.

JAMES MCHENRY v. THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY. [No. 170.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. Henry Arden, for plaintiff in error. *Mr. William G. Choate*, for defendant in error.

June 19, 1888.

J. FREDERICK SHEEDER v. JAMES SHANNON. [No. 218.]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Messrs. S. S. Hollingsworth and Samuel W. Pennypacker, for appellant. *Mr. Henry R. Edmunds*, for appellee.

September 17, 1888.

J. FREDERICK SHEEDER v. JAMES SHANNON. [No. 219.]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Messrs. S. S. Hollingsworth and Samuel W. Pennypacker, for appellant. *Mr. Henry R. Edmunds*, for appellee.

September 27, 1888.

GEORGE GIBSON v. THE MILL CREEK DISTILLING COMPANY. [No. 241.]

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

Mr. Leigh R. Page, for appellant. *Mr. Jno. A. Coke*, for appellee.

September 14, 1888.

See Book 80, p. 1088.

THE BULLION, BECK AND CHAMPION MINING COMPANY v. THE EUREKA HILL MINING COMPANY *et al.* [No. 451.]

Appeal from the Supreme Court of the Territory of Utah.

Mr. Arthur Brown, for appellant. *Mr. Moses Kirkpatrick*, for appellees.

September 29, 1888.

THE U. S. *ex rel.* COLUMBUS DREW *et al.* v. MARIE A. VALENTINE *et al.* [No. 467.]

Appeal from the Circuit Court of the United States for the Northern District of Florida.

Mr. Attorney-General, for appellants. *Mr. H. Bisbee*, for appellees.

June 14, 1888.

M. K. LEWIS v. N. C. CLARK. [No. 600.]

Appeal from the Circuit Court of the United States for the District of Nebraska.

Mr. J. M. Woolworth, for appellant. *Messrs. Nathan S. Harwood and John H. Ames*, for appellee.

June 5, 1888.

THE UNION PACIFIC RAILWAY COMPANY v. ADDISON J. LAKE. [No. 668.]

In Error to the Circuit Court of the United States for the District of Colorado.

Mr. John F. Dillon, for plaintiff in error. *Mr. W. S. Decker*, for defendant in error.

August 10, 1888.

DAVID N. MILLER v. LEWIS COLE.

[No. 748.]

In Error to the Circuit Court of the United States for the District of Nebraska.

Mr. George E. Pritchett, for plaintiff in error. *Mr. J. M. Woolworth*, for defendant in error.

August 10, 1888.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1889.

Vol. 132.

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1889.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

THE METROPOLITAN RAILROAD COMPANY, *Pf. in Err.*,

v.

THE DISTRICT OF COLUMBIA.

(See S. C. Reporter's ed. 1-13.)

District of Columbia a municipal corporation—embraced in and governed by Statute of Limitations—implied obligation—action, when within statute.

1. The District of Columbia is a municipal corporation, having a right to sue and be sued, and is subject to the ordinary rules that govern the law of procedure between private persons.
2. The District of Columbia is embraced in the terms of the Statute of Limitations in force in that District.
3. Municipal corporations are embraced within the words of such statute, and are amenable thereto.
4. An action founded on an implied obligation to reimburse plaintiff for defendant's breach of duty imposed by statute, and the required performance of that duty by the plaintiff in consequence, is an action of assumpsit.
5. The fact that the duty which defendant failed to perform was a statutory one does not make the action one upon the statute; such an action is one within said Statute of Limitations.

[No. 5.]

Argued Nov. 22, 1888. Decided Oct. 21, 1889.

IN ERROR to the Supreme Court of the District of Columbia, to review a judgment in favor of the District of Columbia, the plaintiff below, for work done and materials furnished by it in paving streets in the City of Washington, in consequence of the failure of the Metropolitan Railroad Company to do such work and furnish such material in accordance with its duty as prescribed by statute; and also, to review the ruling of the court below, sustaining a demurrer to pleas of the Statute of Limitations filed by said Company. *Reversed and remanded, with directions to enter judgment for said Railroad Company, defendant, on the demurrer to the plea of the Statute of Limitations.*

The facts are stated in the opinion. Opinion below, 1 Mackey, 861.

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Messrs. W. D. Davidge and Nat'l Wilson, for plaintiff in error:

There is nothing to take the case out of the well-established rule as to voluntary payments. *Baltimore v. Hughes*, 1 Gill & J. 480, 498; 4 Walt, Act. and Def. 450, 454, 457, 462, and cases cited; *Broom, Legal Maxims*, 255, 256; *Union Pac. R. Co. v. Dodge County*, 98 U. S. 545 (25: 197); *Milwaukee & M. R. Co. v. Soutter*, 80 U. S. 13 Wall. 517 (20: 543); *Detroit v. Martin*, 34 Mich. 170, 22 Am. Rep. 512, and note, 519; *Black v. Ward*, 27 Mich. 191, 15 Am. Rep. 162, and note, 171; *Radich v. Hutchins*, 95 U. S. 210, 213 (24: 409, 410); *Baltimore v. Lefferman*, 4 Gill, 425, 45 Am. Dec. 145, and note, 153; *Regan v. Baldwin*, 126 Mass. 485, 30 Am. Rep. 689.

The District being a municipal corporation, the Statute of Limitations can be pleaded where it could be pleaded against a natural person.

Dillon, Mun. Corp. (3d ed.) § 668; *Wood, Lim. of Act.* 93, 94; *Cincinnati v. First Presbyterian Church*, 8 Ohio, 298; *Cincinnati v. Evans*, 5 Ohio St. 594; *Lane v. Kennedy*, 13 Ohio St. 42; *Evans v. Erie County*, 66 Pa. 222; *Armstrong v. Dalton*, 4 Dev. L. (N. C.) 568; *St. Charles County v. Powell*, 22 Mo. 525; *School Directors of St. Charles Twp. v. Goerges*, 50 Mo. 194; *Fort Smith v. McKibbin*, 41 Ark. 45; *Dudley v. Frankfort*, 12 B. Mon. 611.

The Statute of Limitations runs against a municipal corporation.

Pella v. Scholte, 24 Iowa, 283; *Kennebunkport v. Smith*, 22 Me. 445; *North Hempstead v. Hempstead*, 2 Wend. 109; *Rowan v. Portland*, 8 B. Mon. 232; *Litchfield v. Wilmot*, 2 Root (Conn.) 288; *Alces v. Henderson*, 16 B. Mon. 131; *Wheeling v. Campbell*, 12 W. Va. 36; *Forsyth v. Wheeling*, 19 W. Va. 818; *Galveston v. Menard*, 23 Tex. 849; *Kelly v. Greenfield*, 2 Har. & McH. 121; *Russell v. Baker*, 1 Har. & J. 71.

The cause of action set forth in the declaration comes within the provisions of the Statute of Limitations in force in the District of Columbia.

Wood, Lim. of Act. 43, 45; *Pawlet v. Sandgate*, 19 Vt. 621; *Carrol v. Green*, 92 U. S. 509 (23: 738).

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Municipal corporations are comprehended under the general terms "person or persons" and "inhabitants" in the Act of Limitations in force in the District of Columbia.

School Directors of St. Charles Twp. v. Goerges, 50 Mo. 194; *People v. Trinity Church*, 22 N. Y. 44, 57; *People v. Utica Ins. Co.* 15 Johns. 358.

The cause of action did not accrue within three years before suit was brought.

Wood, Lim. of Act. 321, 325; *Peck v. New York & L. U. S. M. Steamship Co.* 5 Bosw. 226; *Bowman v. Wright*, 7 Bush (Ky.) 375; *Hitt v. Sharer*, 34 Ill. 3.

Messrs. A. G. Riddle and Henry E. Davis, for defendant in error:

This is an action to recover money paid, laid out and expended by the District for the use of the defendant, at its special instance and request.

Brooklyn v. Brooklyn City R. Co. 47 N. Y. 475; *Illinois Cent. R. Co. v. Bloomington*, 76 Ill. 447.

The Railroad Company is chargeable with the demand sought to be enforced against it.

Marsh v. Fulton County, 77 U. S. 10 Wall. 676 (19: 1040); *Hitchcock v. Galveston*, 96 U. S. 341-343 (24: 659); *Chapman v. Douglas County*, 107 U. S. 843 (27: 378); *Argenti v. San Francisco*, 16 Cal. 282; *Morville v. American Tract Soc.* 123 Mass. 129-137; *Campbell v. Dist. of Columbia*, 2 MacArth. 583.

The plea of the Statute of Limitations is inapplicable as a bar to the action.

New York v. Broadway & S. A. R. Co. 17 Hun, 242; *Talory v. Jackson*, Cro. Car. 513; *Jones v. Pope*, 1 Saund. 37; *French v. O'Neale*, 2 Har. & McH. 401; *Newcomer v. Keedy*, 3 Md. 19; *Boyd v. Harris*, 2 Md. Ch. 213; *Pease v. Howard*, 14 Johns. 479; *Baltimore v. Green Mount Cemetery*, 7 Md. 535; *Fulton v. Nicholson*, 7 Md. 107; *Eschbach v. Pitts*, 6 Md. 75; *Hogan v. Ingle*, 3 Cranch, C. C. 355; *Mages v. Com.* 46 Pa. 358; *Longwell v. Ridinger*, 1 Gill, 57.

Mr. Justice Bradley delivered the opinion of the court:

This was an action brought by The District of Columbia in November, 1880, to recover from The Metropolitan Railroad Company the sum of \$161,622.52. The alleged cause of action was work done and materials furnished by the plaintiff in paving certain streets and avenues in the City of Washington at various times in the years 1871, 1872, 1873, 1874 and 1875, upon and in consequence of the neglect of the defendant to do said work and furnish said materials in accordance with its duty as prescribed by its charter.

The defendant was chartered by an Act of Congress dated July 1st, 1864, and amended March 3d, 1865. By these Acts it was authorized to construct and operate lines or routes of double-track railways in designated streets and avenues in Washington and Georgetown.

The first section of the charter contains the following proviso: "Provided, that the use and maintenance of said road shall be subject to the municipal regulations of the City of Washington within its corporate limits." Of course this provision reserves police control over the road and its operations on the part

of the authorities of the city. The fourth section of the charter declares that "the said corporation hereby created shall be bound to keep said tracks, and for the space of two feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order, without expense to the United States or to the City of Washington." The fifth section declares that "nothing in this Act shall prevent the government at any time, at their option, from altering the grade or otherwise improving all avenues and streets occupied by said roads, or the City of Washington from so altering or improving such streets and avenues, and the sewerage thereof, as may be under their respective authority and control; and in such event it shall be the duty of said Company to change their said railroad so as to conform to such grade and pavement." It is on these provisions that the claim of the city is based.

The amended declaration sets out in great detail the grading and paving which were done in various streets and avenues along and adjoining the tracks of the defendant, and which it is averred should have been done by the defendant under the provisions of its charter, but which the defendant neglected and refused to do.

The defendant filed twelve several pleas to the action, the eleventh and twelfth being pleas of the Statute of Limitations. Issue was taken upon all the pleas except these two, and they were demurred to. The court sustained the demurrer, and the cause was tried on the other issues, and a verdict found for the plaintiff.

The case is brought here by writ of error, which brings up for consideration a bill of exceptions taken at the trial, and the ruling upon the demurrer to the pleas of the Statute of Limitations. It is conceded that if the court below erred in sustaining that demurrer, the judgment must be reversed. That question will therefore be first considered.

It is contended by the plaintiff that it (the District of Columbia) is not amenable to the Statute of Limitations, for three reasons: first, because of its dignity as partaking of the sovereign power of government; secondly, because it is not embraced in the terms of the Statute of Limitations in force in the District; and, thirdly, because if the general words of the statute are sufficiently broad to include the District, still, municipal corporations, unless specially mentioned, are not subject to the statute.

The first question, therefore, will be, whether the District of Columbia is, or is not, a municipal body merely, or whether it has such a sovereign character, or is so identified with or representative of the sovereignty of the United States as to be entitled to the prerogatives and exemptions of sovereignty.

In order to a better understanding of the subject under consideration, it will be proper to take a brief survey of the government of the District and the changes it has undergone since its first organization.

Prior to 1871 the local government of the District of Columbia, on the east side of the Potomac, had been divided between the corporations of Washington and Georgetown and

the Levy Court of the County of Washington. Georgetown had been incorporated by the Legislature of Maryland as early as 1789 (Davis' Laws Dist. Col. 478), as Alexandria had been by the Legislature of Virginia, as early as 1748 and 1779 (Davis' Laws, 588, 541); and those towns or cities were clearly nothing more than ordinary municipal corporations, with the usual powers of such corporations. When the government of the United States took possession of the District in December, 1800, it was divided by Congress into two counties, that of Alexandria on the west side of the Potomac, and that of Washington on the east side; and the laws of Virginia were continued over the former, and the laws of Maryland over the latter; and a court, called the Circuit Court of the District of Columbia, was established with general jurisdiction, civil and criminal, to hold sessions alternately in each county; but the corporate rights of the Cities of Alexandria and Georgetown, and of all other corporate bodies, were expressly left unimpaired, except as related to judicial powers. (See Act of Feb. 27, 1801, 2 Stat. at L. 108.) A supplementary Act, passed a few days later, gave to the circuit court certain administrative powers, the same as those vested in the county and levy courts of Virginia and Maryland respectively; and it was declared that the magistrates to be appointed should be a board of commissioners within their respective counties, and have the same powers and perform the same duties, as the levy courts of Maryland. These powers related to the construction and repair of roads, bridges, ferries, the care of the poor, etc. (Act of March 8, 1801, 2 Stat. at L. 115.) On May 3d, 1802, an Act was passed to incorporate the City of Washington. (3 Stat. at L. 195.) It invested the mayor and common council (the latter being elected by the white male inhabitants) with all the usual powers of municipal bodies, such as the power to pass by-laws and ordinances; powers of administration, regulation and taxation; amongst others specially named, the power "to erect and repair bridges, to keep in repair all necessary streets, avenues, drains and sewers, and to pass regulations necessary for the preservation of the same, agreeably to the plan of said city." Various amendments, from time to time, were made to this charter, and additional powers were conferred. A general revision of it was made by Act of Congress passed May 15, 1820. (3 Stat. at L. 583.) A further revision was made and additional powers were given by the Act of May 17, 1848 (9 Stat. at L. 223), but nothing to change the essential character of the corporation.

The powers of the levy court extended more particularly to the country, outside of the cities, but also to some matters in the cities common to the whole county. It was reorganized, and its powers and duties more specifically defined, in the Acts of July 1st, 1812 (2 Stat. at L. 771), and of March 3d, 1863 (12 Stat. at L. 799). By the last Act, the members of the court were to be nine in number, and to be appointed by the President and Senate.

In the first year of the war, August 6th, 1861 (12 Stat. at L. 320), an Act was passed "to create a metropolitan police district of the

District of Columbia, and to establish a police therefor." The police had previously been appointed and regulated by the mayor and common council of Washington; but it was now deemed important that it should be under the control of the government. The Act provided for the appointment of five commissioners by the President and Senate, who, together with the mayors of Washington and Georgetown, were to form the board of police for the District; and this board was invested with extraordinary powers of surveillance and guardianship of the peace.

This general review of the form of government which prevailed in the District of Columbia and City of Washington prior to 1871 is sufficient to show that it was strictly municipal in its character; and that the government of the United States, except so far as the protection of its own public buildings and property was concerned, took no part in the local government, any more than any state government interferes with the municipal administration of its cities. The officers of the departments, even the President himself, exercised no local authority in city affairs. It is true, in consequence of the large property interests of the United States in Washington, in the public parks and buildings, the government always made some contribution to the finances of the city, but the residue was raised by taxing the inhabitants of the city and District, just as the inhabitants of all municipal bodies are taxed.

In 1871 an important modification was made in the form of the district government—a Legislature was established, with all the apparatus of a distinct government. By the Act of February 21st, of that year, entitled "An Act to Provide a Government for the District of Columbia" (16 Stat. at L. 419), it was enacted (§ 1) that all that part of the territory of the United States included within the limits of the District of Columbia be created into a government by the name of the District of Columbia, by which name it was constituted "a body corporate for municipal purposes," with power to make contracts, sue and be sued, and "to exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States." A governor and Legislature were created; also a board of public works; the latter to consist of the governor as its president, and four other persons, to be appointed by the President and Senate. To this board was given the control and repair of the streets, avenues, alleys and sewers of the City of Washington, and all other works which might be intrusted to their charge by the Legislative Assembly or Congress.

They were empowered to disburse the moneys raised for the improvement of streets, avenues, alleys and sewers, and roads and bridges, and to assess upon adjoining property, specially benefited thereby, a reasonable proportion of the cost, not exceeding one third. The acts of this board were held to be binding on the municipality of the District in *Barnes v. District of Columbia*, 91 U. S. 540 [28: 440]. It was regarded as a mere branch of the district government, though appointed by the President and not subject to the control of the district authorities.

This Constitution lasted until June 20th, 1874, when an Act was passed entitled "An Act for the Government of the District of Columbia, and for Other Purposes." (13 Stat. at L. 116.) By this Act the government established by the Act of 1871 was abolished, and the President, by and with the advice and consent of the Senate, was authorized to appoint a commission, consisting of three persons, to exercise the power and authority then vested in the governor and board of public works, except as afterwards limited by the Act. By a subsequent Act, approved June 11th, 1878 (20 Stat. at L. 102), it was enacted that the District of Columbia should "*remain and continue a municipal corporation*," as provided in section two of the Revised Statutes relating to said District, and the appointment of commissioners was provided for, to have and to exercise similar powers given to the commissioners appointed under the Act of 1874. All rights of action and suits for and against the District were expressly preserved *in statu quo*.

Under these different changes the administration of the affairs of the District of Columbia and City of Washington has gone on in much the same way, except a change in the depositaries of power, and in the extent and number of powers conferred upon them. Legislative powers have now ceased, and the municipal government is confined to mere administration. The identity of corporate existence is continued, and all actions and suits for and against the District are preserved unaffected by the changes that have occurred.

In view of these laws, the counsel of the plaintiff contend that the government of the District of Columbia is a department of the United States government, and that the corporation is a mere name, and not a person in the sense of the law, distinct from the government itself. We cannot assent to this view. It is contrary to the express language of the statutes. That language is that the District shall "*remain and continue a municipal corporation*," with all rights of action and suits for and against it. If it were a department of the government, how could it be sued? Can the Treasury Department be sued; or any other department? We are of opinion that the corporate capacity and corporate liabilities of the District of Columbia remain as before, and that its character as a mere municipal corporation has not been changed. The mode of appointing its officers does not abrogate its character as a municipal body politic. We do not suppose that it is necessary to a municipal government, or to municipal responsibility, that the officers should be elected by the people. Local self-government is undoubtedly desirable where there are not forcible reasons against its exercise. But it is not required by any inexorable principle. All municipal governments are but agencies of the superior power of the State or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior Legislature sees fit to confer upon them. The form of those agencies and the mode of appointing officials to execute them are matters of legislative discretion. Commissioners are

not unfrequently appointed by the Legislature or executive of a State for the administration of municipal affairs, or some portion thereof, sometimes temporarily, sometimes permanently. It may be demanded by motives of expediency or the exigences of the situation, by the boldness of corruption, the absence of public order and security, or the necessity of high executive ability in dealing with particular populations. Such unusual constitutions do not release the people from the duty of obedience or from taxation, or the municipal body from those liabilities to which such bodies are ordinarily subject. Protection of life and property are enjoyed, perhaps in greater degree, than they could be, in such cases, under elective magistracies; and the government of the whole people is preserved in the legislative representation of the state or general government. "Nor can it in principle," said Mr. Justice Hunt in the *Barnes Case*, "be of the slightest consequence by what means these several officers are placed in their position, whether they are elected by the people of the municipality or appointed by the President or a governor. The people are the recognized source of all authority, state or municipal, and to this authority it must come at last, whether immediately or by a circuitous route." *Barnes v. District of Columbia*, 91 U. S. 540, 545 [28: 440, 441].

One argument of the plaintiff's counsel in this connection is, that the District of Columbia is a separate State, or sovereignty, according to the definition of writers on public law, being a distinct political society. This position is assented to by Chief Justice Marshall, speaking for this court, in the case of *Hepburn v. Ellzey*, 6 U. S. 2 Cranch, 445, 452 [2: 332], where the question was whether a citizen of the District could sue in the circuit courts of the United States as a citizen of a State. The court did not deny that the District of Columbia is a State in the sense of being a distinct political community; but held that the word "State" in the Constitution, where it extends the judicial power to cases between citizens of the several "States," refers to the States of the Union. It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State; but the sovereign power of this qualified State is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District Corporation, do not make those bodies sovereign. Crimes committed in the District are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a State, it is such in a very qualified sense. No more than this was meant by Chief Justice Taney, when, in the *Bank of Alexandria v. Dyer*, 39 U. S. 14 Pet. 141, 146 [10: 391], he spoke of the District of Columbia as being formed, by the Acts of Congress, into one separate political community, and of the two counties composing it (Washington and Alexandria) as resembling different coun-

ties in the same State; by reason whereof it was held that parties residing in one county could not be said to be "beyond the seas," or in a different jurisdiction, in reference to the other county, though the two counties were subject to different laws.

We are clearly of opinion that the plaintiff is a municipal corporation, having a right to sue and be sued, and subject to the ordinary rules that govern the law of procedure between private persons.

2. But the Supreme Court of the District supposes that municipal corporations are not embraced in the words of the Statute of Limitations. Let us see whether that view can be maintained.

The statute in force in the District is that of Maryland, passed in 1715, chap. XXIII. The Act, as regards personal actions, is substantially the same as that of 21 James I. It commences with a preamble, as follows: "Forasmuch as nothing can be more effectual to the peace and tranquillity of this province than the quieting the estates of the inhabitants thereof, and for the effecting of which no better measures can be taken than a limitation of time for the commencing of such actions as in the several and respective courts within this province are brought, from the time of the cause of such actions accruing." It is then enacted, that "all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, sur trover or replevin, . . . all actions of account, contract, debt, book, or upon the case, . . . all actions of debt for lending, or contract without specialty, etc., shall be sued or brought by any person or persons within this province, . . . shall be commenced or sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions of account, and the said actions upon the case, upon simple contract, . . . and, the said actions for debt, detinue and replevin . . . within three years ensuing the cause of such action, and not after;—" (1 Kilty's Laws, April, 1815, chap. XXIII.) There is nothing in any part of the Act to restrain the generality of this language: "All [enumerated] actions sued or brought by any person or persons within this province, . . . shall be commenced within three years." Corporations are "persons" in the law. There is no apparent reason why they should not be included in the statute. It is conceded that private corporations are included. On what ground, then, can municipal corporations be excluded? Not on the ground that they are not "persons," for that would exclude private corporations. They are, therefore, within the terms of the law.

3. Are they not also within the spirit and reason of the law? They are certainly within the reason of the preamble. It is just as much for the public interest and tranquillity that municipal corporations should be limited in the time of bringing suits as that individuals or private corporations should be. The reason stated in the preamble for the passage of the law applies to all; and, moreover, it shows that the objects of the law are beneficent ones, and, therefore, that it should be liberally construed. It cannot apply to the

sovereign power, of course. No restrictive laws apply to the sovereign, unless so expressed. And especially no laws affecting a right on the ground of neglect or laches, because neglect and laches cannot be imputed to him. And it matters not whether the sovereign be an individual monarch, or a republic or State. The principle applies to all sovereigns. The reason usually assigned for this prerogative is, that the sovereign is not answerable for the delinquencies of his agents. But whatever the true reason may be, such is the general law—such the universal law, except where it is expressly waived. The privilege, however, is a prerogative one, and cannot be challenged by any person inferior to the sovereign, whether that person be natural or corporate.

It is scarcely necessary to discuss further the question of the applicability of the Statute of Limitations to a purely municipal corporation when it is embraced within the general terms of the law. It was expressly decided to be applicable in the cases of *Kennebunkport v. Smith*, 22 Maine, 445; *Cincinnati v. First Pres. Ch.* 9 Ohio, 398; *Cincinnati v. Evans*, 5 Ohio St. 594; *St. Charles County v. Powell*, 23 Mo. 525; *Armstrong v. Dalton*, 4 Dev. L. (N. C.) 569, and other cases cited in the notes to Wood, Lim. of Act. § 53, and to 2 Dillon, Mun. Corp. § 668. Judge Dillon, in the section last cited, accurately says: "The doctrine is well understood, that to the sovereign power the maxim, '*nullum tempus occurrit regi*,' applies, and that the United States and the several States are not, without express words, bound by Statutes of Limitation. Although municipal corporations are considered as public agencies, exercising, in behalf of the State, public duties, there are many cases which hold that such corporations are not exempt from the operation of limitation statutes, but that such statutes, at least as respects all real and personal actions, run in favor of and against these corporations in the same manner and to the same extent as against natural persons." In *Evans v. Erie County*, 66 Pa. 222, 228, Sharawood, J., says: "That the Statute of Limitations runs against a county or other municipal corporation, we think cannot be doubted. The prerogative is that of the sovereign alone; *nullum tempus occurrit reipublice*. Her grantees, though artificial bodies created by her, are in the same category with natural persons." See also *Dundee Harbour (Trustees) v. Dougall* (1 Macq. H. L. Cas. 317). But we forbear to quote further authorities on the subject. We hold the doctrine to be well settled.

What may be the rule in regard to purpures and public nuisances, by encroachments upon the highways and other public places, it is not necessary to determine. They are generally offenses against the sovereign power itself, and, as such, no length of time can protect them. Where the right of property in such places is vested in the municipality, an assertion of that right may or may not be subject to the law of limitations. We express no opinion on that point, since it may be affected by considerations which are not involved in the present case.

The court below, in its opinion on the demurrer, suggests another ground, having relation to the form of the action, on which it is supposed that the plea of the Statute of Limitations in this case is untenable. It is this, that the action is founded on a statute, and that the Statute of Limitations does not apply to actions founded on statutes or other records, or specialties, but only to such as are founded on simple contract or on tort. We think, however, that the court is in error in supposing that the present action is founded on the statute. It is an action on the case upon an implied assumpsit arising out of the defendant's breach of a duty imposed by statute, and the required performance of that duty by the plaintiff in consequence. This raised an implied obligation on the part of the defendant to reimburse and pay to the plaintiff the moneys expended in that behalf. The action is founded on this implied obligation, and not on the statute, and is really an action of assumpsit. The fact that the duty which the defendant failed to perform was a statutory one does not make the action one upon the statute. The action is clearly one of those described in the Statute of Limitations. The case of *Carrol v. Green*, 92 U. S. 509 [28: 788] is strongly in point. That was a bill against stockholders of an insolvent bank to enforce their liability for double the amount of their stock, according to the provisions of the charter. It was held by this court that the liability of the stockholders arose from their acceptance of the charter, and their implied promise to fulfill its requirements, and that the legal remedy to enforce it was an action on the case, to which the Statute of Limitations would apply; and, hence, that it applied to a bill in equity founded on the same obligation. To the same effect is the case of *Beatty v. Burnes*, 12 U. S. 8 Crauch, 98 [8: 500], where an action for money had and received was brought, under the Maryland Act of 1791, against a party who had received from the United States payment for land situated in the District, which land was claimed by the plaintiff to belong to him. This court held that, inasmuch as the form of the action was covered by the Statute of Limitations of Maryland, it could be pleaded in bar, notwithstanding the action was given by the Statute of 1791. So, in *McCluny v. Stillman*, 28 U. S. 8 Pet. 270, 277 [7: 676], it was held that the Statute of Limitations of Ohio was pleadable to an action on the case brought against a receiver of the land office to recover damages for his refusing to enter the plaintiff's application in the books of his office for certain lands in his district. It was contended that such a case could not have been contemplated by the Legislature; but the court held that the action was within the terms of the statute, and that this was sufficient. Many more cases might be cited to the same point, but it is wholly unnecessary.

The judgment must be reversed, and the cause remanded, with directions to enter judgment for the defendant on the demurrer to the plea of the Statute of Limitations; and it is so ordered.

WILLIAM H. ROBERTSON, Late Collector of the PORT OF NEW YORK, *Plff. in Err.*,

THE FRANK BROTHERS COMPANY.

(See S. C. Reporter's ed. 17-21.)

Moral duress—voluntary payment—exaction of illegal fees—payment to officer to avoid penalty—appraisal, when conclusive.

1. Virtual or moral duress is sufficient to prevent a payment made under its influence from being voluntary.
2. When moral duress, not justified by law, is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary.
3. When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required; as where an officer exacts illegal fees, or a common carrier excessive charges.
4. The payment of money to an official to avoid an onerous penalty, though the imposition of that penalty may be illegal, is sufficient to make the payment an involuntary one; as where one, in order to get immediate possession of his goods, which are of a perishable nature, pays increased duties illegally exacted.
5. Although the valuation of merchandise made by the appraiser is generally conclusive, yet, if the appraiser proceed upon a wrong principle, contrary to law, his appraisal is impeachable and open to examination.

[No. 15.]

Argued Oct. 17, 1889. Decided Oct. 28, 1889.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment in favor of the Frank Brothers Company, the plaintiff below, for an overcharge of duties on imports. *Affirmed.*

The facts are stated in the opinion.

Mr. O. W. Chapman, *Solicitor-Gen.*, for plaintiff in error:

The importers made these "additions," not under compulsion or duress of property, but voluntarily, for the purpose of bringing this suit, and hence were not entitled to recover.

Haas v. Arthur, 14 Blatchf. 848; *Baltimore v. Lefferman*, 4 Gill, 425; *Radich v. Hutchins*, 95 U. S. 210, 218 (24: 409, 410).

But if these were not the importers' but the appraiser's additions, then they were final.

Hilton v. Merritt, 110 U. S. 97 (28: 83); *Iasigi v. Whitney*, 68 U. S. 1 Wall. 375 (17: 686); *Stairs v. Peaslee*, 59 U. S. 18 How. 521-530 (15: 474-478); *Oberteuffer v. Robertson*, 116 U. S. 499 (29: 706).

The payment must not only have been accompanied by a protest, but it must also have been made to obtain possession of the merchandise.

Porter v. Beard, 124 U. S. 429 (31: 490); *U. S. v. Schlesinger*, 120 U. S. 109 (30: 607).

Meurs. Henry Edwin Tremain, Mason W. Tyler and W. B. Coughtry, for defendant in error:

What constitutes foreign market value for duty purposes?

Oberteuffer v. Robertson, 116 U. S. 499 (20: 706); *Badger v. Cusimano*, 180 U. S. 89 (82: 851). The appraisalment of charges is open to judicial inquiry. A recovery may be had where the appraisers disregarded statutory rules.

Burgess v. Converse, 2 Curt. C. C. 221, 222; *Converse v. Burgess*, 59 U. S. 18 How. 415, 416 (15: 455, 456); *Grinnell v. Lawrence*, 1 Blatchf. 846; *Grinnold v. Lawrence*, 1 Blatchf. 599; *Maxwell v. Grinnold*, 51 U. S. 10 How. 243 (18: 405); *Swift & C. & B. Co. v. U. S.* 111 U. S. 29 (28: 845); *Vaccari v. Maxwell*, 8 Blatchf. 868; *Gant v. Peaslee*, 2 Curt. C. C. 250; *Belmont v. Lawrence*, 8 Blatchf. 119; *U. S. v. Clement*, *Crabbe*, 513.

Mr. Justice Bradley delivered the opinion of the court:

This is an action to recover for an alleged overcharge of duties on imports. The goods imported were bananas brought from Aspinwall. The duty was ten per cent *ad valorem*. The plaintiffs offered evidence tending to show the market value of the bananas at the port of shipment, which was claimed to be only fifty cents apiece for the large bunches and twenty-five cents apiece for the small bunches. The invoices received with the cargo exhibited this as the true market value, and added certain charges for labor and consul fees. The appraisers required the plaintiffs to add fifty per cent of these amounts as transportation charges for bringing the bananas into Aspinwall, and also certain shipping charges and commissions. The plaintiffs protested against this as an unjust addition; but whenever it was omitted the charge was added by the appraiser and a penalty of twenty per cent of the whole duty was imposed and exacted; and the officers declared that this would be done whenever the addition should be omitted. To avoid this penalty, and to get immediate possession of their goods (which are of a perishable nature), the plaintiffs made the addition required, and paid the increased duties that resulted,—but always under protest as before stated.

The form of the entries and invoices with the additions was as follows, the additions being in italics:

"Entry:

"Merchandise imported by Frank Brothers Company in the steamship *Alsa*, whereof Seymour is master, from Aspinwall to New York, Feb. 23, 1882. Marks, F. B.

"Two bins of bananas, containing 4,182 large bunches, at sixty cents, pesos, 2,479.20, 3,468 small bunches at thirty cents, 1,038.90 pesos.

"Charges, two hundred and thirty-nine pesos.

"Shipping charges added as required by the appraiser to make five cents Colombian currency per bunch, 140.88 pesos.

"Transportation charges added as required by appraiser on 4,182 large bunches at 25 cents, \$1.038, and 3,468 small bunches at 12½ cents, \$432.87."

"Invoice:

"Invoice of merchandise shipped by the Frank Bros. Co. on board the *Alsa*, Sansome master, bound for New York, and consigned to Frank Bros. Co.; Colon, Feb. 11, 1882, 2 bins containing—

182 U. S.

"4,202 bunches bananas at 60 2,521.20 pesos.
"3,564 bunches bananas at 80 1,069.20 "
"Charges for labor 239.37 "
"Consul fee 8. "

8,882.77 "

"THE FRANK BROS. COMPANY:

"4,182 large bunches at 60 2,479.20 "

"3,468 small bunches at 80 1,038.90 "

"Charges 239.37 "

"Shipping charges added as required by the appraiser to make 5 cents Colombian currency per bunch 140.88 "

8,897.85 "

"Reduced to U. S. currency \$8,207.98

"Transportation charges added as required by the appraiser on 4,182 large bunches at 25 cents 1,038.

"3,468 small bunches at 12½ cents 432.87

\$4,678.80

"Commission, 2½ per cent 116.84

\$4,790.64"

The appraiser's return indorsed thereon was as follows: "Value correct, with importer's additions."

It was contended by the counsel for the government at the trial, and is contended here, that the payment of the duties complained of was a voluntary payment, inasmuch as the plaintiffs themselves made the additions to the entries and invoices, and, that, therefore, they cannot recover back any part of the money so paid; and they requested the court below to instruct the jury to render a verdict for the defendant. This the court refused to do; and left it to the jury to decide upon the evidence whether the making of the additions was a voluntary act on the part of the plaintiffs, or done under constraint in view of the penalty sure to be imposed in case it was not done.

On this point the judge, in his charge to the jury, speaking of the entry and the additions made by the plaintiffs or their agent, said:

"He says he put them on there because he was compelled to. If that is so he ought not to be estopped from recovering; and here is a question for you on that subject, and you will decide it in this way: If those statements and figures were put on there because he thought that was the best way, on the whole; if, exercising his own judgment freely, he thought that it was the best way to get along with this to put it on there and let it go,—he can't take it back, . . . he can't recover anything back. The verdict will have to be for the defendant anyway, if that is so, because it was his own act in putting it on there. The collector assessed the duty just as he made it, and he can't complain. But, . . . if he was required to do it, or given to understand by some officer in the collector's department that it would be the worse for him, seriously, if he didn't; as, for instance, if the appraiser told him if he didn't put those on there the collector's office would, that the appraiser would, and that he would be exposed to a penalty that would be assessed against him;

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if he was given to understand by the collector's department, or some officer of it, that if he didn't put these figures on there they should, and make it the worse for him because he didn't, and he would thereby be exposed to a penalty of a larger duty which he would have to pay for not doing it, and he was in that way, for the sake of saving himself from the penalty which they would put upon him beyond what would otherwise be chargeable, induced to put them on,—then he is not bound by it. . . . If you find he did not do it freely, then you can look further, and see if there was anything put on there that ought not to be. If he was compelled to do it, it ought not to go on, and if he was, the plaintiffs are entitled to recover. And if you decide he is bound by putting that on, that will end the case; you must give a verdict for the defendant. If not, you may look and see if he was compelled to pay more than he ought,—if he was compelled to pay transportation charges more than he ought to; and, if so, find a verdict for the right amount. If they were compelled to pay labor charges more than they ought to pay, find the verdict for the plaintiffs for the right amount of that. If they didn't pay any more than they ought to, transportation or labor charges, then the verdict is for the defendant."

Under this charge, of course, the jury in finding for the plaintiffs must have found that they acted under constraint, under moral duress, in making the additions for transportation and labor. We do not see how the verdict can be set aside for error in the charge on this point, unless the law be that virtual or moral duress is insufficient to prevent a payment made under its influence from being voluntary.

This point was discussed in *Maxwell v. Griswold*, 51 U. S. 10 How. 242, 256 [13: 405], and in *Swift Co. v. United States*, 111 U. S. 22, 28 [28: 341, 348]. In *Maxwell v. Griswold* an appraisal was erroneously made as to the point of time of the valuation, and the importer paid the consequent excess of duties. The government contended that this was voluntary. But this court said:

"This addition and consequent payment of the higher duties were so far from voluntary in him that he accompanied them with remonstrances against being thus coerced to do the act in order to escape a greater evil, and accompanied the payment with a protest against the legality of the course pursued towards him. Now, it can hardly be meant in this class of cases that to make a payment involuntary it should be by actual violence or any physical duress. It suffices if the payment is caused on the one part by an illegal demand and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment. All these requisites existed here. We have already decided that the demand for such an increased appraisal was illegal. The appraisal itself as made was illegal. The raising of the invoice was thus caused by these illegalities in order to escape a greater burden in the penalty. The payment of the increased duties thus caused was wrongfully imposed on the importer, and was

submitted to merely as a choice of evils. He was unwilling to pay either the excess of duty or the penalty, and must be considered, therefore, as forced into one or the other by the collector *colore officii* through the invalid and illegal course pursued in having the appraisal made of the value of the wrong period. . . . The money was thus obtained by a moral duress not justified by law, and which was not submitted to by the importer except to regain possession of his property already withheld from him on grounds manifestly wrong. Indeed, it seems sufficient to sustain the action under the Act of February 26, 1845 (U. S. Rev. Stat. § 3011), or under principles of the common law, if the duties exacted were not legal, and were demanded and were paid under protest."

In that case, it is true, the fact that the importer was not able to get possession of his goods without making the payment complained of, was referred to by the court as an important circumstance; but it was not stated to be an indispensable circumstance. The ultimate fact, of which that was an ingredient in the particular case, was the moral duress not justified by law. When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. But the circumstances of the case are always to be taken into consideration. When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required,—as where an officer exacts illegal fees, or a common carrier excessive charges. But the principle is applicable in all cases according to the nature and exigency of each. In *Swift Co. v. United States*, 111 U. S. 22 [28: 341], the plaintiffs, who were manufacturers of matches, and furnished their own dies for the stamps used by them, and were thereby entitled to a commission of ten per cent on the price of such stamps, accepted for a long period their commissions in stamps (which, of course, were worth to them only ninety cents to the dollar), and they did this because the Treasury Department would pay in no other manner. We held that the apprehension of being stopped in their business by noncompliance with the treasury regulation was a sufficient moral duress to make their payments involuntary. *Mr. Justice Matthews*, delivering the opinion of the court, said: "The question is whether the receipts, agreements, accounts and settlements made in pursuance of that demand of necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right. We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid, or rather value parted with under such pressure, has never been regarded as a voluntary act within the meaning of the maxim *volenti non fit injuria*." The cases referred to by *Justice Matthews* abundantly support the position taken, and need not be repeated here.

In our judgment the payment of money to an official, as in the present case, to avoid an onerous penalty, though the imposition of that penalty might have been illegal, was sufficient to make the payment an involuntary one. It is true that the thing done under compulsion in this case was the insertion of the additional charges upon the entries and invoices; but that necessarily involved the payment of the increased duties caused thereby, and in effect amounts to the same thing as an involuntary payment.

But it is contended that the act of the appraiser in making, or requiring to be made, the additional charges for transportation and labor, was final and conclusive, and cannot be made the subject of inquiry. It is undoubtedly the general rule that the valuation of merchandise made by the appraiser, unappealed from to merchant appraisers, is conclusive. But whilst this is the general rule it is subject to the qualification that if the appraiser proceed upon a wrong principle, contrary to law, and this be made to appear, his appraisement is not unimpeachable. This qualification applies to the acts of many other officials charged with duties of a similar character, such as assessors of the value of property for taxation, commissioners for appraising lands taken for improvements, or damages sustained by owners of land and the like. What is complained of in the present case is, that the plaintiffs were required to add to the market value of the goods at the places from which they were exported transportation charges and expenses for labor which were never incurred. If that complaint is well founded, such additions cannot be maintained; for whilst the appraisers are not limited to the actual cost of articles exported, but may place upon them their market value at the places from which they were imported, and their estimate of that market value is conclusive, they could not, whilst the law required the addition to that market value of additional charges of transportation, etc., exercise any discretion as to those charges, but were confined to the actual cost thereof when such cost could be shown. It was "cost," not "value," which was required in that part of the estimate of dutiable values. The sections of the Revised Statutes which regulated this matter in 1881 and 1882, when the transactions involved in the present suit took place, were sections 2906 and 2907, the latter of which was repealed by the Act of March 8d, 1883. (23 Stat. at L. 523.)

Section 2906, which is still in force, declares that "when an *ad valorem* rate of duty is imposed on any imported merchandise, or when the duty imposed shall be regulated by, or directed to be estimated or based upon, the value of the square yard, or of any specified quantity or parcel of such merchandise, the collector within whose district the same shall be imported or entered shall cause the actual market value, or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same has been imported, to be appraised, and such appraised value shall be considered the value upon which duty shall be assessed."

Section 2907 declared that, "in determining the dutiable value of merchandise, there shall be added to the cost, or to the actual wholesale

price or general market value at the time of exportation in the principal markets of the country from whence the same has been imported into the United States, the cost of transportation, shipment and transshipment, with all the expenses included, from the place of growth, production or manufacture, whether by land or water, to the vessel in which shipment is made to the United States; the value of the sack, box or covering of any kind in which such merchandise is contained; commission at the usual rates, but in no case less than two and one half per cent; and brokerage, export duty, and all other actual or usual charges for putting up, preparing and packing for transportation or shipment. All charges of a general character incurred in the purchase of a general invoice shall be distributed *pro rata* among all parts of such invoice; and every part thereof charged with duties, based on value, shall be advanced according to its proportion, and all wines or other articles paying specific duty by grades shall be graded and pay duty according to the actual value so determined."

Now, whilst under the first of these sections (2906) the estimate of the market value of the goods, made by the appraiser, is in general unimpeachable, it is plain that the items to be added to that value under section 2907 did not depend upon estimation, but upon the actual truth of the case, namely, the cost of transportation, shipment, etc., to the vessel in which shipment is made. This cost may be something; it may be nothing. In the present case the appraiser required fifty per cent of the market value of the goods to be added as cost of transportation. The plaintiffs disputed this item. Evidence was gone into on the subject, and the matter was left fairly to the jury. The only question for us to determine is, whether the matter was open to evidence, and could lawfully be left to the consideration of the jury; or whether the determination of the appraiser on this subject was conclusive. We think with the court below that this was a question open for examination. In *Oberteuffer v. Robertson*, 116 U. S. 499 [29:708], we decided that since the Act of 1883, repealing section 2907 of the Revised Statutes, it is not lawful for the appraiser to add to the market price of the goods the cost or value of the cartons or boxes in which they are packed, either by themselves, or as part of the market value. In the principle involved that case is similar to the present. If since the repeal of section 2907 the appraiser cannot lawfully add the cost of packing boxes to the appraised value of the goods, before such repeal he could not lawfully add more than that cost; and if he did, it was a matter for examination and correction. To the same effect is the case of *Badger v. Cusimano*, 180 U. S. 89 [32: 851], where the collector caused an appraisement to be made in which a portion of the charges for packing and transportation of the goods imported was deducted from that category and added to the invoice value of the goods themselves. We held that, in the absence of fraud on the part of the importer, this could not lawfully be done, and that such an appraisement is not lawful or conclusive.

We are satisfied, not only on the authority of these cases, but from the reason of the thing

and the proper application of the principles of the law, that the course pursued in the court below was free from error.

These are all the questions which it is deemed important to discuss, and the result is that *the judgment must be affirmed; and it is so ordered.*

ROBERT F. CAMPBELL, *Plff. in Err.*,

v.

SAMUEL H. WADE, *Def. in Err.*

(See S. C. Reporter's ed. 34-38.)

Withdrawal of public lands from sale—effect of—necessary steps to obtain title to public lands—right of applicant—Texas Act as to public lands.

1. The withdrawal from sale by the government of lands previously opened for sale puts an end to proceedings instituted for their acquisition.
2. Occupation and improvement of the tracts desired, with a view to pre-emption, though absolutely essential for that purpose, do not confer upon the settler any right in the land occupied, as against the United States, which impairs in any respect the power of Congress to withdraw the land from sale for the uses of the government, or to dispose of the same to other parties.
3. Until all the preliminary steps prescribed by law for the acquisition of the property are complied with, the settler does not obtain any title against the United States; and among these are entry of the land at the appropriate land office and payment of its price.
4. Before an Act withdrawing lands from sale can be held to impair any vested right of an applicant for purchase, he must have done everything required by law to secure such right. Until then no contract right of the applicant is violated by such legislation.
5. The Texas Act of 1883, withdrawing from sale certain public lands, put an end to the proceedings of the petitioner in this case to acquire the title thereof; and a mandamus will not issue to compel the surveyor to survey the land and make return to the Texas Land Office.

[No. 20.]

Argued Oct. 18, 1889. Decided Oct. 28, 1889.

IN ERROR to the Supreme Court of the State of Texas to review a judgment of that court affirming a judgment of the District Court of the County of El Paso in favor of defendant in proceedings for a mandamus to compel the surveyor, the defendant, or his successor in office, to make survey of land and return the field-notes to the General Land Office of Texas. *Affirmed.*

Statement by *Mr. Justice Field*:

This case comes from the Supreme Court of Texas, and arises upon the following facts: By an Act of that State, passed on the 14th of July, 1879, the sale of a portion of its vacant and unappropriated public lands within certain counties and what was known as the Pacific Railway Reservation was authorized. (Laws of 1879, chap. 52.) It provided that any person, firm or corporation desirous of purchasing any of those lands might do so by having the same surveyed by the authorized public survey-

or of the county or district in which the land was situated. And it was made the duty of the surveyor, upon the application of a responsible party designating the lands desired, to make the survey within three months from its date, and within sixty days thereafter to certify to, record and map the field-notes of the survey, and file them in the General Land Office. The Act provided that within sixty days after the filing of these papers in the General Land Office it should be the right of the person, firm or corporation at whose instance the lands had been surveyed to pay into the treasury of the State the purchase money therefor, at the rate of fifty cents per acre, and that upon presentation to the General Land Office of the receipt of the state treasurer for this money, the commissioner should issue to such person, firm or corporation a patent for the lands. And the Act declared that after the survey of any of the public domain as thus authorized, it should not be lawful for any person to file or locate upon the land thus surveyed.

It was under these provisions, amended by an Act passed March 11, 1881 (Laws of 1881, chap. 38), which, however, did not materially affect them in the particulars under consideration, that the petitioner below, the appellant here, who was a responsible person, sought to purchase lands situated in El Paso County of the State, to the extent of one hundred and fifteen thousand acres, in tracts of six hundred and forty acres each. For that purpose, on the 16th of December, 1882, he applied to the surveyor of the county for the lands, which were fully described, and were of the character authorized to be sold under the Acts in question within the Pacific Railway Reservation. The surveyor received, filed and recorded the application. The petitioner paid the fees for such filing and recording, and demanded that the land should be surveyed for him as required by law. No such survey was, however, made by the surveyor, and on the 22d of January, 1883, before the time expired within which he was allowed to make it, the Legislature of the State withdrew from sale all the public lands mentioned in the Acts in question (Laws of 1883, chap. 8). After this withdrawal, the petitioner again applied to the surveyor for a survey of the lands, and tendered him the legal fees for making the survey, but the surveyor refused to make it, on the ground that the Act of July 14, 1879, authorizing the sale, and the amendatory Act of March 11, 1881, had been suspended by the Act passed January 22, 1883, and consequently that he had no authority to make the survey. The petitioner thereupon presented to the District Court of the County of El Paso a petition for a mandamus to compel the surveyor or his successor in office to make the survey and return the field-notes of it to the General Land Office of Texas. The surveyor appeared in the suit, and filed both an answer and a demurrer to the petition, a procedure permitted, as we understand, under the laws of that State. The demurrer was on the ground that the petition disclosed no cause of action. The answer was a general denial of the allegations of the petition. Upon the trial which followed, the court sitting without the intervention of a jury, judgment was given in favor of the defendant. An appeal being

taken, the case was heard by the commissioners of appeals. Upon their report the judgment was affirmed by the supreme court. To review that judgment the case is brought here on writ of error.

When the petition was filed in the district court of the State, and its judgment rendered, Ward B. Marchand was the surveyor of El Paso County. Pending the appeal from the judgment he died, and his successor in office, Samuel H. Wade, was, by consent of parties, substituted in his place as defendant.

Mr. John B. Rector, for plaintiff in error:

An executory contract is an agreement of two or more persons, upon sufficient consideration, to do or not to do a particular thing.

2 Kent, Com. 12th ed. 450, and *note b*; 1 Story on Contracts, § 1; *Blanchard v. Russell*, 18 Mass. 1; 1 Whart. on Contracts, § 1.

A promise is a sufficient consideration for a promise; and when promises are thus mutually dependent, either can be sued on by the party to whom the promise is made, supposing him to be in no default.

1 Whart. on Contracts, § 523; 1 Parsons on Contracts, 6, 7, 6th ed. pp. 448, 449, 450.

But acceptance before withdrawal binds the parties, if made while the offer continues.

1 Parsons on Contracts, 482.

A proposal is but an offer to contract, and the parties making the offer may withdraw it at any time before acceptance.

1 Whart. on Contracts, § 10; *Montgomery v. Kasson*, 16 Cal. 198; *Com. v. New Bedford Bridge Co.* 2 Gray, 339; *Chicago & A. R. Co. v. Derkes*, 1 West. Rep. 553, 108 Ind. 520; *Linn v. McLean*, 30 Ala. 360.

The obligation of the contract protected by the Constitution of the United States, and what that obligation is.

2 Story (4th ed.) on the Constitution of the U. S. §§ 1379-1380-1381, 1385; 1 Kent, Com. 413, 414, 415, 416, 417, 418, 419, and *note 1*; Sedgwick, Statutory and Const. Law, 616-638; (ed. of 1857); Cooley, Const. Lim. (3d ed.) 273, 274, 275, 276, 284, 285, 286, 290; *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 197 (4:529); *Paschal's Ann. Const. note 157*, pp. 155-158.

The Supreme Court of the United States will determine for itself, irrespective of the state decisions, what is the contract of the State.

Jefferson Branch Bank v. Skeiley, 66 U. S. 1 Black, 443 (17: 177); *Butt v. Muscatine*, 75 U. S. 8 Wall. 575 (19: 490); 3 Parsons on Contracts, (6th ed.) 527-533, 555, and *notes S and T*.

There is no objection for want of mutuality.

Pomeroy on Contracts, § 169, and *note 1*, p. 236; *Perkins v. Hadell*, 50 Ill. 216; *Schröder v. Gemeinder*, 10 Nev. 355; *Smith's Appeal*, 69 Pa. 474.

The government is not entitled to retire from the contract.

Hamilton v. Avery, 20 Tex. 636; *Thomson v. Locke*, 66 Tex. 383; *Throckmorton v. Davenport*, 55 Tex. 236; *Fitzpatrick v. Dubois*, 2 Sawy. 439; *Ramsey v. Loomis*, 6 Or. 378; *Missouri, K. & T. R. Co. v. Noyes*, 25 Kan. 348.

Wherever in Texas the right of a party has legally attached to the land by the performance of duty in some of the steps, by a legal survey, pre-emption, settlement, etc., this is what is called an equity.

Hamilton v. Avery, 20 Tex. 634.

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The first step to acquire land has, in Texas, with the exception of the case at bar, been recognized as creating an equity that will support suit for the land.

De Montel v. Speed, 53 Tex. 389; *Calvert v. Ramsey*, 59 Tex. 490; *Thomson v. Locke*, 66 Tex. 383; *Vance v. Lindsey*, 60 Tex. 286; *Horm v. Shamblin*, 57 Tex. 243; *Buford v. Gray*, 51 Tex. 335.

Vested rights—meaning of the term.

Cooley, Const. Lim. 445; Sedgwick, Stat. and Const. Law (ed. of 1837) 671-676.

Retroactive laws, with some examples.

Sedg. Stat. and Const. Law, 188, 189; Story's Const. 4th ed. § 1898.

Where a right in the nature of a contract has vested under the original statute, then the repeal does not disturb it.

Sedg. Stat. and Const. Law (ed. 1857) pp. 132, 133; Smith on Stat. and Const. Construction, 395, § 775, also 881, §§ 760, 761.

The Act of the Legislature of Texas of January 23, 1853, properly construed, is not retroactive.

Sedg. Stat. and Const. Law (ed. of 1857) 193, 194, 196, 197, 198; Potter's Dwarries on Stat. and Const. Law, 164; *Piedmont & A. L. Ins. Co. v. Ray*, 50 Tex. 519.

Mandamus will lie to compel the surveyor of El Paso County to survey.

De Montel v. Speed, 53 Tex. 341; *Thomson v. Locke*, 66 Tex. 383; *Winder v. Williams*, 23 Tex. 601.

(No counsel appeared for defendant in error.)

Mr. Justice Field delivered the opinion of the court:

It was contended in the state courts, and the contention is renewed here, that the petitioner, by his application for a survey, had acquired a vested interest in the lands he desired to purchase, which could not be impaired by their subsequent withdrawal from sale. This position is clearly untenable. The application was only one of different steps, all of which were necessary to be performed before the applicant could acquire any right against the State. The application was to be followed by a survey, and the surveyor was allowed three months in which to make it. By the express terms of the Act, it was only after the return and filing in the General Land Office of the surveyor's certificate, map and field-notes of the survey, that the applicant acquired the right to purchase the land by paying the purchase money within sixty days thereafter. But for this declaration of the Act, we might doubt whether a right to purchase could be considered as conferred by the mere survey so as to bind the State. Clearly, there was no such right in advance of the survey. The State was under no obligation to continue the law in force because of the application of anyone to purchase. It entered into no such contract with the public. The application did not bind the applicant to proceed any further in the matter; nor, in the absence of other proceedings, could it bind the State to sell the lands.

The adjudications are numerous where the withdrawal from sale by the government of lands previously opened to sale has been adjudged to put an end to proceedings instituted for their acquisition. Thus, under the pre-

emption laws of the United States, large portions of the public domain are opened to settlement and sale, and parties having the requisite qualifications are allowed to acquire the title to tracts of a specific amount by occupation and improvement, and their entry at the appropriate land office and payment of the prescribed price. But it has always been held that occupation and improvement of the tracts desired, with a view to pre-emption, though absolutely essential for that purpose, do not confer upon the settler any right in the land occupied as against the United States, which could impair in any respect the power of Congress to withdraw the land from sale for the uses of the government, or to dispose of the same to other parties. This subject was fully considered in *Priest v. Whitney*, 76 U. S. 9 Wall. 187 [19: 668], where this doctrine was announced. It was subsequently affirmed in the *Yosemite Valley Case* [*Hutchings v. Low*], 82 U. S. 15 Wall. 77 [21: 82], where the court said that until all the preliminary steps prescribed by law for the acquisition of the property were complied with, the settler did not obtain any title against the United States, and that among these were entry of the land at the appropriate land office and payment of its price. "Until such payment and entry," the court said, "the Acts of Congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others. The United States by those Acts enter into no contract with the settler, and incur no obligation to anyone that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them."

In the present case, before the Act withdrawing the lands from sale, which was equivalent to a repeal of the Act authorizing the sale, could be held to impair any vested right of the applicant, he must have done everything required by law to secure such right. Until then no contract could arise in any way binding upon the State. No contract rights of the petitioner were therefore violated by its legislation.

The law in this respect is very clearly stated in the opinion of the Commissioners of Appeals of Texas, adopted by the Supreme Court of that State.

Judgment affirmed.

GEORGE G. DENT ET AL., *Appts.*,

v.

ISAAC A. FERGUSON ET AL.

(See S. C. Reporter's ed. 50-68.)

Execution of contract—want of capacity—fairness of contract—agreement to discharge liens—fraudulent conveyance—parties thereto not relieved—new contract, when enforced—agreement to defraud creditors, not enforced.

Note. See note to *Armstrong v. Toler*, upon *Illegal Contracts*, 24 U. S. 11. Wheat. 268 (6: 469).

1. Where a party to the contract has subsequently recognized it and carried out part of it, this is sufficient proof of its execution and delivery.
2. The evidence in this case fails to show any imbecility, dotage or loss of mental capacity by plaintiffs' ancestor, when the contract alleged was made by him.
3. The fairness of the transaction, in making a contract, should be determined by the condition of things at the time the contract was made and executed, and not by what occurred afterwards, except so far as subsequent developments may reflect light upon it.
4. Where a person has agreed to procure the discharge of liens upon property, the fact that he procures a discharge of the liens by paying only a percentage thereof, does not prevent such discharge being a fulfillment of his agreement.
5. If a person conveys his property for the purpose of hindering, delaying or defrauding his creditors, and for several years acquiesces and concurs in the devices, collusive suits and impositions upon the court in furtherance of this purpose, without taking a single legal step to annul said conveyance or to stop such proceedings, a court of equity will not aid him or his heirs to recover the property from the grantee or his heirs after the fraud is accomplished.
6. Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct.
7. A new contract, founded on a new and independent consideration, if fair and lawful, although in relation to property respecting which there had been unlawful or fraudulent transactions between the parties, will be dealt with by the courts on its own merits, and if the new consideration be valid and adequate, it will be enforced.
8. An agreement between grantor and grantee, made upon the conveyance of property, and which reserves to the grantor the enjoyment of the rents and profits of the property conveyed, to which the creditors of the grantor have a right of immediate appropriation to their debts, and which involves a secret trust for a return to the grantor of property of which such creditors have the immediate right of sale, will not be enforced; but the parties will be left in the position where they have placed themselves, although the grantee refuses to perform his part of the fraudulent agreement with the grantor.

[No. 82.]

Argued April 23, 24, 1839. Decided Oct. 28, 1839.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Tennessee in favor of complainants in an action to recover from defendants real property alleged to have belonged to plaintiffs' ancestor, and to have been fraudulently obtained from him by defendants' ancestor, and to set aside and annul the agreement, deeds and judicial proceedings by which such fraudulent acquisition was effected. *Reversed.*

Opinion below 24 Fed. Rep. 412.

Statement by Mr. Justice Lamar:

This is a suit in equity originally brought in the Chancery Court of Shelby County, Tennessee, on the 10th of December, 1881, by the appellees, heirs at law of Alexander M. Ferguson, deceased, against the appellants, heirs

at law and legal representatives of Henry G. Dent, deceased. Upon application of the complainants, the case was removed into the United States Circuit Court for the Western District of Tennessee on the ground of the diverse citizenship of the parties.

The object of the original and the two amended and supplemental bills is to recover from the defendants a large amount of real property alleged to have belonged to A. M. Ferguson, deceased, and to have been fraudulently obtained from him by Henry G. Dent, deceased; and also to have set aside and annulled the agreement, deeds and judicial proceedings by which such fraudulent acquisition was effected.

The instrument which the complainants most especially seek to have delivered up and canceled purports to be an absolute agreement and conveyance of a large amount of real property situated in Memphis, Tennessee, executed by Ferguson to Dent, and is as follows:

"This agreement, made this 14th day of May, 1869, by and between A. M. Ferguson, of the first part, and H. G. Dent, of the second part, all of the City of Memphis and State of Tennessee, witnesseth, that the said Ferguson, for the purposes and considerations hereinafter set forth, has this day bargained and sold to the said Dent all his right, title and interest of, in and to certain lots or parcels of land situated, lying and being in the City of Memphis and State of Tennessee, as per schedule thereof hereto annexed, and for identification signed by the parties hereto.

"That for said considerations he binds himself to make conveyance by quit-claim to said Dent, or to whomsoever he may direct, of said several pieces of property on demand, excepting, however, one piece of property contained in the schedule hereto annexed, situated on the southeast corner of Beale and Hernando Streets, to which he agrees to make a warranty deed to James E. Dillard, to whom said Dent has bargained the same for \$8,000, subject to certain judgment liens which will be expressed on the face of said deed when it shall be executed. The consideration of this agreement is that the property hereby agreed to be conveyed is much incumbered by judgments, decrees and deeds of trust, taxes and assessments for grading and paving to nearly, if not quite, its full value, as also shown in said schedule, and the only interest remaining to said Ferguson in the same is his equity of redemption. For this equity he is willing to take the sum of \$10,000, and allow the purchaser to make the best use he can of the property in paying off said incumbrances and making what he can out of the surplus. The further consideration of this agreement is, therefore, that the said H. G. Dent will pay the said A. M. Ferguson the sum of \$4,000 in cash in hand and by the conveyance to be made to James E. Dillard, will secure the payment of the further sum of \$6,000 to said Ferguson, making an aggregate of \$10,000 as agreed upon, and will dispose of the balance of said property to the best advantage, to discharge the liens thereon, or otherwise discharge the same, and will have no recourse on said Ferguson in law or equity for any incumbrance or defect of title whatsoever

on any of said pieces or parcels of land, but take the same at his own risk; and inasmuch as the terms, conditions and considerations of this agreement cannot be properly expressed in the several conveyances desired and contemplated by the parties, this instrument and the schedule hereto annexed are made for a more thorough and complete explanation and exposition of the same.

"In testimony whereof the said A. M. Ferguson and H. G. Dent have hereunto set their hands the day and date first above written.

"A. M. Ferguson, [Seal.]

"H. G. Dent, [Seal.]

"Attest: W. L. Van Dyke.

"C. W. Frazer."

The complainants aver in their bills that this instrument was drawn up and signed only as a plan proposed, but never adopted, was never understood by the parties to it to be of any force as between themselves, and was never in fact delivered to Dent, but was retained by Ferguson as his private property and placed with his other papers in the possession and custody of his attorney, one W. L. Van Dyke, where it remained until the death of the latter, when Dent, by fraudulent representations to a woman in charge of Van Dyke's room and effects, succeeded in abstracting it from the papers of Ferguson; and that Dent then, after Ferguson died, set up a claim to the ownership of the property under said pretended contract. They further aver that, even if said instrument was really delivered, it was void because of the fraudulent means and undue influence by which Dent imposed upon Ferguson to make a conveyance of his property at a grossly inadequate price, which was never paid. It is further alleged that Dent was, at the date of said agreement, and had been for many years prior thereto, the agent of Ferguson in the management of his property and had so gained his confidence and had acquired such an ascendancy over Ferguson's mind and will, especially during the latter part of his life, when he was in his dotage and incapacitated to attend to his interests, that all his financial transactions were subject to Dent's supervision and direction; that among these transactions was an indorsement by Ferguson on the 12th of April, 1867, of four notes of Dent of \$12,500 each, aggregating in amount \$50,000, which he (Dent) gave in part payment of a purchase by him of a stock of goods from Lockwood & Co. in Memphis; that this sale by Lockwood & Co. to Dent was soon afterwards attacked by the creditors of the former as fraudulent, and four successive attachments were sued out and levied upon the stock of goods; and that four replevin bonds were given by Dent and signed by Ferguson, one as surety and the other three as a principal, he having purchased from Dent one half interest in the stock.

It is alleged that the amount of the judgment rendered on these bonds against Dent and Ferguson was about \$65,000; and that of the Lockwood notes for \$50,000, one was claimed to have been paid off and taken up by Dent, the other three having been compromised by Dent and Ferguson giving their notes for \$18,000, secured by a deed of trust upon a large part of the Ferguson property in dispute

and one lot belonging to Dent, executed to one Carmack, trustee for certain creditors into whose hands the notes had fallen. It is further alleged that Ferguson, harassed by this sudden and largely increased indebtedness (already great), desired and proposed to make an assignment for the benefit of his creditors, but was overruled in this purpose by the controlling influence of Dent, who, by imposition and fraud, prevailed upon him to sign the pretended contract of May 14, 1869, which the said Dent got up to serve his purpose of fraudulently possessing himself of Ferguson's estate.

The bill further sets forth with great minuteness of detail the various subterfuges and contrivances to which, it is alleged, Dent resorted to cover up and conceal from the creditors the ownership of the property, and the trust deeds and judicial proceedings by which the baffled creditors were inveigled into compromises at enormous sacrifices; and that various persons, mostly Dent's attorneys and relations, or persons having an understanding with him, purchased all of the property under these trust deeds and at said judicial sales (with money furnished by Dent, which he raised from the rents and profits of Ferguson's estate), and now hold their titles in trust for said Dent.

It is then alleged that all the liabilities of Ferguson have been settled, and all the incumbrances upon his property removed, for the most part, out of the rents and profits of said property.

The prayer of the bill is that the contract of May 14, 1869, be declared void; and that the defendants be declared trustees of the property for the complainants, and required to turn it over to their possession, and account for its rents and profits.

The answer, after a general denial of all the allegations of the bill, especially denies those relating to the undue influence charged to have been exercised by Dent over Ferguson, those relating to Dent's agency, and those relating to Ferguson's dotage, weakness of mind and incapacity for business. It admits that Dent's heirs have in their possession a deed or contract properly executed, attested and delivered, dated May 14, 1869, but unregistered, under which they claim title to the property referred to in the bill, and avers the fairness and justice of the contract, its delivery to Dent by Ferguson, and also the delivery into his actual possession of all the property conveyed by it. It also sets forth the hopeless condition of Ferguson's affairs; that Dent had extinguished the debts and removed from the property all the incumbrances and paid the \$10,000, or its equivalent, which was the consideration mentioned in the deed; and that \$10,000 and the discharge of the debts, quite as great in amount as that of the value of the property conveyed, constituted a full and sufficient price therefor. It sets up as a defense the acquiescence of Ferguson, as long as he lived (a period of eleven years), in the contract, and in Dent's acts under it, and also the fact that Ferguson had filed his petition in bankruptcy, stating under oath that he did not own any real estate, which proceeding it relies on as an estoppel and as proof of an outstanding title.

The defendants, Frazer, Trezevant and the De Soto Building and Loan Association, each

filed a separate answer, in which they each stated that the titles held by them respectively to the property with which the bill had connected their names were held by them as trustees for Dent, or as a security for fees, advances and loans to him. Dillard, in his deposition, answered, alleging that the titles held by him to any of the property claimed by complainants were held for the benefit of Dent. Hooper and wife answered, denying the averments of the bill that Susan R. Hooper purchased the Shelby claim which she is prosecuting against the estate of Ferguson, as the agent of Dent, but averring that such purchase by her was bona fide and for her own use and benefit, and that said claim is now her own property.

The answers of the other defendants aver that before the filing of the bill they had parted with whatever right or title they ever had to any of the property in controversy.

Proofs were taken and a hearing was had before the circuit justice, the district judge sitting with him, and a decree was rendered in accordance with the prayer of the bill.

Messrs. D. H. Poston and T. B. Turley for appellants.

Mr. T. B. Edgington, for appellees:

If a trustee or agent, or anyone holding similar fiduciary relations, becomes the purchaser of the principal's property, the transaction is constructively fraudulent.

1 Story's Eq. §§ 807, 810-812, 812 a, 812 b, 812 c; Cooley on Torts, 524, note 8, and 525, notes 4, 5; *Michoud v. Girod*, 45 U. S. 4 How. 555 (11: 1076); *Talbot v. Province*, 7 Baxt. 502; *Fox v. Mackreth*, 1 Lead. Cas. in Eq. *115 (4th Am. ed.) 214, 242, 250.

Delivery is absolutely essential to the taking effect of every deed.

A seizure by Dent of the paper from Van Dyke's room is not a delivery.

8 Wash. on Real Prop. 254 (577); *Jackson v. Leek*, 12 Wend. 107; *Fay v. Richardson*, 7 Pick. 91.

When a solemn admission is made in a bill, answer or petition, inconsiderately or without a full knowledge of the facts, a court of equity will relieve.

Hamilton v. Zimmerman, 5 Sneed, 89; *Helm v. Wright*, 2 Humph. 72, and Cooper's notes; *Decherd v. Blanton*, 3 Sneed, 373; *Smith v. Fowler*, 12 Lea, 163, 174.

Estoppel is only an admission. Estoppels proceed on the ground of constructive fraud.

1 Story's Eq. Jur. § 891; *Richerts v. Edlin*, 1 Tenn. Leg. Rep. 319.

The representations must be made with knowledge of the facts.

Bigelow on Estoppels, 437.

The parties are not in *pari delicto*.

Prewett v. Coopwood, 30 Miss. 369; *Freelove v. Cole*, 41 Barb. 318; *Ford v. Harrington*, 16 N. Y. 285; *Smith v. Elliott*, 1 Pat. & H. (Va.) 807.

The contract being executory, this action is in disaffirmance of it, and consequently in disaffirmance of any fraud contemplated under it, and the court will rescind it.

White v. Franklin Bank, 32 Pick. 181; *Ex parte Bennett*, 10 Ves. Jr. 381; *Michoud v. Girod*, 45 U. S. 4 How. 503 (11: 1076).

Mr. Justice Lamar delivered the opinion of the court:

The main grounds of the bill are—

(1) That the agreement or conveyance of May 14, 1869, was never delivered, but was only a paper in contemplation to be executed, and that the execution and delivery of it were finally abandoned; and

(2) That said contract was procured by fraud on the part of Dent to enable him to possess himself of the estate of Ferguson without paying him a valuable consideration therefor; and that Ferguson was of weak mind, in his dotage, and easily imposed upon by Dent, between whom and himself the relation of principal and agent existed.

We concur fully in the position assumed by both the circuit justice and the district judge, that the execution and delivery of the agreement and conveyance of May 14, 1869, by Ferguson to Dent, were sufficiently proven. A careful examination of the evidence, especially that introduced in behalf of complainants, leaves no doubt on this point. The paper was frequently recognized and acted upon by Ferguson. He received part, at least, of the money to be paid under it and frequently called for more, complaining of Dent that he had not fully paid the amount agreed to in the contract. He received the two Dillard notes for \$3,000 each, as provided for in it, in part payment, and also accepted Dillard's deed of trust on the property conveyed to him as security therefor. He solemnly reaffirmed it over his own signature and seal on the 23d of August, 1869, in a deed introduced in evidence by complainants, in which deed the recital is as follows: "Whereas on the 14th of May, 1869, H. G. Dent and A. M. Ferguson entered into an agreement of purchase and sale by which said Dent purchased the equity of said Ferguson in all his real estate in Shelby County for the sum of \$10,000, \$4,000 of which was to be paid in cash, and \$6,000 in notes," etc. He again recognized and carried out his part of it, when on the 25th of May, 1869, he made a deed to Dillard in pursuance of its terms. His petition in bankruptcy, filed on April 29, 1878, in which he stated on oath that he did not own any real estate, nor hold any interest in any real property, except a leasehold that would expire in less than a month, though not a technical estoppel as a defense in this suit, is at least evidence of the execution and validity of the instrument in question. In view of these facts, which appear from the proofs and pleadings of the complainants, we do not deem it necessary to review the mass of testimony offered by the complainants to sustain their charge that Dent perjured the writing from Ferguson's papers.

As to the second point we cannot assent to the conclusions of the court below. The evidence, we think, fails to show any imbecility, dotage or loss of mental capacity on the part of Ferguson in 1869, when the contract was made. About fifteen witnesses produced by the complainants were questioned as to the character and condition of his mind, three, and perhaps four, of whom, speak of him as being weak, ignorant and childish; but the general tenor of the testimony of the others, who had any opinions to express, was directly the reverse. The

combined effect of this testimony, taken as a whole, putting out of view the evidence on behalf of the defendants, leaves on the mind a decided impression that Ferguson, though to a certain extent illiterate, was a man of good, sound sense, of large experience in business, and capable of transacting his own affairs. Outside of the nature of the transaction itself and the relation of principal and agent between him and Dent, which will be presently considered, there is very little, if any, testimony that he was ignorant of his rights or of the value of his property, or in the slightest degree incompetent to comprehend the terms of the contract in question, or to understand the obligations of an oath. Nor does a single witness testify that Dent ever falsely represented to Ferguson the amount of his indebtedness, ever underestimated to him the value of his property, or ever exaggerated to him the danger from creditors. Even as to who suggested the contract of May 14, 1869, the testimony, slight as it is, is conflicting and uncertain.

It is, however, insisted that the price agreed to on the face of the instrument itself was so grossly inadequate as to create the presumption of fraud and undue influence, aside from, and independent of, any proof other than the single fact that the parties thereto bore the relation to each other of principal and agent. Assuming for the present, and for present purposes only, that the agreement was bona fide as respects third persons, creditors of Ferguson and Dent, and considering it with exclusive reference to the reciprocal rights of the two parties to it, we do not think the evidence is such as to raise the presumption of fraud and therefore to call for or justify the interposition of a court of equity for the cancellation of the contract. The fairness of the transaction, on this point, should be determined by the condition of things at the time the contract was made and executed, and not by what occurred afterwards, except so far as subsequent developments may reflect light upon it.

What were the circumstances under which this instrument was executed? A. M. Ferguson was then possessed of a large estate in Memphis, consisting of valuable city lots with improvements, all estimated by competent witnesses to be worth \$100,000, more or less. At that time he was indebted to various persons in sums which, we believe, it is admitted amounted to as much as the value of his property. Many of these debts, perhaps the majority in amount, originated as joint promisor with, or as indorser or surety for, Henry G. Dent, who had been his agent for the renting of his property and intimate friend for many years, and who was himself wholly insolvent. But whatever the origin of his debts, they had become, as between Ferguson and his creditors, legal and binding upon him; nor did the fact that they were the liabilities of an indorser lighten the burden of them, or lessen the peril of impending insolvency, or abate the eagerness of pursuing creditors. These creditors had been for some time active and pressing for payment, and his real estate was heavily incumbered with judgments, decrees, deeds of trust, sheriff's deeds, taxes and assessments for public improvements. Several other suits, ag-

gregating nearly \$50,000, were proceeding to judgment. Some idea of his embarrassed condition may be found from the fact that the 29th of March, 1869, a bill had been filed to reach his equitable rights and interest in the property, the subject of this controversy, in which the complainant alleged on oath that an execution issued on a judgment at law obtained by him against Ferguson had been duly returned "no property found whereon to levy;" and that after diligent search and inquiry he could not find any property in Memphis to which Ferguson had an unincumbered legal title subject to an execution at law.

Such was the condition of Ferguson's affairs when he made the agreement of May 14, 1869. The consideration of this agreement was that Ferguson should receive \$4,000 in cash and \$6,000 in notes, and that Dent should "discharge the liens," not that he should pay them in full. This discharge Dent fully procured. Ferguson was fully discharged, and all claims against him were legally canceled, not only those then existing, but also those that were impending and which afterwards matured. This fact is thus stated in the words of complainants' bill: "The liabilities of the said A. M. Ferguson by judgments, trust deeds, mortgages, and mortgages in the form of warranty deeds, have all been settled and paid off except as hereinafter stated, and the said complainants, as heirs-at-law of the said A. M. Ferguson, are entitled to have the said real property handed over to them free and discharged of all liens."

If the promise to cancel the debts was a fair and valid transaction when it was made, it did not become less so because subsequent occurrences enabled Dent to effect a settlement with the creditors upon the payment of a small percentage of their respective claims; and if the means he employed to effect such compromises were not proper, it might give the overreached creditors cause of complaint, but certainly not Ferguson. Had Dent been able to persuade the creditors to give a release of their claims without any consideration whatever, that could not retroact and make inadequate what was an adequate consideration when the contract was made. When it was made no one knew that the debts could be compromised for much less than their face value, as was done by Dent; for as the district judge truly remarks: "The astounding fact in this record is that the creditors did not appropriate all this property to their debts." And yet it is an undeniable fact that Dent did avert such an appropriation; and that Ferguson was fully discharged, and the claims were legally canceled by methods not fully developed, but assented to and facilitated by Ferguson. For instance, a judgment for over \$22,000 in favor of H. B. Claffin & Co. of New York was settled for \$1,000; a claim in favor of Louis Selby for \$12,622.11 for \$1,325, and an assessment for \$6,998 for the Nicholson pavement, stated in said agreement of May 14, 1869, to be a lien on the property conveyed, was entirely defeated on legal grounds.

The consideration as to the extinguishment of the debts was fully performed. The \$6,000 of notes were received by Ferguson and afterwards indorsed to his relatives. As to how

much of the remaining \$4,000 coming to him under the agreement was paid to him in cash, there is much conflict of testimony, which, owing to the lapse of time and the death of both parties to the contract, cannot be reconciled. Apparently \$1,400 was paid soon after; for the instrument dated August 23, 1869, which the complainants introduced and rely on, states that the payment of that sum was made on that day. C. L. Morrison, a witness for complainants, whose testimony their counsel declares, in his brief, to be more important than that of any and all the other witnesses for complainants, testifies that from 1871 to 1876 he paid to Ferguson from \$80 to \$90 a month out of the rents collected by him from a portion of the property; and that he saw Dent pay him during that period out of his own pocket about \$800 a year. These sums aggregate a larger amount than \$4,000.

Our conclusion, therefore, is that the contract, considered apart from its bearing on other creditors, does not in the absence of other proof lack the essential qualities of adequacy and fairness as between the parties thereto themselves. If this be so, the point as to principal and agent, upon which so much stress has been laid, is of minor importance. The doctrine as to this fiduciary relation, applied to its full extent, is simply a rule of evidence which, under some circumstances, imposes upon an agent the burden of proving the fairness and justice of the transaction with his principal within the scope of his agency. If the contract was valid as to the creditors of Ferguson, the consideration therein expressed was sufficient to satisfy this burden.

The evidence shows that for many years Dent was an agent of Ferguson for the renting of his property, with more intimate relations than with his other patrons. But the record does not show that he was ever employed to buy or sell real estate for Ferguson. On the contrary, there is positive testimony that his (Ferguson's) traffic in that business was carried on by himself alone.

We have considered this case, so far, upon the assumption of the circuit justice, that the agreement was executed and delivered by Ferguson to Dent in good faith as to Ferguson's creditors. We do not concur in this assumption. If the voluminous record before us discloses a single fact tending to sustain that assumption, except a general expression of opinion by some of the witnesses that he was an honest man, it has escaped our search. The instrument itself was executed under circumstances which would lead a court to presume fraud upon creditors. It was a conveyance by a person deeply indebted, in anticipation of decrees and judgments, which, added to the existing incumbrances, amounted to the value of his property. We, therefore, agree with the district judge on this point, that the real contract was one between Ferguson and Dent to defraud the creditors out of the property conveyed, and to so conceal and cloud the title that they could be circumvented, hindered and delayed, and coerced into settlements and compromises. We think the evidence shows beyond doubt that Ferguson willingly participated for ten years in carrying out this plot. Both

parties knew that \$10,000 could not be saved for Ferguson, or any residuum out of the property for Dent, unless creditors could be wrought upon by some means to accept less than their claims. Neither party to such a contract could have been deceived or imposed upon about that result. Both knew the record fact, that the incumbrances perfected, and the incumbrances rapidly perfecting, exceeded in amount the value of the property.

That Ferguson had that fraudulent design when he signed his name to the instrument and turned over the property to Dent, as its owner, was directly sworn to by witnesses introduced by the complainants and examined by them—of course for a very different purpose. Mrs. A. G. Morrison, a witness produced to show that Dent had fraudulently abstracted certain papers from Ferguson deemed by him to be important and valuable, deposes as follows in reply to the question "What was it Mr. Ferguson told you about the sale of the property?" [referring to the sale now under consideration]: "He told me he went on Mr. Dent's bond, as near as I can remember. Mr. Dent went into business and broke, and the property was covered up some way in Mr. Dent's name to keep it from being sold. I couldn't tell you how long Mr. Ferguson told me, but I am positive he told me it was covered up in Dent's name, and he says: 'There is wherein Dent has robbed me; he would not give me those papers back.'" In reply to another question, which the witness said did not repeat her previous answer accurately, she replied: "He didn't say it in those words. . . . He says he turned the property over to Dent, put it in his name," etc. Again, "He said something about a receiver being appointed, and he says: 'I turned the property over to Dent to keep it from being sold; I don't want it sold, because the rent of my property will pay the debt,'" etc. Another witness for the complainants, Robert McWilliams, testifies as follows concerning a conversation had with Ferguson in 1878: "If I remember correctly, he said that he had made over his property to Dent, with the tacit understanding that he should have sufficient to live on until his discharge in bankruptcy, and then Dent would return or turn over the property to him again." In reply to the question "What, if anything, do you know concerning the arrangement of A. M. Ferguson and Henry G. Dent concerning the Ferguson property on Beale, Hernando and De Soto Streets and elsewhere?" he said: "I know of nothing except that Ferguson told me that he had conveyed this property to Dent with the tacit understanding that he (Ferguson) should have enough out of the rents of the property to live on until he had got through bankruptcy, when the property should be returned to him again."

The question arises,—if a person conveys his property for the purpose of hindering, delaying or defrauding his creditors, and for eleven years acquiesces and concurs in the devices, collusive suits and impositions upon the court in furtherance of this purpose, without taking a single legal step to annul said conveyance or to stop such proceedings,—Will a court of equity aid him or his heirs to recover the property from the grantee or his heirs after the fraud is

accomplished? This court has answered that question in the negative in *Randall v. Howard*, 67 U. S. 2 Black, 585 [17: 269]. In that case the complainants and defendant had made an agreement to defeat the claims of third persons to certain lands which the complainants had mortgaged to the defendant to secure a debt, so as to cloak the ownership by means of a foreclosure sale at which the defendant should purchase and hold the nominal title. After obtaining the title, he fraudulently dispossessed the complainants and asserted the right of ownership in himself. The prayer of the bill was to restrain the defendant from disposing of the land, and to restore it, or so much of it as remained after paying the debt, to complainants. The court, *Mr. Justice Davis* delivering the opinion, held that the agreement was a fraudulent one to defeat a claim set up by other parties for a portion of the mortgaged lands by the covering up, through the aid of the court, the real ownership of the property; and said (p. 588 [270]): "A fraudulent agreement was entered into to defeat, as is charged, 'a fraud attempted against the complainants.' . . . A court of equity will not intervene to give relief to either party from the consequences of such an agreement. The maxim, '*in pari delicto potior est conditio defendentis*,' must prevail. It is against the policy of the law to enable either party in controversies between themselves to enforce an agreement in fraud of the law, or which was made to injure another," citing *Story's Equity*, vol. 1, § 298; *Bolt v. Rogers*, 8 Paige, 156, and *Wilson v. Watts*, 9 Md. 356.

The same principle was applied in *Wheeler v. Sage*, 68 U. S. 1 Wall. 518 [17: 646]. In that case an agreement was entered into between complainants and defendant to secure the title to valuable real estate of an insolvent debtor, at the expense and sacrifice of his creditors, which the defendant violated, and, in conjunction with another person, secured an interest in the property to himself. The bill prayed that he be declared a trustee for the complainants, and required to convey to them that portion of the land to which, under the agreement, they were entitled. The court, *Mr. Justice Davis* delivering the opinion, said (p. 529 [649]): "Generally, when a party obtains an advantage by fraud, he is to be regarded as the trustee of the party defrauded, and compelled to account. But if a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing. If he has been engaged in an illegal business and been cheated, equity will not help him." And then, after a review of the evidence in that case, the opinion concluded in these words: "A proceeding like this is against good conscience and good morals, and cannot receive the sanction of a court of equity. The principle is too plain to need a citation of authorities to confirm it. It is against the policy of the law to help either party in such controversies. The maxim, '*in pari delicto*,' etc."

We cannot assent to the opinion of the district judge that this maxim has no application to the case at bar. In the views prepared by him at the request of *Mr. Justice Matthews*, and which were adopted by the latter, he says, in speaking of the contract of May 14, 1869, that

It is only "in form a contract for the sale of property;" and proceeds: "The real contract was one to defraud the creditors of Ferguson and Dent out of this property, and it was calculated that this could be done on a basis of \$10,000 to Ferguson, to be realized out of the property itself, and all the balance to Dent, whatever that might be. But this was an unequal, unconscionable and unfair division, particularly in view of actual results, in the accomplishment of which Dent has risked nothing but his time and labor. Ferguson has agreed to give too much for Dent's services in that behalf. . . . One of the objects of the bill is to prevent the defendants from reaping the lion's share of the benefits of this confessed fraud, and the maxim, *in pari delicto potior est conditio defendentis*, . . . has no application whatever to a case like this."

From this view we dissent. We find no authority for the idea that it is the province of a court of equity to make a fraudulent debtor the special object of its favor because he has not received a large enough consideration for his "confessed fraud." That court is not a divider of the inheritance of iniquity between the respective heirs of two confederates in fraud. Mr. Justice Baldwin, delivering the opinion of the court, in *Bartle v. Coleman* [Nutt], 29 U. S. 4 Pet. 184, 189 [7: 825], uses the following language: "The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practiced fraud, which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalize the benefits or burthens which may have resulted by the violation of every principle of morals and of laws." Or, as *Chancellor Walworth* states it: "Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct." *Bolt v. Rogers*, 8 Paige, 157.

The cases relied upon by the court below to sustain its position do not shake the authorities we have cited to show that courts of equity refuse to annul and also to enforce contracts in fraud of the rights of others, when called to act as between the parties. For there is a distinct class of decisions affecting subsequent and collateral contracts not partaking of the fraud which infects the main transaction.

The principles established by those decisions in diversified forms, according to the varying cases, is that a new contract, founded on a new and independent consideration, although in relation to property respecting which there had been unlawful or fraudulent transactions between the parties, will be dealt with by the courts on its own merits. If the new contract be fair and lawful, and the new consideration be valid and adequate, it will be enforced. If, however, it be unfair or fraudulent, or the new consideration so inadequate as to import fraud,

imposition or undue influence, it will be rescinded and justice done to the parties. *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258 [6: 488]; *McBlair v. Gibbs*, 58 U. S. 17 How. 283 [15: 132]; *Brooks v. Martin*, 69 U. S. 2 Wall. 70 [17: 732]; *Planters Bank v. Union Bank*, 83 U. S. 16 Wall. 433 [21: 478]; *Union Pac. R. Co. v. Durant*, 95 U. S. 576 [24: 391].

But in all of those cases the court was careful to distinguish and sever the new contract from the original illegal contract. Whether in the application of this principle some of them do not trench upon the line which separates the cases of contracts invalid in consequence of their illegality from new and subsequent contracts arising out of the accomplishment of the illegal object, is not the subject of inquiry here. The present case does not involve any question of a subsequent and distinct contract, but seeks relief directly from the original fraud, to which the person under whom complainants claim was a contracting party, fully sharing in the fraudulent intent.

We do not think that complainants' counsel gives an explanation of the testimony of *McWilliams* which strengthens their claim to relief. That claim, stated in his own language, is: "That Ferguson placed his property in Dent's hands, to be used in liquidating his debts; and, when this was done, the property, or so much of it as had not been consumed in the payment of debts, was to be restored to Ferguson; and that in the meantime Ferguson was to have enough of the rents to live on."

Such an arrangement, so entirely inconsistent with the absolute conveyance of the property as executed between the parties, has all the features of a fraud upon creditors. It reserves to the grantor the enjoyment of the rents and profits of the property conveyed, to which the creditors have a right of immediate appropriation to their debts, and involves a secret trust for the return to himself of property of which such creditors have the immediate right of sale. The law does not countenance any such transaction, but leaves both parties in the position where they have placed themselves. *Lukins v. Aird*, 78 U. S. 6 Wall. 78 [18: 750].

The district judge is mistaken when he says that "one of the objects of the bill is to prevent the defendants from reaping the lion's share of the benefits of this confessed fraud." The object of the suit, as clearly and explicitly stated in the bill, is to secure to the complainants the entire benefit of the confessed fraud by having all the property, with all the intermediate rents and profits added, free from all liens and liabilities, returned to them. The real complaint is that Dent, the fraudulent vendee, refused to perform his part of the fraudulent understanding with Ferguson, the fraudulent vendor; and the avowed purpose of the suit is to compel the defendants to perform it. The prayer cannot be granted without overturning established principles of equity.

The decree of the Circuit Court should, therefore, be reversed, and the case be remanded to that court, with a direction to dismiss the bill, with costs.

So ordered.

1889. JACKSON V. ALLEN, WEST & BUSH.

WILLIAM JACKSON, Master of the Steamship "Counselor," *Plff. in Err.*,
v.

ALLEN, WEST & BUSH, BROWN BROTHERS & CO. ET AL.

BROWN BROTHERS & CO., *Plffs. in Err.*,
v.

ALLEN, WEST & BUSH ET AL.

(See S. C. Reporter's ed. 27-34.)

Removal of cause from state court—insufficiency of record.

1. Where a cause was removed from a state court into the circuit court of the United States upon the ground of the diverse citizenship of the parties and was tried and judgment was rendered therein in the latter court, and it is brought by writ of error to this court, if it appear, from the record, that the citizenship of the parties at the commencement of the action and at the time the petition for removal was filed was not sufficiently shown, and that therefore the jurisdiction of the state court was never divested, this defect cannot be cured by amendment.
2. In such case the judgment will be reversed and the cause remitted to the circuit court, with directions to remand it to the state court.
[Nos. 44, 45.]

Argued Oct. 22, 23, 1889. Decided Oct. 28, 1889.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana to review a judgment of that court.
Reversed.

The facts are stated in the opinion.

Messrs. Thos. L. Bayne and Geo. Denegre for Brown Brothers & Co.

Messrs. Alfred Goldthwaite and John M. Allen for appellees.

Messrs. E. H. Farrar and E. B. Kruttschnitt for Jackson, Master, etc.

Mr. Chief Justice Fuller delivered the opinion of the court:

The original action and that of intervention and third opposition therein were brought in the Civil District Court for the Parish of Orleans, Louisiana, and petitions filed for their removal into the Circuit Court of the United States for the Eastern District of Louisiana, upon the ground of the diverse citizenship of the parties. The cause was thereupon docketed and tried in the circuit court by the judge thereof, on stipulation according to the statute, and upon his findings judgment was rendered and writs of error were prosecuted to this court.

It appears from the record that the citizenship of the parties at the commencement of the actions, as well as at the time the petitions for removal were filed, was not sufficiently shown, and that therefore the jurisdiction of the state court was never divested. *Stevens v. Nichols*, 180 U. S. 230 [82: 914]. This being so, the defect cannot be cured by amendment. *Orehore v. Ohio & M. R. Co.* 181 U. S. 240 [38: 144]. We are compelled to reverse the judgment, at the costs, however, of the respective plaintiffs in error, and remit the cause to the circuit court, with directions to remand to the state court.

Ordered accordingly.

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KNOX COUNTY V. HARSHMAN. 27-34. 14-17

KNOX COUNTY, *Appt.*,

v.
GEORGE W. HARSHMAN.

(See S. C. Reporter's ed. 14-17.)

Appeal from decree granting or refusing injunction—revival of injunction—enjoining writ of mandamus.

1. An appeal from a decree granting, refusing or dissolving an injunction does not disturb its operative effect.
2. When an injunction has been dissolved, it cannot be revived except by a new exercise of judicial power, and no appeal by the dissatisfied party can, of itself, revive it. *A fortiori*, the mere prosecution of an appeal cannot operate as an injunction where none has been granted.
3. Where a bill in equity has been filed to enjoin the execution of a writ of mandamus issued upon a judgment at law, the supersedure of process on the decree dismissing the bill cannot supersede process on the judgment at law, notwithstanding a bill to impeach a judgment is regarded as an auxiliary or dependent, and not as an original, bill.
[No. 1212.]

Argued Oct. 15, 1889. Decided Oct. 28, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Eastern Judicial District of Missouri, dismissing a bill in equity to enjoin proceedings on a writ of mandamus requiring the levy of a special tax to pay a judgment and to enjoin the prosecuting any other writ upon said judgment requiring the levy of a special tax to pay it.

On motion for a writ of *supersedeas*, requiring the Circuit Court to quash the writ of mandamus and restraining said court from issuing any other or further process in execution of said judgment, and commanding appellee to cease prosecuting said writ of mandamus and to cease all further proceedings in execution of said judgment until this cause shall have been heard and decided by this court. *Motion denied.*

Statement by *Mr. Chief Justice Fuller*:

George W. Harshman, on the 28th day of March, 1881, recovered a judgment by default in the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri against the County of Knox, in the State of Missouri, for the sum of \$77,374.46 and costs, and on the 25th day of January, 1882, sued out an alternative writ of mandamus in the usual form, directed to the County Court of said County and the judges thereof, for the levy of taxes to pay the same. To this writ return was made on the 28d day of March, 1882, setting forth the reasons relied on by respondents as justifying their refusal to make the levy required. Issue was joined on this return, and upon a trial and verdict by a jury, October 11, 1883, the circuit court quashed the writ. Harshman brought the cause by writ of error to this court, which held the return insufficient, reversed the judgment, and directed the peremptory writ to be awarded. *Harshman v. Knox County*, 123 U. S. 806 [30:1153]. The mandate went down on the 3d day of June, 1887, and a peremptory writ of mandamus was issued by the circuit court, commanding the County Court of Knox County and the judges thereof to levy the tax

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as prayed, and was duly served June 28, 1887, but nothing was done in execution thereof.

On the 11th day of July, 1887, the County of Knox filed a bill in equity in the circuit court against Harshman, alleging various grounds upon which complainant prayed that Harshman be enjoined from further proceeding on his writ of mandamus, or prosecuting any other writ or proceeding upon said judgment requiring the levy of a special tax to pay the same. No preliminary injunction was granted, and the cause was finally heard on bill and answer at the September term, 1888, when the bill was dismissed and a decree rendered against the County for costs. From this decree the County prayed an appeal, which was granted; an appeal bond for \$500, in the usual form, was duly given and approved; and the record was thereupon filed in this court in due time. On the 10th day of April, 1889, Harshman again sued out a peremptory writ of mandamus, to which the County made substantially the same return as to the alternative writ, but setting up the proceedings in equity, and insisting that the perfecting of the appeal from the decree dismissing the bill operated as a *supersedeas* of the judgment recovered March 28, 1881. Thereupon Harshman moved that said return be quashed, which motion was sustained, and the return quashed accordingly, the district judge, who held the circuit court, delivering an opinion, in which he said: "When the bond for \$500 was taken and approved the court advised counsel for respondents that it did not regard the bond for the sum of \$500 as adequate to work a *supersedeas*, and it expressly declined to order that it should operate as such." The county then filed its motion for a rehearing of the motion to quash, and on the same day Harshman moved for an attachment against the judges of the county court for failing to obey the peremptory writ. The motion for rehearing was denied by the circuit judge, who also refused to stay the collection of the judgment.

The County, appellant in this cause, which is the appeal from the decree dismissing the bill in equity as before stated, now moves for a writ of *supersedeas*, requiring the circuit court to quash the peremptory writ of mandamus of April 10, 1889, and restraining said court from issuing any other or further process in execution of said judgment, and commanding appellee to "cease prosecuting said peremptory writ of mandamus, and to surcease all further proceedings in execution of said judgment under the General Statutes of Missouri of 1866 until this cause shall have been heard and decided by this court."

Mr. James Carr, for appellant, for motion:

At common law a writ of error removed the case from the court in which it had been tried into a higher court for review, and it operated a *supersedeas* of any and all proceedings in execution of the judgment rendered by the lower court, so long as the writ of error was pending.

Kitchen v. Randolph, 98 U. S. 86 (23: 810).

An appeal in chancery likewise operated a *supersedeas* of any and all proceedings in execution of the decree.

Omaha Hotel Co. v. Kountze, 107 U. S. 378, 384 (27: 609, 612).

Mandamus is a writ in the nature of an exe-

cution issued on a judgment at law to enforce its collection.

Greene County v. Daniel, 102 U. S. 195 (26:101); *Bath County v. Amy*, 80 U. S. 13 Wall. 244 (20: 589); *Graham v. Norton*, 83 U. S. 15 Wall. 427 (21: 177); *Riggs v. Johnson County*, 78 U. S. 6 Wall. 186, 196 (18: 773, 777); *Davenport v. Dodge County*, 105 U. S. 287 (26: 1018).

The bill filed by Knox County against George W. Harshman, to enjoin the collection of the judgment obtained by the latter against the former, is not an original suit. It is a mere continuation of the original suit in which the judgment was rendered, and is simply to modify the judgment.

Dunn v. Clarke, 88 U. S. 8 Pet. 1 (8: 845); *Krippendorf v. Hyde*, 110 U. S. 276 (28: 145); *Dewey v. West Fairmont Gas-Coal Co.* 128 U. S. 329 (31: 179); *Pacific R. Co. v. Missouri Pac. R. Co.* 111 U. S. 505 (28: 498); *Webb v. Barnwall*, 116 U. S. 193 (29: 595); *Johnson v. Christian*, 125 U. S. 642 (31: 820).

Everything was done which the statute requires to be done in order to get a *supersedeas*. The order granting the appeal and approving the bond does not say that it shall operate as a *supersedeas*. But it is not necessary that it should do so. When the conditions required by the statute have been complied with the statute itself makes the performance of those conditions operate as a *supersedeas*.

Western A. L. Construction Co. v. McGillis, 127 U. S. 776 (32: 824); *Stockton v. Bishop*, 48 U. S. 2 How. 74 (11: 184); *Hardeman v. Anderson*, 45 U. S. 4 How. 640 (11: 1188); *Hogan v. Ross*, 52 U. S. 11 How. 294 (13: 702); *French v. Shoemaker*, 79 U. S. 12 Wall. 100 (20: 271); *Goddard v. Ordway*, 94 U. S. 672 (24: 287); *Adams v. Law*, 57 U. S. 16 How. 144 (14: 880); *U. S. v. Addison*, 68 U. S. 22 How. 174 (16: 804); *Gay v. Parpart*, 101 U. S. 891 (25: 841); *Ex parte French*, 100 U. S. 1 (25: 529); *Jerome v. McCarter*, 88 U. S. 21 Wall. 17 (22: 515); *Foster v. Kansas*, 112 U. S. 201 (28: 629); *Danville v. Brown*, 128 U. S. 508 (32: 507); *Providence Rubber Co. v. Goodyear*, 78 U. S. 6 Wall. 153 (18: 762); *Draper v. Davis*, 102 U. S. 870 (26: 121); *Western U. Teleg. Co. v. Eyer*, 86 U. S. 19 Wall. 419 (22: 43); *Boise County v. Gorman*, 86 U. S. 19 Wall. 661 (22: 226).

The bond for the sum of \$500 is sufficient.

Harshman v. Knox County, 122 U. S. 806 (30: 1152).

The circuit court by the appeal has lost jurisdiction over the case. The supreme court now is the only court that has jurisdiction of the case.

Jerome v. McCarter, 88 U. S. 21 Wall. 17 (22: 515); *Draper v. Davis*, 102 U. S. 870 (26: 121); *French v. Shoemaker*, 79 U. S. 12 Wall. 86, 89 (20: 270); *Ex parte Milwaukee & M. R. Co.* 72 U. S. 5 Wall. 188 (18: 676); *Stockton v. Bishop*, 48 U. S. 2 How. 74 (11: 184); *Peugh v. Davis*, 110 U. S. 227 (28: 127).

The supreme court acts on the presumption of the correctness of the action of the circuit justice or judge who fixed the amount and approved the security when the writ of error was sued out or appeal taken.

French v. Shoemaker, 79 U. S. 12 Wall. 86 (20: 270).

The supreme court never adjudges damages in a case where the question in it is one of first impression or seriously controverted.

McKee v. Rains, 77 U. S. 10 Wall. 22 (19: 360); *Wayne County v. Kennicott*, 103 U. S. 554 (26: 486).

The court itself possesses a power over its own judgments by staying execution thereon; and it would be very inconvenient if it did not possess the means of rendering such further redress, as equity and good conscience required.

Webb v. Barnwell, 116 U. S. 193 (29: 595); *Gumbel v. Pitkin*, 124 U. S. 181 (31: 874).

Messrs. T. K. Skinker and J. B. Henderson, for respondent, in opposition:

Under Revised Statutes, § 1007, the *superseas* operates only on the judgment appealed from and not on the questions involved, considered apart from the particular suit in which they were decided.

Natal v. Louisiana, 123 U. S. 516 (31: 238).

Where a qualified acceptance of an appeal bond shows that the judge who took it considered the security only sufficient for stay of execution of that part of the decree appealed from, the appeal operates as a *superseas* to that extent only.

Covington Stock-Yards Co. v. Keith, 121 U. S. 248 (30: 914).

A motion to vacate a *superseas* made before the record is printed must be accompanied by a statement of the facts on which it rests, agreed to by the parties, or supported by printed copies of so much of the record as will enable this court to act understandingly without reference to the transcript on file.

Power v. Baker, 112 U. S. 710 (28: 825).

A writ of error, bond and citation, all in due time and before execution is issued, will operate as a stay.

Stockton v. Bishop, 43 U. S. 2 How. 74 (11: 184).

A judgment in a common-law proceeding cannot be brought to this court by appeal, and therefore an appeal bond in such case will not operate as a *superseas*.

Saltmarsh v. Tuthill, 53 U. S. 12 How. 387 (13: 1034).

A writ of error does not reverse or nullify either an injunction or a decree dismissing an injunction.

Slaughter-House Cases, 77 U. S. 10 Wall. 273 (19: 915).

The lodging of a copy of the writ of error in the clerk's office within ten days is absolutely necessary to make the writ of *superseas*.

Baltimore & O. R. Co. v. Harris, 74 U. S. 7 Wall. 574 (19: 100).

For the appeal or writ of error to operate as a *superseas*, security must be given for a sum equal to the amount of the recovery.

Stafford v. Union Bank, 57 U. S. 16 How. 185 (14: 876); *Stafford v. New Orleans Canal & Bkg. Co.* 58 U. S. 17 How. 283 (15: 102).

For a writ of error to operate as a *superseas*, bond must be given for an amount exceeding the amount of the judgment.

U. S. v. Addison, 63 U. S. 22 How. 174 (16: 304).

A writ of error not sued out or served within sixty days after the judgment which is the subject of the writ does not operate as a *superseas*.

Western A. L. Construction Co. v. McGillis, 127 U. S. 776 (32: 324).

At the common law an injunction in equity does not operate as a *superseas*. A court of law is under no obligations to enforce it as a matter of right.

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Boyle v. Zacharie, 31 U. S. 6 Pet. 648 (3: 532).

Where a party has failed to make proper defense through negligence, equity will not aid him.

Hungerford v. Sigerson, 61 U. S. 20 How. 156 (15: 869); *Oreath v. Sims*, 46 U. S. 5 How. 192 (12: 110); *Sample v. Barnes*, 55 U. S. 14 How. 70 (14: 830).

Although a judgment may have been fraudulently procured, it cannot be enjoined in equity unless the person against whom it is rendered can aver and show that he has a good defense on the merits.

White v. Crow, 110 U. S. 183 (28: 113).

Mr. Chief Justice Fuller delivered the opinion of the court:

Appellant's counsel contends that the appeal taken and perfected from the decree dismissing his client's bill of complaint operated, or should be made to operate, to supersede the judgment, in collection of which the peremptory writ of mandamus was awarded. That judgment was recovered on the 28th day of March, 1881, and no proceedings in error have ever been taken, and no bond given, to supersede its operation. An alternative writ of mandamus was sued out, the cause shown by the county court and its judges against granting the peremptory writ was disposed of by this court on writ of error, and the peremptory writ was directed to be issued. The County of Knox then filed its bill in equity to restrain the collection of the judgment as commanded. No preliminary injunction was granted, and upon final hearing the bill was dismissed, and a decree passed against the County for costs.

The general rule is well settled that an appeal from a decree granting, refusing or dissolving an injunction, does not disturb its operative effect.

Hovey v. McDonald, 109 U. S. 150, 161 [27: 888, 891]; *Slaughter-House Cases*, 77 U. S. 10 Wall. 273, 297 [19: 915, 922]; *Leonard v. Ozark Land Co.* 115 U. S. 465, 468 [29: 445, 446].

When an injunction has been dissolved, it cannot be revived except by a new exercise of judicial power, and no appeal by the dissatisfied party can of itself revive it. *A fortiori*, the mere prosecution of an appeal cannot operate as an injunction where none has been granted.

As stated by Mr. Chief Justice Waite, in *Spraul [Natal] v. Louisiana*, 123 U. S. 516, 518 [31: 233, 234], "The *superseas* provided for in § 1007 of the Revised Statutes stays process for the execution of the judgment or decree brought under review by the writ of error or appeal to which it belongs."

The superseding of process on the decree dismissing the bill could not supersede process on the judgment at law; and this is so, notwithstanding a bill to impeach a judgment is regarded as an auxiliary or dependent and not as an original bill.

The record presents no ground for the interference sought, and the motion must be overruled.

CHARLES F. BRUSH and THE BRUSH ELECTRIC COMPANY, *Appts.*,

C. HARRISON CONDIT ET AL.

(See S. C. Reporter's ed. 39-50.)

Patent for improvement in electric lamps—secret invention—anticipated claim.

1. The claim for the invention of the clamp arrangement in letters-patent granted to Charles F. Brush, for improvement in electric lamps, was anticipated by that of Charles H. Hayes, mentioned in the opinion, made in June, 1876.
2. An invention is not concealed or used in secret because hidden from view by its position in the machinery in which it is used.
3. That the rod in the Hayes apparatus was square or rectangular and was surrounded, by a rectangular clamp does not prevent its embodying the principle of the invention claimed in said patent, although the claim in the patent is limited to an annular clamp. The improvement, if any, in the use of the circular clamp over the rectangular clamp was only a question of degree in the use of substantially the same means.

[No. 9.]

Argued Oct. 15, 16, 1889. Decided Nov. 4, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York in a suit in equity, dismissing the complaint with costs, for infringement of letters patent. *Affirmed.*

Opinion below, 23 Blatchf. 246, and 20 Fed. Rep. 826.

The facts are stated in the opinion.

Messrs. W. H. Kenyon and W. C. Witter, for appellants:

A machine, in order to anticipate any subsequent discovery, must be perfected.

Putnam v. Hollender, 19 Blatchf. 48; *Parkhurst v. Kinsman*, 1 Blatchf. 488; *Sickels v. Borden*, 3 Blatchf. 535; *Cahoon v. Ring*, 1 Fish. Pat. Cas. 399; *Jones v. Pearce*, 1 Web. Pat. Cas. 122; *Seymour v. Osborne*, 78 U. S. 11 Wall. 516 (20: 33); *Brown v. Guild*, 90 U. S. 23 Wall. 181 (23: 161).

The machine must not be a mere experimental one abandoned by the inventors.

Gayler v. Wilder, 51 U. S. 10 How. 477 (13: 504); *Coffin v. Ogden*, 85 U. S. 18 Wall. 120 (21: 321); *Pennock v. Dialogue*, 27 U. S. 2 Pet. 1 (7: 327); *Reed v. Cutler*, 1 Story, 590; *Pickering v. McCullough*, 3 Ban. & Ard. 279; *Wilson v. Coon*, 6 Fed. Rep. 626; *Davis v. Brown*, 9 Fed. Rep. 656; *Rich v. Lippincott*, 2 Fish. Pat. Cas. 1; *Bullock Printing Press Co. v. Jones*, 8 Ban. & Ard. 197; *Hall v. Bird*, 6 Blatchf. 442; *Parham v. American, B. O. & S. Machine Co.* 4 Fish. Pat. Cas. 482; *Wood v. Cleveland Rolling-Mill Co.* 4 Fish. Pat. Cas. 560; *Sayles v. Chicago & N. W. R. Co.* 4 Fish. Pat. Cas. 588; *Hayes v. Antisdel*, 2 Ban. & Ard. 10.

That proof of anticipation must be clear and convincing beyond a reasonable doubt.

Cantrell v. Wallick, 117 U. S. 689 (29: 1017); *Coffin v. Ogden*, 85 U. S. 18 Wall. 120 (21: 321); *American Bell Tel. Co. v. American Cushman Tel. Co.* 35 Fed. Rep. 734; *Seibert Cylinder Oil Cup Co. v. Nightingale*, 82 Fed. Rep. 172.

Diligence in giving the invention to the public will prevail over even a prior completed invention.

Lockwood v. Cleveland, 18 Fed. Rep. 37; *Washburn & M. Mfg. Co. v. Haish*, 4 Fed. Rep. 901; *Consolidated Safety-Valve Co. v. Crosby S. G. & Valve Co.* 113 U. S. 157, 179 (28: 989, 946); *American Bell Tel. Co. v. American Cushman Tel. Co.* 35 Fed. Rep. 734; *New York Belting & P. Co. v. Magowan*, 27 Fed. Rep. 362; *Shedd v. Washburn*, 9 Fed. Rep. 904;

Washburn & M. Mfg. Co. v. Haish, 7 Fed. Rep. 906; *Lindsay v. Stein*, 10 Fed. Rep. 907; *Zinsser v. Kremer*, 48 Pat. Off. Gaz. 114.

Where certain elements are claimed in combination with each other and with or without another element, a disclaimer which restricts the claim by striking out one of the alternatives has repeatedly been held good.

Myers v. Frame, 8 Blatchf. 446; *Tuck v. Bramhill*, 8 Fish. Pat. Cas. 400; *Taylor v. Archer*, 4 Fish. Pat. Cas. 449; *Dunbar v. Meyers*, 94 U. S. 187 (24: 84); *Smith v. Nichols*, 88 U. S. 21 Wall. 112 (22: 566); *Aiken v. Dolan*, 8 Fish. Pat. Cas. 197; *Vance v. Campbell*, 66 U. S. 1 Black, 427 (17: 168); *Rumford Chemical Works v. Lauer*, 10 Blatchf. 123; *Schillinger v. Gunther*, 17 Blatchf. 66; *Hailes v. Albany Stove Co.* 16 Fed. Rep. 240.

The question is not whether the machine invented is the best one known to the community, nor whether it does its work better or faster than any other machine in the same department of labor. But, if it be to a certain degree useful, and be original with the patentee, it belongs to him alone, whether it does less or more work.

Wilbur v. Beecher, 2 Blatchf. 132-7; *Many v. Jagger*, 1 Blatchf. 381; *Shaw v. Colwell Lead Co.* 11 Fed. Rep. 715.

The fact of a granting of a patent to a defendant has no tendency to show that the invention described in it does not infringe on a prior patent.

Holliday v. Pickhardt, 12 Fed. Rep. 147; *Brainard v. Cramme*, 12 Fed. Rep. 621.

Messrs. S. A. Duncan and E. Wetmore, for appellees:

To entitle the disclaimer to be proved, it must be pleaded.

1 Daniell's Ch. (4th Am. ed.) 827, and cases cited; *Bailey v. Ryder*, 10 N. Y. 363-370; *Doughty v. West*, 2 Fish. Pat. Cas. 553, 555; *Ferguson v. Ferguson*, 2 N. Y. 360, 362; *Crocket v. Lee*, 20 U. S. 7 Wheat. 522, 527 (5: 513); 5 Curt. Dig. 813.

The fifth and sixth claims are invalid because for different inventions from the original.

Mahn v. Harwood, 112 U. S. 854, 859 (28: 665, 667); *Bates v. Coe*, 98 U. S. 48, 49 (25: 74).

The patentee's invention has been clearly proved to have been anticipated by that of Hayes.

Coffin v. Ogden, 85 U. S. 18 Wall. 120 (21: 321); *Reed v. Cutler*, 1 Story, 590; *Pickering v. McCullough*, 104 U. S. 310 (26: 749); *Curtis on Patents*, §§ 89-92.

Mr. Justice Blatchford delivered the opinion of the court:

This is an appeal by the plaintiffs, Charles F. Brush and The Brush Electric Company, in a suit in equity brought by them in the Circuit Court of the United States for the Southern District of New York, against C. Harrison Condit, Joseph Hanson and Abraham Van Winkle, from a decree dismissing with costs their bill of complaint, so far as it relates to reissued letters-patent No. 8,718, granted May 20, 1879, to Charles F. Brush, one of the plaintiffs, for "improvements in electric lamps," on an application for a reissue filed April 14, 1879, the original letters-patent, No. 208,411, having

been granted to said Brush May 7, 1878, on an application filed September 28, 1877.

The rights of the plaintiffs were finally rested upon an alleged infringement of claims 1, 3, 5 and 6 of the reissue. Another patent was sued on in the case, but at the final hearing the bill in regard to it was dismissed with costs, on motion of the plaintiffs. The opinion of the circuit court, held by *Judge Shipman*, on the merits, as to reissue No. 8,718, is reported in 22 Blatchford, 246.

The specification of the reissue states the general nature of the invention in these words: "My invention relates to electric-light mechanism, and it consists in the following specified device, or its equivalent, whereby the carbon sticks usually employed are automatically adjusted and kept in such position and relation to each other that a continuous and effective light shall be had without the necessity of any manual interference." In this automatic arrangement, the electric arc is established, and then, as the electrodes are consumed, the arc is regulated by causing the strength of the current and the length of the arc mutually to control each other. There is no clock-work or other extraneous power, but the action of the electric current alone effects the necessary movements. The electrodes tend to move towards each other at all times, and this tendency is opposed by the electro-magnetic action, which tends to separate them. These opposing forces are designed to be in equilibrium when the electrodes are at such a distance from each other as will produce the maximum development of light with a given electric current. It was to an electric arc lamp of this character that the invention of Brush was to be applied. The construction of his arrangement, as described in the specification of the reissue, is as follows: A helix of insulated wire, such helix being in the form of a tube or hollow cylinder, rests upon an insulated plate upheld by a metallic post or standard. Within the cavity of the helix are contained an iron core and a rod which passes longitudinally and loosely through and within the core. This rod holds a carbon. The core is also made to move very freely within the cavity of the helix, and is partially supported by means of springs which push upward against ears attached to the core. A ring of metal just below the core surrounds the carbon-holder, and rests upon a floor or support. One edge of the ring is over a lifting tongue, which is attached to the core, while the opposite edge is a short distance below the crown of an adjustable set screw. The design is that one point of the ring may be lifted in such way as to clamp the carbon-holder, while a limit is placed to the upward movement of the core. The poles of the battery being so attached that the circuit of an electric current is completed, the core, by the force of the axial magnetism, is drawn up within the cavity of the helix, and by means of the lifting tongue one edge of the ring is lifted until, by its angular impingement against the rod or carbon-holder, it clamps such rod, and also lifts it up to a distance limited by an adjustable stop. While the ring preserves this angular relation with and impingement against the rod, the rod will be firmly retained and prevented from moving through the ring. The adjustable stop

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is fixed so that it shall arrest the lifting of the rod when the two carbons are sufficiently separated from each other. While the electric current is not passing, the rod can slide readily through the loose ring and the core; and in this condition gravity will cause the upper carbon to rest upon the lower carbon, thus bringing the various parts of the device into the position of a closed circuit. If then a current of electricity is passed through the apparatus, it will instantly operate to lift the rod, and thus separate the two carbons and produce the electric light. As the carbons burn away, thus increasing the length of the voltaic arc, the electric current diminishes in strength, owing to the increased resistance. This weakens the magnetism of the helix, and accordingly the core, rod and upper carbon move downward by the force of gravity until the consequent shortening of the voltaic arc increases the strength of the current and stops such downward movement. After a time, however, the ring will reach its floor or support, and its downward movement will be arrested. Any further downward movement of the core, however slight, will at once release the rod, allowing it to slide through the ring until arrested by the upward movement of the core, due to the increased magnetism. In continued operation, the normal position of the ring is in contact with its lower support, the office of the core being to regulate the sliding of the rod through it. If, however, the rod accidentally slides too far, it will instantly and automatically be raised again as at first, and the carbon points thus be continued in proper relation to each other.

Claims 1, 8, 5 and 6 of the reissue, on which alone recovery is sought, read as follows, there being eight claims in all in the reissue as granted:

"1. In an electric lamp, the combination, with the carbon-holder and core, of a clamp surrounding the carbon-holder, said clamp being independent of the core, but adapted to be raised by a lifter secured thereto, substantially as set forth."

"8. In an electric lamp, the combination of the core or armature C, the clamp D and adjustable stop D', or their equivalents, whereby the points of the carbons are separated from each other when an electrical current is established—prevented from separating so as to break the current—and gradually fed together as the carbons are consumed, substantially as described."

"5. In an electric lamp, the combination, with a carbon-holder, of an annular clamp surrounding the carbon-holder, said clamp adapted to be moved, and thereby to separate the carbon points by electrical or magnetic action, substantially as herein set forth."

"6. In an electric lamp, an annular clamp adapted to grasp and move a carbon-holder, substantially as shown."

What is called in these claims "the clamp D" is the ring of metal which surrounds the rod or carbon-holder.

The specification of the reissue, as granted, contained the following paragraph: "I do not limit myself narrowly to the ring D, as other devices may be employed which would accom-

plish the same result. Any device may be used which, while a current of electricity is not passing through the helix A, will permit the rod B to move freely up and down, but which, when a current of electricity is passing through the helix, will, by the raising of the core C, operate both to clamp and to raise the rod B, and thereby separate the carbon points F F', and retain them in proper relation to each other."

On the 14th of October, 1881, the plaintiffs filed in the Patent Office a disclaimer, in which they stated that the patentee had claimed more than that of which he was the first inventor or discoverer, by or in consequence of the use in the specification of the language contained in the paragraph last above quoted; and that there were material and substantial parts of the thing patented, also embraced within the terms of the above quoted paragraph, which were truly and justly the invention of Brush. The paper went on to enter a disclaimer to that part of the subject matter of the specification and of claims 1, 2, 8, 5 and 6 of the reissue, which, being embraced within the general language of the above quoted paragraph, included as within the invention of Brush "clamping devices substantially different in construction and mode of operation from the clamp D."

On the 6th of April, 1883, the plaintiffs filed in the Patent Office a disclaimer of so much or such part of the invention described in the reissue, and coming within the general language of the third claim, as might cover or include as elements thereof "the core or armature C" and "the clamp D," excepting when the core or armature raises the clamp by a lifter secured to such core or armature, substantially as described in the patent. The same paper disclaimed the specific combinations forming the subject matter of claims 2, 7 and 8.

Judge Shipman held that the first claim describes a clamp independent of, that is, not fixed to, the core, but adapted to be raised by a lifter secured to the core, and does not mean that the clamp is independent of, and not in any way dependent for its motion upon, the core, but is adapted to be raised by a lifter secured to itself. He further held, that the first claim does not include the adjustable stop of the third claim, but includes only the combination of the clamp and core and rod, with the described elements which are necessary to cause an angular impingement upon the rod and an intermittent downward feeding of the rod. He also held that the clamp of the sixth claim is not any annular clamp adapted to grasp and move a carbon-holder, but means to describe in general terms the clamp of the first claim, which raises, clamps and feeds downwardly the rod, preserving a practically uniform length of arc by the described means, or an annular clamp surrounding the carbon-holder independently of the core, but adapted to be raised by a lifter secured to the core and some suitable agency to allow the clamp to be tripped; and that the fifth claim includes the clamp of the first and sixth claims, the carbon-holder, the motor and the tripping device.

Judge Shipman examined the question of the novelty of claims 1, 3, 5 and 6, and arrived at the conclusion that they were invalid by reason of their prior existence as perfected inventions,

in a lamp made in June, 1876, by one Hayes, at Ansonia, Connecticut. On this subject he says in his opinion:

"The clamp, in combination with the other necessary elements, which was made by Charles H. Hayes, of Ansonia, Connecticut, and was a part of a lamp which he constructed about the end of June, 1876, as an improvement upon the White lamp, is the combination of the first and third claims of the Brush patent. The carbon rod was square or rectangular, and, therefore, was surrounded by a rectangular clamp which was independent of the core. It is not denied that this clamp is the equivalent of an annular clamp. It was raised by a lifter secured to the core and was tripped by coming in contact with a floor, while the ascent of the rod was checked by the contact of the clamp with an adjustable stop.

"The plaintiffs' answer to the anticipatory character of this clamp is that it was an abandoned experiment and never was a perfected invention. The facts in regard to its character and position as an invention are as follows: Mr. Hayes was, in 1876, and has been continuously since, in the employ of Wallace & Sons, who are large manufacturers of brass goods in Ansonia. In 1876 this firm was trying to find a successful electric lamp to manufacture. Mr. White furnished them with his device, which they sent, as a part of their exhibit, to the Centennial Exhibition at Philadelphia. Mr. Hayes testifies as follows: 'Experiments with the White lamp showed its defects so strongly or plainly that I designed this' (the Hayes) 'lamp to overcome those defects. I made rough drawings in the middle or latter part of May, 1876; commenced building the lamp at once, and finished it about the end of June following; tested it, tried it, and made some minor alterations, and run it from time to time, when a lamp was needed, until the 16th of September following.' At this time he was in Philadelphia, and a fellow employé by the name of King, thinking that he could improve upon the clutch and make the feeding of the carbons answer more promptly to the changes of the current or make the feeding less 'jerky,' obtained permission from Wallace & Sons, who owned the clamp, to make an alteration. The 'King clutch,' constructed upon a different principle from that of the Hayes or the Brush clamp, was put into the lamp, which has remained in use in the mill, and, since the end of 1876, has been 'used in the electrical room for testing machines, carbons, etc., and has been used for that purpose more or less ever since.' But one Hayes lamp was made until a duplicate specimen was made for use in this case. The Hayes clamp, it will be observed, was used in the lamp only until September 16th. Prior to that date the use of the lamp with the original clamp is thus described by Mr. Hayes upon cross-examination: 'It' (the lamp) 'was moved about and burned in different places—in the mill and outside—and it was also burned in our other shop occasionally.' This shop was known as the skirt shop, the third floor of which was used for electrical work. The mill and skirt shop were ordinarily lighted by gas. 'Question. On what occasions did you use the lamp out-of-doors? Ans. The lamp was used out-of-doors on several occasions; when gangs of

men required light unloading freight from railway cars; digging for some work connected with the water power. I am unable to specify positively any particular date, but have a general recollection of being frequently called upon to make a light for some such purposes. Question. Did you use it sometimes to test dynamos with in June-September, 1876? Ans. I think not during that time. Question. What other use did you put it to during those months except the occasions out-of-doors which you have mentioned? Ans. It was used about the mill, more particularly around the muffles, on occasions when it was necessary to work during the evening. The use was a public one in the presence of the employés of the factory. The Hayes clamp has been preserved and was an exhibit in the case. Wallace & Sons thereafter, after much experimenting, went, to a limited extent, into the manufacture of what were known in the case as 'plate lamps,' or lamps having two carbon plates instead of rods, but did not continue the business long. They say that the discontinuance was due to the fact that they did not have a satisfactory generator. The Hayes clamp was used upon the plate lamps, but, as has been said, was used upon but one carbon-pencil electric lamp.

"The plaintiffs vigorously insist that the Hayes clamp was not a completed and successful invention, but that its use was merely tentative and experimental, and was permanently abandoned because the device did not promise to be successful.

"Two facts are manifest: 1st, that the Hayes clamp was the clamp of the Brush patent; and, 2d, that it became, after September 16th, a disused piece of mechanism in connection with carbon points. The question then is, Was it a perfected and publicly known invention, the use of which was abandoned prior to the date of the Brush invention, or was its use merely experimental, which ended in an abandoned experiment on September 16th?

"The plaintiffs, in support of their view, say that Wallace & Sons were searching for a successful lamp, and were exhibitors of an electric lamp at the Centennial Exhibition; that inventors were in their employ, who were encouraged to make experiments and trials in the hope that something good might be produced, and, under this stimulus, one Hayes lamp was made; that improvements in the location of the spring were made; that it gave a 'jerky' light, and, when the inventor was away, another clamp was put on, by the permission of the owners, to remedy this irregular feeding; that afterwards no other lamp was ever constructed, and the Hayes clutch was left among other 'odds and ends,' and that the indifference with which it was received, its confessed faults, the attempted improvements, and its disuse, show that the Hayes clamp never was anything more than an attempt to invent something, which proved to be a failure.

"The question of fact, in this part of the case, must turn upon the character of the use of the lamp prior to September 16th, because it is established that the Hayes clamp and the Brush clamp, in its patented features, were substantially alike, and that the point in which they differ, viz., the length of the arms, is not a part of the principle of the device. Was the

lamp with this clutch used merely to gratify curiosity, or for purposes of experiment, to see whether the feeding device was successful, or whether anything more was to be done to perfect it; or was it put to use in the ordinary business of the mill, as a thing which was completed, and was for use, and was neither upon trial nor for show?

"Hayes made the lamp for Wallace & Sons as an improvement upon the White lamp, and apparently turned it over to them to be used when they chose. An alteration was subsequently made in the location of the spring. The lamp was used at different times, in the work of the mill, at night, in-doors and out-of-doors. Its use at these times does not seem to have been for the purpose of testing the machine, or of calling attention to its qualities, or of gratifying curiosity, but it was used to furnish light to the workmen at their work. I have queried whether this use was not that of a thing which might be of help in an emergency, and which was thought to be better than nothing, though not of much advantage; but it was, apparently, used to accomplish the ordinary purposes of an electric light in a mill, to enable the workmen to see at night, although it was not uniformly used, because the mill was lighted by gas.

"But the plaintiffs press the question—Why, then, was the further use of the Hayes clamp and lamp discontinued? This question is significant, because the abandonment of a thing which is greatly wanted is, ordinarily, a very suggestive circumstance to show that it was defective, and that, before the invention could be completed, something was to be done which never was done.

"I think that Wallace & Sons did not push the electric-lamp business because they had no generator, and I also think that the Hayes lamp, either with or without the Hayes clutch, did not impress them favorably, for they contented themselves with making only one specimen, whereas they made six White lamps, and, after much experimenting, and after the invention of the Hayes lamp, they made fifty or sixty plate lamps. For some reason they did not manufacture the Hayes lamp, but turned away to the plate lamps. But the facts that the anticipatory device was the device of the patent, and did do practical work, and was put to ordinary use, and that it does not appear that the Hayes clamp was the cause of the neglect with which Wallace & Sons treated the Hayes lamp, seem to me to outweigh the doubts which arise from the shortness of its existence and its permanent disappearance from a carbon-pencil lamp.

"The case is that of the public, well-known, practical use, in ordinary work, with as much success as was reasonable to expect at that stage in the development of the mechanism belonging to electric arc lighting, of the exact invention which was subsequently made by the patentee; and, although only one clamp and one lamp were ever made, which were used together two and one half months only, and the invention was then taken from the lamp and was not afterwards used with carbon pencils, it was an anticipation of the patented device, under the established rules upon the subject. With a strong disinclination to per-

mit the remains of old experiments to destroy the pecuniary value of a patent for a useful and successful invention, and remembering that the defendants must assume a weighty burden of proof, I am of the opinion that the patentee's invention has been clearly proved to have been anticipated by that of Hayes. *Coffin v. Ogden*, 85 U. S. 18 Wall. 120 [21: 821]; *Reed v. Cutter*, 1 Story, 590; *Pickering v. McCullough*, 104 U. S. 810 [26: 749]; *Curtis on Patents*, §§ 89-92.

"The bill, so far as it relates to the clamp patent, is dismissed."

We have examined carefully the evidence in this case, relied upon by the plaintiffs to show that the clamp arrangement of Hayes was not a perfected invention, but was merely an abandoned experiment, and we have arrived at the conclusion that *Judge Shipman's* views on the subject are correct. They are well and accurately expressed, and we could not add to their force by a prolonged discussion of what is purely a question of fact.

The cases of *Coffin v. Ogden* and *Pickering v. McCullough*, cited by *Judge Shipman*, are enforced by the case of *Hall v. Macneale*, 107 U. S. 90, 97 [27: 867, 869]. This latter case meets, also, the objection made by the appellants that the mechanism of the Hayes clutch was concealed from view, and the further objection that it would not operate as perfectly as that of the Brush invention. In *Hall v. Macneale*, speaking of the anticipating safes, this court said: "The invention was complete in those safes. It was capable of producing the results sought to be accomplished, although not as thoroughly as with the use of welded steel and iron plates. The construction and arrangement and purpose and mode of operation and use of the bolts in the safes were necessarily known to the workmen who put them in. They were, it is true, hidden from view, after the safes were completed, and it required a destruction of the safes to bring them into view. But this was no concealment of them or use of them in secret. They had no more concealment than was inseparable from any legitimate use of them."

It is contended by the appellants that, notwithstanding the prior existence of the Hayes apparatus as a perfected invention, claims 5 and 6 of the reissue are sustainable because each of them is limited to an "annular clamp." It is urged that the clamp of the patent is a ring which surrounds a cylindrical rod, and that the rod in the Hayes apparatus was square or rectangular, and was surrounded by a rectangular clamp. But it is quite apparent that claims 5 and 6 of the reissue would, if the patent were valid, be infringed by the manufacture and use of the patented apparatus with a rectangular carbon rod surrounded by a rectangular clamp. Such an apparatus might be inferior in perfection and utility to the cylindrical rod with the ring clamp; but it would still embody the principle of the invention, carried out by equivalent means. The improvement, if any, in the use of the circular clamp over the rectangular clamp, was only a question of degree in the use of substantially the same means.

We are of opinion that the decree of the circuit court must be affirmed, and it is so ordered.

WILLIAM D. THOMPSON ET AL., *Appts.*
v.

THE WHITE WATER VALLEY RAILROAD COMPANY ET AL.

(See S. C. Reporter's ed. 68-75.)

Lien on earnings of railroad—priority of—mortgages of after-acquired property—lien of contractor—rails—vendor's lien.

1. Holders of obligations of a railroad company, conferring upon them a lien upon the earnings of a section of the road for its construction by them, have a lien inferior in priority to that of bondholders secured by an earlier mortgage on the road and to that of purchasers under a foreclosure sale on the mortgage.
2. Mortgages of railroad property and deeds of trust of the same, which in terms cover after-acquired property, are valid and estop the company and all persons claiming under them and in privity with them from asserting that they do not cover all the property and rights which they profess to cover.
3. A contractor to build a section of a railroad, where the work was not done at the request of the mortgagees, but upon a contract with the lessee of the road, which had stipulated as one of the considerations of the lease to construct that part of the line, has not a lien upon the earnings of the section, on the ground that with his money the road over it was constructed, superior to the lien of a prior mortgagee.
4. Rails put down upon the company's road and permanent fixtures which are essential to its successful operation become a part of the property of the company—as much so as if they had existed when the mortgage was executed.
5. The doctrine that a vendor not taking security for the price of realty sold by him holds in equity a lien upon the property for such price, has no application to such a case.
6. The holders of the lien upon the earnings only had in this case a right to redeem the property from the sale under the mortgage.

[No. 26.]

Argued Oct. 21, 1889. Decided Nov. 4, 1889.

NOTE.—*Lien of a mortgage on after-acquired property*, see note to *Pennock v. Coe*, 64 U. S. 23 How. 117 (16: 437); *priority between mortgage and mechanics' lien*, note to *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443 (25: 1057); and *right of mortgagor to income and products of mortgaged premises*, note to *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 603 (23: 405).

Mortgages of railroad property.

A mortgage of the property of a railroad company which is specifically designated, which also contains a clause embracing "all other corporate property, real and personal, of said railroad company, belonging or appertaining to said railroad, whether then held or owned, or thereafter acquired," does not apply to or embrace a tract of land afterwards acquired by the company, which was not used in connection with the road, but was laid out into town lots. *Calhoun v. Memphis & P. R. Co.*, 2 Flipp. 442.

The ground upon which this doctrine proceeds is that the grant was limited by the word "appertaining" to such property as belongs to and is an essential part of the franchise, so that it cannot be established or withdrawn at the pleasure of the company. And the same rule has been applied in the case of a mortgage of a railway "with its cor-

APPEAL from a decree of the Circuit Court of the United States for the District of Indiana, giving complainants thirty days in which to commence proceedings for redemption, and decreeing that, in default of such proceedings, the bill should be dismissed, in a suit to enforce an alleged lien upon earnings of a section of a railroad as prior to the lien of bondholders secured by an earlier mortgage. *Affirmed.*

Statement by Mr. Justice Field:

This suit was brought by holders of obligations of The Indiana, Cincinnati and Lafayette Railroad Company, and on behalf of other holders similarly situated, to enforce an alleged lien claimed by them upon earnings of a section of the road of The White Water Valley Railroad Company, against the claim to priority of bondholders secured by an earlier mortgage. The White Water Valley Railroad Company was organized as a corporation in 1865, under the laws of Indiana, with authority to locate, construct and operate a line of railway from Hagerstown, in Wayne County of that State, to the Town of Harrison, Dearborn County, on the boundary line between Indiana and Ohio. To raise the necessary means to construct the railway, the Company issued its coupon bonds to the amount of \$1,000,000, in sums of \$1,000 each. They were dated August 1, 1865, and were to mature August 1, 1890, and draw interest at the rate of 8 per cent per annum, payable semi-annually. To secure the payment of the principal and interest of these bonds, the Company executed to trustees by way of mortgage, a deed bearing date on that day, of its railroad and all the right of way and land occupied thereby, with the superstructure and all property, materials, rights

and privileges, then or thereafter appertaining to the road, and the benefit of all contracts with other railroad companies, then existing or thereafter to be made, and all property, rights and interests under the same. The deed contained the usual covenants to execute suitable conveyances for the further assurance of property subsequently acquired and intended to be included in the instrument. The Company soon afterwards commenced the construction of the road, and by the fourth of November, 1867, completed that part of it which lies between the Towns of Harrison and Cambridge City, leaving the distance from the latter place to Hagerstown—between 7 and 8 miles—unconstructed. It was then without the requisite means to equip the part of the road completed, or to undertake the construction of the remaining portion of the road. In this condition it entered into a contract of perpetual lease with The Indianapolis, Cincinnati and Lafayette Railroad Company, a corporation then in existence, in consideration of which the latter company agreed to furnish all the necessary equipments, material and laborers to operate the line of the road then completed, and to construct and put in good and safe running order for the accommodation of the public that part of the line then uncompleted, that is, the section between Cambridge City and Hagerstown, and to pay to the lessor annually the sum of \$140,000 in four quarterly payments of \$35,000 each. The contract referred to the mortgage of \$1,000,000 before mentioned, and provided for the payment of the interest thereon out of the rents received, and for the resumption of possession by the lessor if the lessee failed to keep its covenants.

The Cincinnati, Indianapolis and Lafayette

porate privileges and appurtenances." *Shamokin Valley R. Co. v. Livermore*, 47 Pa. 465.

Such a mortgage does not embrace woodland, or land purchased for a certain specific use of the road, as for depots, shops, etc., but which has not actually been applied to that purpose. *Dinsmore v. Racine & M. R. Co.* 12 Wis. 649; *Youngman v. Elmira & W. R. Co.* 65 Pa. 278.

A mortgage of an "undertaking" does not include the land of a railway company. *Doe v. St. Helens & R. G. R. Co.* 2 Eng. R. & Can. Cas. 756.

Nor does a mortgage conveying "said undertaking, and all and singular the rates, tolls, and other sums arising," convey the land to the mortgagee. *Doe v. St. Helens & R. G. R. Co.* 2 Q. B. 384.

But where the governing body of the corporation, in a resolution authorizing an issue of bonds to raise money, provide for the execution of a deed of trust to secure the same, on its right of way, roadbed, etc., "and on all the real and personal property now and hereafter belonging to the company," this necessarily includes the earnings and profits, and authorizes a trust deed conveying the tolls, freights, rents, incomes, etc. *Kelly v. Alabama & C. R. Co.* 58 Ala. 489.

Where a railway company, executing a mortgage upon its road as contemplated, has no legal title to any of the right of way, but only contracts for a small portion thereof, to be conveyed upon conditions which it never performs or has agreed to perform, and a new company is organized, which builds the road and acquires the legal title to most of the right of way and is equitably entitled to the balance, the original company has no such interest or title in the road as can be subjected to sale under 182 U. S.

the mortgage. *Chicago, D. & V. R. Co. v. Loewenthal*, 38 Ill. 433.

Rights of action, legal or equitable, may be the subject of mortgage, but they must be specifically named in the mortgage, and do not pass under a general clause embracing "all personal property." *Milwaukee & M. R. Co. v. Milwaukee & W. R. Co.* 20 Wis. 174; *Brainerd v. Peck*, 34 Vt. 496; *Smith v. McCullough*, 104 U. S. 25 (23: 687); *Morgan v. Donovan*, 58 Ala. 241.

A railway company may include in a mortgage of its railway and appendages property to be thereafter acquired. *Coopers v. Wolf*, 15 Ohio St. 523; *Ludlow v. Hurd*, 1 Disney (Ohio) 558; *Dunham v. Cincinnati, P. & C. R. Co.* 68 U. S. 1 Wall. 254 (17: 584); *Covey v. Pittsburgh, Ft. W. & C. R. Co.* 8 Phila. (Pa.) 173.

A mortgage of a railroad and its franchises embraces and attaches to all property subsequently acquired for its use. *Dinsmore v. Racine & M. R. Co.* 12 Wis. 649; *Ludlow v. Hurd*, 1 Disney (Ohio) 552; *Pennock v. Coe*, 34 U. S. 23 How. 117 (16: 436); *Shaw v. Bill*, 95 U. S. 10 (24: 833); *Farmers Loan & Trust Co. v. Commercial Bank*, 11 Wis. 207; *Pierce v. Emery*, 32 N. H. 484.

The mortgage only follows and attaches to any property which is an accession to the thing granted, which is embraced within the powers of the company as they existed when the mortgage was executed. *Seymour v. Canandaigua & N. F. R. Co.* 25 Barb. 284; *Shaw v. Bill*, 95 U. S. 10 (24: 833); *Elwell v. Grand Street & N. R. Co.* 67 Barb. 58; *Meyer v. Johnston*, 58 Ala. 237.

Where a mortgage embraces "after-acquired" property, it includes a lease of another road taken

Company went into the possession of the property thus leased, and proceeded to have the remaining portion of the line of the road between Cambridge City and Hagerstown constructed. For that purpose the lessee, on the seventh of December, 1867, entered into a contract with Benjamin E. Smith and Henry C. Lord, by which these gentlemen agreed to construct the remaining portion of the line, and the lessee agreed, in consideration of such construction, to issue to them, or to such parties as they might name, obligations of the company to the amount of \$205,000, divided into shares of \$100 each, which obligations were to be transferable on the books of the company like shares of stock, and the principal thereof was to be irredeemable, but bear interest at the rate of 8 per cent per annum, payable semi-annually. The contract with these parties recited the right of the lessee company to the perpetual use and possession of the railroad from Harrison to Hagerstown, and the right to construct the uncompleted portion of the road, and have the benefit of all donations made for that purpose; and provided that in payment for the construction of the uncompleted portion the lessee was to issue its obligations to the amount of \$205,000 as before mentioned. Under this contract the line of railway between Cambridge City and Hagerstown was completed, and the lessee company remained in its possession from July, 1868, to May 1, 1871, receiving the income thereof, and gave its certificates for the obligations mentioned to Lord and Smith to the amount of \$205,000.

Whilst the work upon this section of the road was in progress it was agreed between the contractors and the lessee company that the holders of the certificates for the obligations should have a perpetual lien upon all the earnings of the line constructed by them, to secure the payment of the semi-annual interest, as stipulated, and on the 23d of April, 1868, such lien was given by resolution of the board of directors of the lessee company. On the tenth of July, 1869, the lessor Company and the lessee company united in executing and delivering a mortgage to Smith and Lord upon the section of railroad built by them, in trust to secure the holders of the certificates mentioned. On the twelfth of July, 1869, the board of directors of The White Water Valley Railroad Company, by a resolution entered on its records, ratified the contract of lease, and directed its president to execute, or join in the execution of, any writing necessary or proper to give effect to the agreement for the lien on the earnings mentioned. On the first of May, 1871, the two corporations, the lessor and the lessee companies, agreed that the original contract of lease should be canceled, and that the road of The White Water Valley Railroad Company should be returned to it. In pursuance of such agreement the lease was canceled, and thereafter The White Water Valley Railroad Company operated the property, receiving its revenue and earnings, amounting, as charged in the bill, to the sum of \$100,000. It was agreed between these two companies that in part consideration

by the company. *Buck v. Seymour*, 46 Conn. 155.

In some instances, a mortgage has been held to apply to the net earnings of the road, while in other cases it has been held that the mortgage does not apply to such net earnings unless so applied in express terms. *Addison v. Lewis*, 75 Va. 701; *Tompkins v. Little Rock & Ft. S. R. Co.* 15 Fed. Rep. 6; *Emerson v. European & N. A. R. Co.* 67 Me. 387; *De Graff v. Thompson*, 24 Minn. 452; *Pullen v. Cincinnati & C. A. L. R. Co.* 5 Biss. 237.

A railway company may pledge its net earnings, but so long as they remain in the hands of the mortgagor they are subject to trustee process in favor of the general creditors of the road. *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 603 (23: 405); *Galveston, H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 459 (20: 199); *Mississippi Valley & W. R. Co. v. U. S. Express Co.* 81 Ill. 534; *Smith v. Eastern R. Co.* 124 Mass. 154; *Bath v. Miller*, 51 Me. 341; *Noyes v. Rich*, 52 Me. 115; *Galena & C. U. R. Co. v. Menzies*, 26 Ill. 121; *Ellis v. Boston, H. & R. Co.* 107 Mass. 1; *Emerson v. European & N. A. R. Co.* 67 Me. 387; *Dunham v. Isett*, 15 Iowa, 284; *Clay v. East Tennessee & V. R. Co.* 6 Heisk. (Tenn.) 421.

Only the net earnings, after the payment of operating expenses, can be pledged. *Parkhurst v. Northern Cent. R. Co.* 19 Md. 472.

Land grants to a railway company do not pass under a mortgage of its railway and after-acquired property, although expressly named, until the company has earned them; or, in other words, until it has performed the conditions which entitles it to receive them. Nor does the term embrace a grant of land which the company has no power to accept. *Campbell v. Texas & N. O. R. Co.* 2 Woods, 263; *Meyer v. Johnston*, 53 Ala. 237.

A mortgage of after-acquired property only attaches to such interest as the mortgagor acquires. *Williamson v. New Jersey Southern R. Co.* 23 N. J. Eq. 277; *Williamson v. New Jersey Southern R. Co.* 258

29 N. J. Eq. 311; *Haven v. Emery*, 33 N. H. 66.

A mortgage of a railway and its after-acquired property does not extend to property obtained by it by fraud, so that the title thereto does not vest in it, or to property acquired by it illegally and without authority. *Branch v. Atlantic & G. R. Co.* 8 Woods, 481; *Randolph v. New Jersey W. L. R. Co.* 28 N. J. Eq. 49; *Coe v. New Jersey Midland R. Co.* 81 N. J. Eq. 105; *Meyer v. Johnston*, 53 Ala. 237; *Williamson v. New Jersey Southern R. Co. supra*; *Field v. Post*, 33 N. J. L. 343; *Fraser v. Fredericks*, 24 N. J. L. 162.

A mortgage of a railroad and all its property, real and personal, includes and covers old iron rails, etc., taken up from the road as useless and replaced by new ones, and also new rails purchased to be laid upon the road, but which have not been actually laid. *First Nat. Bank v. Anderson*, 75 Va. 250; *Weetjen v. St. Paul & P. R. Co.* 4 Hun, 529; *Palmer v. Forbes*, 23 Ill. 301; *Farmers Loan & Trust Co. v. Commercial Bank*, 11 Wis. 207; *Farmers Loan & Trust Co. v. Commercial Bank*, 15 Wis. 424; *Farmers Loan & Trust Co. v. Cary*, 13 Wis. 110; *Dinsmore v. Racine & M. R. Co.* 12 Wis. 649; *Brainerd v. Peck*, 34 Vt. 496.

But where a track is laid merely for temporary purposes, as to obtain gravel from a pit, or to take stones from a quarry, or to take freight to a certain point, it becomes no part of the railway and does not pass under a general mortgage of the railroad. *Van Keuren v. Central R. Co.* 33 N. J. L. 165.

Nor do tools and other implements used in repairing the railway or its appliances, but not attached to the realty, pass under such a mortgage, nor coal, wood, or other materials used for fuel, nor an iron safe, nor office furniture. *Williamson v. New Jersey Southern R. Co. supra*; *Hunt v. Bullock*, 23 Ill. 320; but see *Coe v. McBrown*, 23 Ind. 262, *contra*; *Titus v. Mabey*, 25 Ill. 257.

for the surrender of the road from Hagerstown to Cambridge City The White Water Valley Railroad Company should recognize the priority of the lien of all the holders of the certificates, and should either pay or discharge the interest thereon continuously thereafter, or make other satisfactory arrangements with such holders; or, failing therein, should surrender to the lessee company the possession of the railroad between those places and cease to operate the same or to receive its earnings.

The bill charges that The White Water Valley Railroad Company has taken and maintained possession of the section of the railroad mentioned since the first day of May, 1871, up to the commencement of the suit, and been in the receipt of all its earnings, and has disregarded its obligations to the holders of the certificates. The bill therefore prays that an account be taken of the income and earnings of the said branch, and that out of the same the amount due the complainants on their certificates be directed to be paid, and that in default of payment the lien be foreclosed and the property sold.

Answers were filed to this bill and replications to them, and proofs were taken.

Pending the progress of the case The White Water Railroad Company, a corporation under the laws of Indiana—a different corporation from The White Water Valley Railroad Company—was permitted to intervene in the case. It seems that after the commencement of this suit the trustees in the mortgage of August 1, 1865, brought suit for the foreclosure of the mortgage executed to them and obtained a decree for the sale of the entire road mortgaged, which included the whole of the road from Harrison, in Dearborn County, to Hagerstown, in the County of Wayne, embracing that portion extending between Cambridge City and the Town of Hagerstown, and under such decree said property was sold and The White Water Railroad Company became its purchaser. In its answer to the bill of complaint, that Company set up the proceedings had in the foreclosure suit, the decree for the sale of the property mortgaged, and its purchase of the same. The court below decreed in its favor, holding that the whole of that railroad, including the portion lying and extending between Cambridge City and Hagerstown, was thus acquired and owned by The White Water Railroad Company, and that the only equitable relief to which the complainants were entitled was a possible right to redeem from said mortgage; and gave to the complainants thirty days in which to commence proceedings for such redemption, and ordered that in default of such proceedings the bill should be dismissed. The complainants declined to take any proceedings for that purpose and the bill was accordingly dismissed; and they have appealed to this court.

Messrs. D. Thew Wright and C. B. Matthews, for appellants:

The contract by which certain persons were to acquire the rights and build an extension of the road is not void.

Twin-Lick Oil Co. v. Marbury, 91 U. S. 587 (28: 828); *German Nat. Bank v. Kimball*, 103 U. S. 782 (26: 469); *Omaha Hotel Co. v. Wade*, 182 U. S.

97 U. S. 13 (24: 917); *Wardell v. Union Pac. R. Co.* 108 U. S. 651 (26: 509.)

If avoided, honest expenditures must be refunded.

Thomas v. Brownville, Ft. K. & P. R. Co. 109 U. S. 523 (27: 1018).

Vendor's liens may arise in favor of one who is not, technically speaking, the vendor.

Carey v. Boyle, 53 Wis. 574; *Austin v. Underwood*, 87 Ill. 438; *Rutland v. Brister*, 53 Miss. 688; *Poe v. Paxton*, 26 W. Va. 607; *Johns v. Sewell*, 88 Ind. 1; *Fleece v. O'Rear*, 88 Ind. 200; *Dwenger v. Branigan*, 95 Ind. 221; *Russell v. Watt*, 41 Miss. 602; *Munns v. Isle of Wight R. Co. L. R.* 5 Ch. App. 414; *Earl St. Germans v. Crystal Palace R. Co. L. R.* 11 Eq. 568; *Bishop of Winchester v. Mid-Hants R. Co. L. R.* 5 Eq. 17; *Wing v. Tottenham & H. J. R. Co. L. R.* 8 Ch. App. 740; *Allgood v. Merrybent & D. R. Co. L. R.* 83 Ch. Div. 571; *Keane v. Athenry & E. J. R. Co.* 19 Week. Rep. 43; *Walker v. Ware, H. & B. R. Co.* 12 Jur. N. S. 18.

A stipulation in a contract for a lien upon land to secure an obligation, accomplishes its purpose even where the particular land is not specified.

Deacon v. Smith, 8 Atk. 828; *Wellesley v. Wellesley*, 4 Myl. & Cr. 579; *Metcalfe v. Archbishop of York*, 1 Myl. & Cr. 547; *Watson v. Sadlier*, 1 Molloy, 585; *Hill v. McLean*, 10 Lea (Tenn.) 107; *Compton v. Wabash, St. L. & P. R. Co.* 14 West. Rep. 159, 45 Ohio St. 593.

A mortgage of after-acquired property only attaches to the property in the condition in which it came into the hands of the mortgagor. If it comes into his hands incumbered already with a lien, the mortgage attaches subject to that lien.

Beall v. White, 94 U. S. 882 (24: 173); *Pennock v. Coe*, 64 U. S. 28 How. 117 (16: 486); *U. S. v. New Orleans & O. R. Co.* 79 U. S. 12 Wall. 862 (20: 434); *Loomis v. Davenport & St. P. R. Co.* 17 Fed. Rep. 301; *Florida v. Anderson*, 91 U. S. 667 (18: 290); *Wright v. Kentucky & G. E. R. Co.* 117 U. S. 72 (26: 821.)

A lien upon rents is a lien upon the land itself.

Smith v. Patton, 12 W. Va. 541; *Legard v. Hodges*, 1 Ves. Jr. 477; *Legard v. Hodges*, 8 Bro. Ch. 531, 4 Bro. Ch. 421; *Fremont v. Dedire*, 1 P. Wms. 429; *Pinch v. Anthony*, 8 Allen, 536.

Such a lien passes by assignment to any person who becomes the owner of the obligation intended to be secured.

Felton v. Smith, 84 Ind. 485; *Miller v. Moore*, 8 Jones, Eq. 481.

The mortgage covering after-acquired property did not attach to the rights of way before the contract, giving the certificate holders a lien.

Carey v. Boyle, 53 Wis. 574; *Wellesley v. Wellesley*, 4 Myl. & Cr. 579; *Metcalfe v. Archbishop of York*, 1 Myl. & Cr. 547; *Jones v. Parker*, 51 Wis. 218; *Kaiser v. Lembeck*, 55 Iowa, 244; *Pouder v. Ritzinger*, 1 West. Rep. 563, 102 Ind. 571; *Hewitt v. Powers*, 84 Ind. 295.

A merger does not take effect where a subsequent lien would thereby be unjustly let in.

1 Jones, Mortgages, chap. V; *Chicago & A. R. Co. v. Union Rolling Mill Co.* 109 U. S. 720 (27: 1068).

One who furnishes purchase money of land

upon an agreement to receive a lien as security therefor, is superior in equity to former creditors, except those who may have mortgages upon the specific land at the time of the purchase; and with that exception, and with the exception of subsequent bona fide purchasers for valuable consideration, such persons are superior in equity to all other creditors and lien-holders.

Kaiser v. Lembeck, 55 Iowa, 244; *Clark v. Munroe*, 14 Mass. 351; *Kittle v. Van Dyck*, 1 Sandf. Ch. 76; *Adams v. Hill*, 29 N. H. 202; *Jackson v. Austin*, 15 Johns. 477; *Haywood v. Nooney*, 3 Barb. 645; 4 Kent, Com. 489; *Dayton, X. & B. R. Co. v. Lewton*, 20 Ohio St. 401; *Coe v. Delaware, L. & W. R. Co.* 84 N. J. Eq. 266.

It is an error to assume that the mortgagee stands in a better position than his mortgagor.

Botsford v. New Haven, M. & W. R. Co. 41 Conn. 454.

It is competent for the company and the vendor of rails to agree that they should remain personal property and subject to the lien of the vendor for purchase money, although these rails became part of the realty covered by the mortgage.

Haven v. Emery, 38 N. H. 66.

Mr. W. H. Miller, for appellees:

The contract of Nov. 4, 1867, which is the foundation of these alleged liens, being a lease of one Indiana railroad to another, is void.

Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co. 118 U. S. 290 (80: 83).

A mortgage, or any other express security or lien, whether given in pursuance of the contract of sale or by subsequent agreement, is a waiver of the vendor's lien.

Fox v. Fraser, 92 Ind. 265.

The agreement for a lien on the earnings is subject to the prior mortgage.

Dunham v. Cincinnati, P. & O. R. Co. 68 U. S. 1 Wall. 254 (17: 584).

† Railroad mortgages upon subsequently acquired property are valid.

Galveston, H. & H. R. Co. v. Cowdrey, 78 U. S. 11 Wall. 459 (20: 199); *U. S. v. New Orleans & O. R. Co.* 79 U. S. 13 Wall. 862 (20: 484); *Willink v. Morris Canal & Bkg. Co.* 4 N. J. Eq. 379; *Pennock v. Co.* 64 U. S. 23 How. 117 (16: 436); *Butt v. Ellett*, 86 U. S. 19 Wall. 544 (22: 183); *Porter v. Pittsburg Bessemer Steel Co.* 122 U. S. 267 (80: 1210).

Mr. Justice Field delivered the opinion of the court:

From the above brief statement of the case, it is clear that the decree of the court below must be affirmed. The claims of the complainants, whatever validity and force may be given to them as liens upon the earnings of the section of road from Cambridge City to Hagerstown, between the parties agreeing to such liens, are entirely subordinate to the rights of the bondholders under the mortgage of The White Water Valley Railroad Company, executed for their benefit to trustees on the first of August, 1865. That mortgage was made before the claims of the complainants had any existence. It covered the entire property of the Company then owned by it, including its line of railway from Hagerstown, in Wayne County, to Harrison, in Dearborn County, and all

property appertaining to the road which it might afterwards acquire. The validity of mortgages of that character by railroad companies upon property which may be subsequently acquired is not an open question now. It has been affirmed by adjudications of the highest courts of the States as well as by this court. Indeed, in a majority of cases, mortgages by such companies upon their roads and appurtenances have been executed for the purpose of raising the necessary means to construct the roads; and sometimes, indeed, when the lines of such roads had only been surveyed. In *Galveston, H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 459, 481 [20: 199, 206], there were several deeds of trust which in terms covered after-acquired property, each of which was similar in its character to the one in this case, and the court held that they estopped the Company and all persons claiming under them, and in privity with them, from asserting that they did not cover all the property and rights which they professed to cover. Said the court: "Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad which the Company was authorized by law to build, together with its superstructure, appurtenances, fixtures and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases." See, also, *Porter v. Pittsburg Bessemer Steel Co.* 122 U. S. 267, 268 [80: 1210, 1211], and cases there cited.

The decision in the case of *Galveston, H. & H. R. Co. v. Cowdrey* also covers the only plausible position of the complainants, that they have a lien upon the earnings of the section, because with their moneys the road over it was constructed. But the work was not done at the request of the mortgagees, but upon a contract with the lessee of the road, which had stipulated as one of the considerations of the lease to construct that part of the line. With those contractors the bondholders, secured by the mortgage of August 1, 1865, had no relations, and incurred no obligation to them. In the case cited it was contended that priority should be given to the last creditor for aiding to conserve the road. But the court answered that this rule had never been introduced into our laws, except in maritime cases, which stand on a particular reason; that by the common law whatever is affixed to the freehold becomes part of the realty, except certain fixtures erected by tenants, which do not affect the question; and that the rails put down upon the company's road become a part of the road. Here the same rule applies, and not only the rails, but those permanent fixtures which are essential to the successful operation of the road, become a part of the property of the Company, as much so as if they had existed when the mortgage was executed.

The doctrine that a vendor not taking security for the price of realty sold by him holds in equity a lien upon the property for such price is not controverted, but it has no application to the present case. The only right which the

-complainants possessed was that which was recognized by the decree,—a right to redeem the property from the sale under the mortgage,—a right which they were allowed to exercise within a specific period; but, they declining to do so, the bill was properly dismissed.

Decree affirmed.

THE COUNTY OF SCOTLAND, IN THE
STATE OF MISSOURI, *Pff. in Err.*,

v.
WILLIAM HILL.

(See S. C. Reporter's ed. 107-117.)

Consolidation of railroad companies—county subscription—Missouri Constitution—purchaser of negotiable securities, notice to—state judgment, when binding—purchaser, with notice, of county bonds from innocent holder—transfer of bonds—rights of purchaser from bona fide holder—interest on coupons—interest on judgment.

1. The privilege given to The Alexandria and Bloomfield Railroad Company, by its charter of 1857, of receiving county subscriptions, was not extinguished by the subsequent consolidation of that company with other companies, but passed with its other rights and privileges into the new condition of existence, arising from such consolidation.
2. In making the subscription in question in this action, the county court acted as the representative authority of the County itself, officially invested with the discretion necessary to be exercised under the change of circumstances brought about by the consolidation, and the subscription is binding upon the County.
3. The prohibition, in the Missouri State Constitution of 1885, of municipal subscriptions to the stock of, or loans of credit to, companies, associations or corporations, without the previous assent of two thirds of the qualified voters at a regular or special election, had the effect to limit the future exercise of legislative power, but did not take away any authority granted before that Constitution went into operation.
4. Purchasers of negotiable securities are not chargeable with constructive notice of the pendency of a suit affecting their title or validity, but those who buy such securities from litigating parties with actual notice of the suit do so at their peril and must abide the result the same as the parties from whom they got their title.
5. An adjudication in a state court which binds the plaintiff, whether it was right or wrong, concludes him until it has been reversed or set aside. It cannot be disregarded any more in the courts of the United States than in those of the State.
6. The ownership of the coupons of county bonds by any prior holder, under such circumstances as would protect that holder against any defense by the county, entitles a subsequent purchaser to recover, even if he, when afterwards purchasing them, had knowledge of the pendency of a suit involving their validity.
7. Whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity.

8. If any intermediate holder between the plaintiff and defendant take negotiable paper under such circumstances as would entitle him to recover against the defendant, the plaintiff will have the same right, even though he may have purchased with a knowledge of its infirmity, as between the original parties.

9. Where coupons, as well as the bonds, are silent as to the rate of interest after maturity, and are made payable in New York, the rate of interest established by law in that State is to be allowed on the coupons after their maturity.

10. Where the judgment was rendered in Missouri the law of that State governs as to interest on the judgment after its rendition.

[No. 29.]

Argued April 16, 17, 1889. Decided Nov. 4, 1889.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri, to review a judgment against the County of Scotland in the State of Missouri, for the amount of certain coupons or bonds issued by that County to The Missouri, Iowa and Nebraska Railway Company, a corporation created by the consolidation of The Alexandria and Nebraska City Railroad Company of Missouri (formerly known as The Alexandria and Bloomfield Railroad Company) with the Iowa Southern Railway Company of Iowa. *Affirmed.*

The facts are stated in the opinion.

Reported below, 25 Fed. Rep. 395.

Mr. Henry A. Cunningham, for plaintiff in error:

A county is a *quasi* corporation or political division of the State, not a private corporation, and so far as it is a corporation it must act strictly within the limits of the powers conferred upon it by the Act creating it.

Ray County v. Bentley, 49 Mo. 236; *State v. St. Louis County Ct.* 84 Mo. 546; *Barton County v. Walser*, 47 Mo. 202; *Beardon v. St. Louis County*, 86 Mo. 561.

Every buyer was bound to satisfy himself, in seeking authority for the execution of the bonds, that the county court had not delegated authority for the insertion of false recitals.

Anthony v. Jasper County, 101 U. S. 688 (25: 1005); *Chambers County v. Olens*, 38 U. S. 21 Wall. 324 (22: 520); *Merchants' Exch. Nat. Bank v. Bergen County*, 115 U. S. 891 (39: 433); *Dallas County v. MacKensie*, 94 U. S. 663 (24: 188).

Cases between different parties plaintiff cannot be invoked as an estoppel in this case.

Cromwell v. Sac County, 94 U. S. 360 (24: 200); *Gould v. Evansville & C. R. Co.* 91 U. S. 526 (23: 416).

Reports of decisions of this court upon facts herein stated are not evidence of those facts in other cases between different parties.

Mackay v. Easton, 86 U. S. 19 Wall. 619 (23: 211).

When a *remittitur* is entered the judgment must be set aside. Especially is this requisite when coupons merged in the judgment are to be withdrawn.

Bronson v. Schulten, 104 U. S. 410 (26: 397); *Noonan v. Bradley*, 79 U. S. 12 Wall. 121 (20: 279); *Harbor v. Pacific R. Co.* 32 Mo. 428.

Messrs. F. T. Hughes and J. H. Overall, for defendant in error:

Where a municipal corporation has power to issue negotiable securities the bona fide holder has a right to presume them valid, and they are not to be impeached any more than other negotiable instruments. He need not look beyond the recitals in the bonds.

Lexington v. Butler, 81 U. S. 14 Wall. 282 (20: 809); *Coloma v. Eaves*, 92 U. S. 484 (28: 579); *Macon County v. Shores*, 97 U. S. 272 (24: 859); *Ralls County v. Douglass*, 105 U. S. 728 (26: 957).

The defendant in error occupies the position of a bona fide holder of the bonds and coupons in suit for value, without notice of any of the defenses set up.

Story, Prom. Notes, § 191; 1 Daniel, Neg. Instr. 753; 2 Pars. Bills and Notes, 488; 2 Randolph, Com. Paper, § 987; *Marion County v. Clark*, 94 U. S. 278 (24: 59); *Cromwell v. Sac County*, 96 U. S. 59 (24: 686); *Scotland County v. Hill*, 112 U. S. 188 (28: 692); *Hill v. Scotland County*, 84 Fed. Rep. 208.

Neither the pendency of the injunction suit of *Wagner v. Mety*, 63 Mo. 150, nor the decree in that case, can defeat the right of the defendant in error to recover on the facts as proven in this case.

Warren County v. Marcy, 97 U. S. 96 (24: 977); *Stewart v. Lansing*, 104 U. S. 509 (26: 868); *Burgess v. Seligman*, 107 U. S. 20 (27: 859); *Carroll County v. Smith*, 111 U. S. 562 (28: 519).

The company at most simply changed its name and this would not destroy its corporate entity, or disturb its original franchises and privileges.

Bucksport & B. R. Co. v. Busk, 68 Me. 81, 19 Am. R. Rep. 10; *Racine County Bank v. Ayers*, 12 Wis. 512; *Milwaukee & N. I. R. Co. v. Field*, 12 Wis. 340.

A subscriber is estopped by his contract of subscription.

Cooley, Const. Lim. 254, and note; *Wallace v. Loomis*, 97 U. S. 146 (24: 896); Rorer, Railroads, 97; *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228; *Montpelier & W. R. R. Co. v. Langdon*, 46 Vt. 284; *Parker v. Northern O. M. R. Co.* 38 Mich. 28; *Smith v. Mississippi & A. R. Co.* 6 Smedes & M. 179; *People v. Maynard*, 15 Mich. 470.

The corporation at least was a *de facto* corporation.

Douglas County v. Bolles, 94 U. S. 104 (24: 46); *Chubb v. Upton*, 95 U. S. 687 (24: 524); *Ralls County v. Douglass*, 105 U. S. 729 (26: 957).

Mr. Justice Harlan delivered the opinion of the court:

This writ of error brings up for review a judgment against the County of Scotland, in the State of Missouri, for the amount of certain coupons of bonds, bearing date September 1, 1870, and purporting to have been issued by that County to The Missouri, Iowa and Nebraska Railway Company, a corporation created by the consolidation of The Alexandria and Nebraska City Railroad Company, of Missouri (formerly known as The Alexandria and Bloomfield Railroad Company), with The Iowa Southern Railway Company, of Iowa. The coupons are payable to bearer, at the Farmers Loan and Trust Company, New York, while the bonds are payable to the above con-

solidated company, or bearer, at the same place, on the 31st of December, 1895, with interest thereon from December 31, 1870, payable annually in that city, at the rate of eight per cent per annum. Each bond recites that it is issued under and pursuant to an order of the county court, for subscription to the stock of The Missouri, Iowa and Nebraska Railway Company, "as authorized by an Act of the General Assembly of the State of Missouri, entitled 'An Act to Incorporate The Alexandria and Bloomfield Railroad Company,' approved February 9, 1857."

It appeared in proof that the county court, in conformity with the petition of taxpayers and residents, made an order, on the ninth of August, 1870, for the subscription of \$200,000 to the stock of The Missouri, Iowa and Nebraska Railway Company, payable in coupon bonds of the above kind, and at the same time designated an agent with authority to make the subscription upon the books of the company, to represent the County at the meetings of stockholders, and to receive dividends on its stock. The order stated that the subscription was upon certain specified terms and conditions, among which was one providing for the delivery to the railway company of \$100,000 of the bonds when the road was "graded, bridged and tied, the track laid, and the cars running thereon from Alexandria, Missouri, to a permanent depot, located within one half mile of the court-house in Memphis," and for the delivery of the remaining \$100,000 of bonds when the road was completed from Memphis to the west or north line of the County and the cars were running over it. By the same order the county attorney was directed to have the bonds printed, the presiding justice of the County to sign them, and the clerk to make proper attestation of his signature. At the same time Charles Mety was appointed trustee for the County, and charged, in that capacity, with the duty of receiving the bonds from the county clerk as soon as they were issued, and of delivering them to the railway company, in exchange for stock, upon its complying with the conditions specified in the order for the subscription. The trustee was required to give bond in the sum of three hundred thousand dollars, for the faithful performance of his trust.

On the eleventh of September, 1871—the road being then nearly completed to Memphis, the county seat—Levi Wagner and other taxpayers and citizens brought a suit in the Circuit Court of Scotland County to perpetually enjoin Mety from delivering the bonds or coupons to the railway company. It was alleged, as a principal ground for such relief, that the subscription made by the County, to pay which the bonds had been executed, was without proper legal authority, and, therefore, null and void. The defendants in that suit were Mety, the county trustee and custodian of the bonds; Fullerton, county treasurer; Dawson, Cooper and Margulis, justices of the County, and sitting as the county court at the time the subscription was made; and The Missouri, Iowa and Nebraska Railway Company. A few days prior to September 20, 1871, Mety went to Warsaw, Illinois, taking with him \$100,000 of the bonds, to be there delivered

to the railway company, upon the completion of the road to Memphis. He and the justices of the county court had then heard of the institution of the Wagner suit, and he went to Warsaw, under the direction of the members of that body, in order to evade the service upon him of the proposed injunction. While there he received from Dawson and Cooper, a majority of the justices composing the county court, an official communication, under date of September 20, 1871, in these words: "The iron is laid on The Missouri, Iowa and Nebraska Railway to the depot and the building is up. The company having complied with all the requirements, you will please deliver them the first hundred thousand dollars of the County's subscription and receive stock for the same." He complied with this order by delivering the bonds, at Warsaw, on the same day, taking from the company, as suggested by the justices, its bond indemnifying him against all damages, costs, expenses, etc., which he, as trustee for the County, might incur "by reason of certain injunction suits now pending in the Scotland County Circuit Court." On the eleventh of December, 1871, the county court, by an order entered upon its record, so modified the previous order of August 9, 1870, as to authorize Mety to deliver to the company the second installment of \$100,000 of bonds, upon the execution to him, as trustee, and to the County, of an indemnifying bond containing certain specified provisions. Such an obligation was immediately executed by the company, and the second installment of bonds was thereupon delivered to it by the court while in session at the county seat.

The Wagner suit was taken, by change of venue, to the Circuit Court of Shelby County, Missouri, by which a final decree was rendered on the second of June, 1874, declaring the bonds void for the want of legal authority in the Scotland County Court to make the subscription of stock in The Missouri, Iowa and Nebraska Railway Company, and ordering them to be surrendered for cancellation. This decree was affirmed by the Supreme Court of Missouri, at its October Term, 1878. That judgment of affirmance proceeded, mainly, upon the ground that, as the privilege given, by its charter of 1857, to The Alexandria and Bloomfield Railroad Company (afterwards The Alexandria and Nebraska City Railroad Company, Laws Mo. 1865-66, p. 222), of having municipal subscriptions without a previous vote of the people, was not exercised prior to the formation, by consolidation in 1870, of The Missouri, Iowa and Nebraska Railway Company, such privilege passed, if at all, to the consolidated company, subject to the prohibition in the State Constitution of 1865 against municipal subscriptions to corporations or companies, except upon the previous sanction of two thirds of the qualified voters at a regular or special election for that purpose. *Wagner v. Meety*, 69 Mo. 150. That ruling, the court said, was in harmony with its previous decision in *State v. Garrouette*, 67 Mo. 445.

The question of power in the county court to subscribe to the stock of The Missouri, Iowa and Nebraska Railway Company, with-

out a previous vote of the people, and to issue bonds in payment of its subscription, was directly presented and determined, upon full consideration, in *Scotland County v. Thomas*, 94 U. S. 682 [24: 219] decided in 1876. The coupons there in suit were of the same issue of bonds as those from which the coupons in the present suit were detached. It is true that that case was determined upon demurrer to the complaint. But that fact does not weaken the force of the decision, so far as it bears upon the question of legal authority in the county court to make the subscription. The record and opinion in that case show that it was stipulated between the parties that the question of subscribing to the stock of The Missouri, Iowa and Nebraska Railway Company had never been submitted to a vote of the qualified voters of Scotland County, and that, in determining the demurrer, the court should consider that fact as if it had been averred in the complaint. It was also agreed that the court should consider, as facts admitted, the articles of consolidation between The Iowa Southern Railway Company and The Alexandria and Nebraska City Railroad Company, and the above orders of the County Court of Scotland County. It was held that the privilege given to The Alexandria and Bloomfield Railroad Company, by its charter of 1857, of receiving county subscriptions, was not extinguished by the subsequent consolidation in 1870 of that company with other companies, but passed with its other rights and privileges into the new condition of existence arising from such consolidation; that, in making the subscription in that case, which is the identical subscription here in question, the county court acted "as the representative authority of the County itself, officially invested with all the discretion necessary to be exercised under the change of circumstances brought about by the consolidation;" that the subscription was binding upon the County; and that the bonds issued in payment were valid obligations. It was also distinctly ruled, in accordance with *Callaway County v. Foster*, 98 U. S. 567 [28: 911], and with previous decisions of the Supreme Court of Missouri, that the prohibition, in the State Constitution of 1865, of municipal subscriptions to the stock of, or loans of credit to, companies, associations or corporations, without the previous assent of two thirds of the qualified voters at a regular or special election, had the effect to limit the future exercise of legislative power, but did not take away any authority granted before that Constitution went into operation. The doctrines of that case were reaffirmed in *Henry County v. Nicolay*, 95 U. S. 619, 624 [24: 894] (1877); *Schwylger County v. Thomas*, 98 U. S. 169, 173 [25: 88, 89] (1878); *Cass County v. Gillett*, 100 U. S. 585, 592 [25: 585, 586] (1879); and *Ralls County v. Douglass*, 105 U. S. 728, 731 [26: 957, 958] (1881)—all cases arising in the State of Missouri, and relating to municipal bonds issued under legislative authority granted before the adoption of the Constitution of 1865. See also *Menasha v. Hazard*, 102 U. S. 91 [26: 88]; *Green County v. Conness*, 109 U. S. 104 [27: 872], and *Livingston County v. First Nat. Bank*, 128 U. S. 102 [32: 859]. In *Ralls*

County v. Douglass attention was called to *State v. Garrouite*, 87 Mo. 445, and *State v. Dallas County Court*, 73 Mo. 829, holding views different as well from those announced by this court in the cases above cited, as those previously announced by the state court in *State v. Macon County Court*, 41 Mo. 458; *Kansas City, etc. R. Co. v. Alderman*, 47 Mo. 349; *Smith v. Clark County*, 54 Mo. 58, 70, and *State v. Sullivan County Court*, 51 Mo. 522. But this court declined to reconsider its former decisions to the prejudice of bona fide holders of bonds issued prior to the change of decision in the state court. The bonds, the coupons of which are here in suit, were all issued in 1871, at which time the highest court of Missouri held that the above constitutional provision, as to municipal subscriptions or the loaning of municipal credit to corporations without a previous vote of the people, was intended (to use the language of *Balls County v. Douglass*) "as a limitation on future legislation only, and did not operate to repeal enabling Acts in existence when the Constitution took effect."

We pass to the consideration of the controlling question in the case, namely, whether Hill's rights as a holder of these coupons for himself and others, are affected by the final decree in the suit instituted in the state court by Wagner and others.

At the first trial of the present action, the County offered to read in evidence the record of the Wagner suit in support of its plea, averring, among other things, that Hill, and each previous holder of these coupons, had full, actual notice of the institution and object of that suit. It also offered to read in evidence the indemnifying bond of September 21, 1871, and, also, to prove by Mety, the trustee of the County, that he had actual notice of the pendency of the Wagner suit at the time he delivered the bonds to The Missouri, Iowa and Nebraska Railway Company. There was also an offer to prove that the railway company "and each subsequent holder" received the bonds with actual notice of the pendency of that suit. The circuit court excluded all of this evidence. This court held that such exclusion was improper, and for that reason the judgment was reversed and the cause remanded for a new trial. *Scotland County v. Hill*, 112 U. S. 188 [28: 692].

Chief Justice Waite, delivering the opinion of the court, said: "The suit was about the bonds, and the liability of the County thereon. The decree was in accordance with the prayer of the bill, and certainly concluded both Mety and the railroad company. After the rendition of this decree, the company could not sue and recover on the bonds, because, as between the company and the County, it had been directly adjudicated that the bonds were void and of no binding effect on the County. But it is equally well settled that the decree binds not only Mety and the company, but all who bought the bonds after the suit was begun, and who were chargeable with notice of its pendency, or of the decree which was rendered. The case of *Warren County v. Marcy*, 97 U. S. 96 [24: 977], decides that purchasers of negotiable securities are not chargeable

with constructive notice of the pendency of a suit affecting the title or validity of the securities; but it has never been doubted that those who buy such securities from litigating parties, with actual notice of the suit, do so at their peril, and must abide the result the same as the parties from whom they got their title. Here the offer was to prove actual notice, not only to the plaintiff when he bought, but to every other buyer and holder of the bonds from the time they left the hands of Mety, pending the suit, until they came to him. Certainly, if these facts had been established, the defense of the County, under its fourth plea, would have been sustained; and this whether an injunction had been granted at the time the bonds were delivered by Mety or not. The defense does not rest on the preliminary injunction, but on the final decree by which the rights of the parties were fixed and determined."

The court also said: "It is a matter of no importance whether the decision in the Wagner suit was in conflict with that of this court in *Scotland County v. Thomas*, *supra*, or not. The question here is not one of authority but of adjudication. If there has been an adjudication which binds the plaintiff, that adjudication, whether it was right or wrong, concludes him until it has been reversed or otherwise set aside in some direct proceeding for that purpose. It cannot be disregarded any more in the courts of the United States than in those of the State."

It appears from the bill of exceptions taken at the last trial, resulting in the judgment now before us for review, that the County sought by evidence introduced in its behalf to support the charge of actual notice of the Wagner suit as well upon the part of Hill as of each previous holder of the bonds, the coupons of which are here in suit. There was proof by the plaintiff tending to show that the bonds delivered by Mety to the railroad company were passed by that corporation to the company that built the road, in payment for construction, and that they were sold, for value, by the latter to various parties in different parts of the country, who had no notice whatever of the institution or object of the Wagner suit. There was also evidence tending to show that the parties owning the coupons immediately before they were delivered to Hill for himself, and for others whom he represented, were all purchasers for value, without notice of the injunction suit, or of any infirmity in the bonds.

The County asked an instruction to the effect that "if at the time or times of making purchases of either of the coupons in this suit declared upon, William Hill, the plaintiff, had actual knowledge of the pendency of or judgment in the case of *Levi J. Wagner et al. v. Charles Mety et al.* [affd. 69 Mo. 150], and if the jury so find they are instructed that as to any such coupon purchased by plaintiff, whether for himself or as agent for other persons, no recovery of judgment can be herein had." The court refused to so instruct the jury, but instructed them, in substance, that the ownership of the coupons by any prior holder under such circumstances as would protect that holder against any defense

by the County, entitled Hill to recover, even if he, when afterwards purchasing for himself or others, had knowledge of the pendency of the Wagner suit. That this was the meaning of the court is quite clear from the following extracts from its charge to the jury: "This paper is valid in the hands of a party who received it for value without actual notice of the pendency of the suit of Wagner and others; but if he and each intermediate party from the first delivery of these bonds and coupons also had notice of such suit or other infirmity, then no recovery can be had. . . . If the obligations sued on were duly executed, as above mentioned, and delivered by said Mety, and were thereafter purchased for value by the plaintiff from persons who had acquired the same for value without notice of said suit or of any fraud in the execution and delivery of the same, as above stated, then as to such obligations the plaintiff is entitled to recover. On the other hand, if the plaintiff and each of the persons through whom he derived title had actual notice of said Wagner suit, or of the delivery of said obligations by Mety to escape said suit, known to be about to be instituted, then as to such of said obligations there can be no recovery. . . . One link broken in the chain breaks the chain."

As there was no evidence tending to show that Hill was a party to the scheme devised by the county officers and the railway company for the delivery of the bonds to the latter before the injunction suit should be ripe for a decree, we are of opinion that the court did not err in its instructions to the jury.

The bonds were delivered to the railway company at the office of the bank in Warsaw, Illinois, of which Hill was president. And it is, perhaps, true that Hill had then heard of the Wagner suit, and knew or suspected that Mety's purpose in bringing the bonds to Warsaw was to deliver them to the company before the injunction could be served upon him. But he had no connection with the conspirators, nor did he or any of the parties represented by him have, at that time, any interest in the coupons. It is said that the construction company received the bonds with actual notice, upon the part of one of its chief officers, of the injunction suit. But there can be no claim that any of the holders of the coupons intermediate between the construction company and Hill had any such notice. Be that as it may, the question as to such notice was properly submitted to the jury.

The principles of law by which this question must be determined are well settled. In *Douglas County v. Bolles*, 94 U. S. 104 [24: 46], which involved the rights of parties claiming to be bona fide holders of certain municipal bonds, issued to a railroad corporation, and by it passed to the contractor who built its track, the court, after observing that the plaintiffs could call to their aid the fact that their predecessors in ownership were bona fide purchasers, said: "And still more, the contractor for building the railroad received the bonds from the county in payment for his work, either in whole or in part, after his work had been completed. There is no pre-

tense that he had notice of anything that should have made him doubt their validity. Why was he not a bona fide purchaser for value? The law is undoubted that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights." In *Cromwell v. Sac County*, 96 U. S. 51, 59 [24: 681, 686], it was said that, with some exceptions that have no relevancy here, "the rule has been too long settled to be questioned now, that whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity. His own title and right would be impaired, if any restrictions were placed upon his power of disposition." So in *Roberts v. Lane*, 64 Me. 108, 111, it was said that "if any intermediate holder between the plaintiff and defendant took the note under such circumstances as would entitle him to recover against the defendant, the plaintiff will have the same right, even though he may have purchased when the note was overdue, or with a knowledge of its infirmity, as between the original parties." See also *Montclair v. Ramsdell*, 107 U. S. 147, 159 [27: 431, 435]; *Porter v. Pittsburg Bessemer Steel Co.* 123 U. S. 267, 298 [30: 1210, 1211]; *Mornyser v. Cooper*, 85 Iowa, 257, 260; *Kost v. Bender*, 25 Mich. 516; *Byles, Bills*, 119, 124.

It is objected that there was error in allowing interest at the rate of seven per cent upon the coupons after their maturity. Such allowance was proper for the reason that the coupons (which, as well as the bonds, were silent as to the rate of interest after maturity) were made payable in New York, where the rate as then established by law was seven per cent. 1 Rev. Stat. N. Y. 771, Part. 2, chap. 4, title 351; Act of June 20, 1879, Laws of 1879, chap. 588, p. 598. In *Bank of Louisville v. Young*, 87 Mo. 398, 407, the rule was recognized that "interest is to be paid on contracts according to the place where they are to be performed; where interest is expressly or impliedly to be paid." *Andrews v. Pond*, 88 U. S. 13 Pet. 65, 73, 77, 78 [10: 61]; *Story, Conflict of Laws*, § 291. In respect to interest on the amount for which judgment was rendered, we are of opinion that the law of Missouri governs, and the judgment must bear only six per cent interest. 1 Rev. Stat. Mo. 1879, §§ 2723, 2725, p. 458.

The judgment of the court below is affirmed, to bear interest from the date of its rendition at the rate of six per cent per annum.

The objection that some of the coupons included in the present judgment were, in fact, included in former judgments against the County, is without foundation.

The judgment is affirmed.

AUGUSTUS DAY, *Appt.*,

v.

THE FAIR HAVEN AND WESTVILLE RAILWAY COMPANY.

(See S. C. Reporter's ed. 98-108.)

Letters-patent for improvement in track clearers—diagonal brace—patentable novelty.

1. The fourth claim of reissued letters-patent, No. 8,388, dated August 27, 1878, for an improvement in track clearers, does not cover any patentable novelty.
2. The employment of a diagonal brace to a track scraper to prevent lateral displacement does not involve patentable novelty; its use in that way would naturally suggest itself to any mechanic and is within the range of common knowledge and experience.
3. As the diagonal brace to enable the scraper to be kept in its place on the track, is the only element of the combination which is claimed to be new, and that involves no patentable novelty, the decree of dismissal must be affirmed.

[No. 85.]

Argued Oct. 23, 24, 1889. Decided Nov. 11, 1889.

APPEAL from a decree of the Circuit Court of the United States for the District of Connecticut, dismissing a suit in equity for an infringement of letters-patent. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 28 Fed. Rep. 189.

Mr. Charles J. Hunt for appellant.

Mr. Wm. Edgar Simonds for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court:

Augustus Day filed his bill in equity against The Fair Haven and Westville Railway Company in the Circuit Court of the United States for the District of Connecticut, alleging an infringement of the fourth claim of reissued letters-patent No. 8,388, dated August 27, 1878, for an improvement in track clearers.

The defense was that the claim lacked patentable novelty, unless construed to contain parts not mentioned in it, and if so construed, then that there had been no infringement. The Circuit Court, Shipman, J., decided (*Day v. Fair Haven & W. R. Co.* 28 Fed. Rep. 189) that the claim did not cover patentable novelty, and dismissed the bill accordingly, and from this decree the cause was brought to this court by appeal.

So much of the specification as is necessary to be quoted here states that:—

"The nature of this invention relates to an improvement in the construction of railway-track-cleaning devices, and the means of operating them, being more especially designed to be attached to horse-cars for the purpose of removing snow, ice, mud and other obstructions from the rails and immediately at the sides thereof; and it consists in the combination of a pair of independently-acting scrapers, pivotally secured to the floor of a car, and resting upon the track, when in operation, wholly by their own weight, with means for raising and lowering such scrapers simultaneously; in the combination, with an independently-acting scraper resting, when in operation, wholly by its own weight upon the track, of a draw-bar in the direct line of draft and a supplementary and diagonal draw-bar, which at the same time acts as a brace, the forward ends of both of said draw-bars being secured on the same axial line; in the peculiar construction and arrangement of a cast-shank with relation to the scraper, which is secured there-

to, and the draft-irons, which connect it to the under side of the car; in the pendent guards, which lift the scraper from the track on meeting with an obstruction on the outside of the rail, and deflect outwardly from the track, and in a peculiar crank for operating the shaft which raises and lowers the pair of scrapers at each end of the car, as more fully hereinafter set forth.

"In the drawing, A represents my scraper, being a plate of sheet metal of the form shown, slightly curved in cross-section. The front end of this scraper is rounded off at its lower edge, as shown in the drawings, to allow it to pass, without jar or danger of breaking, over the ends of rails that may be projected above the plane of the adjacent rails. The lower edge of the rear part of the wing of the scraper is cut away, as shown, to allow it to pass over pavement or earth at the side of the track which projects above the rail, thereby preventing such projecting matter from lifting the scraper proper from the face of the rail. B is the shank, to which it is secured by the bolts *a a*. This shank is a casting in the form shown in Fig. 2. It is formed with a pair of longitudinal ribs, *b*, on top, to receive the end of the draw-bar C, whose other end is pivoted to a hanger, D, pendent from the car; or it may be pivoted directly to the sill of the car.

"The shank is also fitted or cast with diagonal studs *c* on top of said ribs *b* to receive the outer end of a diagonal brace, E, whose other end is pivoted to a hanger, D', parallel with the hanger D, but near the longitudinal center of the car, both draw-bar and diagonal brace being thus pivoted on the same axial line, so that when it is desired to raise and lower the scrapers, the same will be done without disturbing the vertical position thereof with relation to the track, as would be done were there but one pivotal point. While the scraper and the parts to which it is attached are free to move in a vertical plane, this brace E effectually resists any lateral pressure to which the scraper may be subjected in moving obstructions from the rail, its own weight being sufficient to keep it down on the rail. The draw-bar and brace are securely bolted to the shank, and by the described arrangement of the ribs and studs perfect accuracy in the 'set' of the scraper is secured—an essential feature of my invention."

The claims were nine in number, of which the first four are as follows:

"1. In a railway-car, a pair of independently-acting scrapers, pivotally secured to the floor of the same, and resting upon the track, when in operation, wholly by their own weight, in combination with means for raising and lowering such scrapers simultaneously, substantially as and for the purpose set forth.

"2. In a track-cleaning device, the combination, with an independently-acting scraper, resting, when in operation, wholly by its own weight upon the track, of a draw-bar in the direct line of draft, and a supplementary and diagonal draw-bar, which at the same time acts as a brace, the forward ends of both of

said draw-bars being secured on the same axial line, substantially as and for the purpose set forth.

"8. The construction and arrangement of the shank B, as described, with relation to scraper A, draw-bar C, and diagonal brace E, as and for the purposes set forth.

"4. The combination, with the draw-bar C and scraper A, of the diagonal brace E, as and for the purpose set forth."

But it was stipulated that the complainant did not seek to recover except under the fourth claim.

The original patent, No. 125,547, was granted April 9, 1873, and the original specification did not contain the words italicized above, nor the first and second claims.

Upon the hearing, the complainant adduced the evidence of certain expert witnesses, who testified, on cross-examination, in substance, that the draw-bar C performed the office of drawing the scraper along the track, and was assisted in so doing by the diagonal brace E, which brace also performed the office of preventing the scraper from being removed from the track by the side thrust; that while the diagonal brace assisted in the direct draft, yet its most important function was to prevent the lateral movement of the scraper from the track; that, in considering the office performed by the draw-bar C and brace E, that office was the same if they were attached to any scraper in any way, provided an attachment was made; that so far as the fourth claim of the reissue was concerned, it was not material how the draw-bar and brace were pivoted, except that the pivoting should be on "the same axial line," so "that when the scraper is lifted from the track it shall not be moved laterally in either direction."

As already stated, the fourth claim is: "The combination, with the draw-bar C and scraper A, of the diagonal brace E, as and for the purpose set forth."

Inasmuch as the scraper and draw-bar were both confessedly old, and the primary function of the diagonal brace is manifestly to prevent lateral displacement, the question, assuming that it is the diagonal brace only which is claimed to be new, is whether the application of a diagonal brace to a track-scraper to prevent lateral displacement involves patentable novelty. And this question must be answered in the negative, for we concur with the circuit court that the employment of a brace to effect that purpose would naturally suggest itself to any mechanic, and that its use in that way is within the range of common knowledge and experience. Considered aside from the method of the combination of the parts and the manner of pivoting, the contrivance is a well-known one of obvious suggestion, and used here to perform an office exactly analogous to that in which it has been frequently formerly used.

But it is contended on behalf of appellant that, as the combination would be inoperative "for the purpose set forth," namely, clearing the track of a railway of obstructions such as snow, ice, mud, etc., unless the bottom of the car were treated as part of such combination, the peculiar method of pivoting: the

draw-bar and the diagonal brace must also be included.

The mechanism by which the draw-bar and the diagonal brace are pivoted to the car and fastened to the scraper is not referred to in this claim, although it is in other claims of the series. As the claim must be held to define what the Patent Office has determined to be the patentee's invention, it ought not to be enlarged beyond the fair interpretation of its terms. It is true that elements of a combination not mentioned in a claim may sometimes be held included, in the light of other parts of the specification, which may be applicable, but here the claim is so broad that we are not justified in importing into it an element which would operate to so enlarge its scope as to cover an invention in no manner indicated upon its face.

As therefore the diagonal brace to enable the scraper to be kept in its place on the track is the only element of the combination which is claimed to be new, and that involves no patentable novelty, *the decree must be affirmed, and it is so ordered.*

THE PENNSYLVANIA RAILROAD COMPANY, *Pf. in Err.*,

P. H. MILLER, Admr. of GEORGE R. DUNCAN, Deceased.

(See S. C. Reporter's ed. 75-84.)

Pennsylvania Constitution—consequential damages for constructing railroad—Pennsylvania Railroad Company—liability of—charter and statutes relating thereto—exemption.

1. Section 8 of art. XVI of the Constitution of Pennsylvania of 1873, which provides that corporations taking private property for public use shall make compensation for property taken, injured or destroyed, includes then existing corporations.
2. The framers of the said Constitution did not intend to repeal any of the provisions of the charter of The Pennsylvania Railroad Company; but they had the power to subject said Railroad Company to the provision, above mentioned, that it should make just compensation, not only for property taken by it, but also for such as it should injure or destroy.
3. There was not, prior to the said Constitution of 1873, any such contract between the State of Pennsylvania and said Railroad Company, in its charter or by statute, as prevented its subjection by that Constitution to liability for consequential damages arising from the construction of the elevated road mentioned in the opinion, even if prior to said Constitution it was not liable for such consequential damages.
4. Said Railroad Company took its original charter subject to the general law of the State, and to such changes as might be made in such general law, and subject to future constitutional provision or future general legislation, as there was no prior contract exempting it from liability thereto.
5. No such exemption from future general legislation, either by a constitutional provision or by an Act of the Legislature, exists unless it is ex-

previously given, or unless it follows by an implication equally clear with express words.

- a. The statutory provisions existing prior to the said Constitution of 1873, in favor of said Company, cannot be properly interpreted so as to hold that the State parted with its prerogative of imposing the liability above mentioned in regard to future transactions.

[No. 86.]

Argued Oct. 24, 25, 1889. Decided Nov. 11, 1889.

IN ERROR to the Court of Common Pleas, No. 2, for the County of Philadelphia, State of Pennsylvania, to review a judgment in favor of George R. Duncan, the plaintiff's intestate, against the Pennsylvania Railroad Company, for consequential damages to property, caused by the construction of the railroad and its use and operation. *Affirmed.*

The facts are stated in the opinion.

Reported below, 111 Pa. 352.

Messrs. Wayne MacVeagh and A. H. Wintersteen, for plaintiff in error:

A provision in a state constitution may be a law impairing the obligation of a contract.

Riek v. Jefferson Police Jury, 116 U. S. 181, 185 (29: 587, 588); *Pacific R. Co. v. Maguire*, 87 U. S. 20 Wall. 86 (22: 282); *Davis v. Gray*, 88 U. S. 16 Wall. 208, 232 (21: 447, 457); *Miss. & M. R. Co. v. McClure*, 77 U. S. 10 Wall. 511, 515 (19: 997, 998).

This court is not concluded by the view of the questions involved taken by the Supreme Court of the State.

Jefferson Branch Bank v. Skelley, 66 U. S. 1 Black, 436 (17: 178); *Bridge Proprietors v. Hoboken L. & I. Co.* 68 U. S. 1 Wall. 116 (17: 571), and other cases cited in *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 86, 87 (31: 614).

A contract existed exempting this franchise from the new burden of liability for consequential damages.

Cooley, Const. Lim. 279; *Planters Bank v. Sharp*, 47 U. S. 6 How. 801 (12: 447).

It is none the less a violation of the constitutional inhibition if the value of the right is lessened, although the right may not directly be taken away.

Von Hoffman v. Quincy, 71 U. S. 4 Wall. 535, 558 (18: 403, 409); *McCracken v. Hayward*, 43 U. S. 2 How. 608, 612 (11: 397); *Bronson v. Kinzie*, 43 U. S. 1 How. 311, 319 (11: 143); *Ch. Bridge Co. v. Binghamton Bridge Co.* 70 U. S. 3 Wall. 51 (18: 187); *Jefferson Branch Bank v. Skelley*, 66 U. S. 1 Black, 436 (17: 178); *Providenos Bank v. Billings*, 29 U. S. 4 Pet. 514 (7: 989); *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 420 (9: 778); *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665 (29: 770); *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87 (3: 162); *Favlet v. Clark*, 13 U. S. 9 Cranch, 292 (3: 785); *Riek v. Jefferson Police Jury*, 116 U. S. 182 (29: 587); *Green v. Biddle*, 21 U. S. 8 Wheat. 1, 84 (5: 547).

The charter of this Railroad Company, not specifically imposing a liability for consequential damages, is a contract exempting it from the subsequent imposition of such liability.

Shrunk v. Schuykill Nav. Co. 14 Serg. & R. 71; *Monongahela Nav. Co. v. Coons*, 8 Watts & S. 101; *Henry v. Pittsburgh & A. Bridge Co.* 8 Watts & S. 85; *Mifflin v. Harrisburg, P. M.*

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& L. R. Co. 16 Pa. 193; *New York & E. R. Co. v. Young*, 83 Pa. 175; *Watson v. Pittab. & C. R. Co.* 87 Pa. 469; *Buckwalter v. Black Rock Bridge Co.* 88 Pa. 281; *Bald Eagle Boom Co. v. Sanderson*, 81* Pa. 402; *Hays v. Com.* 82 Pa. 518; *Ahl v. Rhoads*, 84 Pa. 819, 824; *Lewis v. Jeffries*, 86 Pa. 340; *Long's Appeal*, 87 Pa. 114; *Pennsylvania R. Co. v. Langdon*, 92 Pa. 31; *Lycoming Gas & W. Co. v. Moyer*, 99 Pa. 615, 619.

Where the decisions of a state court establish a rule of property, they will be followed by the Supreme Court of the United States.

Burgess v. Seligman, 107 U. S. 20, 83 (27: 359, 365); *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 256 (27: 922, 928); *Connecticut Mut. L. Ins. Co. v. Oushman*, 108 U. S. 51 (27: 648).

The contract of exemption exists and is enforceable, notwithstanding the Act of 1855 and the Amendment of 1857.

Com. v. Pennsylvania Canal Co. 66 Pa. 41, 52, 58; *Humphrey v. Pegues*, 83 U. S. 16 Wall. 244 (21: 826); *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665 (23: 757); *Sinking Fund Cases*, 99 U. S. 700, 758, 759 (25: 496, 515); *Hamilton's Communication to Senate*, Jan. 20, 1795, 3 Hamilton's Works, 518, 519.

When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances.

Davis v. Gray, 88 U. S. 16 Wall. 208, 232 (21: 447, 457); *Hall v. Wisconsin*, 108 U. S. 5, 11 (26: 302, 305).

The contract rights of the Railroad Company were not lost by the acceptance of subsequent legislation.

Monongahela Nav. Co. v. Coon, 6 Pa. 379.

The rights of the Railroad Company are not affected by the new Constitution, because the adoption of the new Constitution was not a valid exercise of the Legislature's right to alter, revoke or annul charters.

Douglas v. Essex County, 38 N. J. L. 214; *Woodbury v. Berry*, 18 Ohio St. 456; *White v. Syracuse & U. R. Co.* 14 Barb. 559, 562; *Cooley*, Const. Lim. 87, 120; *Barto v. Himrod*, 8 N. Y. 483, 489; *Locke's Appeal*, 73 Pa. 491, 494; *Brown v. Fleischner*, 4 Or. 182; *Lammert v. Lidwell*, 62 Mo. 188; *Tomlinson v. Jessup*, 82 U. S. 15 Wall. 454 (21: 204); *Spring Valley Water Works v. Schottler*, 110 U. S. 347 (28: 173).

The Railroad Company has not accepted or made itself otherwise subject to the provisions of the Constitution of 1874.

McAboy's Appeal, 107 Pa. 548; *Pittsburgh v. Pennsylvania R. Co.* 48 Pa. 855.

The immunity from liability for consequential damages was not lost by delay in the exercise of the right of building this improvement.

Philadelphia, W. & B. R. Co. v. Williams, 54 Pa. 108; *Black v. Phila. & R. R. Co.* 58 Pa. 249; *People's Pass. R. Co. v. Baldwin*, 14 Phila. 281, 282; *Richardson v. Akin*, 87, Ill. 188; *Louisville v. Wible*, 84 Ky. 290; *Los Angeles v. Los Angeles City Water Co.* 61 Cal. 65; *Com. v. New Bedford Bridge Co.* 3 Gray, 389.

Messrs. M. Hampton Todd, David T. Watson and George W. Biddle, for defendant in error:

There is no contract in the charter of the plaintiff in error that it shall be exempt from liability to make just compensation for property injured and destroyed by the construction

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or enlargement of their works, highways or improvements.

Constitution of Pa. art. XVI, § 8; Declaration of Rights, in the Constitution of 1776, art. VIII; Constitution of 1790, art. IX, § 10; Constitution of 1838, art. VII, § 4; *Philadelphia & T. R. Co's Case*, 6 Whart. 25; *Struthers v. Dunkirk, W. & P. R. Co.* 87 Pa. 282; *O'Connor v. Pittsburgh*, 18 Pa. 189; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 114; *Pittsburgh, B. & E. R. Co. v. McCloskey*, 1 Cent. Rep. 619, 110 Pa. 436; Constitutional Debates, Vol. 8, 597-600; *Pusey v. Allegheny*, 98 Pa. 522.

The charter of the plaintiff in error is subject to the general laws and to such changes as may be made therein.

Re Provident Inst. for Savings, 9 Cush. 604, 611; *Newton v. Mahoning County*, 100 U. S. 548, 557 (25:710, 711); *Morawetz, Priv. Corp.* (2nd ed.) §§ 1063, 1065, 1067; *Hare, Am. Const. Law*, 609; *Cooley, Const. Lim.* 574 (4th ed.) 716; *Nelson v. Vermont & C. R. Co.* 26 Vt. 718; *Brannin v. Connecticut & P. R. Co.* 31 Vt. 222; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140; *Frankford & P. P. B. Co. v. Phila.* 58 Pa. 119; *Baltimore & S. R. Co. v. Nesbit*, 51 U. S. 10 How. 395, 400 (13: 469).

Police power extends to persons and property and cannot be abridged even by legislation.

Boston Beer Co. v. Mass. 97 U. S. 32 (24:991).

A State may at any time alter the laws regulating procedure and provide new remedies for the ascertainment of justice.

Cairo & F. R. Co. v. Hecht, 95 U. S. 170 (24: 424); *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 18 Wall. 166 (20: 557); *Hare, Am. Const. Law*, 847; *Wilkinson v. Leland*, 27 U. S. 2 Pet. 657 (7: 542); *Boston, C. & M. R. Co. v. State*, 32 N. H. 215; *S. W. R. Co. v. Paulk*, 24 Ga. 363; *Duncan v. Pa. R. Co.* 94 Pa. 485; *Long's Appeal*, 87 Pa. 117.

Exemption from future general legislation can never be implied; there must be an express contract.

Hare, Am. Const. Law, 661, 668 *et seq.*; *Tucker v. Ferguson*, 89 U. S. 23 Wall. 527 (22: 805); *Providence Bank v. Billings*, 29 U. S. 4 Pet. 514 (7: 939); *Gitman v. Sheboygan*, 87 U. S. 2 Black. 610 (17: 805); *Christ Church v. Philadelphia County*, 65 U. S. 24 How. 800 (16: 602); *N. W. Fertilizing Co. v. Hyde Park*, 97 U. S. 659 (24: 1086); *Newton v. Mahoning County*, 100 U. S. 548, 561 (25: 710, 712).

The privilege of taking private property for public use is such an element of sovereignty that it cannot be granted so as to preclude future legislative control of its subsequent exercise.

Cooley, Const. Lim. 524; *Hare, Am. Const. Law*, 331, 332, 621; *People v. Brooklyn*, 4 N. Y. 419, 424; *Mott v. Pa. R. Co.* 80 Pa. 9; *Brewster v. Hough*, 10 N. H. 138.

By reason of the plaintiff in error having accepted additional privileges and amendments to its charter since the Act of May 3, 1855, and the Amendments of the Constitution of Pennsylvania of 1857, it subjected its charter to the power of the Legislature to alter the same.

Pa. R. Co. v. Langdon, 92 Pa. 21; *Pa. R. Co. v. Duncan*, 2 Cent. Rep. 551, 111 Pa. 361; *Monongahela Nav. Co. v. Coon*, 6 Pa. 379; *Union Pass. R. Co. v. Phila.* 101 U. S. 528, 539, 540 132 U. S.

(25:912, 914, 915); *Tomlinson v. Jessup*, 82 U. S. 15 Wall. 454 (21: 204).

By reason of the plaintiff in error having accepted the benefit of a general law passed since the adoption of the existing Constitution of Pennsylvania, it is within the provisions of section 2, article XVI, of that instrument, and therefore, holds its charter subject to the provisions of the Constitution.

Stewart's Appeal, 56 Pa. 413; *Cohen v. Wilkinson*, 1 Macn. & G. 481; *Logan v. Earl of Courtown*, 18 Beav. 22; *People v. Albany & V. R. Co.* 24 N. Y. 267; *Com. v. Erie & N. E. R. Co.* 27 Pa. 339; *Black v. Canal Co.* 24 N. J. Eq. 476; *Stevens v. Paterson & N. R. Co.* 84 N. J. L. 537; *Newton v. Mahoning County*, 100 U. S. 548, 561 (25: 710, 712); *Pittsburgh Junction R. Co's Appeal*, 4 Cent. Rep. 268, 122 Pa. 511; *Dillon, Mun. Corp.* 580; *Springfield v. Connecticut River R. Co.* 4 Cush. 68; *Re Boston & A. R. Co.* 58 N. Y. 574; *Cake v. Phila. & E. R. Co.* 87 Pa. 307; *Boergreen Cemetery Assn. v. New Haven*, 43 Conn. 284; *Bridge Co. v. N. H. Bridge Co.* 7 N. H. 85; *Central R. Co. v. Pennsylvania R. Co.* 81 N. J. Eq. 475, 14 Am. L. Rev. 186.

Mr. Justice Blatchford delivered the opinion of the court:

This is an action on the case, brought in June, 1881, by George R. Duncan against The Pennsylvania Railroad Company, a Pennsylvania corporation, in the Court of Common Pleas, No. 2, for the County of Philadelphia, Pennsylvania. The plaintiff sued as the owner in fee of a piece of land, with the buildings, wharves and improvements thereon, situated at the northwest corner of Twenty-Third Street and Filbert Street, in the City of Philadelphia, and extending 230 feet and 11 inches along the west side of Twenty-Third Street, and 426 feet from that corner along the north side of Filbert Street, to low-water mark on the Schuylkill River.

The declaration alleged that the defendant had constructed along and upon Filbert Street, and in front of the premises of the plaintiff, an elevated railroad, placed on iron and stone pillars set at the curb-lines in Filbert Street, at intervals longitudinally of 50 feet, more or less, and at an elevation of at least 20 feet above the established grade of Filbert Street, and had constructed an abutment for the sustaining of a bridge superstructure across the Schuylkill River, on the eastern side of said river and in the middle of Filbert Street, in front of the premises of the plaintiff, and had constructed, opposite Filbert Street, in the channel of the river, two piers to further support the bridge superstructure, the bridge and the elevated railroad making a continuous line of railway, operated by the defendant, to transport freight and passengers in cars drawn by steam locomotives; that Twenty-Third Street and Filbert Street, at the place in question, were public highways of the City of Philadelphia; that the construction by the defendant of the elevated railroad, and of the abutment and pier for the support of the bridge superstructure, and the operation and use of the elevated railroad to transport freight and passengers in cars drawn by steam locomotives, and the noise, burning cinders, smoke, dust and dirt,

incident to the use of such railroad, had injured the plaintiff in the enjoyment of his premises, and had rendered the same incommensurable, and of little or no value to him, and had deprived him of the free use of Filbert Street as a highway, and of free access to and from the wharves on the river front of his property, by the river as well as by Filbert Street, and had greatly depreciated the value of the wharves; and that the injuries were committed on the first of June, 1881, and at all times since.

The elevated railroad in question was built by the defendant in 1880 and 1881, and was opened for freight in April, 1881, and for passengers in December, 1881. It is known as the Filbert Street extension, and crosses the Schuylkill River a short distance above Market Street, and ends at Broad Street. From Twenty-First Street west to the river the tracks were laid upon a structure of wooden and iron beams directly over the cartway of the street, and were sustained by iron pillars some 18 inches square, resting upon the footway inside of the curb-line. This was the case along the whole length of the south side of the plaintiff's property, the structure being some 40 feet high, and the railing or guard along the track coming within one or two feet of the wall of the plaintiff's building. None of the plaintiff's property was actually taken by the defendant, but the action was brought for the consequential damages caused by the construction of the railroad and its use and operation.

The defendant set up, among other defenses, that it had the right to do what it had done, without liability to the plaintiff, by virtue of its charter, contained in an Act passed by the Legislature of Pennsylvania, April 18, 1846 (Laws of 1846, No. 263, p. 812), and by virtue of a further Act of that Legislature, passed May 16, 1857 (Laws of 1857, No. 579, p. 519).

The case was tried before the court and a jury, and resulted in a verdict for the plaintiff, for \$20,000, for which amount, with costs, he had judgment. On a writ of error, the judgment was affirmed by the Supreme Court of Pennsylvania (*Pennsylvania R. Co. v. Duncan*, 111 Pa. 352 [2 Cent. Rep. 551]), and the defendant has brought the case to this court by a writ of error to the court of first instance, to which the record had been remitted. Duncan having died, his administrator has been substituted as defendant in error.

The federal question involved is whether the Acts of 1846 and 1857 constituted a contract between the State and the defendant, relieving the defendant from liability in this suit, and whether such contract was of such a character that its obligation could not be impaired by subsequent legislation by the State.

It is first necessary to see what are the provisions of the statutes on which the defendant relies.

The 11th section of the Act of 1846 gave authority to the defendant to construct a railroad from Harrisburg to Pittsburg, with a branch to Erie, and gave to it the right to enter upon and occupy all land necessary for the purpose, and to "take" the necessary materials from any land adjoining or in the neighborhood of the railroad so to be constructed, "Provided, That such compensation shall be made, secured, or

tendered to the owner or owners of any such lands or materials as shall be agreed upon between the parties, or in such manner as is hereafter mentioned: *Provided further*, That the timber used in the construction or repair of said railroad shall be obtained from the owners thereof only by agreement or purchase." The 12th section provided for the fixing of such compensation, when not agreed upon, through a petition to the court of quarter sessions of the proper county. The 17th section contained this provision: "And it shall be lawful for the said Company, in the manner and subject to the conditions and provisions hereinbefore provided, in relation to the main line of their railroad by this Act authorized to be made, to make such lateral railroads or branches, leading from the main line of their said railroad, to such convenient place or points, in either of the counties into or through (which the said main line of their road may pass, as the president and directors may deem advantageous, and suited to promote the convenience of the inhabitants thereof, and the interests of said Company."

By the fourth section of the Act of March 27, 1848 (Laws of 1848, No. 224, p. 274), passed as a supplement to the Act of 1846, provision was made for ascertaining, through the action of the court of common pleas of the proper county, the damages sustained by the owner of land or materials "taken" by the defendant, in case such compensation could not be agreed upon. Section 5 of that Act provided as follows: "That if said Railroad Company shall find it necessary to change the site of any portion of any turnpike or public road, they shall cause the same to be reconstructed forthwith, at their own proper expense, on the most favorable location, and in as perfect a manner as the original road: *Provided*, That the damages incurred in changing the location of any road authorized by this section shall be ascertained and paid by said Company in the same manner as is provided for in regard to the location and construction of their own road."

By section 1 of an Act passed April 12, 1851 (Laws of 1851, No. 297, p. 518), it was provided that the fifth section of the Act of 1848 should be so construed as to include the streets, lanes, and alleys in any town, borough or city through which the road passed.

By the Act of May 16, 1857, before referred to, provision was made for the sale at public auction of the whole main line of the public works of the State of Pennsylvania, which included The Philadelphia and Columbia Railroad. The Act provided, among other things (§ 3), that it should be lawful for any railroad company then incorporated by the State to purchase such main line for a sum not less than \$7,500,000; and that if The Pennsylvania Railroad Company should become the purchaser at such public sale or by assignment (which assignment the Act provided for), it should pay in addition to the purchase money of not less than \$7,500,000 the further sum of \$1,500,000, and should, in consideration thereof, have forever certain exemptions from taxation. This provision in regard to taxation was held unconstitutional by the Supreme Court of Pennsylvania in *Mott v. Pennsylvania R. Co.* 80 Pa. 9, a decision made before the sale took place. The third section of the Act further provided that it

should be lawful for the purchaser "to straighten and improve the said Philadelphia and Columbia Railroad, and to extend the same to the Delaware River, in the City of Philadelphia." The 11th section of the Act provided as follows: "That should any company already incorporated by this Commonwealth become the purchaser of said main line, they shall possess, hold and use the same under the provisions of their Act of incorporation and any supplements thereto, modified, however, so as to embrace all the privileges, restrictions and conditions granted by this Act in addition thereto; and all provisions in said original Act and any supplements inconsistent with the privileges herein granted shall be and the same are hereby repealed."

At a meeting of the stockholders of the defendant, held on the 20th of July, 1857, for the purpose of accepting or rejecting the provisions of the Act of 1857, and of considering such action as the directors of the defendant had taken in pursuance of that Act, subject to the approval of the stockholders, it was resolved, that the stockholders of the defendant accepted the provisions of the Act, so far as the same in any way related to or affected the defendant, and ratified and approved of such action as had been taken by the board of directors of the defendant, in purchasing the said main line of the public works, pursuant to the provisions of that Act, for the sum of \$7,500,000. The sale at public auction had taken place on the 25th of June, 1857, and the property had been purchased by the defendant for the sum above mentioned. On the 31st of July, 1857, the State conveyed by deed poll to the defendant the property so purchased, described as in the margin.¹

By the Constitution of Pennsylvania of 1873, which took effect January 1, 1874, it was provided as follows, by section 8 of article XVI: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction."

With these premises, we are prepared to consider the views taken of this case by the Su-

preme Court of Pennsylvania. That court gave its assent to the principle that the charter of the defendant was inviolable. It further stated that the framers of the Constitution of 1873 did not intend to repeal any of the provisions of that charter. It held that section 8 of article XVI of that Constitution included not only then existing municipal corporations, but also then existing "other corporations." It further held, that the defendant did not derive its authority to build the branch road in question, from the western side of the Schuylkill River through Filbert Street, from the Act of 1846, because that Act embraced only the power to build and operate a road from Harrisburg to Pittsburg; but that it derived such authority from the Act of May, 1857, in the 11th section thereof, before quoted; and that the convention which made the Constitution of 1873 had the power to subject the defendant's exercise of the right of eminent domain to the provision that it should make just compensation, not only for the property which it might choose to "take," in the strict sense of that word, but also for such as it might injure or destroy.

We think these views are sound. There was no such contract between the State and the defendant, prior to the Constitution of 1873, as prevented the subjection of the defendant by that Constitution to the liability for consequential damages arising from its construction of this elevated road in 1880 and 1881. Prior to the Constitution of 1873, and under the constitutional provisions existing in Pennsylvania before that time, the Supreme Court of that State had uniformly held that a corporation with such provisions in its charter as those contained in the charter of the defendant, was liable, in exercising the right of eminent domain, to compensate only for property actually taken, and not for a depreciation of adjacent property. The eighth section of article XVI of the Constitution of 1873 was adopted in view of those decisions, and for the purpose of remedying the injury to individual citizens caused by the nonliability of corporations for such consequential damages. Although it may have been the law in respect to the defendant, prior to the Constitution of 1873, that under its charter and the statutes in regard to it, it was not liable for such consequential damages, yet there was no contract in that charter, or in any stat-

¹"The whole main line of the public works between the said Cities of Philadelphia and Pittsburg, in the State of Pennsylvania, consisting of The Philadelphia and Columbia Railroad, The Allegheny Portage Railroad, including the new road to avoid the inclined planes, with the necessary and convenient width for the proper use of said railroads, the Eastern Division of the Pennsylvania Canal, from Columbia to the junction, the Juniata Division of the Pennsylvania Canal from the junction to the eastern terminus of The Allegheny Portage Railroad, and the Western Division of the Pennsylvania Canal, from the western terminus of The Allegheny Portage Railroad to Pittsburg, and including also the right, title and interest of the Commonwealth in the bridge over the Susquehanna, at Duncan's Island, together with the same interest in the surplus water-power of said canals, with the right to purchase and hold such lands as may be necessary to make the same available; and all the reservoirs, machinery, locomo-

tives, cars, trucks, stationary engines, workshops, tools, water stations, toll-houses, offices, stock and materials whatsoever and wheresoever thereunto belonging or held for the use of the same, and together with all the right, title, interest, claim and demands of the Commonwealth of Pennsylvania to all property—real, personal and mixed—belonging unto or used in connection with the same by the said Commonwealth, and together with all and singular other the buildings, improvements, powers, authorities, ways, means and remedies, estates and interests, rights, members, incidents, liberties, privileges, easements, franchises, emoluments, reversions, remainders, rents, issues, profits, hereditaments and appurtenances of what name, nature, or kind soever thereto belonging or in any wise appertaining, which by force and virtue of the said recited Act of Assembly and the provisions thereof were meant and intended and of right ought to be hereby assigned and transferred therewith."

ute in regard to the defendant, prior to the Constitution of 1878, that it should always be exempt from such liability, or that the State, by a new constitutional provision, or the Legislature, should not have power to impose such liability upon it, in cases which should arise after the exercise of such power. But the defendant took its original charter subject to the general law of the State, and to such changes as might be made in such general law, and subject to future constitutional provisions or future general legislation, since there was no prior contract with the defendant, exempting it from liability to such future general legislation, in respect of the subject matter involved.

This principle is well set forth in the opinion of the justices of the Supreme Judicial Court of Massachusetts, given by them in answer to a question submitted to them by the Senate of that Commonwealth, in *Re Provident Institution for Savings*, 9 Cush. 604. See also *Nelson v. Vermont & C. R. Co.* 26 Vt. 717; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140; *Brant v. Connecticut & P. R. R. Co.* 81 Vt. 214; *Frankford & P. P. R. Co. v. Philadelphia*, 58 Pa. 119; *Baltimore & S. R. Co. v. Nesbit*, 51 U. S. 10 How. 895, 899, 400 [13: 469]; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 18 Wall. 166 [20: 557]; *Cairo & F. R. Co. v. Hecht*, 95 U. S. 168, 170 [24: 423, 424]; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 82, 83 [24: 989, 992]; *Newton v. Mahoning County*, 100 U. S. 548, 557 [25: 710, 711]; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512 [29: 468]; 1 Hare, Am. Const. Law, 609, 610; 2 Morawetz, Priv. Corp. (2d ed.) §§ 1062, 1065, 1067; Cooley, Const. Lim. (4th ed.) *574, 716.

The provision contained in the Constitution of 1878 was merely a restraint upon the future exercise by the defendant of the right of eminent domain imparted to it by the State. By its terms it imposes a restraint only upon corporations and individuals invested with the privilege of taking private property for public use, and extends the right to compensation, previously existing, for property taken, to compensation for property injured or destroyed by the construction or enlargement of works, highways or improvements, made or constructed by such corporations or individuals. Such provision is eminently just, and is intended for the protection of the citizen, the value of whose property may be as effectually destroyed as if it were in fact taken and occupied. The imposition of such a liability is of the same purport as the imposition of a liability for damages for injuries causing death, which result from negligence, upon corporations which had not been previously subjected by their charters to such liability. *Boston, C. & M. R. Co. v. State*, 32 N. H. 215; *Southwestern R. Co. v. Paulk*, 24 Ga. 356; *Duncan v. Pennsylvania R. Co.* 94 Pa. 435; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174 [32: 377]; Cooley, Const. Lim. (4th ed.) *581, 724; 1 Hare, Am. Const. Law. 421.

Nor will the exemption claimed from future general legislation, either by a constitutional provision or by an Act of the Legislature, be admitted to exist, unless it is expressly given, or unless it follows by an implication equally clear with express words. In the present case the statutory provisions existing prior to the Constitution of 1878, in favor of the defendant,

cannot be properly interpreted so as to hold that the State parted with its prerogative of imposing the liability in question, in regard to future transactions. *Providence Bank v. Billings*, 29 U. S. 4 Pet. 514 [7: 989]; *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 420 [9: 778]; *Christ Church v. Philadelphia County*, 65 U. S. 24 How. 800 [16: 602]; *Gilman v. Sheboygan*, 87 U. S. 2 Black, 510 [17: 805]; *Tucker v. Ferguson*, 89 U. S. 23 Wall. 527 [22: 805]; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659 [24: 1086]; *Newman v. Mahoning County*, 100 U. S. 548, 561 [25: 710, 712]; 2 Hare, Am. Const. Law, 661, 663, 664.

Judgment affirmed.

JOSEPH ARON, *Appt.*,

v.

THE MANHATTAN RAILWAY COMPANY.

(See S. C. Reporter's ed. 84-90.)

Patent for improvement in railway-car gates—old mechanism—patentable novelty—old instrumentalities.

1. The combinations referred to in the several claims in the patent No. 288,494, granted to Joseph Aron, as assignee of William W. Rosenfield, Nov. 13, 1888, for an improvement in railway-car gates, are merely an application to a new situation of old devices which had been previously applied to analogous uses.
2. Mechanism for opening and closing apertures distant from the operator, in which the devices used for those purposes are the mechanical equivalents of those employed by the said patentee, is old; and what he did was to adapt well-known devices to the special purpose mentioned in the patent.
3. The patentee is entitled to the merit of being the first to conceive of the convenience and utility of a gate opening and closing mechanism which can be operated efficiently by an attendant in the new situation; but his right to a patent must rest upon the novelty of the means he contrives to carry his idea into practical application.
4. If changes in old instrumentalities to adapt them to the use contemplated involve only the exercise of ordinary mechanical skill, they do not sanction the patent.

[No. 43.]

Argued Oct. 23, 29, 1889. Decided Nov. 11, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing a suit in equity to recover for the infringement of letters-patent No. 288,494, granted to the plaintiff as the assignee of William W. Rosenfield, the inventor, Nov. 18, 1888, for an improvement in railway-car gates. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 26 Fed. Rep. 314.

Mr. M. B. Philipp, for appellant.

A combination of old devices in which the novelty consists essentially in the arrangement or location of one of them with respect to the other has often been of the greatest utility and value, and patents therefor have been sustained both in England and in this country.

Seymour v. Osborne, 78 U. S. 11 Wall. 516 (20: 33); *Smith v. Goodyear D. V. Co.* 93 U. S. 496 (23: 954); *Webster Loom Co. v. Higgins*, 105 U. S. 591 (26: 1181).

Messrs. Julien T. Davies and Edwin H. Brown, for appellee:

The patent is bad upon its face. No patentable invention is defined by these claims.

Merrill v. Yeomans, 94 U. S. 568 (24: 285); *Keystone Bridge Co. v. Phœnix Iron Co.* 95 U. S. 274 (24: 344); *Miller v. Bridgeport Brass Co.* 104 U. S. 350 (26: 738); *Union Water-Meter Co. v. Desper*, 101 U. S. 332 (25: 1024); *Gage v. Herring*, 107 U. S. 640 (27: 601); *Fay v. Cordesman*, 109 U. S. 420 (27: 984); *White v. Dunbar*, 119 U. S. 47 (30: 308); *Weir v. Mordeu*, 125 U. S. 98 (31: 645).

The appellant must show that the production of the alleged improvement involved the exercise of the inventive faculty.

Atlantic Works v. Brady, 107 U. S. 192 (27: 438); *Phillips v. Detroit*, 111 U. S. 608 (28: 533); *Hollister v. Benedict & B. Mfg. Co.* 113 U. S. 59 (28: 901); *Thompson v. Botselmer*, 114 U. S. 1 (29: 76).

The court will take judicial notice of the prior state of the art.

Dunbar v. Meyers, 94 U. S. 198 (24: 38); *Terhune v. Phillips*, 99 U. S. 592, 598 (25: 298, 294); *Slawson v. Grand Street, P. P. & F. R. Co.* 107 U. S. 654 (27: 578); *King v. Gallun*, 109 U. S. 99, 101 (27: 870, 871); *Phillips v. Detroit*, 111 U. S. 606 (28: 533); *Brown v. Piper*, 91 U. S. 87 (23: 200); *Ah Kow v. Nunan*, 5 Sawy. 552; *Grier v. Will*, 120 U. S. 429 (30: 717).

Any alteration or modification which involves only the exercise of ordinary mechanical skill does not sanction the patent.

Pa. R. Co. v. Locomotive E. S. Truck Co. 110 U. S. 496 (28: 225); *Blaks v. San Francisco*, 113 U. S. 682 (28: 1071); *Stephenson v. Brooklyn Cross-Town R. Co.* 114 U. S. 152 (29: 59).

Appellant's claims do not cover combinations.

Thatcher Heating Co. v. Burtis, 121 U. S. 295 (30: 945); *Pickering v. McCullough*, 104 U. S. 317 (26: 751).

Mr. Justice Blatchford delivered the opinion of the court:

This is a suit in equity, brought by Joseph Aron against The Manhattan Railway Company, in the Circuit Court of the United States for the Southern District of New York, to recover for the infringement of letters-patent No. 286,494, granted to the plaintiff, as the assignee of William W. Rosenfield, the inventor, November 13, 1883, for an "improvement in railway-car gates," the application for the patent having been filed April 8, 1883. The circuit court, held by Judge Wallace, dismissed the bill, and the plaintiff has appealed.

The specification of the patent says: "In many classes of railway cars, and particularly those used upon the elevated and other city railways, it has been found necessary, in order to prevent passengers from falling from the train, and also to prevent persons from attempting to get off or on a car while in motion, to provide the entrances to the car platforms with gates, by which they can be closed except at the proper times. These gates are usually in charge of a guard or attendant, whose duty it

is to close the gates before the train commences to move, and to open them only after the train has come to a full stop. As there is usually but one guard or attendant stationed between each two adjoining cars, it follows that to open or close both gates he must pass around from one to the other of the adjoining platforms. This passing from one platform to the other, besides being a source of annoyance to the guard, occasions some delay, which is very annoying to the passengers, particularly at times when a large number are required to get off or on a car in a very short time. It is the object of the present invention, among other things, to provide means by which the guard or attendant can, without changing his position, open or close both gates simultaneously and with the least possible delay. To that end one feature of the invention consists in providing the gates with connections so arranged that any two adjoining gates can be simultaneously opened or closed by the guard while standing in the passageway leading from one of the cars to the other."

The drawings annexed to the patent represent two ordinary railway cars, with platforms adjoining each other, and the usual entrances from the station platform, and gates of the ordinary construction for closing such entrances. The gates are hinged in the usual manner to posts which rise from the corners of the platforms, and close against the usual jambs which project from the sides of the cars. The platforms are provided with the usual guard-railings, extending inward from the above mentioned posts to similar posts which are located a sufficient distance apart to leave a passageway from one car to the other. When the gates are thus arranged it is necessary, in order to close or open both gates, for the guard to pass from one platform around the inner post to the opposite platform, thus causing some delay in opening and closing one of the gates, adding to the labor of the guard and causing annoyance to the passengers. In order to avoid this, each of the gates is provided, at a suitable distance from its hinge, with a curved lever, which extends rearward and terminates a short distance outside of the guard-railing. This lever is connected by a link, *e*, with a rod, *f*, which slides in or on a suitable bearing secured to the guard-railing, and is provided at its inner end with a handle by which it can be operated. The guard or attendant, while standing in the passageway can, by grasping the two handles and pushing or pulling the rods, *f*, open or close both gates simultaneously and without loss of time.

The specification states that the rods, *f*, will preferably be provided with some form of locking mechanism by which the gates can be fastened in their opened or closed positions; and that such locking may be accomplished by having the handles pivoted to the rods, *f*, as shown, and provided with extensions which can be turned so as to extend in front of the inner posts and hold the gates closed, or so as to lie in the rear of lugs and hold the gates open. It then describes an arrangement whereby the rods, *f*, and links, *e*, may be placed upon the inside of the guard-railings, as well as upon the outside; and also an arrangement by which the connections for operating the

gates may, if desired, be placed beneath the platforms; and also an arrangement whereby the gates may be so hinged as to lie against the body of the car when open, instead of against the guard-railings; and also an arrangement whereby sliding gates may be used instead of swinging gates.

There are six claims in the patent, only the first five of which are involved in the present case. They are as follows:

"1. The combination, with a gate arranged to close the side entrance to a car platform, of an operating handle located at or near the inner end of the platform guard-rail, and means connecting said gate and handle, whereby the attendant may open and close the gate while standing at the end of said guard-rail, substantially as described.

"2. The combination, with gates arranged to close the side entrances to the adjoining platforms of two cars, of operating handles located at or near the inner ends of the platform guard-rails, and means connecting said gates and handles, whereby the attendant may open or close both gates simultaneously while standing at the ends of said guard-rails, substantially as described.

"3. The combination, with a railway car and its platform, having an end guard-rail, by which a side entrance thereto is provided, of a gate for closing said entrance, a rod, as *f*, sliding in or on guides secured to said guard-rail, and a link, as *e*, connected to said gate and rod, all substantially as described.

"4. The combination, with a railway car and its platform, having an end guard-rail, by which a side entrance thereto is provided, of a swinging gate for closing said entrance, a rod, as *f*, sliding in or on a guide secured to said rail, a link, as *e*, connected to said gate and rod, and means for locking said gate in its closed position, all substantially as described.

"5. The combination, with gates arranged to close the side entrances to the adjoining platforms of two cars, of rods, as *f*, sliding in or on guides secured to the guard-rails of said platforms, and links, as *e*, connected to said gates and rods, substantially as described."

The opinion of *Judge Wallace* is reported in 26 Fed. Rep. 314. The only question he considered was that of the patentable novelty of the improvement, saying:

"A brief reference to the prior state of the art will indicate that the combinations referred to in the several claims are merely an application to a new situation of old devices which had been previously applied to analogous uses. Devices to open and close an aperture at a distance from the operator, in a great variety of forms, were old. As illustrations of those things which are matters of common knowledge, and of which the court will take judicial notice, it is sufficient to allude to the strap used by the driver at the front of the omnibus to open and close the rear door; to the devices for opening or closing valves at a distance, in steam and hydraulic apparatus; and to the devices used at railway switches for opening and closing the rails.

"Referring to the prior state of the art, as

shown by various prior patents which have been introduced in evidence, it appears also that mechanism to open and close the entrance to passenger cars at a point distant from the operator was likewise old; as, where the operator standing upon the front platform employed such mechanism to open or close a door at the rear platform. One prior patent alone, the one granted to John Stephenson September 15, 1874, shows five methods of closing and opening the rear doors of street cars from the front platform.

"Mechanism for closing and opening apertures at a distance from the operator, in which the same devices were employed as are employed by the patentee, was old, and is disclosed in a number of earlier patents, which have been put in evidence. It will suffice to refer to two only. The patent to Woolensak of March 11, 1873, for an improvement in transom-lifters, describes the means for opening and closing the transom as consisting of a sliding rod, which is connected by a pivoted link to the arm of the transom frame. The patent to Corrigan, granted April 16, 1878, for an improvement in blind-adjusters, whereby outside blinds are opened and closed without lifting the window-sash, describes as the mechanism employed a sliding bar connected by a pivoted link with a hinged shutter. In both of these patents the aperture to be opened and closed at a distance from the operator—in the one case a shutter and in the other a transom—is opened and closed, as is the case in the patent in suit, by pushing or pulling the sliding rod or bar. In both of these patents there is likewise described a locking device, by means of which the sliding rod or bar is retained in a fixed position, so that the shutter or the transom will remain fastened when opened or closed, at the option of the operator; thus showing opening, closing, and locking apparatus in all essentials like that of the patent in suit. Moreover, the patent to Corrigan shows this apparatus arranged to open and close the two shutters of the window, at the option of the operator, simultaneously, the sliding bars being so arranged as to be pushed or pulled each by one hand of the operator.

"Mechanism for opening and closing apertures distant from the operator, in which the devices used for the purpose are the mechanical equivalents of those employed by the patentee, is shown to be old by a large number of patents which have been put in evidence.

"This partial exhibit of the prior state of the art demonstrates that what the patentee did was to adapt well-known devices to the special purpose to which he contemplated their application. It was necessary that the gate should swing inward to open and outward to close; that the sliding rod should be located where it would be out of the way of passengers entering or leaving the platform; and that the end or handle of the rod should be located where it could be conveniently operated by the attendant, without inconveniencing outgoing or incoming passengers. The new situation acquired adequate modifications of existing devices for opening and closing an aperture at a distance from the operator, appropriate to the new occasion. Accordingly, the patentee located the rods on bearings secured to the guard-

rails, with their handles near the passageway formed by the space or opening near the middle of the guard-rail. If this required invention, his improvement was the proper subject of a patent. He did nothing more and nothing less than this. It seems impossible to doubt that any competent mechanic familiar with devices well known in the state of the art, could have done this readily and successfully, upon the mere suggestion of the purpose which it was desirable to effect. When it was done as to one car platform, it was only requisite to duplicate it upon another to make the improvement of the patentee in all its length and breadth.

"The patentee is entitled to the merit of being the first to conceive of the convenience and utility of a gate opening and closing mechanism which could be operated efficiently by an attendant in the new situation. His right to a patent, however, must rest upon the novelty of the means he contrives to carry his idea into practical application. It rarely happens that old instrumentalities are so perfectly adapted for a use for which they were not originally intended as not to require any alteration or modification. If these changes involve only the exercise of ordinary mechanical skill, they do not sanction the patent; and, in most of the adjudged cases where it has been held that the application of old devices to a new use was not patentable, there were changes of form, proportion or organization of this character which were necessary to accommodate them to the new occasion. The present case falls within this category."

We concur in these views, and affirm the decree of the Circuit Court.

THE KEYSTONE MANGANESE AND IRON COMPANY, *Appt.*,

MATT MARTIN

(See S. C. Reporter's ed. 91-98.)

Final decree, what is.

The decree is not final and is not appealable, where the action is for an injunction restraining defendant from committing further trespasses on the mineral and ore in land or removing the same and for an account of the quantity and value of the ore taken from the land by the defendant, and the decree grants the injunction, and orders an accounting, but the account remains to be taken.

[No. 51.]

Argued Nov. 1, 1889. Decided Nov. 11, 1889.

APPPEAL from a decree of the Circuit Court of the United States for the Eastern District of Arkansas, enjoining the defendant from entering upon or removing mineral from land and ordering an account taken of the quantity and value of the mineral already removed by the defendant from the land, and that the defendant account to the plaintiff for its value, and appointing a master to take said account

and to hear evidence and report the same to the court. *Dismissed.*

The facts are stated in the opinion.

Messrs. U. M. & G. B. Rose for appellant.

Mr. G. N. Tillman for appellee.

Mr. Justice Blatchford delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the Eastern District of Arkansas, by Matt Martin against The Keystone Manganese and Iron Company.

The bill alleges that the plaintiff, owning a piece of land in Independence County, Arkansas, conveyed it, in June, 1853, with other lands, to one Smith and his heirs forever, subject to the condition that Martin retained to his heirs, representatives and assigns "a perpetual and unlimited right in fee to all the stones and minerals that may be in or upon said lands, and full and unquestioned power and right to enter said lands for the purpose of digging, quarrying and mining upon said lands, with full power and right of ingress and egress thereto and therefrom, and upon said lands to remain and erect buildings thereon, and to use such timber and other materials as may be convenient and proper for the excavation, preservation, manufacture and removal of such stones and minerals and improvements as may be connected with the working of said stones and minerals, it being well understood by the parties hereto that the right of sale and all else is hereby conveyed to said Thomas C. Smith, except the right to the stones and minerals on said lands, which, with all needful and proper rights and privileges to obtain, prepare for market, and remove the same, are expressly reserved from sale." The deed was executed by Martin alone.

The bill further alleges that ever since said deed the plaintiff has been and now is in the possession of the mineral and ore in and upon the land; that there are large and valuable deposits of manganese therein; and that the defendant, in December, 1885, unlawfully entered upon said mineral deposits and began to mine and remove therefrom the manganese, and had carried it away, to the value of more than \$5,000. It prays for an injunction restraining the defendant from the commission of further trespasses during the pendency of the suit; that an account be had of the quantity and value of the ore taken by the defendant from the land; and that it be decreed to account to the plaintiff therefor, and be perpetually enjoined from further trespassing upon the mineral and ore in the land.

The defendant put in an answer, setting up its right to mine and remove the manganese ore by virtue of its having obtained such right, for a specified period of time, from persons who had become the owners of the land through a sale of it for the nonpayment of taxes, and also setting up a Statute of Limitations.

After a replication, proofs were taken on both sides, and the circuit court decided in favor of the plaintiff, upon the ground that, under the laws of Arkansas in force at the time the taxes were assessed, for the nonpayment of which the land was sold, it was necessary that the mine, having been separated from the

NOTE.—As to what is a final decree, see note to *Gibbons v. Ogden*, 19 U. S. 6 Wheat. 448 (5: 302).

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surface soil, should be separately assessed, and it could not be sold for taxes, except upon such an assessment; and that neither the mine, nor the mineral in it, was, in the present case, assessed or sold. The court made a decree perpetually enjoining the defendant from entering upon or removing the mineral or any part thereof from the land, and further ordering that an account be taken of the quantity and value of the mineral and ore already removed by the defendant from the land, and that the defendant account to the plaintiff for its value, and appointing a master to take said account and to hear evidence and report the same to the court. From that decree the defendant has appealed to this court, and the case has been argued by the appellee on its merits, and submitted on a printed brief by the appellant.

We think that the decree is not a final decree, and that this court has no jurisdiction of the appeal. The decree is not final, because it does not dispose of the entire controversy between the parties. The bill prays only for an injunction and an account of the quantity and value of the ore taken from the land by the defendant. The injunction is granted, but the account remains to be taken. The case is not one where nothing remains to be done by the court below except to execute ministerially its decree. In all cases like the one before us this court has uniformly held that the decree was not final and was not appealable.

The principal cases in which it has held that the decree was not appealable, because not final, are the following: *The Palmyra*, 28 U. S. 10 Wheat. 502 [6: 375]; *Perkins v. Fourniquet*, 47 U. S. 6 How. 206 [12: 406]; *Pulliam v. Christian*, 47 U. S. 6 How. 209 [12: 409]; *Barnard v. Gibson*, 48 U. S. 7 How. 650 [12: 357]; *Craighead v. Wilson*, 59 U. S. 18 How. 199 [15: 332]; *Beebe v. Russell*, 60 U. S. 19 How. 283 [15: 668]; *Humiston v. Stainthorp*, 69 U. S. 2 Wall. 106 [17: 905]; *North Carolina R. Co. v. Swasey*, 90 U. S. 23 Wall. 405 [23: 186]; *Bostwick v. Brinkerhoff*, 106 U. S. 8 [27: 78]; *Grant v. Phoenix Ins. Co.* 106 U. S. 429 [27: 237]; *Dainness v. Kendall*, 119 U. S. 53 [30: 305]; *Parsons v. Robinson*, 122 U. S. 112 [30: 1122]; while the decree has been held final, for the purposes of an appeal, in *Ray v. Law*, 7 U. S. 3 Cranch, 179 [2: 404]; *Whiting v. Bank of U. S.* 38 U. S. 13 Pet. 6 [10: 38]; *Forgay v. Conrad*, 47 U. S. 6 How. 201 [12: 404]; *Bronson v. La Crosse & M. R. Co.* 67 U. S. 2 Black, 528 [17: 359]; *St. Louis, I. M. & S. R. Co. v. Southern Express Co.* 108 U. S. 24 [27: 638]; *Ex parte Norton*, 108 U. S. 237 [27: 709]; *Winthrop Iron Co. v. Meeker*, 109 U. S. 180 [27: 698].

In *The Palmyra*, a prize case, the captors had filed a libel in the district court, and that court had dismissed it, without costs and damages against the captors. The circuit court affirmed the decree of restitution, with costs and damages. The libelants having appealed to this court, the appeal was dismissed, on the ground that the decree of the circuit court was not final. Chief Justice Marshall saying: "The damages remain undisposed of, and an appeal may still lie upon that part of the decree awarding damages. The whole cause is not, therefore, finally determined in the circuit court; and we are of opinion that the cause cannot be divided so as to bring up successively distinct parts of it."

In *Perkins v. Fourniquet* the circuit court decreed that the plaintiffs were entitled to two sevenths of certain property, and referred the matter to a master to take and report an account of it, and reserved all other matters in controversy until the coming in of the master's report. It was held that that was not an appealable decree, Chief Justice Taney saying: "The appellant is not injured by denying him an appeal in this stage of the proceedings, because these interlocutory orders and decrees remain under the control of the circuit court, and subject to their revision, until the master's report comes in and is finally acted upon by the court, and the whole of the matters in controversy between the parties disposed of by a final decree. And upon an appeal from that decree every matter in dispute will be open to the parties in this court, and may all be heard and decided at the same time."

In *Pulliam v. Christian* a decree of the circuit court set aside a deed made by a bankrupt before his bankruptcy, and directed the trustees under that deed to deliver over to the assignee in bankruptcy all the property remaining undisposed of in their hands, but without deciding how far the trustees might be liable to the assignee for the proceeds of sales previously made and paid away to the creditors, and directed an account to be taken of these last-mentioned sums, in order to a final decree. It was held that the decree was not appealable, Mr Justice McLean saying: "There is no sale or change of the property ordered which can operate injuriously to the parties."

In *Barnard v. Gibson*, the suit was one for the infringement of letters-patent. By the decree of the circuit court a perpetual injunction was awarded, and it was referred to a master to ascertain and report the damages which the plaintiff had sustained. It was held that the decree was not appealable. The decree in that case was in all substantial particulars like the decree in the present case.

In *Craighead v. Wilson*, the decree of the circuit court ascertained the heirship of the plaintiffs and their relative rights in a succession, but referred it to a master to state accounts between the plaintiffs and defendants, and ascertain how much property remained in the hands of the latter, and how much had been sold, with the prices, and to ascertain what might be due from either of the defendants to the plaintiffs. It was held that the decree was not appealable.

In *Beebe v. Russell*, the bill prayed that the defendants might be ordered to convey to the plaintiff certain pieces of property, which it was alleged they fraudulently withheld from him, and account for the rents and profits. The circuit court decreed that the defendants should execute certain conveyances and surrender possession, and then referred the matter to a master to take an account of the rents and profits, giving instructions in regard to the manner of taking it. This court stated that the object of the statute in regard to appeals was to prevent a case from coming to this court from the courts below in which the whole controversy had not been determined finally, and that such final determination might be had in this court; and that whenever the whole controversy had been determined by the circuit

court, and ministerial duties only were to be performed, although an amount due remained to be ascertained, the decree was final. The decree in that case was held not to be appealable.

In *Humiston v. Stainthorp*, which was a patent suit, the decree was like that in *Barnard v. Gibson*, and the appeal was dismissed.

In *North Carolina R. Co. v. Swasey* it was held that a decree of foreclosure and sale was not final, in the sense which allowed an appeal from it, so long as the amount due upon the debt had not been determined, and the property to be sold had not been ascertained and defined.

In *Bostwick v. Brinkerhoff*, Chief Justice Waite stated the principle as follows: "The rule is well settled and of long standing, that a judgment or decree, to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmation here, the court below would have nothing to do but to execute the judgment or decree it had already rendered."

This view was repeated in *Grant v. Phenix Ins. Co.*, where an appeal by the defendant from a decree in a foreclosure suit was dismissed, the decree neither finding the amount due nor ordering a sale of the mortgaged property, although it overruled the defense, declared the plaintiff to be the holder of the mortgage, and, in order to ascertain the amount due to it and other lien creditors and for taxes, referred the case to a master, and appointed a receiver to take charge of the property.

In *Daines v. Kendall* the principle was again asserted that "a decree, to be final for the purposes of an appeal, must leave the case in such a condition that if there be an affirmation here the court below will have nothing to do but execute the decree it has already entered."

The same view was maintained in *Parsons v. Robinson*.

It remains to see the principle upon which this court has acted in holding decrees to be appealable as final decrees.

In *Ray v. Law* it was held that a decree for a sale under a mortgage was an appealable decree. Of course, this involves the proposition that the court below had ascertained and fixed the amount due under the mortgage.

In *Whiting v. Bank of U. S.* this court held that a decree of foreclosure of a mortgage and for a sale was a final decree, and that it was not necessary to the finality of it that the sale should have taken place and been confirmed. The court said that if the sale had been completed under the decree, the title of the purchaser would not have been overthrown or invalidated even by a reversal of the decree; that, consequently, the title of the defendants to the land would have been extinguished, and their redress upon a reversal would have been of a different kind from that of a restitution of the land sold; and that, under a decree of foreclosure and sale, the ulterior proceedings were but a mode of executing such decree.

A leading case where this court held the decree below to be final was that of *Forgay v.* 182 U. S. U. S., Book 33.

Conrad. The decree in that case ordered that certain deeds be set aside as fraudulent and void; that certain lands and slaves be delivered up to the plaintiff; that one of the defendants pay a certain sum of money to the plaintiff; that the plaintiff have execution for those several matters; and that the master take an account of the profits of the lands and slaves and an account of certain money and notes; and then concluded as follows: "And so much of the said bill as contains, or relates to, matters hereby referred to the master for a report, is retained for further decree in the premises; and so much of the said bill as is not now, nor has been heretofore, adjudged and decreed upon, and which is not above retained for the purposes aforesaid, be dismissed without prejudice, and that the said defendants do pay the costs." It was held that that decree was a final decree and appealable, Chief Justice Taney saying: "And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the circuit court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

In *Bronson v. La Crosse & M. R. Co.* it was held that a decree for the sale of mortgaged premises was a final decree, settling the merits of the controversy, and that the subsequent proceedings were simply a means of executing the decree. The same principle was applied in *St. Louis, I. M. & S. R. Co. v. Southern Express Co.* and in *Ex parte Norton*.

In *Winthrop Iron Co. v. Meeker*, it was held that where a decree decides the right to the property in contest, and the party is immediately entitled to have it carried into execution, it is a final decree, although the court below retains possession of so much of the bill as may be necessary for adjusting accounts between the parties, the court remarking that such a case was different from a suit by a patentee to establish his patent and recover for infringement, because there the money recovery was a part of the subject matter of the suit.

Within the principles established by the foregoing cases, the decree now before us was not a final decree, and the appeal must be dismissed.

WILLIAM ROEMER, *Appt.*,

v.

DAVID NEUMANN ET AL.

(See S. C. Reporter's ed. 108-106.)

Filing disclaimer, in patent suit, after decision—rehearing in equity—practice as to disclaimer—patent void for want of novelty.

1. After an action in equity for the infringement of letters-patent has been heard and decided upon its merits, the plaintiff cannot file a disclaimer in

court, or introduce new evidence upon that or any other subject, except at a rehearing granted by the court, upon such terms as it thinks fit to impose.

2. The granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests in the discretion of the court in which the case has been heard or tried, and is not a subject of appeal.
3. Where, after an opinion has been rendered in the court below dismissing a suit for infringement of letters-patent, plaintiff filed a disclaimer and a petition for rehearing and a rehearing was granted upon payment of the costs, and on failure to pay the costs a final decree was entered dismissing the bill with costs, and the plaintiff appealed to this court,—*held*, that the terms imposed as a condition precedent to a rehearing not having been complied with, the disclaimer was not in the case.
4. The patent granted to plaintiff Sept. 1, 1878, No. 208,541, for improvements in locks for satchels, as originally issued, is void for want of novelty.

[No. 52.]

Argued Nov. 1, 1889. Decided Nov. 11, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing a suit in equity for the infringement of letters-patent for improvements in locks for satchels. *Affirmed.*

Opinion below, 26 Fed. Rep. 102.

Statement by *Mr. Justice Gray*:

This was a bill in equity for the infringement of letters-patent No. 208,541, granted to the plaintiff September 1, 1878, for improvements in locks for satchels, with the following specification and claims:

"Be it known that I, William Roemer, of Newark, County of Essex, and State of New Jersey, have invented a new and improved lock for satchels, traveling-bags, etc., of which the following is a specification:

"This invention relates to certain improvements in the construction of lock-cases of the kind described in letters-patent No. 190,907 and 195,233, which were granted to me May 15, 1877, and September 18, 1877, respectively.

"The principal object of the invention is to reduce the expense of the lock-case, and to render the same more practical in form and construction.

"The invention consists, principally, in forming the body of the lock-case with open ends, and in combining the same with cast blocks or end pieces, which are separately made, all as hereinafter more fully described.

"In the accompanying drawing, figure 1 represents a bottom view of my improved lock-case; figure 2 is a vertical longitudinal section of the same, and figure 3 is a vertical transverse section of the same on the line *cc*, figure 1. Similar letters of reference indicate corresponding parts in all the figures.

"The letter 'A' in the drawing represents the body or central portion of the lock-case. The same is made of sheet metal or other suitable material, and bent into a U form, substantially as indicated in figure 3, so as to form the top *a* and the sides *b b* of the lock-case. The bottom of the lock-case is open, and the ends of the portion A are also open.

"B B are pieces of cast metal or other suitable material, constructed to fit into the open ends of the body A, into which these blocks or plugs B B are inserted, as clearly shown in figure 2. Each block B should have a shoulder, *d*, to limit the degree of its insertion into the shell A, or of the insertion of the shell into the block.

"In use on a satchel or carpet-bag, the ends B B, after being inserted into the shell A, or *vice versa*, in manner stated, are fastened to the satchel or bag by a bolt or pin that passes through an aperture, *e*, of the shell A, and through a corresponding aperture, *f*, of the block B, there being one such bolt or pin at or near each end of the piece A; but the plugs or end pieces B B may also be secured by additional or separate bolts, if desired, and so may also the shell A. The blocks B may also serve, if desired, to secure the ends of the handle or the catches which close the jaws of the bag, and for other suitable purposes.

"The lock portion proper is, of course, contained within the shell A, the drawing indicating the bolt C, which is moved by means of the handle *g*. The other parts of the lock are not necessary to show. By casting the pieces B B the same mold may be used for both pieces B B of one lock-case, and the entire case is made very inexpensive and yet practical. The ends are adapted to shells A of suitable varying lengths.

"I claim—

"1. In a lock-case, the combination of the body A, having open ends, with the end pieces, B B, that are applied thereto, substantially as herein shown and described.

"2. The end pieces, B B, of a lock-case, made with shoulders *d*, for defining their positions relative to the body A, substantially as and for the purpose specified."

After an answer denying in due form novelty and infringement, and a general replication, the case was heard upon the pleadings and proofs in the circuit court, which rendered and filed an opinion dismissing the bill, and holding that while the defendant's lock would be an infringement of the plaintiff's patent if the claims were good, yet, in view of the prior state of the art, the claims were void for want of novelty, unless they could be so limited by construction as to make end pieces, provided with notches or recesses to hold handle rings or catches, an essential feature of the invention; and that they could not be so limited, because, although the drawing showed end pieces provided with such notches, the notches were not in terms referred to, either in the specification or in the claims, as a part of the invention, nor in any way alluded to, except in the incidental observation in the specification that the blocks or end pieces "may also serve, if desired, to secure the ends of the handles or the catches which close the jaws of the bag." 26 Fed. Rep. 102.

Immediately afterwards the plaintiff filed in the Patent Office a disclaimer stating that he had reason to believe (being so informed by that opinion) that through inadvertence the specification and claims of the patent were too broad, including that of which the plaintiff was not the first inventor, and, therefore, dis-

claiming in each claim "any blocks, B, that have not the notches formed in them as shown in the drawing for holding the handle rings, as described in the specification;" and thereupon, in order to enable him to avail himself of the disclaimer, filed a motion for a rehearing, and, upon the court declining to entertain the question upon that motion, filed a formal petition for a rehearing, which the court, upon argument and consideration, granted upon condition that the plaintiff should pay to the defendant all costs of suit up to the time of filing that petition, to be taxed by the clerk. The costs having been taxed accordingly, and the plaintiff having stated through his counsel in open court that he was unable to comply with the condition, a final decree was entered, dismissing the bill, with costs; and the plaintiff appealed to this court.

Mr. Arthur V. Briesen, for appellant:

A disclaimer is filed in time, if filed after the opinion of the court.

Atwater Mfg. Co. v. Beecher Mfg. Co. 8 Fed. Rep. 610; *Tyler v. Galloway*, 20 Blatchf. 447; *Sessions v. Romadka*, 21 Fed. Rep. 183; *Smith v. Nichols*, 88 U. S. 21 Wall. 117 (22: 567).

The disclaimer is unnecessary, provided the court would read the patent so that, if two readings are possible, it will give that reading which will sustain it.

Adair v. Thayer, 17 Blatchf. 468-470; *Waterbury Brass Co. v. New York & B. Brass Co.* 8 Fish. Pat. Cas. 48-47; *Fitch v. Bragg*, 8 Fed. Rep. 588; *Turrill v. Michigan Southern & N. I. R. Co.* 68 U. S. 1 Wall. 491-510 (17: 668-672); *Eyan v. Goodwin*, 8 Sumn. 520.

Messrs. J. E. Hindon Hyde and Frederic H. Betts, for appellees:

While, under the statute, Rev. Stat. § 4923, a patentee can recover upon a separable portion of the invention claimed in his patent, even without filing a disclaimer, provided that he has not unreasonably neglected or delayed to file such disclaimer, yet the practice in equity is, that it is not proper to enter a decree in favor of a patentee, based on a portion of the invention claimed by him, until he has given satisfactory proof that he has filed a proper disclaimer.

Myers v. Frame, 8 Blatchf. 446; *Burdett v. Estey*, 15 Blatchf. 849; *Christman v. Rumsey*, 17 Blatchf. 148; *Aiken v. Dolan*, 8 Fish. Pat. Cas. 207; *Yale Lock Mfg. Co. v. Scovill Mfg. Co.* 18 Blatchf. 248; *Gage v. Herring*, 107 U. S. 648 (27: 604).

Merely bringing old devices into juxtaposition, and then allowing each to work out its own effect without the production of something novel, is not invention.

Reckendorfer v. Faber, 92 U. S. 854 (28: 722); *Hailes v. Van Wormer*, 87 U. S. 20 Wall. 853 (22: 241); *Rubber-Coated H. T. Co. v. Welling*, 97 U. S. 7 (24: 942); *Double-Pointed Tack Co. v. Two Rivers Mfg. Co.* 109 U. S. 120 (27: 878); *Stawson v. Grand Street, P. P. & F. R. Co.* 107 U. S. 854 (27: 578); *Pokering v. McCullough*, 104 U. S. 810 (26: 749).

Roemer's invention was a mere mental conception until 1878. It had not been reduced to practical form, and did not take rank as an invention until that time.

Webb v. Quintard, 9 Blatchf. 852; *White v.* 132 U. S.

Allen, 2 Cliff. 224; *Sickels v. Borden*, 8 Blatchf. 585.

Mr. Justice Gray delivered the opinion of the court:

After the case had been heard and decided upon its merits, the plaintiff could not file a disclaimer in court, or introduce new evidence upon that or any other subject, except at a rehearing granted by the court, upon such terms as it thought fit to impose. The granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests in the discretion of the court in which the case has been heard or tried, and is not a subject of appeal. The terms imposed as a condition precedent to a rehearing not having been complied with, the disclaimer was not in the case.

The construction which the court gave to the claims of the patent as originally issued was indisputably correct. So construed, it is hardly denied by the plaintiff, and is conclusively proved by the evidence, that the patent is void for want of novelty.

Decree affirmed.

LEWIS W. SMITH, *Ptf. in Err.*,

v.

RICHARD J. BOLLES.

(See S. C. Reporter's ed. 125-132.)

Measure of damages, in action for false representations—loss sustained—money paid out—evidence—proximate results.

1. In an action for damages for false and fraudulent representations in the sale of stock, the measure of damages is not the difference between the contract price and the market value if the property was as represented to be.
2. What the plaintiff might have gained is not the question; but what he lost by being deceived into the purchase.
3. Defendant is bound to make good the loss sustained, such as the moneys that plaintiff has paid out and interest and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability does not include the expected fruits of an unrealized speculation.
4. What the plaintiff paid for the stock is proper to be proved to establish what loss plaintiff has sustained. If the stock had a value, that would necessarily be applied in reduction of the damages.
5. The damage to be recovered must always be the natural and proximate consequence of the act complained of. Those results are proximate which the wrong-doer, from his position, must have contemplated as the probable consequence of his fraud.

[No. 47.]

Argued Oct. 31, 1889. Decided Nov. 11, 1889.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio to review a judgment for plaintiff in an action to recover damages for fraudulent representations in the sale of shares of mining stock. *Reversed.*

Statement by **Mr. Chief Justice Fuller**:

Richard J. Bolles filed his petition against

Lewis W. Smith on the twenty-first day of February, 1884, in the Circuit Court of the United States for the Northern District of Ohio, to recover damages for alleged fraudulent representations in the sale of shares of mining stock, in place of which an amended petition was substituted on the second day of March, 1886, by leave of court. The amended petition set up five causes of action:

First. That in the fall of 1879 defendant and one Joseph W. Haskins entered into a fraudulent combination to form an incorporated mining company based upon alleged mining property in the Territory of Arizona, and for the alleged purpose of mining silver ore therefrom and milling the same for market; that the title to the property was claimed to be in Haskins; that Haskins and others organized said corporation under the Laws of New York, by the name of "The Irene Mill and Mining Company," with a capital of two millions of dollars, divided into one hundred thousand shares of twenty dollars each; that Haskins took the whole of the stock and paid for the same by transferring to the company the alleged mining property, and apparently for the sum of two millions of dollars; that Haskins and defendant then represented that sixty thousand shares of said stock were issued to or paid for by Haskins, and were deposited with the treasurer of the company, to be sold to subscribers and purchasers, and the proceeds to be applied to the construction of a stamp mill to be connected with the supposed mining property, and for the purpose of further sinking the shaft and tunnel then in progress; that the defendant had in connection with Haskins some interest in the stock, the extent of which was then and is still unknown to plaintiff; that plaintiff was wholly ignorant of the value of the stock and of the mining property on which it was supposed to be based, never having dealt in such stock or property; that in the month of February, 1880, the defendant applied to him to buy and subscribe for some of the stock, stating that he was interested in it, and that before acquiring an interest he had learned from Haskins the enormous value of the property, and to satisfy himself had gone to Arizona and thoroughly examined it; that he then represented to plaintiff a variety of facts as existing in respect to the mine, making it of great value, which representations are set forth in detail; and that having known the defendant for several years, and believing him to be a truthful and honest man, and without knowledge or suspicion that said representations were untrue, but, believing and relying on the same, the plaintiff had, at the request of the defendant, in the month of February, 1880, agreed to buy of the defendant four thousand shares of the stock, at \$1.50 per share, which contract was completed in the month of March, 1880, by the payment in full of the purchase price, to wit, six thousand dollars, to one H. J. Davis, who claimed to act as treasurer of the company, and from whom plaintiff received certificates for the stock. Plaintiff then alleged that said representations were each and all false and fraudulent, specifically denying the truth of each of them, and averring that "said stock and mining property was then,

and still is, wholly worthless; and that had the same been as represented by defendant it would have been worth at least ten dollars per share, and so plaintiff says that by reason of the premises he has sustained damages to the amount of forty thousand dollars."

Second. That defendant made similar false and fraudulent representations to John H. Bolles, by which the latter was induced to purchase two thousand shares of the stock, at the price of \$1.50 per share, and was, by reason of the premises, damaged to the extent of six thousand dollars; and that John H. Bolles had transferred his claim to the plaintiff, who was entitled to recover of defendant said sum.

Third. That defendant made similar false and fraudulent representations to L. W. Mars-teller, who was thereby induced to purchase eight hundred shares of said stock, at the price of \$2.00 per share, and was damaged by reason of the premises to the extent of two thousand dollars, and had transferred his claim to the plaintiff, who was therefore entitled to recover said sum of the defendant.

Fourth. That the defendant had made similar false and fraudulent representations to Mrs. Mary Manchester, and induced her, in reliance thereon, to purchase two hundred and twenty-five shares of the stock, at a cost (according to the original petition) of four hundred and fifty dollars, and she had incurred damages thereby to the extent of fifteen hundred dollars; that this claim had been assigned to the plaintiff, who was entitled to recover said sum of the defendant.

Fifth. That defendant made similar false and fraudulent representations to one John Van Gassbeck, who was induced thereby to purchase twenty-five hundred shares of the stock, at \$2.00 per share, making five thousand dollars, which he had paid to defendant, and he was by reason of the premises damaged to the extent of ten thousand dollars; and that Van Gassbeck had transferred this claim to the plaintiff, whereby the latter was entitled to recover said sum of the defendant.

Plaintiff further averred that the aggregate of said damages amounted to sixty thousand five hundred dollars, for which he prayed judgment.

Defendant answered plaintiff's petition, admitting the incorporation and organization of "The Irene Mill and Mining Company," but denying all and singular the remaining allegations of the petition, and further set up affirmatively the Statute of Limitations.

The second and fourth causes of action as set forth in the original petition, founded on the claims of John H. Bolles and Mary Manchester, sought merely a rescission of the contracts and to recover back all the money they had respectively paid for shares of stock, but by the amended petition their causes of action were changed to counts for the recovery of damages resulting to said John H. and Mary from the alleged false and fraudulent representations.

The cause was tried by a jury and resulted in a verdict for the plaintiff, assessing his damages at the sum of \$8,140, upon which, after a motion for a new trial had been made by the defendant, and overruled, judgment

was rendered, and the cause was then brought here on writ of error.

Messrs. W. W. Boynton, J. O. Hale and Edward H. Fitch, for plaintiff in error:

It was erroneous to permit the plaintiff to prove the pecuniary standing of the defendant.

Claffin v. Commonwealth Ins. Co. 110 U. S. 95 (28: 82); 2 Greenl. Ev. § 269 (Red. ed.); Sedgwick on Damages, 277.

Damages will not be allowed to be given with any reference to the defendant's wealth or poverty.

Myers v. Malcolm, 6 Hill, 292; *James v. Biddington*, 6 Car. & P. 589; *Moody v. Osgood*, 50 Barb. 638.

Evidence of like acts or declarations by the party charged with the fraud is not admissible unless at or near the same time.

Lincoln v. Claffin, 74 U. S. 7 Wall. 188 (19: 109); *Castle v. Bullard*, 64 U. S. 28 How. 173 (16: 424); *Butler v. Watkins*, 80 U. S. 13 Wall. 456 (30: 629).

A new trial will always be granted where the judge interferes with the lawful province of the jury to the prejudice of the party complaining.

Hoihecker v. Fitzhugh (Kan.) 20 Pac. Rep. 465.

When counsel in argument makes a statement of a material fact not in evidence against the objection of the other party, he violates the right of a fair trial, and his client assumes the burden of proving that the decision was not affected thereby.

Bullard v. Boston & M. R. Co. 3 New Eng. Rep. 899, 64 N. H. 27; *Dougherty v. Welch*, 2 New Eng. Rep. 561, 53 Conn. 558-560.

It is error sufficient to reverse a judgment for counsel, against objection, to state facts pertinent to the issue and not in evidence, or to assume, *arguendo*, such facts to be the case, when they are not.

Brown v. Swineford, 44 Wis. 282.

If counsel persevere in arguing impertinent facts not before the jury, or in appealing to prejudices foreign to the evidence, exception may be taken by the other side, which may be good ground for a new trial, or for a reversal in this court.

Cleveland Paper Co. v. Banks, 15 Neb. 20; *Grosse v. State*, 11 Tex. App. 264; *Conn v. State*, 11 Tex. App. 890; *Willis v. McNeill*, 57 Tex. 465; *Thompson v. State*, 43 Tex. 273; *Berry v. State*, 10 Ga. 522; *Union Cent. L. Ins. Co. v. Cheever*, 86 Ohio St. 201; *State v. Noland*, 85 N. C. 576; *Butler v. Slam*, 50 Pa. 459; *People v. Mitchell*, 62 Cal. 411; *Tucker v. Henniker*, 41 N. H. 822; *Rolfe v. Rumford*, 66 Me. 564.

Whenever, in the exercise of a sound discretion, it appears to the court that the jury may have been influenced as to their verdict by such extrinsic matters, however thoughtlessly or innocently uttered, or that the statements were made by counsel in a conscious and defiant disregard of his duty, then the verdict should be set aside.

Winter v. Saxe, 19 Kan. 556; *Fry v. Bennett*, 3 Bosw. 202; *Brownlee v. Hewitt*, 1 Mo. App. 360; *State v. Lee*, 66 Mo. 167; *State v. Kring*, 64 Mo. 591; 1 Hayne, New Trial and Appeal, § 50; *Wolfe v. Minnie*, 74 Ala. 886.

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To permit over objection prosecuting counsel to comment upon the personal appearance of the defendant, not as a witness nor on account of his manner and bearing as such, but as indicating a probability of guilt, or to refer to a particular juror as having become prejudiced in the case, is such error as will reverse the judgment.

Bessette v. State, 101 Ind. 86; *Perkins v. Guy*, 55 Miss. 158; *Martin v. State*, 63 Miss. 505; *People v. Dane*, 59 Mich. 550.

Mr. E. J. Estep, for defendant in error:

Any evidence having a tendency, though it may be slight, to establish fraud, is competent.

Hubbard v. Briggs, 81 N. Y. 588.

Defendant is answerable for the loss of the moneys which the plaintiff, without fault on his part, lost in this speculation.

Hubbard v. Briggs, 81 N. Y. 518.

Whenever counsel may infer any particular result from the evidence, however improbable such result may be, the court should not restrain him from arguing upon such result.

Hatcher v. State, 18 Ga. 464; *Logan v. Monroe*, 20 Me. 259; Hayne on New Trial, § 50, p. 156.

Mr. Chief Justice Fuller delivered the opinion of the court:

The bill of exceptions states that the court charged the jury "as to the law by which the jury were to be governed in the assessment of damages under the issues made in the case," that "the measure of recovery is generally the difference between the contract price and the reasonable market value, if the property had been as represented to be, or in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant, and as may be shown in the evidence before you."

In this there was error. The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out, and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation. The

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reasonable market value, if the property had been as represented, afforded, therefore, no proper element of recovery.

Nor had the contract price the bearing given to it by the court. What the plaintiff paid for the stock was properly put in evidence, not as the basis of the application of the rule in relation to the difference between the contract price and the market or actual value, but as establishing the loss he had sustained in that particular. If the stock had a value in fact, that would necessarily be applied in reduction of the damages. "The damage to be recovered must always be the natural and proximate consequence of the act complained of," says Mr. Greenleaf, Vol. II, § 256; and "The test is," adds *Chief Justice* Beasley in *Orater v. Binninger*, 38 N. J. L. 518, "that those results are proximate which the wrong-doer from his position must have contemplated as the probable consequence of his fraud or breach of contract." In that case, the plaintiff had been induced by the deceit of the defendant to enter into an oil speculation, and the defendant was held responsible for the moneys put into the scheme by the plaintiff in the ordinary course of the business, which moneys were lost, less the value of the interest which the plaintiff retained in the property held by those associated in the speculation. And see *Horns v. Walton*, 117 Ill. 130, 141 [8 West. Rep. 571, 578]; *Slingerland v. Bennett*, 66 N. Y. 611; *Schwabacker v. Riddle*, 84 Ill. 517; *Fitzsimmons v. Chapman*, 87 Mich. 139.

We regard the instructions of the court upon this subject as so erroneous and misleading as to require a reversal of the judgment. The five causes of action covered the purchase of nine thousand five hundred and twenty-five shares of stock, for which \$16,050 in the aggregate had been paid. The plaintiff did not withdraw either of his five counts, nor request the court to direct the jury to distinguish between them. The verdict was a general one for \$3,140; and while it may be quite probable that the jury did in fact, as counsel for defendant in error contends, award to the plaintiff under his first cause of action the sum he had paid for the shares he had purchased himself, and interest, we cannot hold this as matter of law to have been so; nor can we determine what influence the erroneous advice of the learned judge may have had upon the deliberations of the jury.

Other errors are assigned, which we think it would subserve no useful purpose to review. They involve rulings, the exceptions to which were not so clearly saved as might have been wished, had the disposal of this case turned upon them, and which will not probably, in the care used upon another trial, be repeated precisely as now presented.

For the error indicated, the judgment is reversed and the cause remanded with a direction to grant a new trial.

THE FIRST NATIONAL BANK OF CHARLOTTE, NORTH CAROLINA, *Plff. in Err.*,

v.
E. A. MORGAN.

(See S. C. Reporter's ed. 141-144.)

National banks—suits in other counties than
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those in which they are located—personal privilege—waiver of—Act of July 12, 1882—illegal interest.

1. A suit against a national bank, to recover back twice the amount of interest illegally taken by it, is a suit to recover a penalty incurred under a law of the United States.
2. The exemption of national banks from suits in state courts elsewhere than in the county or city in which such banks are located was prescribed for the convenience of those banks, and is a privilege which they can waive.
3. Where a national bank, when sued in a state court in a county other than that in which the bank is located, appears in the suit and makes its defense, and goes to trial upon the merits, without claiming its privilege of being sued only in the county in which it is located, it waives such privilege and cannot claim it for the first time in an appellate court.
4. The proviso of the fourth section of the Act of July 12, 1882, refers only to suits by or against national banks brought after the passage of that Act, and does not apply to a suit commenced before its passage.

[No. 50.]

Argued Nov. 1, 1889. Decided Nov. 11, 1889.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment in favor of plaintiff in an action, brought in the Superior Court of Cleveland County, North Carolina, to recover of a National Bank established at Charlotte in Mecklenburg County in that State twice the amount of interest paid to it above what the law allowed it to receive. *Affirmed.*

The facts and case are stated in the opinion.

Mr. Wm. E. Earle, for plaintiff in error:

The judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted.

U. S. v. Huckabee, 38 U. S. 16 Wall. 414, 435 (21: 457, 464); *Piquinot v. Pennsylvania R. Co.* 57 U. S. 16 How. 104 (14: 863); *Dred Scott v. Sandford*, 60 U. S. 19 How. 400-403 (15: 698, 699).

Neither state legislation nor judicial construction can affect the jurisdiction as pointed out in § 5198 of the Banking Law.

Commercial Nat. Bank v. Simmons, 1 Flip. 452; *Union Nat. Bank v. Chicago*, 3 Biss. 88; *Main v. Second Nat. Bank*, 6 Biss. 26; *Cadle v. Tracy*, 11 Blatchf. 106; *Oldham v. First Nat. Bank*, 85 N. C. 240; *New Orleans Nat. Bkg. Asso. v. Adams*, 8 Woods, 24; *Manufacturers Nat. Bank v. Baack*, 8 Blatchf. 138.

In an action to recover a forfeiture, the declaration must set forth every fact which is necessary to inform the court that his case is within the statute.

Comyn's Dig. Pleader (c. 50) (c. 22); *Wright v. Wheeler*, 8 Ired. L. 184; *Shelton v. Davis*, 69 N. C. 324; *Oates v. Gray*, 66 N. C. 442; *McKay v. Woodle*, 6 Ired. L. 352; *Allen v. Ferguson*, 6 Ired. L. 17; *McKee v. Linberger*, 69 N. C. 317.

Mr. Jos. B. Batchelor, for defendant in error:

It nowhere appears in the record that any right under any statute of the United States was claimed by the plaintiff in error, and that

the decision of the Supreme Court of North Carolina was adverse to such right.

Gibson v. Chouteau, 75 U. S. 8 Wall. 814 (18: 317); *Gross v. U. S. Mortgage Co.* 108 U. S. 484 (27: 797); *Commercial Bank v. Rochester*, 82 U. S. 15 Wall. 689 (21: 117); *Phœnia Ins. Co. v. Gardiner*, 78 U. S. 11 Wall. 204 (20: 112); *Klinger v. Missouri*, 80 U. S. 18 Wall. 257 (20: 685).

Under the decisions in North Carolina, the fact that the court does not have jurisdiction of the person must be taken advantage of by plea in abatement, otherwise the jurisdictional question is waived, and the court can render a valid judgment.

Branch v. Houston, Bush. L. 85; *McMinn v. Hamilton*, 77 N. C. 300; *Oloman v. Staton*, 78 N. C. 285; *De Sobry v. Nicholson*, 70 U. S. 3 Wall. 423 (18: 264); *Carter v. Bennett*, 56 U. S. 15 How. 357 (14: 727).

The question before the court is one of practice and procedure only, in which the state statute governs.

Carter v. Bennett, 56 U. S. 15 How. 357 (14: 727); *Jones v. McMasters*, 61 U. S. 20 How. 22 (15: 810).

Mr. Justice Harlan delivered the opinion of the court:

This action was brought in the Superior Court of Cleveland County, North Carolina, by the defendant in error, against the plaintiff in error, a national banking association, established at Charlotte, Mecklenburg County, in that State. It was based upon the provision of the Revised Statutes of the United States authorizing any person, paying to any such association a greater rate of interest than the law allows it knowingly to take, receive, reserve or charge, to recover from it, in an action in the nature of an action of debt, twice the amount of the interest so paid. R. S. §§ 5197, 5198.

The defendant filed an answer denying all the material allegations of the complaint, and, in addition, pleaded in bar the limitation of two years provided by Congress for actions of this character. R. S. § 5198.

The jury, in response to the issues submitted to them, found that the plaintiff paid, on the usurious contracts described in certain counts of the complaint, the sum of \$554.28 during the two years next preceding the commencement of the action, and returned a verdict against the bank for twice that sum, namely, \$1,108.56. Judgment was accordingly rendered for the latter sum in favor of Morgan.

That judgment, having been affirmed by the Supreme Court of North Carolina, is here for re-examination. The principal error assigned is that the only state court which, consistently with the laws of the United States, could take cognizance of this action, was one established in the county or city where the bank was located, and which had jurisdiction in similar cases.

By the 9th section of the Judiciary Act of 1789, it was provided that the district courts of the United States "shall also have exclusive original cognizance . . . of all suits for penalties and forfeitures incurred under the laws of the United States." 1 Stat. 76, 77. This provision was in force when the National

Bank Act of June 8, 1864, was passed. 18 Stat. 99, §§ 8, 57. By that Act it was declared that associations formed pursuant to its provisions "may make contracts, sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons" (§ 8); and that "suits, actions and proceedings against any association" formed under it "may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases: *Provided, however*, That all proceedings to enjoin the comptroller under this Act shall be had in a circuit, district or territorial court of the United States, held in the district in which the association is located." (§ 57.)

Section 568 of the Revised Statutes provides that the district courts shall have jurisdiction of "all suits for penalties and forfeitures incurred under any law of the United States," and section 629 declares that the circuit courts of the United States shall have original jurisdiction of "all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations." Section 711 defines the cases in which "the jurisdiction vested in the courts of the United States" shall be "exclusive of the courts of the several States," and among such are "all suits for penalties and forfeitures incurred under the laws of the United States." But no subdivision of that section, in terms, embraces suits brought under the National Bank Law, by or against associations organized under it.

The revision omitted entirely that part of the Act of 1864 (§ 57) designating the particular state courts in which suits, actions or proceedings against a national banking association might be brought. That omission was remedied by the Act of February 18, 1875, entitled "An Act to Correct Errors and to Supply Omissions in the Revised Statutes of the United States." (18 Stat. 816, 820.) By that Act, section 5198 of the Revised Statutes (title *National Banks*), giving the right to recover back twice the amount of the interest illegally received by a national bank, was amended by adding thereto these words: "That suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

A suit against a national bank to recover back twice the amount of interest illegally taken by it is a suit to recover a penalty incurred under a law of the United States; and it may be that if the Act of 1864 had been silent as to the courts which might take cognizance of such a suit, it must, at any time before the revision took effect, have been brought in the proper court of the United States. But the Acts of 1864 and 1875, authorizing certain state courts to take cognizance of suits, actions and proceedings against national banking associations, had the effect, so far as suits for penalties

incurred under the laws of the United States were concerned, to modify the provision in prior enactments that expressly excluded suits for such penalties from the cognizance of state courts. When the present action was brought, the jurisdiction of the courts of the United States of suits for penalties incurred under the National Banking Act for taking usurious interest, was not exclusive of, but concurrent with, the jurisdiction of such state, county or municipal courts of the county or city in which the bank was located as had jurisdiction, under the local law, in similar cases. This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts. *First Nat. Bank of Bethel v. Pahquioque Nat. Bank*, 81 U. S. 14 Wall. 888, 894 [20: 840, 842]; *Crocker v. Marine Nat. Bank*, 101 Mass. 240. But, without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and, if it had been claimed by the defendant when appearing in the Superior Court of Cleveland County, must have been recognized. The defendant did not, however, choose to claim immunity from suit in that court. It made defense upon the merits, and, having been unsuccessful, prosecuted a writ of error to the Supreme Court of the State, and in the latter tribunal, for the first time, claimed the immunity granted to it by Congress. This was too late. Considering the object as well as the words of the statute authorizing suit against a national banking association to be brought in the proper state court of the county where it is located, we are of opinion that its exemption from suits in other courts of the same State was a personal privilege that it could waive, and which, in this case, the defendant did waive, by appearing and making defense without claiming the immunity granted by Congress. No reason can be suggested why one court of a State, rather than another, both being of the same dignity, should take cognizance of a suit against a national bank, except the convenience of the bank. And this consideration supports the view that the exemption of a national bank from suit in any state court except one of the county or city in which it is located is a personal privilege, which it could claim or not, as it deemed necessary.

It is proper to say that we lay no stress upon the proviso of the fourth section of the Act of July 12, 1882, entitled "An Act to Enable National Banking Associations to Extend Their Corporate Existence, and for Other Purposes," 22 Stat. 162-163, c. 290, § 4. That proviso refers only to suits by or against national banking associations, brought after the passage of that Act. The present suit was commenced before that date.

The objection that the complaint does not state facts sufficient to constitute a cause of action, under the Act of Congress, is not well taken. It might have been more specific, but

enough was alleged to justify the court in overruling the motion in arrest of judgment. The Bank filed its answer, and went to trial upon the merits; and as the verdict embraces only illegal interest taken within the two years next preceding the commencement of the action, there is no ground to contend that the judgment exceeded the amount that Congress authorized to be recovered.

Judgment affirmed.

DAVID K. BILL, *Pff. in Err.*,

v.

MARY J. SUMNER.

(See S. C. Reporter's ed. 118-124.)

Leasing of property, when a disposal of it—meaning of the word "dispose"—unpaid purchase money, when due.

1. Where, in a contract for the sale of an interest in a mine, it is provided that if the purchaser at any time shall dispose of or sell such interest, then and in that case the unpaid purchase money shall become immediately due and payable, a leasing of the property is a disposal of it so as to render the purchaser immediately liable for the unpaid purchase money, although by the terms of the contract the same had not become otherwise due.
2. The words "dispose of" are not synonymous with the word "sell," and its definition must be considered with reference to the remainder of the contract to ascertain its meaning.
3. It being agreed in the contract that the purchaser shall pay the purchase money out of the first production of the mine, and having put it out of his power to perform this obligation by a lease of the same, such lease was a disposal of the property within the meaning of the contract, which rendered him immediately liable for the purchase money.

[No. 768.]

Submitted Oct. 21, 1889. *Decided* Nov. 11, 1889.

IN ERROR to the Circuit Court of the United States for the District of Colorado to review a judgment in favor of plaintiff to recover unpaid purchase money of a mine. *Affirmed.*

The facts and case are stated in the opinion. *Messrs. Thomas M. Patterson and Charles S. Thomas*, for plaintiff in error:

If a contract specifies no time the law implies that it shall be performed within a reasonable time, and what is a reasonable time is a question of law.

2 Parsons on Contracts, 662; *Attwood v. Clark*, 2 Me. 249; *Hill v. Hobart*, 16 Me. 164; 2 Chitty on Contracts, 1062, note U; 1 Sugden on Vendors, 417, note T.

The court erred in construing the making of this lease to be a disposition of the property within the meaning of the contract.

Sheffield v. Orrery, 8 Atk. 286; *Phelps v. Harris*, 101 U. S. 880 (25: 858); *U. S. v. Gratiot*, 89 U. S. 14 Pet. 526 (10: 578); *Livingston v. Stickles*, 7 Hill, 253.

The words "sale" and "dispose" mean alienation of title.

Jackson v. Silvernail, 15 Johns. 278; *Jackson v. Harrison*, 17 Johns. 66; *Edwards v. Farmers F. Ins. & Loan Co.* 21 Wend. 494; *Elston v. Schilling*, 42 N. Y. 79; *Orusco v. Bugby*, 8 Wils. 234, 2 W. Bl. 786; *Doe v. Hogg*, 4 Dow. & Ry. 226.

"Disposed" means a parting with the title in any manner.

Hargrave v. King, 5 Ired. Eq. 480; *Church v. Brown*, 15 Ves. Jr. 258; *Rogers v. Goodwin*, 2 Mass. 475; *Beard v. Knowl*, 5 Cal. 252; *Nichols v. Eaton*, 91 U. S. 716 (23: 254); *Hall v. Tufts*, 18 Pick. 455; *Walker v. Vincent*, 19 Pa. 869.

Mr. L. C. Rockwell for defendant in error.

Mr. Justice Miller delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Colorado. The action was originally brought by Mary J. Sumner, the present defendant in error, against David K. Hill, plaintiff in error, in the District Court of Arapahoe County, in the State of Colorado, and was afterwards removed by Hill, on the ground of diverse citizenship, into the Circuit Court of the United States.

It appears from the record that on and prior to the 12th day of February, 1880, the defendant Hill and Edward R. Sumner, and his son, Edward H. Sumner, were the owners of a mine, called the Buckeye lode, situated on Fryer Hill, in the California mining district, in the County of Lake and State of Colorado; that the said Edward R. Sumner was the owner of one eighth, and his son, Edward H. Sumner, the owner of another one eighth, undivided, of this mine, of which Hill was the owner of the remainder. It also appears that Hill was a man of considerable means, which was not the case with the others; that some work had been done upon the mine, and money expended upon it, which had been advanced mainly by Hill; that in this condition of affairs Edward R. Sumner sold his one eighth in the mine to Hill, and took from Hill a written obligation to pay him ten thousand dollars for it, in the manner prescribed by an instrument in writing, of which the following is a copy:

"This is to certify that Edward R. Sumner, of Leadville, State of Colorado, has this day sold to me one undivided one eighth part of the Buckeye lode, vein, mine or deposit, situated on Fryer Hill, in the California mining district, in the County of Lake, in the State of Colorado, for the sum of ten thousand dollars, to be paid as follows, to wit (\$1,808.48) one thousand three hundred eight ¹⁰/₁₀₀ dollars cash in hand, the receipt of which is hereby acknowledged.

"Second. To pay all expenses for and on behalf of Edward R. Sumner upon one undivided one eighth part of said mine owned by Edward H. Sumner which has accrued since the first day of February, A. D. 1880, and which may hereafter accrue for sinking the shaft upon said mine, for all machinery purchased in sinking the shaft and in operating the same until pay mineral shall have been reached.

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"Third. To pay on behalf of said Edward R. Sumner, for the benefit of Edward H. Sumner, owner of said one eighth interest of the whole of said mine, one eighth part of all the expenses for litigation regarding the title and the possession thereof, or for trespasses which may be committed upon said property from and after the date above written.

"Fourth. And to pay on behalf of the said Edward R. Sumner one eighth part of all other assessments, taxes and expenses (meaning upon the one eighth interest owned by Edward H. Sumner, being independent of the one eighth conveyed to me this day by said Edward R. Sumner) of every name and nature, which may justly accrue against said property, which sum or sums of money, as well as all other sums of money which may be advanced and paid out by me in pursuance of this agreement, shall be applied by indorsement upon this contract by the said Edward R. Sumner or his assigns in payment of the aforesaid sum of ten thousand dollars, as far as the same shall go to the payment thereof.

"Fifth. And after deducting all the aforesaid sums of money above mentioned, I hereby agree to pay to the said Edward R. Sumner or his order the residue of the said ten thousand dollars out of the first production of my interest in said mine, so soon as the same shall be realized therefrom; and if at any time I shall dispose of or sell one eighth part of said mining property, then and in that case the residue of said ten thousand dollars shall become immediately due and payable to the said Edward R. Sumner or his order. In no case am I to pay out more than ten thousand dollars on behalf of said Edward R. Sumner on the one eighth interest of Edward H. Sumner, including the \$1,808.48 mentioned as paid above.

"Witness my hand and seal this twelfth day of February, A. D. 1880, at Chicago, Illinois.

"(Signed) David K. Hill. [Seal.]"

It seems from this paper pretty clear that Edward R. Sumner, in conveying his one eighth, was anxious to secure the other one eighth, held by his son Edward H. Sumner, from being lost by reason of his inability to pay such assessments as might be made on it in the progress of developing the mine and bringing it into profitable operation. It appears from the record that Hill continued work upon the mine and received credit upon this written contract until October 10, 1883, and about that time he ceased to work upon it or to make any further effort to develop it. On July 29, 1885, Hill made a lease of the mine to George A. Jenks, who had been agent of Hill in the previous efforts to develop it. The following is a copy of this lease:

"This agreement of lease, made this 29th day of July, in the year of our Lord one thousand eight hundred and eighty-five, between David K. Hill, of the City of Chicago, County of Cook, and State of Illinois, and Robert Esser, of the City of Leadville, County of Lake, and State of Colorado, lessors, and George A. Jenks, of the City of Leadville, County of Lake, and State of Colorado, lessee, witnesseth:

"That the said lessors, for and in consideration of the royalties, covenants and agreements hereinafter reserved and by the said lessee to be paid, kept and performed, have granted, demised and let, and by these presents do grant, demise and let unto the said lessee all the following-described mine and mining property situate in California mining district, County of Lake, and State of Colorado, to wit:

"All their interest in the Buckeye lode mining claim, situate on the north slope of Fryer Hill, in said mining district, county and State, together with the appurtenances:

"To have and to hold unto the said lessee for the term of two years from date hereof, expiring at noon on the 29th day of July, A. D. 1887, unless sooner forfeited or determined, through the violation of any covenant hereinafter against the said tenant reserved.

"And in consideration of such demise the said lessee does covenant and agree with the said lessors as follows, to wit:

"To enter upon said mine or premises, and work the same mine fashion, in manner necessary to good and economical mining, so as take out the greatest amount of ore possible, with due regard to the development and preservation of the same as a workable mine, and to the special covenants hereinafter reserved.

"To well and sufficiently timber said mine at all points, where proper in accordance with good mining, and to repair all old timbering wherever it may become necessary.

"To keep at all times the drifts, shafts, tunnels and other workings thoroughly drained and clear of loose rock and rubbish, unless prevented by extraordinary mining casualty.

"To deliver to said lessors as royalty ten per cent of the net smelter returns of all ore extracted from said premises, running to and including twenty dollars (\$20) per ton, and on all ores running over twenty (\$20) per ton, twenty-five per cent of the net smelter returns.

"To deliver to the said lessors the said premises, with the appurtenances and all improvements, in good order and condition, with all drifts, shafts, tunnels and other passages thoroughly clear of loose rock and rubbish, and drained, and the mine ready for immediate continued work (accidents not arising from negligence alone, excluded), without demand or further notice, on said 29th day of July, A. D. 1887, at noon, or at any time previous, upon demand for forfeiture.

"And, finally, that upon the violation of any covenant or covenants hereinbefore reserved, the term of this lease shall, at the option of the lessors, expire, and the same, with said premises, with the appurtenances, shall become forfeited to said lessors, and said lessors or their agent may thereupon, after demand of possession in writing, enter upon said premises and dispossess all persons occupying the same, with or without process of law; or at the option of said lessors, the said tenant and all persons found in occupation may be proceeded against as guilty of unlawful detainer.

"And the said lessors expressly reserve to themselves the property and right of property

in all minerals to be extracted from said premises during the term of this lease.

"Each and every clause and covenant of this agreement of lease shall extend to the heirs, executors, administrators and lawful assigns of all parties hereto.

"In witness whereof the said parties have hereunto set their hands and seals.

"ROBERT ESSER.

"DAVID K. HILL.

"GEORGE A. JENKE.

[Seal.]

[Seal.]

[Seal.]"

The obligation of Hill was assigned by Edward R. Sumner to Mary J. Sumner, the present plaintiff in error, who brought this action. Two issues were raised by the pleadings in the case. The first of these was that there was a failure on the part of Hill to prosecute with due diligence his obligation to develop the mine, whereby the sum of ten thousand dollars less the sums credited on the contract became due. The second was, that by making the lease the complainant had, within the meaning of the fifth clause of the contract, disposed of the mining property so as to become immediately liable for the residue of said ten thousand dollars. The court by instructing the jury that the execution of this lease by Hill caused the remainder of the ten thousand dollars to become due and payable, rendered it unnecessary for the jury to consider the first proposition; and if the court was right in that instruction, the verdict of the jury in favor of the plaintiff necessarily followed. We shall therefore consider the soundness of this instruction.

The definition of the words "dispose of" or "sell," in this article, must be considered with reference to the remainder of the contract to ascertain its meaning. Obviously the word "dispose" must have some meaning in the contract, and is not synonymous with the word "sell." It would be useless, if such were its construction. It must mean something more or something less than the word "sell." In the circumstances of this case, it would seem to mean something more. The references of counsel in their briefs to decided cases attempting to define that word are of course of very little avail, as in each instance it must be taken in connection with the circumstances in which it is used. In the language of this court in the case of *Phelps v. Harris*, 101 U. S. 880 [25: 858] "the expression 'to dispose of' is very broad, and signifies more than 'to sell.' Selling is but one mode of disposing of property."

Looking, then, to the purposes which Edward R. Sumner had in view in the use of this clause, by which the sale or disposal of one eighth of the property rendered the ten thousand dollars due, less the credits that should have been entered upon it at that time, it is obvious that it was expected that Hill would continue to make efforts to develop the mine and put it in profitable working condition, until all parties were ready to abandon it as a useless experiment, or until the ten thousand dollars which Hill had agreed to pay Edward R. Sumner had been exhausted by payments of contribution on account of the one eighth interest remaining in Edward H. Sumner. Any contract made by Hill

which would put it out of his power to perform this obligation was the thing to be guarded against, and the only guard which the contract provided was that he should not make such disposal of even one eighth of the property. If he chose to dispose of one eighth or of the whole of it by selling it outright, or by leasing it for two or five or ten years, he had the right to do it. In such event, however, he became liable to Sumner for so much of the ten thousand dollars as had not been exhausted by paying the contributions properly assessable against the one eighth of Edward H. Sumner. This option he exercised by making the lease to Jenks. If the results of that lease have been as profitable as Hill might have supposed they would be, he could well afford to pay the remainder of the ten thousand dollars. If it did not, it was a losing venture, which he voluntarily entered upon.

We are of opinion that in doing this, he disposed of the property within the meaning of the clause under consideration, and instantly became liable for that part of the ten thousand dollars which he had not paid by advances on account of the interest of Edward H. Sumner.

As this view of the case was in accordance with instructions of the presiding judge, and is conclusive of it, the judgment of the circuit court is affirmed.

CHARLES E. CROSS ET AL., *Plffs. in Err.*,

THE STATE OF NORTH CAROLINA.

(See S. C. Reporter's ed. 182-140.)

Forgery, when indictment for triable in state court—connected with crime against United States—forging note payable at national bank—false entries in books—crime against state and national governments—practice—due process of law.

1. Where the president and cashier of a national bank forged a promissory note, and entered it upon the books of the bank, for the purpose of sustaining false entries in the books, and in order to deceive the United States bank examiner, they may be tried and convicted of forgery of the note in the state court, although the offense of making such false entries is one against the United States, of which its courts have exclusive cognizance.
2. The crime of forgery against the State could not be excused or obliterated by committing another and distinct crime against the United States.
3. The forging of a promissory note, made payable to or at a national bank, does not constitute the offense described in section 5418, U. S. Rev. Stat., and is not, within the meaning of that section, a fraud against the United States.
4. The same act or series of acts may constitute an offense equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government.
5. Although the forgery may have been committed in order that the instrument forged might become the basis of false entries upon the books of the bank, that circumstance cannot defeat the authority of the State to punish the forgery, as,

in itself, a distinct, separate offense committed within its limits and against its laws.

6. Where the jury were unable to agree, and returned into court, and, by polling them, it appeared that they were agreed upon a verdict of guilty under the first and second counts of the indictment, but could not agree as to the third and fourth counts, and, the jury having been again sent out, the court permitted a *nolle prosequi* to be entered upon the third and fourth counts, and the jury, upon being informed of this, returned a verdict of guilty upon the remaining counts,—held, that this was a mere error in practice, that did not affect substantial rights, and did not amount to a deprivation of the liberty of the defendants without due process of law.

[No. 1084.]

Argued Oct. 22, 1889. Decided Nov. 11, 1889.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Wake County in that State, sentencing plaintiffs in error to hard labor for forgery. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 101 N. C. 770.

Mr. W. R. Henry, for plaintiffs in error: Criminal offenses against the federal government are exclusively cognizable in federal courts, unless by federal statutes it is otherwise provided.

State v. Tuller, 34 Conn. 280.

The federal court having exclusive jurisdiction to determine the falsity of the entries and to punish the makers thereof, jurisdiction to try the defendants for said forgeries cannot be conceded the state court.

State v. Shepard, 7 Conn. 54; *State v. Smith*, 43 Vt. 324; *Drake v. State*, 60 Ala. 48; *State v. Cooper*, 18 N. J. L. 861; *State v. Chaffin*, 2 Swan, 498; *State v. Shelley*, 11 Lea, 594; *State v. Ingles*, 2 Hayw. (N. C.) 4; *State v. Lewis*, 2 Hawks, 98; *State v. Fayetteville*, 2 Murph. 371; *State v. Stanly*, 4 Jones, L. 290; *U. S. v. Harrison*, 3 Sawy. 556; 1 Whart. Cr. L. 4th ed. 565; Whart. Cr. Ev. 487; *State v. Pike*, 15 N. H. 88; *U. S. v. Comerford*, 25 Fed. Rep. 903.

The trial in the state court was without warrant of law and illegal, and the defendants should be discharged.

Sturges v. Crowninshield, 17 U. S. 4 Wheat. 123 (4: 529); *Prigg v. Pennsylvania*, 41 U. S. 16 Pet. 589 (10: 1060); *The William King*, 15 U. S. 2 Wheat. 159 (4: 206); *Lee v. Lee*, 88 U. S. 8 Pet. 44 (8: 860); *Delafield v. Illinois*, 2 Hill, 169; *U. S. v. Lathrop*, 17 Johns. 4, 22; *Story on the Conflict of Laws*, 516; *People v. Lynch*, 11 Johns. 549; *Martin v. Hunter*, 14 U. S. 1 Wheat. 346 (4: 97); *U. S. v. Bailey*, 34 U. S. 9 Pet. 241 (9: 118); *Ross v. State*, 55 Ga. 192.

When a criminal case is put to a jury it cannot be withdrawn except by consent of the accused, or because of some unavoidable accident.

State v. McKee, 1 Bailey L. 651, 21 Am. Dec. 502; *State v. Thornton*, 13 Ired. L. 256; *State v. Taylor*, 84 N. C. 773; *State v. Hornsby*, 8 Rob. (La.) 583, 41 Am. Dec. 320; *Wharton on Cr. L.* § 513; *State v. McNeill*, 93 N. C. 552; *State v. Bowers*, 94 N. C. 910; *State v. Thompson*, 95 N. C. 596.

Mr. Theo. F. Davidson, Attorney-General of North Carolina, for defendant in error: Every citizen of the United States is also a

citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for the infraction of the laws of either. The same act may be an offense or transgression of the laws of both.

Moore v. Illinois, 55 U. S. 14 How. 18 (14: 806); *Coleman v. Tennessee*, 97 U. S. 509 (24: 1118); *Ex parte Houghton*, 7 Fed. Rep. 657; *Com. v. Bakeman*, 105 Mass. 58; *Fox v. Ohio*, 46 U. S. 5 How. 410, 434 (12: 218).

The effect of the *nolle prosequi*, under the circumstances, is an acquittal as to the counts to which it pertains.

State v. John, 8 Ired. L. 380; *State v. Bowers*, 94 N. C. 910; *State v. McNeill*, 98 N. C. 552; *State v. Thompson*, 95 N. C. 596; *State v. Taylor*, 84 N. C. 773.

The action of the state court was not erroneous.

State v. Carland, 90 N. C. 668.

Mr. Justice Harlan delivered the opinion of the court:

The Supreme Court of North Carolina having affirmed a judgment of the Superior Court of Wake County, in that State, whereby, in conformity with the verdict of a jury, the plaintiffs in error were sentenced to hard labor, the present writ of error was sued out upon the ground that the judgment of affirmance sustains an authority exercised under the State which was drawn in question as being repugnant to the laws of the United States. The specific contention of the defendants is, that the offense of which they were convicted was cognizable only in the courts of the United States. If this position be well taken, the judgment must be reversed; otherwise, affirmed.

By the Code of North Carolina it is made an offense against that State "if any person, of his own head and imagination, or by false conspiracy or fraud with others, shall wittingly and falsely forge and make, or shall cause or wittingly assent to be forged or made, or shall show forth in evidence knowing the same to be forged, . . . any bond, writing obligatory, bill of exchange, promissory note, indorsement or assignment thereof, . . . with intent . . . to defraud any person or corporation." Code of N. C. 1883, vol. I, § 1029. It is provided by the same Code that "in any case, where an intent to defraud is required to constitute the offense of forgery, or any other offense whatever, it shall be sufficient to allege, in the indictment, an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and, on the trial of such indictment, it shall be sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any State, county, city, town, or parish, or body corporate, or any public officer, in his official capacity, or any co-partnership or member thereof, or any particular person." *Ib.* § 1191.

The first count of the indictment against the defendants charged that they "unlawfully and feloniously, of their own head and imagination, did wittingly and falsely make, forge and counterfeit," and "did wittingly assent to the falsely making, forging and counterfeiting, a certain promissory note for the payment of money; which said forged promissory note is of the tenor following, that is to say:

"\$6,250.00.

March 8th, 1888.

"Four months after date, we, D. H. Graves, principal, and W. H. Sanders, the other subscribers, sureties, promise to pay the State National Bank of Raleigh, North Carolina, or order, sixty-two hundred and fifty dollars, negotiable and payable at the State National Bank of Raleigh, N. C., with interest at the rate of eight per cent per annum after maturity until paid, for value received, being for money borrowed, the said sureties hereby agreeing to continue and remain bound for payment of this note and interest, notwithstanding any extension of time granted from time to time to the principal debtor, waiving all notice of such extension of time from either payor or payee; and I do hereby appoint Sam. C. White, cashier, my true and lawful attorney to sell any or all collateral he may have in his hands to pay this claim if I should fail to do so when said claim falls due, after giving me ten days' notice of his intention to sell the same, and pay any surplus that may remain to me.

"D. H. GRAVES.

"W. H. SANDERS."

"And upon the back of which said false, forged and counterfeited promissory note is stamped and written — 'D. D. D. H. Graves. \$6,250. July 8,'—with intent to defraud, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The second count relates to a note of the same description, and charges the defendants with having unlawfully, feloniously and wittingly uttered and published it as true, "with intent to defraud," knowing at the time the same to be false, forged and counterfeited.

The third count charged that the defendants, of their own head and imagination, falsely, unlawfully and feloniously made, forged and counterfeited, and caused and procured to be made, forged and counterfeited, and wittingly aided and assented to the false making, forging and counterfeiting a note of like description, "with intent to defraud . . . the State National Bank, a corporation . . . duly created and existing under the laws of the United States, contrary," etc.

The fourth count charged that the defendants, devising and intending to defraud the State National Bank of Raleigh, North Carolina, a corporation existing under the laws of the United States, unlawfully and falsely combined and conspired together to make, forge, counterfeit, and by such conspiracy and fraud feloniously, falsely and wittingly did forge and make, and caused and assented to be forged and made, the above described note, "with intent to defraud, contrary to the form of the statute," etc.

The defendants filed a joint plea in abatement, contesting the jurisdiction of the state court upon the following grounds:

"That at the time of the alleged conspiracy and conspiracies, forgery and forgeries, uttering and utterings, in said indictment specified, there was a national banking association, duly organized and acting under the laws of the United States, in Raleigh, Wake County, North Carolina, known as the State National Bank of Raleigh, North Carolina, having its place of

business and doing its said business in the said City of Raleigh, in the County of Wake and State of North Carolina, and within the jurisdiction of the Circuit Court of the United States for the Eastern District of North Carolina;

"That the said Charles E. Cross was then and there an officer of said bank, to wit, its president, and the said Samuel O. White was then and there an officer of said bank, to wit, its cashier;

"That said alleged conspiracy and conspiracies, forgery and forgeries, uttering and utterings, were made, entered into, committed and done by the said Charles E. Cross, and afterwards assented to by the said Samuel O. White, for the purpose of supporting, sustaining and making a certain false entry and entries, in the books of said bank, and that the said false entry and entries were by the said Samuel O. White, cashier as aforesaid, acting as cashier, actually made in and upon the books of the said bank, the said Charles E. Cross being then and there aiding and abetting, for the purpose of deceiving, and with intent to deceive, the agent of the United States, to wit, the bank examiner of the United States, duly appointed to examine into the affairs of the said association, to wit, the State National Bank of Raleigh, North Carolina;

"That the said note, in said indictment specified, was never uttered or published in any way, nor to any other person or corporation, nor was there any intent or attempt so to do;

"That the said note, in the said indictment specified, was entered upon and in the books of the State National Bank aforesaid as the property of the said National Bank of Raleigh, North Carolina, and placed among the assets by the said Charles E. Cross and Samuel O. White as aforesaid, for the purpose and with the intent aforesaid.

"The above facts the said Charles E. Cross and Samuel O. White are ready to verify.

"Wherefore they pray judgment if the said court now here will or ought to take cognizance of this indictment here preferred against them, and that by the court here they may be dismissed and discharged," etc.

This plea having been disallowed, the defendants severally pleaded not guilty. After the cause was finally submitted to the jury, the attorney for the State, with the permission of the court, entered a *nolle prosequi* as to the third and fourth counts. The jury thereupon returned a verdict of guilty as charged in the indictment, and judgment thereon was accordingly entered.

The plea in abatement was evidently drawn with reference to section 5209 of the Revised Statutes, title *National Banks*. That section provides, among other things, that "every president, director, cashier, teller, clerk or agent of any association . . . who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who, with like intent, aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor."

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or, and shall be imprisoned not less than five years nor more than ten."

It is contended that the courts of the United States have exclusive jurisdiction to try the defendants for having made the false entries on the books of the bank, with the intent stated in the plea; that the forgery in question is an integral, essential element in such entries, which were false only because based upon the forged notes; that the defendants cannot be tried for the false entries, after being tried for the forgery; consequently, a recognition of the right of the state court to try them for the latter offense will defeat the jurisdiction of the federal court to try them for the former offense. In other words, that where exclusive jurisdiction is given to the courts of the United States to try an offense, the state court cannot exercise jurisdiction in respect to any particular act constituting an essential ingredient of that offense, although the commission of such act is made a crime against the State.

The fallacy of this argument is in assuming that the offense described in section 5209 of the Revised Statutes, namely, the making, by an officer or agent of a national banking association, of a false entry in its books, reports or statements, with intent to injure or defraud the association, or others, or with the intent to deceive its officers or any agent appointed to examine its affairs, necessarily involves the crime of forgery, of which the defendants were found guilty. If the notes in question had not been forged, but, with or without the consent of the obligors, had been temporarily placed by the defendants among the assets of the bank, and entered upon its books, when they were not its property, with intent to deceive the agent appointed to examine its affairs, they could have been punished under section 5209. On the other hand, the crime defined in section 1029 of the Code of North Carolina would have been complete if the defendants simply made and forged, or caused to be made and forged, or willingly assented to the making or forgery of the notes described in the indictment, with intent to defraud, and did not follow it up by committing the crime against the United States of making false entries in respect thereto upon the books of the bank, with the intent to deceive the agent designated to examine its affairs. The crime against the State could not be excused or obliterated by committing another and distinct crime against the United States.

It is also contended that the crime of forgery, as defined in the Code of North Carolina, and described in the indictment, is made, by section 5418 of the Revised Statutes, an offense against the United States; and that as the courts of the United States are invested with exclusive jurisdiction "of all crimes and offenses cognizable under the authority of the United States" (R. S. § 711), the judgment must be reversed. This position cannot be sustained. Section 5418 of the Revised Statutes makes it an offense against the United States for any person to falsely make, alter, forge or counterfeit "any bid, proposal, guarantee, official bond, public record, affidavit or other writing, for the purpose of defrauding the United States," or to utter or publish as true "any such false, forged, altered or counterfeited bid, proposal, guarantee, official bond, public record, affidavit or

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other writing for such purpose, knowing the same to be false, forged, altered or counterfeited," or to transmit to or present at the "office of any officer of the United States any such false, forged, altered or counterfeited bid, proposal, guarantee, official bond, public record, affidavit or other writing, knowing the same to be false, forged, altered or counterfeited, for such purpose." See also § 5479.

We do not think that the crime of which the defendants were found guilty is within either the words or scope of § 5418. The object of that section was to protect the general government against the consequences that might result from the forgery, alteration or counterfeiting of documents, records or writings, that had some connection with its business, as conducted by its own officers. The false making or forging of promissory notes or other securities, purporting to be executed by individuals, and made payable to or at a national banking association, cannot be said to have been done "for the purpose of defrauding the United States," and to constitute the offense described in section 5418. Such an act may be in fraud of the bank or of its stockholders, but is not, in itself, or within the meaning of that section, a fraud upon the United States.

The argument in behalf of the plaintiffs in error fails to give effect to the established doctrine that the same act or series of acts may constitute an offense equally against the United States and the State subjecting the guilty party to punishment under the laws of each government. This doctrine is illustrated in *United States v. Marigold*, 50 U. S. 9 How. 560, 569 [18: 257]; *Fox v. Ohio*, 46 U. S. 5 How. 410, 433 [12:213]; *Moore v. Illinois*, 55 U. S. 14 How. 13, 19 [14:806], and *Ex parte Siebold*, 100 U. S. 371, 390 [25:717, 724]; in the first of which cases it was said that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the state and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each." If it were competent for Congress to give exclusive jurisdiction to the courts of the United States of the crime of falsely making or forging promissory notes, purporting to be executed by individuals, and made payable to or at a national bank, or the crime of uttering or publishing as true any such falsely made or forged notes, it has not done so. Its legislation does not assume to restrict the authority, which the States have always exercised, of punishing in their own tribunals the crime of forging promissory notes and other commercial securities executed by private persons, and used for purposes of private business. The forgery of such instruments is none the less injurious to the welfare of the people of a State because they happen to be made payable to or at banking associations which come into existence under the authority of the United States. If the punishment by the State of the crime of forgery, of which the defendants were found guilty, leaves them exposed to punishment by the United States for having made false entries upon the books of the bank of which they were officers, with the intent to deceive the agent appointed by the general gov-

ernment to examine its affairs, it results from the fact that they are amenable to the laws of the United States, as well as of the State of North Carolina, and may be subjected to punishment for violating the laws of each government. The forgery may have been committed in order that the instrument forged might thereafter become the basis of false entries upon the books of the bank. But that circumstance cannot defeat the authority of the State, charged with the duty of protecting its own citizens, from punishing the forgery as, in itself, a distinct, separate offense committed within its limits and against its laws.

The remaining assignment of error relates to what occurred when the jury were brought into court, and the fact disclosed by polling them that they were agreed upon a verdict of guilty under the first and second counts of the indictment, but could not agree as to the third and fourth counts. Thereupon the attorney for the State, in the presence of the jury, proposed to enter a *nolle prosequi* as to the third and fourth counts. The jury having been sent out, the court permitted a *nolle prosequi* upon those counts to be entered. Of this fact the jury were informed, and being instructed to pass only on the remaining counts, they retired, and returned into court a verdict of guilty, in manner and form as charged in the indictment. The Supreme Court of the State expressed its disapproval of the mode adopted for ascertaining the individual opinion of each juror before an agreement had been reached by the entire body, but held that the entry of a *nolle prosequi* as to the third and fourth counts was, in legal effect, a consent to the acquittal of the defendants in respect to the offenses therein named, and, therefore, did not work any injury to them. It also held that in accordance with the principles of previous decisions in that court the general verdict would be restricted to such of the counts as the jury were directed to pass on. We are of opinion that there was nothing in all this amounting to a deprivation of the liberty of the defendants without due process of law. At most it was a mere error in procedure or practice that did not affect the substantial rights of the accused. What was permitted to be done was to the end simply that the jury might return a verdict upon those counts in the indictment upon which they were agreed.

Judgment affirmed.

PATRICK C. BOYLAN, *Plff. in Err.*,
v.
THE HOT SPRINGS RAILROAD COMPANY.

(See S. C. Reporter's ed. 146-152.)

Contract to carry passenger by railroad, when conditions binding—evidence—waiting condition—refusal to pay fare—expulsion from train—action of assumpsit.

1. Where the contract to carry the plaintiff as a

NOTE.—Conductor's right to expel passenger from train.

A person riding upon a pass issued to another, which is not transferable, is not a passenger, unless

passenger by a Railroad Company was an express one, signed by the plaintiff and the Company's agent, and was contained in a ticket for a passage to the place of destination and back, the plaintiff, having assented to the contract by accepting and signing it, is bound by the conditions expressed in it, whether he did or did not read them or know what they were.

2. The question, when the plaintiff first knew that the ticket required him to have it stamped at the end of the route in order to return upon it, was therefore rightly excluded as immaterial.
3. Where, by the express conditions of the plaintiff's contract, he had no right to a return passage under his ticket, unless it bore the signature and stamp of the Company's agent at the end of the route, no agent or employé of the Company was authorized to alter or waive any condition of the contract, and, therefore, the action of the baggagemaster in punching the ticket and checking the plaintiff's baggage and that of the gateman in admitting him to the return train could not bind the Company to carry him, nor estop it to deny his right to be carried.
4. The plaintiff not having his ticket stamped as required by the contract, and insisting on the right to make the return trip under the unstamped ticket and without paying further fare, and absolutely refusing to pay the usual fare, the fact that the conductor did not inform him of its amount is immaterial.
5. The unstamped ticket giving him no right to a return passage, and he having refused to pay the usual fare upon a demand by the conductor, there was no contract in force between him and the Company to carry him back, and, therefore, there could be no breach of the contract, and an action of assumpsit cannot be maintained to recover damages for plaintiff's expulsion from the Company's train.

6. The plaintiff, therefore, was not prejudiced by the exclusion of the evidence concerning the circumstances attending his expulsion and the consequent injuries to him or his business.

[No. 1140.]

Submitted Oct. 31, 1889. Decided Nov. 11, 1889.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment for the defendant in an action of assumpsit against a railroad corporation by a person who, after taking passage in one of its trains, was forcibly expelled by the conductor. *Affirmed.*

Statement by *Mr. Justice Gray*:

This was an action of assumpsit against a railroad corporation by a person who, after taking passage on one of its trains, was forcibly expelled by the conductor.

At the trial in the circuit court, the plaintiff testified that on March 18, 1882, he purchased at the office of The Wabash, St. Louis and Pacific Railway Company in Chicago a ticket for a passage to Hot Springs and back (which is copied in the margin,* and which, as was al-

*Issued by Wabash, St. Louis and Pacific Railway. Tourist special contract. Good for one first-class passage to Hot Springs, Ark., and return, when officially stamped on the back hereof, and presented with coupons attached.

In consideration of the reduced rate at which this ticket is sold, I, the undersigned, agree to and with the several companies over whose lines this ticket entitles me to be carried, as follows, to wit:

1st. That in selling this ticket The Wabash, St. Louis and Pacific Railway Company acts as agent, and is not responsible beyond its own line.

2d. That this ticket is not transferable, and no

the conductor knows that he is not the person named therein, and assents to the substitution. Toledo, W. & W. R. Co. v. Beggs, 85 Ill. 80.

Where a person has a pass which contains certain conditions with which the passenger refuses to comply,—as, where there is an indorsement upon the back of it which he is required to sign, but refuses when called upon by the conductor,—he thereupon ceases to be a passenger, if the conductor so elects, and, refusing to pay his fare, may be ejected from the train. Elliott v. Western & A. R. Co. 58 Ga. 454.

The ticket is the only evidence of the passenger's right to a passage, and he must produce it when called for; and if he loses the ticket, his right to travel upon it ceases; and if, after being given a reasonable time to find it, he fails to pay his fare, he may be expelled from the train. Frederick v. Marquette, H. & O. R. Co. 37 Mich. 342; Duke v. Great Western R. Co. 14 Up. Can. Q. B. 377.

Where a passenger paid for three tickets, but through mistake the ticket-agent only gave him two, which he gave to two persons with him, it was held he must pay his fare or the conductor would be justified in removing him from the train. Weaver v. Rome, W. & O. R. Co. 3 Thomp. & C. 270.

And the same is true where the ticket-agent through mistake gives the passenger a ticket for a shorter distance, although paid for a ticket to a point beyond. Frederick v. Marquette, H. & O. R. Co. 37 Mich. 342.

As between the conductor and the passenger, the ticket is the only evidence of the passenger's right to a passage. Hufford v. Grand Rapids & I. R. Co. 53 Mich. 113; Frederick v. Marquette, H. & O. R. Co. 37 Mich. 342, 26 Am. Rep. 581.

Passenger is entitled to a reasonable time in which to find the ticket, and cannot be expelled until 182 U. S.

such reasonable time has been given him. Robson v. New York Cent. & H. R. Co. 21 Hun, 387.

A passenger having presented his ticket to the conductor, it was punched and returned to him. The passenger mislaid the ticket, and for a time was unable to find it. The conductor afterwards again called for the ticket, and as the passenger was unable to find it, he was ejected from the car, without any demand of payment of fare. It was held that his expulsion was wrongful. Robson v. New York Cent. & H. R. Co. 21 Hun, 387.

But where the passenger knew when he got upon the train that his ticket was lost, he is not entitled to this lenity. Crawford v. Cincinnati, H. & D. R. Co. 26 Ohio St. 530; Downs v. New York & N. H. R. Co. 38 Conn. 287.

Where the conductor knew that the plaintiff was a commuter, and that the time covered by his ticket had not expired, but, acting in accordance with the instructions of the defendants, he demanded of the plaintiff his fare for the trip, and on his refusal to pay it, ejected him from the train, it was held that the plaintiff was not bound to produce his ticket immediately when requested, but was entitled to a reasonable time to find it, and was entitled to ride as long as there was any reasonable expectation of finding it during the trip. His failure to produce the ticket was not such a breach of the contract as to justify the defendants in treating the plaintiff as a trespasser on the train; and if the defendants had a right to eject the plaintiff from the train, they had no right to do so elsewhere than at a regular station on the road. Maples v. New York & N. H. R. Co. 38 Conn. 557.

A railway company may refuse to receive certain classes of persons as passengers, and a person who has entered one of its trains as a passenger may, under certain circumstances, be expelled

leged in the declaration and appeared upon the face of the ticket, was then signed by him as well as by the ticket agent, and witnessed by a third person), and upon this ticket traveled on the defendant's railroad to Hot Springs.

He was asked by his counsel when he first actually knew that the ticket required him to have it stamped at Hot Springs. The question was objected to by the defendant, and ruled out by the court.

He further testified that on April 19, 1882, when leaving Hot Springs on his return to Chicago, he went to the baggage office and requested the baggage-master to check his baggage, and, on his asking to see the ticket, showed it to him, and he thereupon punched the ticket, checked the baggage, and gave him the checks for it; and also that the gateman asked to see the ticket, and he showed it to him, and then passed through the gate, and took his seat in the cars. This testimony was objected to by the defendant, on the ground that no statement or action of the baggage-master, or of the gateman, would constitute a waiver of any of the written conditions of the contract; and it was admitted by the court, subject to the objection.

The plaintiff then testified that soon after leaving Hot Springs the conductor, in taking the tickets of passengers, came to him, and, upon being shown his ticket, said it was not good, because he had failed to have it stamped at Hot Springs; the plaintiff replied that the baggage-master, when checking his baggage, had said nothing to him about it, and he did not know it was necessary; the conductor answered that he must either go back to Hot Springs and have the ticket stamped, or else pay full fare, but did not demand any specific sum of fare, or tell him what the fare was, and upon his refusing to pay another fare or to leave the train, forcibly put him off at the next station, notwithstanding he resisted as much as he could, and in so doing injured him in body and health.

On motion of the defendant, upon the grounds, among others, that this was an action of assumpsit for breach of contract, and that the plaintiff failed to produce to the conductor a ticket or voucher which entitled him to be carried on the train, and that until the plaintiff identified himself at the office at Hot Springs and had the ticket stamped and signed by the agent there, he had no subsisting contract be-

stop-over at any intermediate point will be allowed, unless specially provided for by the local regulations of the lines over which it reads.

3d. That any alteration whatever of this ticket renders it void.

4th. That it is good for going passage only five (5) days from date of sale, as stamped on back and written below.

5th. That it is not good for return passage, unless the holder identifies himself as the original purchaser, to the satisfaction of the authorized agent of the Hot Springs Railroad, at Hot Springs, Ark., within fifty-five (55) days from date of sale, and when officially signed and dated in ink, and duly stamped by said agent, this ticket shall then be good only five (5) days from such date.

6th. That I, the original purchaser, hereby agree to sign my name, and otherwise identify myself as such, whenever called upon to do so by any conductor or agent of the line or lines over which this ticket reads.

7th. That baggage liability is limited to wearing apparel not exceeding \$100 in value.

8th. That the coupons belonging to this ticket will not be received for passage if detached.

9th. That my signature shall be in manuscript and in ink.

10th. That unless all the conditions on this ticket are fully complied with, it shall be void.

11th. That I will not hold any of the lines named in this ticket liable for damages on account of any statement not in accordance with this contract made by any employé of said lines.

12. And it is especially agreed and understood by me that no agent or employé of any of the lines named in this ticket has any power to alter, modify or waive in any manner any of the conditions named in this contract.

Signature: P. C. BOYLAN.
Witness: H. C. KERRAN.

Date of sale, March 18th, 1882.
GEO. H. DANIELS, Gen'l Ticket Agent.

therefrom, as, drunken and disorderly persons, or others whose conduct or appearance is such as is calculated to operate as a serious annoyance to other passengers, or is disgusting. *Railway Co. v. Valleley*, 32 Ohio St. 845; *Lemont v. Washington & G. R. Co.* 1 Mackey (D. C.) 180, 47 Am. Rep. 238.

An intoxicated passenger who is guilty of disorderly conduct may be removed after tendering him such "proportion of the fare he has paid as the distance he then is from the place to which he has paid his fare bears to the whole distance for which he has paid his fare;" and, unless unnecessary force is used, the company incurs no liability on account of such removal. *Baltimore, P. & C. R. Co. v. McDonald*, 68 Ind. 316.

A passenger who is guilty of gross misconduct, either by insulting or assaulting other passengers or the conductor, or who uses vile or profane language in the car, or who threatens to assault other passengers or the conductor, may lawfully be expelled from the train. *Pittsburgh, C. & St. L. R. Co. v. Van Houten*, 48 Ind. 90.

A carrier of passengers may rightfully exclude a passenger whose conduct at the time is annoying, or whose reputation for misbehavior is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive to other passengers; but the social penalties of exclusion of unchaste women from other public places cannot be imported into the law of common carriers, nor

can the carrier classify his passengers according to their respective reputations for chastity, whether they be men or women. *Brown v. Memphis & C. R. Co.* 5 Fed. Rep. 490.

Where a woman was excluded from the "ladies' car" because she was of notoriously bad character, the defendant pleaded a reasonable regulation authorizing the exclusion, and that the plaintiff came within it. It was held that it is a mixed question of law and fact whether the regulation is reasonable or not, to be submitted to the jury, on proper instructions by the court, and that it will not be determined on demurrer. And a motion for new trial was overruled, and a verdict of \$3,000 for the expulsion of the plaintiff sustained. *Brown v. Memphis & C. R. Co.* 4 Fed. Rep. 37, 7 Fed. Rep. 51.

A person who refuses to pay his fare or to show his ticket when demanded by the conductor, from that time becomes a trespasser, and may be removed from the train. *Pittsburgh, C. & St. L. R. Co. v. Van Houten*, 48 Ind. 90; *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82; *Bennett v. New York Cent. & H. R. Co.* 5 Hun, 590, affirmed 69 N. Y. 594; *Swan v. Manchester & L. R. Co.* 132 Mass. 116; *Hibbard v. New York & E. R. Co.* 15 N. Y. 455.

A person has no right to a passage upon a ticket which has been punched so as to indicate that it has once been used, nor where it has been so mutilated as to render it impossible to determine whether it has been used or not. But the company

tween himself and the defendant for a return passage to Chicago, the court declined to permit the plaintiff to testify to the consequent injury to his business and to his ability to earn money, excluded all evidence offered as to the force used in removing him from the train, and as to his expulsion from the train (although corresponding to allegations inserted in the declaration), and directed a verdict for the defendant.

The plaintiff excepted to the rulings of the court, and, after verdict and judgment for the defendant, sued out this writ of error.

Mr. Charles Carroll Bonney, for plaintiff in error:

If any rule or regulation made by a common carrier be an unnecessary infringement of the rights and liberty of the passengers, it is unlawful because unreasonable.

State v. Overton, 24 N. J. L. 485.

The contract of the carrier was to carry the passenger safely, and protect him from injury.

Stokes v. Saltonstall, 88 U. S. 13 Pet. 190 (10:115); *Jennings v. Great Northern R. Co.* L. R. 1 Q. B. 7; *Bass v. Chicago & N. W. R. Co.* 86 Wis. 450.

There is no implied authority to expel a passenger for a mere violation of the contract of carriage.

Butler v. Manchester, S. & L. R. Co. L. R. 21 Q. B. Div. 207; *Kent v. Baltimore & O. R. Co.* 10 West. Rep. 457, 45 Ohio St. 284; *Lamberton v. Connecticut F. Ins. Co.* 39 Minn. 129.

The circuit court erred in refusing to allow the plaintiff to testify to the damage to his business.

Hunter v. Stewart, 47 Me. 419; 1 Suth. Dam. 158; *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 213; 3 Suth. Dam. 257-58, and authorities cited; *Baker v. Drake*, 58 N. Y. 211; *Brewster v. Van Liew*, 6 West. Rep. 497, 119 Ill. 562; *Chicago & A. R. Co. v. Pillsbury*, 11 West. Rep. 757, 123 Ill. 9.

has no right to eject him at any other point than a regular station. *Terre Haute, A. & St. L. R. Co. v. Vanatta*, 21 Ill. 188; *Chicago & N. W. R. Co. v. Peacock*, 43 Ill. 253.

Where the rules of the company require all passengers to purchase a ticket before entering the cars, and forbid the conductors from taking money for fares, a passenger who neglects to supply himself with a ticket may be removed from the car although he tenders his fare in money. *McCarthy v. Dublin, W. & W. R. Co.* 5 Ir. Rep. C. L. 244; *Lane v. East Tennessee, V. & G. R. Co.* 5 Lea (Tenn.) 124.

So where a person is wrongfully in possession of his ticket, although ignorant of that fact,—as, where he innocently purchased it with counterfeit money,—he may be ejected from the train unless he rectifies the wrong upon demand. *Memphis & C. R. Co. v. Chastine*, 54 Miss. 503.

The same rule prevails where, in paying his fare to the conductor, the latter through mistake gives the passenger back too much change; unless he rectifies the mistake when called upon to do so, he may be expelled, when he has ridden as far as the payment made entitles him to ride. *McCarthy v. Chicago, R. I. & P. R. Co.* 41 Iowa, 432.

Where a passenger offered a worthless piece of paper, claiming it to be a pass, and refused to pay fare or leave the train, the servants of the company had a right to remove him from the train at a regular station, and to use the necessary force for the

Mr. G. W. Kretzinger, for defendant in error:

An ordinary ticket is not a contract between the purchaser and the railway company.

Logan v. Hannibal & St. J. R. Co. 77 Mo. 668, 19 Am. & Eng. R. R. Cas. 142; *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 894 (32:250); *Petrie v. Pennsylvania R. Co.* 42 N. J. L. 450; *Bradshaw v. South Boston R. Co.* 185 Mass. 407; *Hufford v. Grand Rapids & I. R. Co.* 53 Mich. 118; *Frederick v. Marquette, H. & O. R. Co.* 87 Mich. 842.

The ticket must be the conclusive evidence of the extent of the passenger's right to travel.

Bradshaw v. South Boston R. Co. 185 Mass. 409.

If the conductor was justified in ejecting the plaintiff, the Company cannot be liable therefor.

Yorton v. Milwaukee, L. S. & W. R. Co. 54 Wis. 234; *Shelton v. Lake Shore & M. S. R. Co.* 29 Ohio St. 214; *Pittsburgh, C. & St. L. R. Co. v. Nuzum*, 60 Ind. 588; *McClure v. Philadelphia, W. & B. R. Co.* 34 Md. 582; *Rawitzky v. Louisville & N. R. Co.* 40 La. Ann. 47; *Hufford v. Grand Rapids & I. R. Co.* 53 Mich. 118.

In actions of contract the parties are limited to the mere evidence of the breach of contract.

Henton v. Morton, 2 Ashmead, 152; *Zell v. Arnold*, 2 Pa. 292; *Dixon v. Barclay*, 22 Ala. 878; *Nations v. Hawkins*, 11 Ala. 864; *Mayo v. Madden*, 4 Cal. 27; *Crooker v. Willard*, 28 N. H. 185, note.

Counts for tort and upon contracts cannot be joined at common law, which is the law here.

Wilson v. Marsh, 1 Johns. 503; *Sloyer v. Westcott*, 2 Day, 418; *Coryton v. Lithby*, 2 Wms. Saund. 117(c) note; *Church v. Mumford*, 11 Johns. 479.

The use of personal force and the personal injury resulting therefrom constitute the tort described in the declaration in the case at bar. If no promise, express or implied, springs from the wrong, then an action in assumpsit will not lie thereon.

purpose. *Chicago, R. I. & P. R. Co. v. Herring*, 57 Ill. 58.

Where one had bought and lost his ticket, and, before he was expelled, one of his companions tendered the fare to the conductor, who refused to receive it, demanding a ticket, and the passenger, who was very much intoxicated, was put off the train in a cut about twenty feet deep and he proceeded in the direction of his home some one thousand and seven hundred feet, when he lay or fell down and was run over and killed, about fifteen minutes later, by the train of another company, which had the right to run its cars over the defendant's road, it was held that, as the intestate was wrongfully removed from the train, the question as to whether his death was or was not directly traceable to such removal should have been left to the jury, and that the court erred in nonsuiting the plaintiff. *Guy v. New York, O. & W. R. Co.* 30 Hun, 399.

A passenger wrongfully upon a train may be removed, and the corporation will only be liable for unnecessary violence. *Lake Shore & M. S. R. Co. v. Pierce*, 47 Mich. 277; *Shelton v. Lake Shore & M. S. R. Co.* 29 Ohio St. 214.

If the holder of the ticket deports himself properly, the company has no right to refuse the ticket, or, so long as he deports himself properly, to eject him from the train before reaching the station named in the ticket. *Churchill v. Chicago & A. R. Co.* 57 Ill. 390.

Carson River Lumbering Co. v. Bassett, 2 Nev. 253; *Jones v. Hoar*, 5 Pick. 235; *Howland v. Needham*, 10 Wis. 495; *Bennett v. Francis*, 2 Bos. & P. 550; *Churchill v. Chicago & A. R. Co.* 67 Ill. 394.

Mr. Justice Gray delivered the opinion of the court:

This is an action of assumpsit, and cannot be maintained without proof of a breach of contract by the defendant to carry the plaintiff. The only contract between the parties was an express one, signed by the plaintiff himself as well as by the defendant's agent at Chicago, and contained in a ticket for a passage to Hot Springs and back. The plaintiff, having assented to that contract by accepting and signing it, was bound by the conditions expressed in it, whether he did or did not read them or know what they were. The question, when he first knew that the ticket required him to have it stamped at Hot Springs, was therefore rightly excluded as immaterial.

By the express conditions of the plaintiff's contract, he had no right to a return passage under his ticket, unless it bore the signature and stamp of the defendant's agent at Hot Springs; and no agent or employe of the defendant was authorized to alter, modify or waive any condition of the contract. Neither the action of the baggage-master in punching the ticket and checking the plaintiff's baggage, nor that of the gateman in admitting him to the train, therefore, could bind the defendant to carry him, or estop it to deny his right to be carried.

The plaintiff did not have his ticket stamped at Hot Springs, or make any attempt to do so, but insisted on the right to make the return trip under the unstamped ticket, and without paying further fare. As he absolutely declined to pay any such fare, the fact that the conduct-

or did not inform him of its amount is immaterial.

The unstamped ticket giving him no right to a return passage, and he not having paid, but absolutely refusing to pay, the usual fare, there was no contract in force between him and the defendant to carry him back from Hot Springs.

There being no such contract in force, there could be no breach of it; and no breach of contract being shown, this action of assumpsit, sounding in contract only, and not in tort, cannot be maintained to recover any damages, direct or consequential, for the plaintiff's expulsion from the defendant's train.

The plaintiff, therefore, has not been prejudiced by the exclusion of the evidence concerning the circumstances attending his expulsion and the consequent injuries to him or his business.

The case is substantially governed by the judgment of this court in *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390 [32: 249], and our conclusion in the case at bar is in accord with the general current of decision in the courts of the several States. See, besides the cases cited at the end of that judgment, the following: *Churchill v. Chicago & A. R. Co.* 67 Ill. 390; *Petrie v. Pennsylvania R. Co.* 42 N. J. L. 449; *Pennington v. Philadelphia, W. & B. R. Co.* 62 Md. 95; *Rawitzky v. Louisville & N. R. Co.* 40 La. Ann. 47.

Nor was anything inconsistent with this conclusion decided in either of the English cases relied on by the learned counsel for the plaintiff. Each of those cases turned upon the validity and effect of a by-law made by the railway company, not of a contract signed by the plaintiff, and otherwise essentially differed from the case at bar.

In *Jennings v. Great Northern R. Co.* L. R. 1 Q. B. 7, the by-law required every passenger to obtain a ticket before entering the train, and

And it is the duty of the agents to ascertain whether a passenger has purchased a ticket, before ejecting him from the cars. *Quigley v. Central Pac. R. Co.* 11 Nev. 350.

A passenger who presents to the conductor a "stock pass" from the railroad company, which entitles him to return on its road without payment of fare, can recover damages sustained by him when so returning, caused by his expulsion from the cars by the conductor for nonpayment of the fare. *Houston & T. C. R. Co. v. Ford*, 53 Tex. 304; *Graham v. Pacific R. Co.* 65 Mo. 536.

Where the plaintiff purchased an excursion ticket with the printed condition, "Good this day only on all trains, except the Boston express trains," and was expelled from the Boston express train for nonpayment of fare, it was held that he had no cause of action. *Nolan v. New York, N. H. & H. R. Co.* 9 Jones & S. 541; *Terry v. Flushing, N. S. & C. R. Co.* 13 Hun, 359.

A person on a train refusing to produce a ticket or pay his fare, subsequently changing his mind, and tendering full fare, would be entitled to continue his journey on the train. But if the refusal be accompanied by violent and abusive conduct, whereby the conductor is compelled to stop the train for the purpose of putting him off, he may forfeit such right; and the conductor, using proper discretion, may remove him notwithstanding a tender of full fare is then made. *Gould v. Chicago, M. & St. P. R. Co.* 18 Fed Rep. 155; *Hoffbauer v. Davenport & N. W. R. Co.* 52 Iowa, 342; *Louisville, N.*

& G. S. R. Co. v. Harris, 9 Lea (Tenn.) 180; *Thomas v. Geldart*, 4 Puga. & Bur. (N. B.) 95; *O'Brien v. New York Cent. & H. R. Co.* 80 N. Y. 238; *Nelson v. Long Island R. Co.* 7 Hun, 140; *Farewell v. Grand Trunk R. Co.* 15 Up. Can. C. P. 427; *Shedd v. Troy & B. R. Co.* 40 Vt. 88; *Wents v. Erie R. Co.* 3 Hun, 241; *Briggs v. Grand Trunk R. Co.* 24 Up. Can. Q. B. 510; *Boston & L. B. Co. v. Proctor*, 1 Allen, 207; *Lillis v. St. Louis, K. C. & N. R. Co.* 64 Mo. 464; *Sherman v. Chicago & N. W. R. Co.* 40 Iowa, 45; *Powell v. Pittsburgh, C. & St. L. R. Co.* 25 Ohio St. 70.

Where the refusal to pay is such that the passenger becomes a trespasser, he cannot, after the bell is rung to stop the train, reinstate himself as a passenger by an offer to pay his fare. *Hoffbauer v. Davenport & N. W. R. Co.* 52 Iowa, 342.

But where the train is stopped at a regular station, at which it would have stopped anyway, if the passenger before he is ejected offers to pay the fare, it should be accepted. The contrary rule applies only where the train is stopped expressly to put him off. *Toledo, W. & W. R. Co. v. Wright*, 68 Ind. 536, 34 Am. Rep. 277.

Before he is ejected, other persons in his behalf may offer to pay the fare. *Hoffbauer v. Davenport & N. W. R. Co.* 52 Iowa, 342; *O'Brien v. New York Cent. & H. R. Co.* 80 N. Y. 238.

That carrier of persons is bound to accept all passengers, and the exceptions to the rule, and when he may exclude a passenger, see *note to Pearson v. Duane*, 71 U. S. 4 Wall. 606 (18: 447).

to show and deliver up his ticket whenever demanded. The plaintiff took a ticket for himself, as well as tickets for three horses and three boys attending them, by a particular train, which was afterwards divided into two, in the first of which the plaintiff traveled, taking all the tickets with him; and when the second train was about to start, the boys were asked to produce their tickets, and, being unable to do so, were prevented by the company's servants from proceeding with the horses. An action by the plaintiff against the company for not carrying his servants was sustained, because the company contracted with him only, and delivered all the tickets to him; and *Lord Chief Justice Cockburn*, with whom the other judges concurred, said: "It is unnecessary to determine whether, if the company had given the tickets to the boys, and the boys had not produced their tickets, it would have been competent for the company to have turned them out of the carriage."

In *Butler v. Manchester, S. & L. R. Co. L. R. 21 Q. B. Div. 207*, the ticket referred to conditions published by the company, containing a similar by-law, which further provided that any passenger traveling without a ticket, or not showing or delivering it up when requested, should pay the fare from the station whence the train originally started. The plaintiff, having lost his ticket, was unable to produce it when demanded, and, refusing to pay such fare, was forcibly removed from the train by the defendant's servants. The Court of Appeal, reversing a judgment of the Queen's Bench Division, held the company liable, because the plaintiff was lawfully on the train under a contract of the company to carry him, and no right to expel him forcibly could be inferred from the provisions of the by-law in question, requiring him to show his ticket or pay the fare, and each of the judges cautiously abstained from expressing a decided opinion upon the question whether a by-law could have been so framed as to justify the course taken by the company.

Judgment affirmed.

CHAUNCEY R. WATSON, *Appt.*,

v.

THE CINCINNATI, INDIANAPOLIS, ST.
LOUIS & CHICAGO RAILWAY
COMPANY.

(See S. C. Reporter's ed. 161-167.)

Validity of patent for improved car doors—novelty—invention.

1. The patent No. 203,226, granted to Chauncey R. Watson, for an improvement in grain-car doors, April 30, 1878, cannot be upheld, because it does not involve invention, but consists in a mere aggregation of parts, each to perform its separate and independent function substantially in the same manner as before combination with the other, and without contributing to a new and combined result.
2. There was nothing new in flexible or rigid doors, outside and inside, nor in the use of outside and inside rigid doors in combination, the inside door filling only part of the opening.

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3. The substitution of the old flexible sliding inside door, reduced in size to correspond with the old inside rigid grain door, may have required some mechanical skill, and may have been new and useful, but it did not involve the exertion of the inventive faculty, and embraced nothing that was patentable.

[No. 48.]

Argued Oct. 31, 1889. Decided Nov. 13, 1889.

APPEAL from a decree of the Circuit Court of the United States for the District of Indiana dismissing a suit for the infringement of letters-patent No. 203,226, granted to Chauncey R. Watson, for an improvement in grain-car doors, bearing date the 30th day of April, 1878. *Affirmed.*

Opinion below, 23 Fed. Rep. 443.

Statement by Mr. Chief Justice Fuller:

This was a bill filed by appellant against The Cincinnati, Indianapolis, St. Louis & Chicago Railway Company, in the Circuit Court of the United States for the District of Indiana, alleging an infringement of letters-patent No. 203,226, granted to him for an improvement in grain-car doors, bearing the date the thirtieth day of April, 1878.

The complainant averred in his bill that the patent was intended to secure and did secure to him "the sole and exclusive right to make, use and sell a car for the transportation of grain and other freight, constructed substantially like an ordinary freight car, having an outside door for closing the car, and provided with an inside flexible or yielding sliding grain door, which is adapted to be carried up on guide rods or their equivalent overhead and out of the way and under the roof of the cars; that of such a car having an outside enclosing door proper, in combination with an inside sliding flexible grain door, he was the first and original inventor," etc. These averments were denied in the answer, which also alleged that the thing patented in said patent, and every material or substantial part thereof, had been shown and described prior to Watson's supposed invention in various letters-patent, fifteen in number, among them being a patent issued to Martin M. Crooker, May 26, 1863, and a patent issued to Horace L. Clark, August 29, 1871; and further averred that the grain-car doors referred to in the bill as being on the cars of The Chicago, Rock Island & Pacific Railway Company, were made under the Crooker patent, which was afterwards assigned to Dennis F. Van Liew, and it was with his license and consent that the cars were so equipped with said doors; that "the only differences between said Crooker's doors and the complainant's are, that Crooker's slide in grooves and have their slats fastened together by a continuous wire running through them, while complainant's slide on rods passing through staples, and are fastened together by ordinary hinges, both being inside doors, and, with the exception of the above differences, operating in substantially the same way;" that complainant's door, as described in his patent, contains no patentable invention in view of the Crooker patent, nor is it any improvement thereon, nor in view of the state of the art was there any patentable novelty or invention

therein. The answer also denied any infringement of Watson's patent. Proofs having been taken the bill was, upon hearing, dismissed, from which decree appeal was prosecuted to this court. The opinion of Woods, J., will be found reported in 28 Fed. Rep. 443.

Mr. Charles P. Jacobs, for appellant:

This court has repeatedly sustained patents for inventions where a better result was produced, although the differences in the latter inventions and those shown in the prior patent were small.

Clough v. Gilbert & B. Mfg. Co. 106 U. S. 166, 178 (37: 184, 188); *Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co.* 113 U. S. 157 (28: 939); *Seymour v. McCormick*, 60 U. S. 19 How. 96 (15: 557).

Important inventions often simple.

Seymour v. Osborne, 78 U. S. 11 Wall. 516 (20: 83); *Smith v. Nichols*, 88 U. S. 21 Wall. 119 (22: 567); *Magic Buffle Co. v. Douglas*, 2 Fish. Pat. Cas. 580; *Clark, P. S. & F. R. Co. v. Copeland*, 2 Fish. Pat. Cas. 221.

A happy thought often completes an invention.

Poillon v. Schmidt, 6 Blatchf. 299; *Ryan v. Goodwin*, 8 Summ. 514; *Orandal v. Walters*, 9 Fed. Rep. 659.

That nobody made it before is evidence of invention by Watson.

Dederick v. Cassell, 9 Fed. Rep. 806; *Worwick Mfg. Co. v. Steiger*, 17 Fed. Rep. 250.

The simplicity of an invention in utility and effect over what preceded it is proof tending to establish the fact of novelty.

Birdsell v. McDonold, 6 Pat. Off. Gaz. 682; *Stibbrell & B. Mfg. Co. v. Cincinnati Gaslight & Coke Co.* 7 Pat. Off. Gaz. 829.

If the result is obtained in a better mode than was before known, this is evidence of invention.

Detroit Lubricator Mfg. Co. v. Renchard, 9 Fed. Rep. 298; *Wood v. Packer*, 17 Fed. Rep. 650.

The law has no nice standard by which to gauge the degree of mental power or inventive genius brought into play in originating the new device.

Middletown Tool Co. v. Judd, 8 Fish. Pat. Cas. 141; *Hoe v. Cottrell*, 1 Fed. Rep. 608; *Collins Co. v. Coes*, 8 Fed. Rep. 225.

Slight changes producing better result, patentable.

Turrill v. Illinois Cent. R. Co. 3 Fish. Pat. Cas. 830; *Pearl v. Ocean Mills*, 11 Pat. Off. Gaz. 2; *Isaacs v. Abrams*, 14 Pat. Off. Gaz. 861; *Eppinger v. Richey*, 14 Blatchf. 307; *Wallace v. Noyes*, 13 Fed. Rep. 172.

Success the true test of merit in a device.

Davis v. Fredericks, 19 Fed. Rep. 99; *Brown Mfg. Co. v. Deere*, 21 Fed. Rep. 709.

Old devices in a new combination patentable.

Western Electric Mfg. Co. v. Chicago Electric Mfg. Co. 14 Fed. Rep. 691.

Value of new device recognized, and its adoption evidence of invention.

Ward v. Grand Detour Plow Co. 14 Fed. Rep. 696; *Miller v. Pickering*, 16 Fed. Rep. 540; *Parkhurst v. Kinsman*, 1 Blatchf. 494.

Abandoned devices cannot avail to defeat a patent.

Roberts v. Dickey, 1 Pat. Off. Gaz. 4.

Where several old elements are taken from several different machines, and brought together without effecting any new or better result, the device thus made is not a patentable combination.

Hayles v. Van Wormer, 87 U. S. 20 Wall. 353 (22: 241); *Phillips v. Detroit*, 111 U. S. 604 (28: 582); *Haald v. Rice*, 104 U. S. 737 (26: 910); *Morris v. McMillin*, 113 U. S. 244 (28: 703).

Watson changed the older devices and produced a new and better result.

Smith v. Goodyear D. V. Co. 98 U. S. 486 (25: 952); *Forsyth v. Clapp*, 6 Fish. Pat. Cas. 528; *Union Paper Collar Co. v. White*, 7 Pat. Off. Gaz. 696; *Tulghman v. Morse*, 9 Blatchf. 421.

Utility a test of invention.

Washburn & M. Mfg. Co. v. Haish, 4 Fed. Rep. 900; *Howe v. Underwood*, 1 Fish. Pat. Cas. 175; *Hayden v. Suffolk Mfg. Co.* 4 Fish. Pat. Cas. 108; *Goodyear v. Day*, 2 Wall. Jr. 288; *Smith v. Goodyear D. V. Co.* 98 U. S. 486 (23: 952); *Webster on Patents*, 80; *Eppinger v. Richey*, 14 Blatchf. 807; *Isaacs v. Abrams*, 14 Pat. Off. Gaz. 861.

Defendant is estopped to deny invention.

Singer v. Walmesley, 1 Fish. Pat. Cas. 553.

The court should proceed in a liberal spirit, so as to sustain the patent.

Klein v. Russell, 86 U. S. 19 Wall. 466 (22: 124); *Turrill v. Michigan Southern & N. I. R. Co.* 68 U. S. 1 Wall. 491 (17: 668); *Blandy v. Griffith*, 8 Fish. Pat. Cas. 609; *Fitch v. Bragg*, 8 Fed. Rep. 588; *Estabrook v. Dunbar*, 10 Pat. Off. Gaz. 909; *Blanchard v. Sprague*, 2 Story, 164; *Treadwell v. Parrott*, 8 Fish. Pat. Cas. 124; *Winans v. Denmead*, 56 U. S. 15 How. 830 (14: 717); *Corning v. Burden*, 56 U. S. 15 How. 252 (14: 688).

Mr. George Payson for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court:

The proof of the use of grain-car doors by the defendant was contained in a stipulation, whereby it was agreed "that the defendant had hauled over its line of road, in said State of Indiana, freight cars belonging to the Chicago, Rock Island & Pacific Railway Company, having a solid outside door, like an ordinary freight car, and an inner flexible sliding grain door of less height than the opening in the side of the car, the grain door sliding in grooves like the grooves shown in the patent of Martin M. Crooker, of May 26, 1868, and the slats composing the door being attached to each other by being strung upon wires passing through the slats."

Watson's application was dated February 18, 1878, and contained the following claims:

"1st. A grain door, constructed of longitudinal sectional pieces, hinged or strapped together in such manner as that the door as a whole may yield to follow any desired line of movement when it is not in use as a grain door, and it is desired to place it out of the way, substantially as herein described.

"2d. A grain door, D, constructed as above described, and hinged or strapped so as to be flexible or yielding, for the purpose set forth, in combination with the guiding rods C, whereby, when not in use, it may be carried up and placed in the horizontal portion of said guid-

ing rods, so as to be out of the way, substantially as described.

"8d. A grain door, D, constructed as described, and provided with staples c c, in combination with guiding rods C and devices for affixing it to the top of the car, substantially as described and for the purposes set forth."

The application was rejected March 8, 1878, the examiners stating: "This 'grain door' differs from Crooker's (May 26, '88, No. 78,188, carpentry doors) 'railroad car' only in the name and in this, that the upper portion of Crooker's door is cut off to make applicant's. The rods and staples are substitutes for Crooker's channel-irons—obvious to any skilled workman." Watson then, on the 18th of March, 1878, amended his specification by inserting:

"This invention relates to improvements in the class of grain doors for cars, and the invention consists in the combination, with a car, of an inside vertically-sliding flexible or yielding door and guiding rods, whereby the door, when not in use, may be carried up and placed on the horizontal portion of said guiding rods, so as to be out of the way.

"I am aware that a car door of similar construction, sliding in grooved ways, is old, and such I do not desire to claim, broadly, as my invention. Said door, however, constitutes an outside or closing car door proper, and the car could not be loaded or used for bulk grain unless the grain is put in from the roof of the car, as the door completely closes the doorway or opening. Furthermore, said door is obviously objectionable for other reasons, viz.: The grain will lodge or get in the grooved ways in which the door slides, binding or locking it so as to prevent its being raised, and also, being an outside door, the grain, pressing against it, would force or bulge the door outward, producing a similar effect as the grain lodging in the grooved ways, whereas my door, being an inside door and not reaching the top of the doorway or opening, admits an open space at the top for loading in the grain, with an ordinary outside door, to be locked or otherwise secured after the car is loaded. By also employing guiding rods for the door to slide upon, and, being an inside door, the defects incident to the grooved ways and an outside door before referred to are entirely obviated."

"And at the same time he substituted for his first and second claims the following:

"1st. The combination, with a car, of an inside flexible or yielding and vertically-sliding grain door and guiding rods C, whereby said door, when not in use, can be carried up and placed on the horizontal portions of said guiding rods, out of the way, substantially as and for the purpose herein shown and described."

March 20, the application was again rejected, the examiners stating:

"It is not considered that Crooker in removing the upper few slats of his door would be making a patentable improvement on his own invention, albeit he might change its name and allege the result of loading in over the top of his door.

"The change is an obvious one to any user of freight cars; further, the use of rods and

eyes is old in this connection. See patent of H. L. Clark, Aug. 29, '71, No. 118,514 (carpentry doors), which further confirms the former action in relation thereto.

"In regard to the clogging and binding referred to in argument, no clear or considerable results are seen to be accomplished by applicant's device over the reference, such as should argue any invention thereon."

Watson then, on the 21st of March, 1878, further amended by substituting for the first and second claims the following:

"The combination, with a car, of an inside flexible or yielding sliding grain door, having staples c, and the vertical and horizontal bent guiding-rods C, extending from the floor of the car upwardly and under the roof of the car, as herein shown and described, whereby said door, when not in use, can be carried up on the horizontal portions of said guiding rods, out of the way, substantially as specified."

The examiners again responded, March 23, 1878:

"The application does not present patentable novelty over Crooker, cited.

"In view of the state of the art as shown by the references cited, the use of eyes and rods for guiding the sliding door are the simple mechanical equivalents of the channel irons of Crooker. As claim does not differ in a matter of substance from the preceding, it is a second time rejected."

An appeal was prosecuted to the examiners-in-chief, who reversed the decision, saying:

"The invention in this case is small and the claim is correspondingly limited. It consists of a combination of various instrumentalities not found in either of the references.

"Applicant's car, as a whole, is adapted by convertibility to uses not compatible with the cases cited, without injury. In this case the flexible door is applied in addition to the usual slide doors, and when coarse freight is to be carried the flexible shutters are secured in place at the top under the roof of the car."

The door in use upon the freight cars which appellee hauled over its road was a grain door sliding in grooves. The Watson door was carried on rods with staples. Even if there was no material difference between a door sliding in grooves and a door sliding on rods and staples, there was no infringement, for Watson had in effect disclaimed a door sliding in grooves by his amendments and the terms of his specification as they stood amended, and in the narrow claim of his patent the staples c and the guiding rods C were part of his combination, which he could not, under the circumstances, say were not essential to it, nor that the grooves were an equivalent. *Gage v. Herring*, 107 U.S. 640 [27:601]; *Fay v. Cordesman*, 109 U.S. 408 [27:979]. But counsel for appellant insists that Watson's real invention "was not a question of rods or grooves, but was the combination in a freight car having an outside rigid door, of an inner flexible sliding grain door."

The Crooker door was patented May 26, 1868, and made of separate strips attached to each other by long continuous metal straps, so as to be flexible and capable of being slid up

out of the way under the roof of the car, in grooves or channel irons affixed to the inside of the door posts, but was a full and not a half door. One of the doors was an inside door, as appears from the drawings, and was described in his specification as follows: "B B and B' B' are metallic grooved ways applied at the margin of the door spaces *d d* and partially across the car, immediately under the roof of the same, the vertical portions of the ways B' B' being on the inside of the car, just at the edge of the said spaces, and firmly bolted in place upon the car framing; or, if preferred, these vertical portions may be in the door space itself, as is the case with those of the ways B B." The Clark patent was issued August 20, 1871, for a rigid grain door filling only half the opening, and sliding on rods to the top of the car, where it was then swung up into a horizontal position, turning on eyes at the upper corners of the rods. The evidence established that inside grain doors, filling only part of the opening, had long been used on freight cars in connection with the outside door. Watson's door was made of separate slats, united to each other by hinges, and provided with staples at both ends, that encircled the guiding rods on which the door might be slid up under the roof of the car so as to be out of the way. Making Crooker's door smaller so as to fill only half the opening, and using it in connection with an ordinary outside door, in combination with a car, is the invention claimed.

We agree with the learned judge holding the circuit court when he says: "There is nothing in either specification or claim concerning 'ordinary freight cars' nor solid sliding outside doors, and in the claim nothing about outside doors at all, unless inferred from the description given of an inside door. If, however, such an inference is permissible, and the patent must or may be construed to consist in such a combination of inside and outside doors as is asserted, it cannot be upheld, because it does not involve invention, but consists in a mere aggregation of parts, each to perform its separate and independent function substantially in the same manner as before combination with the other and without contributing to a new and combined result. The outside door certainly remains unaffected in construction and in use; and the inner door is the same as the Crooker door, with a few slats left off or taken off by design or by accident; and whether done in one way or the other the change cannot reasonably be called invention, unless the distinction between mere mechanical skill and inventive genius is to be disregarded."

There was nothing new in flexible or rigid doors, outside and inside. There was nothing new in the use of outside and inside rigid doors in combination, the inside door filling only part of the opening. The substitution of the old flexible sliding inside door, reduced in size to correspond with the old inside rigid grain door, may have required some mechanical skill, and may have been new and useful, but it did not involve the exertion of the inventive faculty, and embraced nothing that was patentable. *Thompson v. Boisselier*, 114 U. S. 1, 11, 12 [29: 76, 79, 80], and cases there cited; *Stephenson v. Brooklyn Cross-Town R. Co.* 114 U. S. 149 [29: 58].

The decree was right, and it is affirmed.

WILLIAM H. ROBERTSON, Collector of the Port of New York, *Pff. in Err.*,

ROBERT G. GLENDINNING ET AL.

(See S. C. Reporter's ed. 158-160.)

Duty on handkerchiefs—designation—construction of statute—Act of 1883.

1. The duty upon embroidered linen handkerchiefs under the Act of 1883 is 35 per cent *ad valorem*.
2. When an article is designated by a specific name and a duty imposed upon it by such name, general terms in a later part of the same Act, although sufficiently broad to comprehend such article, are not applicable to it.
3. A certain rate of duty is designated by the eighth paragraph of section 6 of the Act of 1883 upon handkerchiefs of linen by name, and they are therefore liable to the duty prescribed by that paragraph and do not come under the eleventh paragraph of the same schedule, which fixes a duty upon linen embroideries of 30 per cent *ad valorem*.

[No. 55.]

Argued Nov. 14, 1889. Decided Nov. 18, 1889.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of plaintiff in an action to recover an alleged excess of duties exacted by the Collector at the Port of New York upon embroidered linen handkerchiefs. *Reversed.*

The facts are stated in the opinion.

Mr. O. W. Chapman, Solicitor-General, for plaintiff in error.

Messrs. Charles Curis and Stephen G. Clarke, for defendants in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

This is an action brought to recover an alleged excess of duties exacted by the Collector at the Port of New York. Defendants in error had imported certain embroidered linen handkerchiefs, upon which the Collector, the plaintiff in error, assessed a duty of 35 per cent *ad valorem*, under the eighth paragraph of schedule J of § 2502 of title 33 of the Revised Statutes, as enacted by § 6 of the Act of March 8d, 1883 (22 Statutes, 489, 507), which reads:

"Brown and bleached linens, ducks, canvas, paddings, cot bottoms, diapers, crash, huckabacks, handkerchiefs, lawns, or other manufactures of flax, jute or hemp, or of which flax, jute or hemp shall be the component material of chief value, not specially enumerated or provided for in this Act, thirty-five per centum *ad valorem*."

The defendants in error paid this duty under protest, claiming that the goods were only liable to 30 per cent *ad valorem*, under the eleventh paragraph of the same schedule, as follows:

"Flax or linen laces and insertings, embroideries, or manufactures of linen, if embroidered or tamboured in the loom or otherwise, by machinery or with the needle or other process, and not specially enumerated or provided for in this Act, thirty per centum *ad valorem*."

Samples of the goods in question were produced in evidence and it appeared that the body of the cloth was linen cambric, that is, made of flax; that the articles were known in trade as, and were in fact, embroidered handkerchiefs; and that the embroidery was a substantial part of the handkerchief, and was done with cotton.

All the requirements as to protest, appeal and time of bringing suit having been complied with, the court directed a verdict for the importers for the difference claimed, upon which judgment was rendered, and the cause is brought here on writ of error.

The articles in controversy were embroidered linen handkerchiefs; and it is contended in support of the judgment that the provisions of the statute should be treated as if they read: "On linen handkerchiefs thirty-five per cent *ad valorem*, but if embroidered thirty per cent *ad valorem*."

We cannot concur in this construction. The word "handkerchiefs" is denominative and not merely descriptive; and when an article is designated by a specific name, and a duty imposed upon it by such name, general terms in a later part of the same Act, although sufficiently broad to comprehend such article, are not applicable to it. *Arthur v. Lahey*, 96 U. S. 112, 118 [24: 766], and cases cited.

The eighth paragraph covers handkerchiefs and also "other manufactures of flax, jute or hemp, or of which flax, jute or hemp shall be the component material of chief value," and the eleventh paragraph applies to flax or linen laces, insertings, embroideries or manufactures of linen, if embroidered or tamboured, and not specially enumerated or provided for in the Act.

Where manufactures of linen, other than those enumerated in the first provision, are embroidered or tamboured they are subjected to the rate specified in the second provision. "The test of the rate of duty is that of embroidery or not." *Arthur v. Homer*, 96 U. S. 187, 140 [24: 811, 812]. In that case, certain linen embroidered dress-patterns had been imported into the Port of New York, and were held dutiable at the rate imposed on embroidered manufactures of linen. The Acts of March 2, 1861, of July 14, 1862, and of June 30, 1864, and the Revised Statutes of 1874, bearing upon the subject, were considered. By none of these Acts were such dress-patterns specifically enumerated as subject to a different duty. But linen handkerchiefs were, as by the Act of 1883 they are, mentioned as among the linen goods for which a certain rate was designated.

In *Solomon v. Arthur*, 102 U. S. 208, 211, 212 [26: 147, 148], Mr. Justice Bradley, delivering the opinion of the court, makes the distinction between the use of a description applicable to many kinds of goods having different names, and the use of the specific name itself, entirely clear, and upon that distinction the disposition of the case turned.

We consider that distinction applicable here, and hold that these handkerchiefs, although embroidered, did not fall within the second provision.

The judgment must be reversed and the cause remanded, with instructions to grant a new trial, and it is so ordered.

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EDWIN A. MERRITT, Collector of the
PORT OF NEW YORK, *Pf. in Err.*,

v.

CHARLES L. TIFFANY.

(See S. C. Reporter's ed. 167-171.)

Duties on statuary—bronze statuary and statuettes—instructions to jury.

1. Professional productions of a statuary or a sculptor, as those words are used in the statute in relation to duties upon imports, embrace such works of art as are the result of the artist's own creation, or are copies of them, made under his direction and supervision, or copies of works of other artists, made under the like direction and supervision, as distinguished from the productions of the manufacturer or mechanic.
2. Bronze statues and statuettes are not necessarily statuary, subject only to a duty of 10 per cent *ad valorem*, but if they are the production of a manufacturer or mechanic they come under the designation of "manufactures of copper" subject to a duty of 45 per cent *ad valorem*.
3. In an action to recover back excessive duties paid upon bronze statues and statuettes, where there is some evidence going to show that the process of their manufacture was purely mechanical, the defendant is entitled to the instruction to the jury, that if they find that the imported articles were made, not by professional sculptors or statuaries, or by their assistants under their directions, but were made by skilled workmen or mechanics in the employ of the manufacturer, then their verdict should be for the defendant.

[No. 60.]

Argued Nov. 4, 1889. Decided Nov. 18, 1889.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment for plaintiff to recover an excess of duties paid under protest upon bronze statues and statuettes. *Reversed.*

The facts are stated in the opinion.

Mr. O. W. Chapman, Solicitor-General, for plaintiff in error.

Messrs. Edward Hartley and Walter H. Coleman for defendant in error.

Mr. Justice Field delivered the opinion of the court:

In 1880 and 1881, the plaintiff below, Charles L. Tiffany, imported from France and England various bronze statues and statuettes, which he claimed a right to enter as statuary, on paying a duty of ten per cent *ad valorem*, but on which the Collector charged a duty of forty-five per cent, as nonenumerated manufactures of copper. He was accordingly compelled, in order to obtain his goods, to pay \$420.25 in excess of the ten per cent, which payment he made under protest, and appealed to the Secretary of the Treasury, who affirmed the decision of the Collector. He then brought this action in the Supreme Court of New York, from which it was removed on certiorari to the Circuit Court of the United States for the Southern District of New York.

The plaintiff relied for recovery on the paragraph in "Schedule M—Sundries," contained in title thirty-three of the Revised Statutes, "Duties upon Imports." That paragraph reads as follows:

"Paintings and statuary, not otherwise provided for: ten per centum *ad valorem*." But the term 'statuary,' as used in the laws now in force imposing duties on foreign importations, shall be understood to include professional productions of a statuary or of a sculptor only." (R. S. 2d ed. 478, 479.)

The Collector claimed that the goods were subject to the duty charged under the paragraph in "Schedule E—Metals," contained in the same title of the Revised Statutes. That paragraph reads as follows:

"Copper in rolled plates, called braziers' copper, sheets, rods, pipes and copper bottoms, and all manufactures of copper, or of which copper shall be a component of chief value, not otherwise provided for: forty-five per centum *ad valorem*." (R. S. 467.)

The articles imported were all made of copper, and fell under the general designation of "manufactures of copper," or of "manufactures of which copper is a component of chief value," subject to a duty of forty-five per cent *ad valorem*, as charged by the collector, unless provision for a different duty on articles of that character is made in some other clause of the statute. There is no other clause applicable to them, unless they come under the head of "statuary," as defined by Congress. That definition, as seen above, includes the "professional productions of a statuary or of a sculptor only." What productions are to be deemed professional productions of a statuary or a sculptor it is difficult to state in general terms, so as to embrace every article of the kind. It is sufficiently accurate, however, for this case, to say that the definition embraces such works of art as are the result of the artist's own creation, or are copies of them, made under his direction and supervision, or copies of works of other artists, made under the like direction and supervision, as distinguished from the productions of the manufacturer or mechanic. The definition does not limit the professional productions to those of the sculptor's creation. As said in *Tutton v. Viti*, 108 U. S. 812, 818 [27:787, 788]: "An artist's copies of antique masterpieces are works of art of as high a grade as those executed by the same hand from original models of modern sculptors."

The articles in question in this present case are reproductions of noted figures, and with the exception of the two Roman Gladiators by Guillemain, were all made by manufacturers or mechanics. A model of a figure being prepared, any number of copies can be cast from it without any aid of the sculptor. One of the witnesses in the case testified that he had been employed in New York City for eleven years in the manufacture of bronze statuettes; and that the company with which he was connected manufactured about forty thousand figures a year, varying in size from ten inches to thirty-six and thirty-nine inches, some similar to, and some larger than, the sample produced.

Another witness, who stated that he had been familiar with the process of manufacturing statues for twenty years, testified that the men who do the work of casting are skilled mechanics; that a model of a figure can be made so as to produce any number of copies; and that the process is purely mechanical.

The testimony of Leon Barré, who purchased

the articles for the plaintiff, is instructive. He had been salesman and buyer for him for sixteen years, and had purchased in Europe bronze statues for him since 1880. He thus testified:

"The method of production of bronze statuary abroad is as follows: The artist or statuary first conceives a design; he puts it on paper; he studies his subject historically, and then makes a clay model; from that clay model he makes a plaster one which he either sells to a founder or reproducer, who is technically called an editor, or else he edits it himself . . .

The editor must, for the purpose of reproduction, either use the clay or plaster model of the statuary. That was so here. I find next two Roman Gladiators on this invoice. The original model of that was made by Guillemain and edited by him, and manufactured under his immediate personal supervision. He is a well-known sculptor and statuary, and these are his professional productions. I find next the statues of Penelope, Madeline, and the Retour des Champs, and busts of Delilah and Shakespeare. The busts are cast by Barbedienne. He is the most noted founder of bronze statuary. The others are cast by David, who is also a superior founder. I don't know what artist made the original clay model in these cases. I find also on the invoice a Venus de Milo, and Mercury, and David before the Combat, and a Bernard Palissy, all cast by Barbedienne. The original artist is unknown to me. Barbedienne is a maker of statues. When a sculptor has produced his clay model, unless he is himself an editor, he expends no further work on the subject; but all subsequent processes of founding, chasing and finishing are done by the editor. This is artistic work. There is another way of making bronze statuary, but the statues in this suit were made as I have stated . . . In all cases of editing it is absolutely necessary for the editor to have and use the model of a sculptor." Upon cross-examination this witness gave further evidence tending to show that, with the exception of Guillemain referred to, the only other sculptor is Basset; all the others are editors. The witness states: "I know Basset to be a sculptor; I have seen his models. He did not make the models for the Love and Flora. Any number of reproductions in bronze can be made from the artist's model without any further work of the sculptor."

The evidence thus given by different witnesses was sufficient to justify the defendant in asking the court to instruct the jury that, "If they find from the evidence that the imported articles were made, not by professional sculptors or statuaries, or by their assistants under their direction, but were made by skilled workmen or mechanics in the employ of the manufacturer, then their verdict should be for the defendant." This instruction the court refused, to which refusal counsel excepted. In its ruling in this respect we think the court erred. Under the instruction the jury might possibly have found that some of the articles, like the Roman Gladiators, were the productions of a statuary or a sculptor, within the meaning of the statute, while excluding others.

The judgment must therefore be reversed and the cause remanded for a new trial; and it is so ordered.

JOHN GLENN, Trustee of the NATIONAL EXPRESS AND TRANSPORTATION COMPANY, *Plff. in Err.*,

v.
THOMAS J. SUMNER.

(See S. C. Reporter's ed. 152-157.)

Practice of state courts—admissions in plea—conclusive verdict—immaterial exception.

1. As to the sufficiency and scope of pleadings, and the form and effect of verdicts, in actions at law, the circuit courts of the United States are governed by the practice of the courts of the State in which they are held.
2. Where the law authorizes a defendant to plead several pleas, he may use each plea in his defense, and the admissions unavoidably contained in one cannot be used against him in another.
3. In an action for an assessment on stock, the finding of the jury that defendant never subscribed for the stock and was not liable to pay the assessment, conclusively determines the action in his favor.
4. Consequently the ruling of the circuit court upon the effect of his discharge in bankruptcy is immaterial, and does not prejudice plaintiff.

[No. 67.]

Argued Nov. 5, 1889. Decided Nov. 18, 1889.

IN ERROR to the Circuit Court of the United States for the Western District of North Carolina to review a judgment in favor of defendant in an action by the trustee under an assignment from an insolvent corporation to recover an assessment upon its stock. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles Marshall and John Howard for plaintiff in error.

Mr. Samuel F. Phillips for defendant in error.

Mr. Justice Gray delivered the opinion of the court:

The sufficiency and scope of pleadings, and the form and effect of verdicts, in actions at law, are matters in which the circuit court of the United States are governed by the practice of the courts of the State in which they are held. *Rev. Stat. § 914; Bond v. Dustin*, 112 U. S. 604 [28:835].

By the Code of Civil Procedure of North Carolina the complaint is required to contain a plain and concise statement of the facts constituting the cause of action, and to have each material allegation distinctly numbered. § 93. The answer must contain "a general or special denial of each material allegation controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief," and "a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language." § 100. In the absence of a counterclaim, no replication is necessary, unless ordered by the court. § 105. A general verdict is defined to be one "by which the jury pronounce generally upon all or any of the issues." § 232.

In the present action, brought by the trustee under an assignment from an insolvent corporation to recover an assessment upon its stock, the allegations concerning the defendant's subscription for shares, and his liability, by reason

of his contract of subscription and of the assessment made thereon by the court of chancery, were contained in the second and seventh paragraphs of the complaint, and their truth was specifically denied in the first defense set up in the answer. The pleadings therefore distinctly presented the issue, whether the defendant made the subscription and was liable for the assessment, as well as the issues of the Statutes of Limitations and of a discharge in bankruptcy.

In the record sent up the verdict unequivocally states that the jury "find all issues in favor of the defendant," and the judgment repeats that "all the issues raised by the pleadings" were so found. This necessarily includes a finding that the defendant was never liable to pay the assessment. This explicit finding cannot be controlled by statements of fact in those parts of the answer which set up as independent defenses matters in avoidance, or in a bill of exceptions relating to one of those defenses only. Such statements, made for the purpose of presenting the issue to which they relate, are not evidence upon any other issue in the same record. As held by *Chief Justice Marshall*, sitting in the Circuit Court for the District of North Carolina, where the law authorizes a defendant to plead several pleas, he may use each plea in his defense, and the admissions unavoidably contained in one cannot be used against him in another. *Whitaker v. Freeman*, 1 Dev. L. 271, 280. See also *Knight v. McDouall*, 12 Ad. & El. 488, 442; *Gould v. Oliver*, 2 Man. & Gr. 208, 234; *S. C. 2 Scott, N. R. 241, 262*.

The finding of the jury, that the defendant never subscribed for the shares or was liable to pay the assessment, constitutes of itself a conclusive determination of the case in his favor. Consequently, the ruling of the circuit court upon the question, stated in the bill of exceptions and principally argued at the bar, of the effect of the discharge in bankruptcy, is wholly immaterial, and cannot have prejudiced the plaintiff, for, however that question should be decided, the defendant would be entitled to judgment upon the verdict. *Evans v. Pike*, 118 U. S. 241 [30:284]; *Moores v. Citizens Nat. Bank*, 104 U. S. 625 [26:870]; *Moriesey v. Bunting*, 1 Dev. L. 8.

Judgment affirmed.

JOHN B. ANTHONY, *Plff. in Err.*,

v.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

(See S. C. Reporter's ed. 172, 173.)

Refusal of instructions to jury—general exception.

1. Refusal to give instructions to the jury as requested cannot avail the plaintiff in error, where the substance of the instructions refused was contained in the charge subsequently given by the court.
2. A general exception to the whole charge will not avail a plaintiff in error, where the charge contains distinct propositions, and any one of them is free from objection.

[No. 77.]

Argued Nov. 7, 1889. Decided Nov. 18, 1889.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment for defendant in an action to recover damages for injuries to plaintiff by the derailment of a car attached to a train belonging to defendant in which the plaintiff was a passenger. *Affirmed.*

The facts are stated in the opinion.

Reported below, 27 Fed. Rep. 724.

Messrs. Nathan Frank and D. P. Dyer for plaintiff in error.

Mr. Henry W. Bond, for defendant in error:

Where instructions are asked in the aggregate, and there is anything exceptionable in either of them, the whole may be properly rejected by the court.

Worthington v. Mason, 101 U. S. 149 (25: 848); *Moulton v. American L. Ins. Co.* 111 U. S. 385 (28:447); *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 295 (28: 899); *Harvey v. Tyler*, 69 U. S. 2 Wall. 328 (17: 871); *Rogers v. The Marshal*, 68 U. S. 1 Wall. 644 (17: 714); *Johnston v. Jones*, 66 U. S. 1 Black, 209 (17: 117).

A general exception to the charge is of no avail, where the charge embraces several distinct propositions and any one of them is correct.

Burton v. West Jersey Ferry Co. 114 U. S. 474 (29: 215); *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584-596 (28: 527-532); *Cooper v. Schlesinger*, 111 U. S. 149 (28: 888); *Lincoln v. Clafin*, 74 U. S. 7 Wall. 132 (19: 106).

No judgment should be reversed in the supreme court where it is clear that the appellant is not prejudiced thereby.

Lancaster v. Collins, 115 U. S. 227 (29: 375); *Hornbuckle v. Stafford*, 111 U. S. 389-394 (28: 468-470); *Union C. S. Min. Co. v. Taylor*, 100 U. S. 87-92 (25: 541-548); *Cannon v. Pratt*, 99 U. S. 619-628 (25: 446-448).

Mr. Justice Field delivered the opinion of the court:

This was an action by the plaintiff to recover damages from The Louisville and Nashville Railroad Company for injuries suffered by him by reason of the derailment of a car attached to a train belonging to that Company, in which he was being carried as a passenger on its line from Louisville, Kentucky, to St. Louis, Missouri.

The answer of the defendant set up that the accident was caused by reason of a latent or hidden defect or flaw in the body of a steel rail laid on the track of the road—a defect which no outward inspection could detect. Issue being joined, the case was brought to trial and certain instructions to the jury were requested by the plaintiff, which set forth, with substantial accuracy, the liability of railroad companies for having defective roads, by which accidents are caused to passengers traveling in their cars. These instructions were refused, and to the refusal exceptions were taken. These exceptions, however, cannot avail the plaintiff in error, because the substance of the instructions refused was contained in the charge subsequently given by the court. The object of the instructions was to impart such information as would govern the jury in their deliberations and guide to a right conclusion in their verdict. Such information can generally be

most advantageously given after the conclusion of the testimony and the argument of counsel; and it is not material whether it be then given immediately in response to the request of counsel or be contained in the formal charge of the court.

The charge itself, though embodying the substance of the instructions asked, also referred to other matters presenting distinct propositions of law; but to none of them was any exception taken, pointing out specifically the matter objected to. Only a general exception to the whole charge was made; and a general exception of that kind will not avail a plaintiff in error, where the charge contains distinct propositions and any one of them is free from objection. The whole charge must be substantially wrong before such a general exception will avail for any purpose. This is the settled law established by numerous decisions of this court. (*Lincoln v. Clafin*, 74 U. S. 7 Wall. 132, 139 [19: 106, 109]; *Cooper v. Schlesinger*, 111 U. S. 148, 151 [28: 882, 883]; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 596 [28: 527, 531]; *Burton v. West Jersey Ferry Co.* 114 U. S. 474, 476 [29: 215, 216]). It is also required by the Fourth Rule of this court, which provides as follows: "The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."

Whatever, therefore, may be the actual merits of the plaintiff's claim to damages, nothing is presented to us by the record which we can examine.

Judgment affirmed.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, *Plff. in Err.*,

SAMUEL B. THOMAS, Sheriff and Tax Collector of HINDS COUNTY, ET AL.

(See S. C. Reporter's ed. 174-180.)

Jurisdiction to review state judgment—exemption of railroad from taxation—construction of charter—general rule—preamble to a law, effect of.

1. Where it is claimed that a state law impairs a contract contained in the charter of a corporation, exempting the corporation from taxation, and an action has been brought in a state court by it to restrain the collection of taxes illegally imposed, and a decision of the state court is against the exemption claimed, this court has jurisdiction to re-examine such decision.
2. A provision in an Act incorporating a railroad company, that the company, its stock, railroad and property "shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi River, but not to extend beyond twenty-five years from the date of the approval of this Act," does not exempt

such company or its property from taxation before said railroad is completed to the Mississippi River.

3. Exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the language used, construed *strictissimi juris*.

4. The preamble is no part of an Act, and cannot enlarge or confer powers, nor control the words of the Act, unless they are doubtful or ambiguous. [No. 1086.]

Submitted Oct. 28, 1889. Decided Nov. 18, 1889.

IN ERROR to the Supreme Court of the State of Mississippi to review a judgment of the Supreme Court of Mississippi, affirming a judgment of the Chancery Court of Hinds County, in that State, dismissing, on demurrer to the bill, an action against the sheriffs and tax collectors of the several counties through which the road extended, to enjoin the collection of taxes upon the property of a railroad, as unauthorized and illegal. *Affirmed.*

Reported below, 65 Miss. 553.

Statement by Mr. Chief Justice Fuller:

The Yazoo and Mississippi Valley Railroad Company was incorporated by an Act of the Mississippi Legislature, approved February 17, 1882, the preamble and sections 2, 8, 13 and 14 being as follows:

"Whereas, the construction of railroads to, in, through and along the Mississippi River basin, and the Yazoo and Sunflower River basins, penetrating these and other alluvial lands in this State, west of The Chicago, St. Louis and New Orleans Railroad, and connecting them by railroads and branches with other railroads west, east, north and south, is deemed and hereby declared to be a work of great public importance, and in strict accordance with the true policy and interest of this State, should be encouraged by legislative sanction and liberality; and whereas, the physical difficulties of constructing and maintaining railroads to, across, along or within either the Mississippi, Sunflower, Deer Creek or Yazoo bottoms or basins, or the other alluvial lands herein referred to, are such that no private company has so far been able to establish a railroad and branches developing said basins and alluvial lands, and connecting them with the railroad system of the country: Now, therefore, in order to induce the investment of capital in the construction, maintenance and operation of such a railroad and branches, and thus develop the resources and wealth of this State:"

"Sec. 2. *Be it further enacted*, That the said corporation shall also have, and it is hereby authorized and invested with the right and power to build and construct, and thereafter to use, operate, own and enjoy a railroad or railroads, with one or more tracks, into, along and across that part of the State of Mississippi lying between the Mississippi River and The Chicago, St. Louis and New Orleans Railroad, on such line or lines as shall be deemed best by the board of directors of the Company hereby chartered; one of said lines or a branch therefrom, to reach the Mississippi River at or near a point opposite Arkansas City if practicable, so as to connect such point on the east bank of the Mississippi River with some point or points on the

line of The Chicago, St. Louis and New Orleans Railroad; one of said lines of railroad, or a branch therefrom, to be extended to or pass through Yazoo City, Mississippi; and said Company shall have the right and power, and are hereby authorized, to build one or more branches or lines of railroads between the Mississippi River and Deer Creek, and between Deer Creek and the Sunflower River, and between the Sunflower and Yazoo Rivers, in the direction of or to the north line of this State, and extend the same, or any one thereof, in the direction of or to the south boundary line of this State, as shall from time to time, in the judgment of said Company, be deemed proper; and shall also be authorized to construct and operate such spurs or laterals from or along such main line or branches not exceeding one hundred miles in length, as may from time to time be necessary or proper to fully develop said country lying west of The Chicago, St. Louis and New Orleans Railroad, and east of the Mississippi River, in this State; and the said Company, as soon as and whenever, from time to time, they have located said line or lines of railroad or branches, spurs or laterals thereto, or any of them, shall file in the office of the secretary of state a statement showing the general line thereof as far as the same has up to that time been located."

"Sec. 8. *Be it further enacted*, That in order to encourage the investment of capital in the works which said Company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this State will and will not impose thereon, it is hereby declared that said Company, its stock, its railroads and appurtenances, and all its property in this State, necessary or incident to the full exercise of all the powers herein granted—not to include compresses and oil mills—shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi River, but not to extend beyond twenty-five years from the date of the approval of this Act; and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this State. All of said taxes to which the property of said Company may be subject in this State, whether for county or State, shall be collected by the treasurer of this State and paid into the state treasury, to be dealt with as the Legislature may direct; but said Company shall be exempt from taxation by cities and towns."

"Sec. 13. *Be it further enacted*, That unless said Company shall construct and have in operation twenty miles of railroad within three years from the passage of this Act, the Legislature shall have the right to declare this charter forfeited.

"Sec. 14. *Be it further enacted*, That all Acts in conflict with this Act, or any part thereof, be and the same are hereby repealed, and that this Act take effect and be in force from and after its passage, the public welfare requiring it." (Laws of Miss. 1882, p. 888.)

By section one the corporation is authorized to hold, purchase, receive and enjoy real and

personal estate in Mississippi and other States, however acquired; and to sell, rent, lease, mortgage or otherwise dispose thereof.

By section five, it is empowered to consolidate with any other company or companies, and acquire or lease other railroads in or out of the State for a term of years or in perpetuity; to do an express business over its own and other lines of railroads and steamboats or other conveyances in and out of the State; and to acquire, put up, use and operate a line or lines of telegraph in this or other State or States; by section six, to fix its own rate of charges, not to exceed a maximum indicated, provided, it may make special agreements with shippers as to lumber, coal, iron, etc., and other freights transported in carloads, without discrimination; by section seven, to enter on state lands anywhere and take in fee simple one hundred feet on each side of the center of any of its tracks, as right of way; to use any rocks, timber, earth, sand, gravel, water or other materials anywhere found on such state lands; to build bridges across any stream, whether navigable or not, with power and authority "to build, construct, maintain and operate of itself or with others, in or out of this State, a ferry across, or a tunnel under, or a bridge over, the Mississippi River at any point within this State, where its railroads, branches, laterals or spurs may reach said river;" to acquire all lands and materials necessary for landings, wharves, inclines or approaches thereto; to establish such landings, wharves, etc., as may be necessary or convenient in transporting freights, passengers, cars or rolling stock, loaded or unloaded, upon and across said Mississippi River, or any other river or body of water within this State; and to own, use and operate, and control by itself or others, "all such steamboats, ferries or other water craft as are or may be convenient or necessary in crossing such water, so as to develop trade over said lines of railroad;" by section nine, to insure persons and property, or either, transported or to be transported over any part of its line, and all other property coming into the possession or control of said Company for transportation or storage, and to charge reasonable compensation for such insurance or storage; to erect or acquire and use such depots, storage houses, wharves, etc., as shall be necessary or convenient; and to construct and operate compresses and oil mills; by section ten, to run its railroad, branches, laterals or spurs into the corporate limits of any incorporated town or city, and to build and operate its tracks, across or along any streets of such incorporated municipality; and by section eleven, the board of directors, stockholders, executive committee, officers and agents of the Company may hold their meetings and transact the Company's business in or out of the State, and establish such offices as they deem best in or out of the State, and all acts done by said Company, its officers or agents, out of the State shall be of the same force and effect as if done within the State.

By the Code of Mississippi of 1880, under the heading "Taxation of Railroads," taxation was provided for in certain sections, summarized by counsel, in substance, as follows:

"Section 597 provides that each railroad company owning and operating a railroad in

this State shall, on or before the third Monday in August in each year, file with the auditor of public accounts a complete schedule of all its property, real or personal, setting forth the length in miles or fractions of its road-bed, switches and side tracks, and showing the number of miles and fractions lying in the State, and in each county, and in each incorporated town, and the value of the whole, and each part as herein subdivided, capital stock, bonded indebtedness, the gross amount of receipts, the rolling stock, depot buildings, workhouses and machine shops, car shops, and stationary machinery, and the county and town in which situated, and the land on which they are situated, together with all other real, mixed and personal property.

"Section 599 requires: The auditor, when this schedule has been filed, and also in cases when it has been refused, is directed to notify the governor of the State of the fact, who shall proceed to convene the auditor, treasurer and Secretary of State, who, thus convened, shall assess the value of each railroad for purposes of taxation, and shall certify the same to the auditor of public accounts.

"Section 600 provides the means of ascertaining the items and value of the property. The board is directed to value the entire road and property, that value is to be divided into the number of miles in the State, and the valuation for each county is to be according to the number of miles of the road in each. The number of miles for the State shall be the product for state taxes, and the number of miles in each county the product for county taxes; and, having thus ascertained the sums to be taxed, they shall certify the same and the facts to the auditor.

"Under section 601* may be added ten percent on the amount of taxes assessed against railroad companies failing or refusing to file schedules as directed by section 597, or filing unfair ones.

"Section 608 provides that when the valuation so ascertained and certified has been furnished to the auditor, he shall ascertain the taxes due the State and counties, and notify the companies of the amounts due to the State, by letter or otherwise, and shall certify the sums to be taxed in the several counties for county purposes to the clerk of the chancery court of the county, and the amount to be taxed by cities and towns to the mayor thereof, and the sums so certified shall be entered on the collector's books, to be collected as other taxes; and by section 604 the auditor shall collect the taxes due the State by distress warrants issued to any sheriff, authorizing the seizure and sale of personal property in the county; and, should the personal property be insufficient, the auditor may sell the entire road and franchise to the highest bidder, and the purchaser shall be put in possession.

"Section 605. The county taxes are to be collected as all other taxes.

"Section 606. Railroad property situated in any city or incorporated town may be taxed for city or town purposes, upon a valuation thereof made upon the same basis as the property of individuals, and this section is to apply to the foregoing as well as to the following modes of taxation herein provided for.

"Section 607 provides that every railroad accepting this Act, and annually paying to the auditor of public accounts the taxes hereinafter provided for, and signifying their acceptance in writing, shall be exempt from all the foregoing provisions, except section 606 in relation to cities and towns, and such payment shall be in full of all state and county taxes, fifty per cent of the amount paid to be placed to the credit of the counties through which the railroad may pass, to be divided amongst them according to the number of miles in each. Lands owned by such railroad companies, and not used in operating the roads, shall be taxed as other property and for all purposes.

"(SEC. 608. Each railroad company whose line is in whole or in part in this State shall, if it accepts the provisions of this Act, pay to the state treasurer on the warrant of the auditor, on or before the 31st day of December, in each and every year, a privilege tax as follows, to wit: [Here follows a list of the existing railroads in the State, their names being given and the sums required of each.] *Provided*, That no railroad company shall be subject to taxation under this chapter while the same is in process of construction; but if any part of any road shall be finished and used for profit, the part so used shall be taxed although the whole road may not be finished." (Code Miss. 1880, p. 194 *et seq.*)

In 1884, section 604, so far as it provided for putting a purchaser of a railroad under the tax sale therein mentioned, in possession of the road, was repealed, and section 607 was so amended as to give to the counties two thirds, instead of fifty per cent, of the privilege tax.

Section 608 was amended so as to read:

"Each railroad company whose line is in whole or in part in this State shall, if it accepts the provisions of this Act, pay to the state treasurer, on the demand of the auditor, on or before the fifteenth day of December in each and every year, a privilege tax as follows, to wit: [then follow the names of the companies, not including appellant.] All the railroads not named herein, and not exempt from taxation by their charters, sixty dollars per mile: *Provided*, That no railroad company shall be subject to taxation under this chapter while the same is in process of construction; but if any part of any road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished, nor where the same is now exempt from taxation by its charter." (Laws Miss. 1884, chap. XXII, pp. 29, 30.)

In 1886 the privilege tax for all railroads was increased 25 per cent. (Acts 1886, p. 23.)

April 8, 1888, the Legislature of Mississippi passed an Act entitled "An Act to Provide for the Assessment of Past-Due and Unpaid Taxes on Railroads Which have Escaped the Payment thereof," the first section of which is in these words:

"That every railroad which has failed to pay the taxes for which the same was liable, for any year for which it was so liable, such railroad not being exempt by law or its charter from taxation for such years, and so being liable to taxation, shall be assessed for, and shall pay, an

ad valorem tax, to be assessed as hereinafter provided, unless such railroad shall, within sixty days after the passage of this Act, pay the taxes for which the same was liable according to its charter, or shall pay the privilege taxes for which the same was liable, as follows: If a standard or broad-gauge road, for the years prior to 1884, eighty dollars per mile; for the years 1884 and 1885, one hundred dollars per mile; and for the years 1886 and 1887, one hundred and twenty-five dollars per mile; and, if a narrow-gauge, or not standard or broad-gauge road, for the years prior to 1884, forty dollars per mile; for the years 1884 and 1885, fifty dollars per mile; and for the years 1886 and 1887, sixty-two dollars and fifty cents per mile." (Laws of Miss. 1888, chap. 28, p. 49.)

Section two provides that sixty days after the passage of the Act, the tax collectors of the several counties through which any railroad runs, which has failed to pay the taxes for which it was liable, and failed to avail itself of the provisions of the first section and paid taxes according thereto, shall assess, as additional assessment, every such railroad in their respective counties for the several years for which taxes have not been paid, on lists duly prepared for that purpose by the railroad commission, whose duty it shall be to prepare such lists immediately after the passage of the Act, and then proceeds with other particulars in relation to the valuation, assessment and collection, referring to various sections of the Code, so far as applicable.

Under this Act, taxes amounting to \$58,000 were assessed against appellant for the years 1885, 1886 and 1887, in respect to parts of its line which were operated in those years for business as a carrier, the road not having been completed to the Mississippi River.

On the 17th of July, 1888, appellant filed its bill in the Chancery Court of Hinds County against Thomas and others, the appellees here, who were sheriffs and tax collectors of the several counties through or into which the road extended, to enjoin the collection of the taxes so assessed upon its railroad property, as unauthorized and illegal. The illegality complained of was, that the tax was in violation of the Company's charter, by which, it was insisted, the property of the Company incident to its railroad operations was exempted from taxation; and it was averred that the charter, as respects the exemption claimed, was a contract "irrevocable and protected by the contract clause of the Constitution of the United States; that the unwarranted application of the general laws subsequently passed, as well as the application of the general laws in force at the time, is equivalent to a direct repeal of the charter exemption; that it is an effectual abrogation of its privilege of exemption by means of authority exercised under the State."

To this bill the defendants demurred. The demurrer was sustained, and the bill dismissed by the chancery court, and the complainant appealed to the Supreme Court of the State of Mississippi. The decree of the court below was affirmed by that court, and to this judgment of affirmance the plaintiff in error sued out the pending writ of error. The opinion of the Supreme Court was delivered by Arnold, *Ch. J.*, and is as follows:

"Statutes exempting persons or property from taxation, being in derogation of the sovereign authority and of common right, are, according to all the authorities, strictly construed. As taxation is the rule and exemption the exception, the intention to create an exemption must be expressed in clear and unambiguous terms, and it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain. Legislation which relieves any species of property from its due proportion of the burdens of government must be so clear that there can be neither reasonable doubt nor controversy in regard to its meaning. *Cooley on Taxation*, 2d ed. 204; *Bailey v. Maguire*, 89 U. S. 22 Wall. 215 [22:850]; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665 [29:770]; *Frantz v. Dobson*, 64 Miss. 631.

"In the light of these principles we are unable to find anything in the charter of appellant to warrant the exemption claimed in this case. It is quite plain to us that the exemption created by section eight of appellant's charter, Acts of 1883, p. 847, was intended to commence from and after the completion of a railroad to the Mississippi River and was to continue thereafter for twenty years if the road was completed to the river in five years from the date of the approval of the Act, but liable to be diminished by whatever time beyond five years was consumed in the completion of the road to the river.

"At the time appellant's charter was enacted, railroads in process of construction were not taxable under the general laws of the State (Code, § 608), and this may account for the charter providing exemption from taxation after the completion of the road, and none during the period of its construction."

Together with arguments upon the merits a motion to dismiss was also submitted.

Messrs. James Fentress and W. P. Harris, for plaintiff in error:

The eighth section of the charter grants an exemption from taxation, the period of exemption to begin at the date of the grant. This grant is binding on the State, and cannot be repealed or destroyed.

Piqua Branch Bank v. Knoop, 57 U. S. 16 How. 369 (14:977); *Jefferson Branch Bank v. Skelley*, 66 U. S. 1 Black, 486 (17:178); *Northwestern University v. Illinois*, 99 U. S. 809 (25:387); *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244 (27:922); *Furman v. Nichol*, 75 U. S. 8 Wall. 44 (19:370); *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665 (29:770).

When a particular Act assumes to regulate the entire subject of it, it is exclusive.

Swann v. Buck, 40 Miss. 263; *Gibbons v. Brittenum*, 56 Miss. 232; *Mississippi Mills v. Cook*, 56 Miss. 40; *Cooley on Taxation*, 377 *et seq.*; *Stone v. Yazoo & M. V. R. Co.* 62 Miss. 607.

Messrs. T. M. Miller and Marcellus Green, for defendants in error:

Legislation which relieves any species of property from its due proportion of the burdens of government must be so clear that there can be neither reasonable doubt nor controversy in regard to its meaning.

Cooley on Taxation, 2d ed. 204; *Bailey v. Maguire*, 89 U. S. 22 Wall. 215 (22:850); *Vicks-*

burg, S. & P. R. Co. v. Dennis, 116 U. S. 665 (29:770); *Dennis v. Vicksburg, S. & P. R. Co.* 84 La. Ann. 954.

Mr. Chief Justice Fuller delivered the opinion of the court:

The Supreme Court of Mississippi did not put its decision upon the ground that it was not competent under the State Constitution for the State to contract with the Company that the latter should not be subjected to taxation, but upon the ground that the exemption claimed could not be allowed. The taxes in question were assessed under the Act of 1888, and if the charter of the Company, which became a law on the 17th of February, 1882, inhibited such taxation, then this court has jurisdiction to re-examine the conclusion reached. Although by the terms of the Act of 1888 the taxes therein referred to were not to be levied as against a railroad exempt by law or charter, yet the Supreme Court held that this company is not exempt, and is embraced within the Act; so that if a contract of exemption is contained in the Company's charter, then the obligation of that contract is impaired by the Act of 1888, which must be considered, under the ruling of the Supreme Court, as intended to apply to the Company. The result is the same, although the Act of 1888 be regarded as simply putting in force revenue laws existing at the date of the Company's charter, rather than itself imposing taxes; for if the contract existed those laws became inoperative, and would be reinstated by the Act of 1888. The motion to dismiss the writ of error is therefore overruled.

By the eighth section of the Company's charter it was declared "that said Company, its stock, its railroads and appurtenances, and all its property in this State necessary or incident to the full exercise of all the powers herein granted—not to include compresses and oil mills—shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi River, but not to the extend beyond twenty-five years from the date of the approval of this Act; and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this State." If the provision had terminated with the words "Mississippi River" it would not be open to argument in this court that the exemption claimed did not commence until the river was reached.

In *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665 [29:770], it was held that a provision in a railroad charter by which "the capital stock of said company shall be exempt from taxation, and its road, fixtures, work shops, warehouses, vehicles of transportation and other appurtenances, shall be exempt from taxation for ten years after the completion of said road within the limits of this State," did not exempt the road, fixtures and appurtenances from taxation before such completion. It was argued there, as it is here, that the Legislature, while exempting the railroad from taxation for ten years after its completion, could not have intended to subject it to taxation before its completion, and when its earnings were little or nothing; on the other hand, it was argued there, as it is here, that one reason for defining the exemption of the railroad and its appurte-

nances from taxation, as "for ten years after the completion of said road," without including any time before its completion, was to secure a prompt execution of the work and to prevent the corporation from defeating the principal object of the grant, and prolonging its own immunity from taxation by postponing or omitting the completion of a portion of the road; but this court said, speaking through *Mr. Justice Gray*: "Each of these arguments rests too much on inference and conjecture to afford a safe ground of decision where the words of the statute creating the exemption are plain, definite and unambiguous." It appeared there, as it does here, that the taxing officers of the State had omitted in previous years to assess the property, but it was held that such omission could not "control the duty imposed by law upon their successors, or the power of the Legislature, or the legal construction of the statute under which the exemption is claimed." And the court took occasion to reiterate the well settled rule that exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the language used, construed *strictissimi juris*.

Tested by that rule, did the addition of the words "but not to extend beyond twenty-five years from the date of the approval of this Act" operate to create an exemption of twenty-five years from the date of the Act, subject to being reduced to less than that if the road were completed to the river before the lapse of five years, but for twenty years at all events; or did it operate to reduce the term of the twenty years' exemption by so much as the completion of the road to the river took over five years? Upon the one view there would be a loss of exemption through rapidity of construction; in the other view, a gain, or, rather, the prevention of a loss. Does it appear by clear and unambiguous language that the State intended to surrender the right of taxation for twenty-five years? If the surrender admits of a reasonable construction consistent with the reservation of the power for a portion of the longer period, then for that portion it cannot be held to have been surrendered. Is not the construction that the exemption was to be for a term of twenty years, subject to a diminution of that term if the river were not reached in five years, as reasonable as the opposite construction; and if the latter construction be adopted, would it not be extending the exemption beyond what the language of the concession clearly requires? Can an exemption expressly limited to a term of twenty years after the accomplishment of a designated work, but not to extend beyond twenty-five years from a certain date, be read as an exemption for twenty-five years, but not to extend beyond twenty years from the completion of that work? It seems to us, notwithstanding the able and ingenious arguments of appellant's counsel, that these questions answer themselves, and that the exemption claimed cannot be sustained.

By the general law of the State of Mississippi in force at the time the charter of appellant was granted, it was provided that no railroad company should be subject to taxation while the same was in process of construction, but if

any part of any road should be completed so as to be used for profit, the part so used should be taxed, although the whole road might not be finished. It is admitted that the taxes here were levied in respect to parts of the road which were in operation.

The second section of its charter empowered the corporation to build and construct, and thereafter use, operate, own and enjoy a railroad or railroads into, along and across that part of the State lying between the Mississippi River and The Chicago, St. Louis and New Orleans Railroad, "one of said lines, or a branch therefrom, to reach the Mississippi River at or near a point opposite Arkansas City if practicable, so as to connect such point on the east bank of the Mississippi River with some point or points on the line of The Chicago, St. Louis and New Orleans Railroad;" and by section seven it was empowered to "build, construct, maintain and operate of itself, or with others, in or out of this State, a ferry across, or a tunnel under, or a bridge over, the Mississippi River, at any point within this State where its railroads, branches, laterals or spurs may reach said river;" and to acquire lands, etc., for landings, wharves, inclines, etc., and to establish said landings, wharves, inclines, etc., as might be necessary or convenient in transporting freights, passengers, etc., upon and across said Mississippi River. In our opinion it cannot be doubted that a principal object of the grant to the Company was the building of a line across the State from the Chicago Railroad to the Mississippi River, and that the point of contact was to be opposite Arkansas City, if that were practicable. Five years was contemplated as sufficient to complete the road to the river, so that the twenty years' exemption should commence.

By the thirteenth section it was provided that the Legislature might declare the charter forfeited, if twenty miles were not constructed and in operation within three years from the passage of the Act. This indicates that the Legislature did not assume that the line might probably be extended to the river in less than five years, and were not thereby induced to insert the twenty years as a limitation on the twenty-five. No reason is perceived for limiting the exemption to begin with the completion of the railroad to the Mississippi River, if it were intended that the exemption should be for more than twenty years at all events, commencing with the approval of the Act.

The question when the property may be taxed is answered by ascertaining when the period of the specified exemption begins; for until then the general law provided that while the road could not be taxed during the process of construction, such parts as were finished and in operation could be, though they might be for a time exempt under the charter after the line was completed to the Mississippi River. When the Mississippi River was reached then the period of exemption would begin; but how long it would continue would depend upon the length of time to elapse before the end of twenty-five years from the approval of the charter. And this disposes of the argument that it is immaterial whether the period of exemption is twenty or twenty-five years, because it is agreed that the property could not

be taxed until the period of exemption, whatever that is, shall have expired, for that ignores the real inquiry, which is as to when the exemption commences.

Again, the preamble to the Act is referred to by counsel as sustaining their construction, because it is therein declared that the work is one of "great public importance," and "to be encouraged by legislative sanction and liberality," and that "the physical difficulties of constructing and maintaining railroads to, across, along or within either the Mississippi, Sunflower, Deer Creek or Yazoo bottoms or basins, or the other alluvial lands herein referred to, are such that no private company has so far been able to establish a railroad and branches developing said basins and alluvial lands, and connecting them with the railroad system of the country." But as the preamble is no part of the Act, and cannot enlarge or confer powers, nor control the words of the Act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the Legislature is in itself fatal to the claim set up. Indeed, what is therein stated appears to us to be quite as referable to the remarkably extensive powers granted as to the assignment of reasons for exemption from taxation.

It is true that it is stated in section eight that, in order to encourage the investment of capital in the enterprise, and "to make certain in advance of such investment, and as inducement and consideration therefor, the taxes and burdens which this State will and will not impose thereon," the exemption is thereby declared. Yet if, notwithstanding that statement, the matter were left uncertain, that would not allow the court to make it certain by construction, and to remove ambiguity upon the presumption of a legislative intent contrary to the fixed presumption where the rights of the public are involved. In short there can be no uncertainty in the result when the language used is construed, as it must be, in accordance with thoroughly settled principles. After stating the exemption in controversy, section eight concludes as follows: "And when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this State. All of said taxes to which the property of said Company may be subject in this State, whether for county or State, shall be collected by the treasurer of this State and paid into the state treasury; to be dealt with as the Legislature may direct; but said Company shall be exempt from taxation by cities and towns."

Since upon the expiration of the period of exemption, it would have followed that the property of the Company would be subject to taxation at the same rate as other property, it may be that the object of the final clause was to create a scheme of taxation peculiar to the road. Upon the comprehensiveness and validity of such scheme we do not undertake to pass. It was not to take effect until the exemption expired, and the terms in which it was couched do not render the commencement of the exemption other than the Supreme Court held it to be.

The case is clearly controlled by our decision

in *Vicksburg, S. & P. R. Co. v. Dennis*, *supra*, and the judgment must therefore be affirmed.

THE YAZOO & MISSISSIPPI VALLEY
RAILROAD COMPANY, *Appt.*,
v.
THE BOARD OF LEVEE COMMISSIONERS
OF THE YAZOO-MISSISSIPPI
DELTA ET AL.

(See S. C. Reporter's ed. 190, 191.)

Former decision followed.

This suit sets up the same exemption from taxes, under the same circumstances, relied on in *Yazoo and Mississippi Valley Railroad Company v. Thomas*, No. 1086, *ante*, p. 802, and is governed by the decision in that case.

[No 1087.]

Submitted Oct. 28, 1889. Decided Nov. 18, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Mississippi dismissing a suit against the Board of Levee Commissioners and certain Sheriffs and Tax Collectors to enjoin the collection of taxes levied under an Act of the Legislature against property of the Yazoo and Mississippi Valley Railroad Company. *Affirmed.*

The facts are stated in the opinion.

Messrs. James Fentress and W. P. Harris for appellant.

Messrs. S. S. Calhoun and Marcellus Green for appellees.

Mr. Chief Justice Fuller delivered the opinion of the court:

This is an appeal by plaintiff in the suit from the decree of the Circuit Court for the Southern District of Mississippi, dismissing its bill of complaint filed in that court against the appellees, The Board of Levee Commissioners, and certain sheriffs and tax collectors, to enjoin the collection of taxes levied under an Act of the Legislature, creating such Board of Commissioners, for the purpose of providing for the payment of the principal and interest of bonds authorized to be issued by the Board, the proceeds of which were to be applied to the construction and repair of levees on the Mississippi River.

The bill set up the same exemption relied on in *Yazoo & M. V. R. Co. v. Thomas*, No 1086 [*ante*, p. 802], and it was insisted that the taxes sought to be collected were unauthorized and illegal by reason of such exemption; and that the law imposing the taxes impaired the obligation of the alleged contract of exemption and thus violated the Constitution of the United States, the litigation therefore making a controversy arising under that Constitution. Without considering whether any other ground for affirming the decree exists, it is sufficient to say that this case is disposed of by the decision which has just been announced in that referred to.

Decree affirmed.

THE MISSOURI PACIFIC RAILWAY
COMPANY, *Pf. in Err.*,

THE CHICAGO & ALTON RAILROAD
COMPANY.

(See S. C. Reporter's ed. 191, 192.)

Overruling motion for new trial—discretion—review.

1. Overruling a motion for a new trial is a matter of discretion and not a subject of exception, according to the practice of the courts of the United States.
2. Courts of the United States are independent of any statute or practice prevailing in courts of the State where the trial is had in regard to motions for a new trial and bills of exceptions.

[No. 86.]

Submitted Nov. 5, 1889. Decided Nov. 25, 1889.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri. *Affirmed.*

Opinion below, 25 Fed. Rep. 317.

Mr. John F. Dillon, for plaintiff in error: There is no discretion to overrule a motion for a new trial based on a plain and palpable misconception of a material fact, as in this case: a fact admitted by the pleadings.

Messrs. Alexander Martin and Robert H. Kern, for defendant in error:

If there be no exceptions to the rulings of the court in the progress of the trial, and no special finding of facts, the judgment must be affirmed, as this court has no power to re-examine any question decided by the circuit court.

Martinton v. Fairbanks, 112 U. S. 670 (28: 862); *Atina Insurance Co. v. Boon*, 95 U. S. 118-189 (24: 396-400); *Springfield F. & M. Ins. Co. v. Sea*, 88 U. S. 21 Wall. 160 (22: 512); *The Abbottsford*, 98 U. S. 441 (25: 168).

Mr. Justice Gray delivered the opinion of the court:

In this action, tried by the circuit court without a jury, there is no case stated by the parties, or finding of facts by the court. The bill of exceptions, after setting forth all the evidence introduced at the trial, states that "there were no declarations of law asked for, or given by the court," and the single exception taken is to the overruling of a motion for a new trial, which is a matter of discretion, and not a subject of exception, according to the practice of the courts of the United States. In regard to motions for a new trial and bills of exceptions, those courts are independent of any statute or practice prevailing in the courts of the State in which the trial is had. *Indianapolis Railroad v. Horst*, 98 U. S. 291 [23: 898]; *Newcomb v. Wood*, 97 U. S. 581 [24: 1085]; *Chateaugay Ore & Iron Co., Petitioner*, 128 U. S. 544 [32: 508].

Judgment affirmed.

PETER RAIMOND, *Pf. in Err.*,

THE PARISH OF TERREBONNE.

(See S. C. Reporter's ed. 192-195.)

Presenting case on writ of error—findings.

182 U. S.

U. S., Book 83.

A statement of facts by the parties, or a finding of facts by the circuit court, is strictly analogous to a special verdict, and in order to present any question on writ of error must state the ultimate facts of the case, presenting questions of law only.

[No. 88.]

Argued Nov. 12, 1889. Decided Nov. 25, 1889.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana. *Affirmed.*

Reported below, 28 Fed. Rep. 773.

Statement by **Mr. Justice Gray**:

This was an action by a citizen of Mississippi against a Parish in Louisiana upon certain bonds and coupons, amounting with interest to more than \$5,000 in value, alleged in the petition and denied in the answer to have been issued in accordance with the Statute of Louisiana of March 28, 1874, c. 74, and to have been purchased by the plaintiff in good faith and before maturity.

After the case had been tried by the circuit court pursuant to an agreement of counsel in open court to waive the intervention of a jury, and judgment for the defendant had been rendered but not signed, and, pending a motion for a new trial, the counsel of the parties filed an agreement in writing, waiving a jury and submitting the case to the decision of the court upon what they called a "statement of facts," and stipulating that "the court shall find the facts in accordance therewith, and change [charge?] the law so that a bill of exceptions may be made up or error be assigned to the Supreme Court."

That "statement of facts" consisted of a description of the instruments sued on; a reference to the plaintiff's deposition on file, testifying to the circumstances under which he purchased them; an abstract of the testimony of another witness for the plaintiff to those circumstances; and a statement of the proof offered by the defendant as to the circumstances under which the bonds were issued.

The court, after setting forth the statement so filed, added this finding: "The court further finds that it was admitted on the trial herein that as far as the facts were stated in the case of *Rabasse v. Police Jury of Terrebonne Parish*, in the opinion of **Mr. Justice Manning**, reported in 80 La. Ann. 287, they were a correct statement of the facts of this case, though each party claimed that there existed additional facts beyond those stated in said opinion."

The court found as conclusions of law, "that the construction given to the statute authorizing the issue of bonds for the debts of said Parish should in this cause, and as to the points determined in said cause by the Supreme Court of this State—i. e., *Rabasse v. The Parish*—should be deemed and held as the construction of a municipal law and not as that of a commercial law, and is therefore binding upon this court; and further, that if said construction should be deemed and held as that of a commercial law, then the court adopts it as a just and proper inference from the facts of the case," and "that the petition herein should be dismissed, and that there be judgment for the defendant."

The court thereupon signed the judgment previously rendered, which was as follows:

"The parties in this cause having in open court waived the intervention of a jury, and submitted the cause to the court on the facts set forth in the opinion by Mr. Justice Mauney, in *Rabasse v. Parish of Terrebonne*, 80 La. Ann. 287, and the court, having considered the said agreed statement of facts and being advised in the premises, finds the issues of law raised by the pleadings in favor of the defendant; and, for the reasons assigned by the court in the opinion this day read and filed, it is ordered, adjudged and decreed, both the circuit and district judges concurring, that there be judgment in favor of the defendant, The Parish of Terrebonne, with costs, and against the demands of the plaintiff, Peter Raimond." 28 Fed. Rep. 773.

The plaintiff, without tendering a bill of exceptions, sued out this writ of error.

Mr. Alfred Goldthwaite for plaintiff in error.

Messrs. J. D. Rouse and Wm. Grant, for defendant in error:

This is not a finding of facts, but a statement by the court that such evidence was offered by the plaintiff, and such proof made by the defendant, as is set forth in the statement, that other facts were before the court by admission of the parties, and that the existence of other facts than those stated in said opinion was claimed. As a finding of fact it is insufficient, and amounts to no more than a general verdict upon which, in the absence of any wrongful admission or rejection of evidence, the judgment is not subject to review.

Norris v. Jackson, 76 U. S. 9 Wall. 125 (19:608); *Springfield F. & M. Ins. Co. v. Sea*, 88 U. S. 21 Wall. 160 (22:512); *Durst v. Morris*, 81 U. S. 14 Wall. 484 (20:722); *Mercantile Mutual Insurance Company v. Folsom*, 85 U. S. 18 Wall. 287 (21:827).

Mr. Justice Gray delivered the opinion of the court:

Assuming the agreement in writing, waiving a jury and submitting the case to the decision of the circuit court, to have been seasonably filed, the record is not in such a shape as to authorize this court to review that decision.

By the settled construction of the Acts of Congress defining the appellate jurisdiction of this court, either a statement of facts by the parties, or a finding of facts by the circuit court, is strictly analogous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances which may tend to prove the ultimate facts, or from which they may be inferred. *Burr v. Des Moines R. & Nav. Co.* 68 U. S. 1 Wall. 99 (17:561); *Norris v. Jackson*, 76 U. S. 9 Wall. 125 (19:608); *Martinton v. Fairbanks*, 112 U. S. 870 (28:862).

In the present case the pleadings present issues of fact. There is no bill of exceptions. The so-called statement of facts is mainly a recapitulation of evidence introduced by the parties at the trial. The case was not submitted to the decision of the court upon that statement only, but the court made a further finding

as to what took place at the trial. That finding merely states that the parties admitted that, so far as the facts were stated in a certain reported opinion of the Supreme Court of Louisiana, they were a correct statement of the facts of this case; but that each party claimed that there existed additional facts, as to which there is no finding. On referring to that opinion, such facts as are there stated appear to be scattered through it, intermingled with statements of conflicting evidence, and with the court's conclusions of fact upon that evidence, as well as with its conclusions of law. *Rabasse v. Police Jury of Terrebonne Parish*, 80 La. Ann. 287.

In short there is nothing in the present case which can be called, in any legal or proper sense, either a statement of facts by the parties, or a finding of facts by the court; and no question of law is presented in such a form as to authorize this court to consider it.

Judgment affirmed.

JAMES E. VANE, App't.,
v.

RICHARD S. NEWCOMBE and JAMES G. SMITH, Receivers of the BANKERS AND MERCHANTS' TELEGRAPH COMPANY OF NEW YORK.

(See S. C. Reporter's ed. 220-231.)

Indiana Lien Law—contractor not an employé—work and labor—legislative intent—common-law lien, waiver of—agreement.

1. A contractor with a corporation is not an employé of the corporation within the meaning of section 1 of the Indiana Act of 1877, § 5286, Rev. Stat., which gives a lien to employes for work and labor done and performed by them for the corporation.
2. To be an employé within the meaning of the Statute the plaintiff must have been a servant, and not, as he was, a mere contractor, bound only to produce a certain result of labor, but free to dispose of his own time and personal effort according to his pleasure, without responsibility to the other party.
3. The Statute gives a lien to employes of the corporation only for work and labor, and not for the value of materials furnished, nor for advances of money made.
4. In cases of doubt or uncertainty, Acts in part *matéria* may be referred to, in order to discern the intent of the Legislature in the use of particular terms.
5. Plaintiff, by perfecting his claim for a lien under the Statute, waived any right he had to assert his common-law lien on the personal property and earnings of the corporation, and, also, gave up any right he had to a common-law lien as to the wires, by giving up possession of them.
6. The instrument executed by the receiver of the corporation, that the use of the wires by it shall not be construed as impairing or interfering with the lien of the plaintiff thereon, did not confer any lien upon the property.

[No. 69.]

Argued Nov. 6, 1889. Decided Nov. 25, 1889.

APPEAL from a decree of the Circuit Court of the United States for the District of Indiana disallowing plaintiff's claim for a lien

upon the property of a Telegraph Company. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 27 Fed. Rep. 588.

Mr. Addison C. Harris, for appellant:

If Vane has a lien in law or equity he sought the proper court in which to secure his rights.

Blair v. St. Louis, H. & K. R. Co. 17 Am. & Eng. R. R. Cas. 837, 19 Fed. Rep. 861.

Vane has a statutory lien.

Ind. Rev. Stat. 1881, chap. 75, § 5206, chap. 79, §§ 5276, 5311, chap. 86, § 5471; Elliott's Sup. (1889) chap. 28, § 1596 *et seq.*, §§ 1092, 1094, chap. 81, §§ 1638-1712.

Statutes for the benefit of laborers, and the like, secure a liberal construction in this court.

Davis v. Alcord, 94 U. S. 545 (24: 283); *Flagstaff Silver Min. Co. v. Oullins*, 104 U. S. 176 (26: 704).

The Act being remedial must be so construed (if possible) as to make it effect the evident purpose for which it was enacted.

Platt v. Union Pac. R. Co. 99 U. S. 60 (25: 428); *Connecticut Mut. L. Ins. Co. v. Talbot*, 12 West. Rep. 289, 113 Ind. 373; *Stout v. Grant County*, 5 West. Rep. 635, 107 Ind. 848; *Edger v. Randolph County*, 70 Ind. 338.

Courts in construing a statute may recur to the history of the times when it was passed.

U. S. v. Union Pac. R. Co. 91 U. S. 79 (23: 228); *Maryland v. Baltimore & O. R. Co.* 89 U. S. 22 Wall. 118 (22: 715); *Kansas Pac. R. Co. v. Prescott*, 83 U. S. 16 Wall. 609 (21: 374); *Preston v. Brouder*, 14 U. S. 1 Wheat. 121 (4: 50).

Acts *in pari materia* may be referred to.

Stout v. Grant County, 5 West. Rep. 635, 107 Ind. 848; *Lehigh Coal & Nav. Co. v. Central R. Co.* 29 N. J. Eq. 252; *Watson v. Watson Mfg. Co.* 30 N. J. Eq. 588; *Warren v. Sohn*, 11 West. Rep. 361, 112 Ind. 218; *Hogan v. Cushing*, 49 Wis. 169.

Vane was an employé and had a lien.

Groinger v. Aynsley, L. R. 6 Q. B. Div. 182; *Flagstaff Silver Min. Co. v. Oullins*, 104 U. S. 176 (26: 704); *Munger v. Lenroot*, 32 Wis. 541; *Watson v. Watson Mfg. Co.* 30 N. J. Eq. 588; *Reg. v. Freke*, 5 El. & Bl. 944; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 643 (32: 819); *Gurney v. Atlantic & G. W. R. Co.* 58 N. Y. 858; *Re Astor*, 50 N. Y. 363; *St. Paul Water Co. v. Ware*, 83 U. S. 16 Wall. 566 (21: 486); Phil. Mec. Liens, 57; *Stons v. U. S.* 3 Ct. Cl. 260; *Warren v. Sohn*, 11 West. Rep. 361, 112 Ind. 218.

Vane had a common-law lien.

Holderman v. Manier, 1 West. Rep. 860, 104 Ind. 118; *Darter v. Brown*, 48 Ind. 395; *East v. Ferguson*, 59 Ind. 169; *Hanna v. Phelps*, 7 Ind. 21; *Shaw v. Bradley*, 59 Mich. 204; *Hall v. Tittabawassee Boom Co.* 51 Mich. 377; 1 Jones on Liens, § 788.

He did not lose his lien by yielding possession.

McFarland v. Wheeler, 26 Wend. 467.

Leaseholds are personal property in Indiana.

McCarty v. Burnet, 84 Ind. 26; *McDowell v. Hendrix*, 87 Ind. 513; *Schee v. Wiseman*, 79 Ind. 889; *Smith v. Dodds*, 85 Ind. 452-456; *Meni v. Rathbone*, 21 Ind. 466, 467; *Cade v. Brownlee*, 15 Ind. 369; *Duchane v. Goodtitle*, 1 Blackf. 117.

The interest of the New York company was personal property.

Turner v. Indianapolis, B. & W. R. Co. 8

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Biss, 889; *Boston Safe-Deposit & Trust Co. v. Bankers & M. Teleg. Co.* 86 Fed. Rep. 288; *Western U. Teleg. Co. v. Burlington & S. W. R. Co.* 11 Fed. Rep. 6; *Holderman v. Manier*, 1 West. Rep. 860, 104 Ind. 118; 1 Jones on Liens, § 789; *Green v. Farmer*, 4 Burr. 2214.

As between debtor and creditor the doctrine of liens is so equitable that it cannot be favored too much.

Jacobs v. Latour, 5 Bing. 180; *Arians v. Brickley*, 65 Wis. 267; *Hall v. Tittabawassee Boom Co.* 51 Mich. 377; *Webber v. Cogswell*, 2 Canada S. C. 15; *Williams v. Allsup*, 10 C. B. (N. S.) 417; *Hammond v. Danielson*, 126 Mass. 294; *Townsend v. Newell*, 14 Pick. 332.

Vane had an equitable lien.

Fosdick v. Schall, 99 U. S. 235 (25: 389); *Miltenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286 (27: 117); *Barton v. Barbour*, 104 U. S. 126 (26: 672); *Hale v. Frost*, 99 U. S. 889 (25: 419); *Gibert v. Washington City, V. M. & G. S. R. Co.* 88 Gratt. 586; *Turner v. Indianapolis, B. & W. R. Co.* 8 Biss. 315; *Douglass v. Cline*, 12 Bush, 608; *Atkins v. Petersburg R. Co.* 8 Hughes, 307, 320; *Union Trust Co. v. Walker*, 107 U. S. 596 (27: 490); *Farmers Loan & Trust Co. v. Vicksburg & M. R. Co.* 83 Fed. Rep. 778; *Union Trust Co. v. Souther*, 107 U. S. 591 (27: 488); *Burnham v. Bowen*, 111 U. S. 776 (28: 596); *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434 (29: 963); *Blair v. St. Louis, H. & K. R. Co.* 32 Fed. Rep. 471.

The arrangement of November 19, 1884, fixed a lien on the property.

2 Story, Eq. Jur. 87; 3 Pom. Eq. Jur. chap. 7, § 1233 *et seq.*; *Perry v. Board of Missions*, 3 Cent. Rep. 62, 102 N. Y. 99; *Payne v. Wilson*, 74 N. Y. 348; *Unity J. S. Mut. Bkg. Ass. v. King*, 25 Beav. 72; *Clarke v. Southwick*, 1 Curt. C. C. 297; *Gregory v. Morris*, 96 U. S. 619 (24: 740); *Pinch v. Anthony*, 8 Allen, 536; *Re Pavy's Pat. F. Fabric Co. L. R.* 1 Ch. Div. 631.

Mr. Robert G. Ingersoll, for appellees: To avail himself of the Act Vane must have been an employé.

Aldridge v. Williams, 44 U. S. 3 How. 9 (11: 469); *Chase v. Lord*, 77 N. Y. 1; *People v. Wood*, 71 N. Y. 871.

The legislative intent in statutes must be gathered from the language used in the law.

Re Rochester Water Comrs. 66 N. Y. 413; *Hudson Iron Co. v. Alger*, 54 N. Y. 173; *Mushlitt v. Silverman*, 50 N. Y. 380.

The term "laborer" cannot be construed as designating one who contracts for and furnishes the labor and service of others.

Balch v. New York & O. M. R. Co. 46 N. Y. 524; *Aikin v. Wasson*, 24 N. Y. 482.

Vane, a contractor, has no lien under the Employés' Act; but if he has, his lien must be subject to the claims of the holders of receivers' certificates.

Davis v. Alcord, 94 U. S. 545 (24: 283); *Cook v. Cobb* (N. C.) 7 S. E. Rep. 700; *Western Div. of Western N. O. R. Co. v. Drew*, 3 Woods, 691; Jones on R. R. Securities, 537, chap. 17; *Hoover v. Montclair & G. L. R. Co.* 29 N. J. Eq. 4; Beach on Receivers, I. 896, § 879; *Meyer v. Johnston*, 53 Ala. 349; *Wallace v. Loomis*, 97 U. S. 146 (24: 895); *Dennison v. Chicago, A. & St. L. R. Co.* 4 Biss. 414; *Tommey v. Spartanburg & A. R. Co.* 4 Hughes, 640; *Metropolitan Trust Co. v. Tonawanda Valley & O. R. Co.* 4 Cent.

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Rep. 384, 108 N. Y. 249; *Raht v. Attrill*, 9 Cent. Rep. 238, 106 N. Y. 432; *Neafle's Appeal* (Pa.) 11 Cent. Rep. 186; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 437 (29: 964); *Hassall v. Wilcox*, 130 U. S. 493-508 (32: 1001-1005).

Mr. Justice Blatchford delivered the opinion of the court:

On the filing of a bill in equity, in October, 1884, in the Circuit Court of the United States for the District of Indiana, by The Bankers and Merchants' Telegraph Company of Indiana, an Indiana corporation, against The Bankers and Merchants' Telegraph Company of New York, a New York corporation, praying for an accounting between the defendant and the plaintiff as to moneys due by the former to the latter, and for a determination of the relative rights of the parties to certain telegraph lines and property in Indiana, and for the appointment of receivers *pendente lite*, to take possession of the lines and property, an order was made by the court appointing Richard S. Newcombe and James G. Smith receivers of all the lines and property of the plaintiff and the defendant, or either of them, situated within the jurisdiction of the court. The same persons had been appointed receivers of the defendant, in a suit brought by one Day in the Supreme Court of the State of New York.

In March, 1885, James E. Vane filed in the suit in the circuit court an intervening petition. It set forth that in June, 1884, the defendant had employed Vane to put six additional wires on and along the telegraph poles then owned by the defendant, from Freeport, Ohio, to Hammond, Indiana, and to attach such wires to the proper fixtures and appendages to the poles, so that the Company might have six additional, independent wires between those places, and agreed with Vane to pay him, as compensation for the work, \$45 for every mile of wire put and strung upon the poles, the defendant agreeing to furnish all of the wire and other necessary material, which were to be delivered at the nearest distributive point along the route of the line, and to pay all freight for their shipment to the various points along the route, and to deliver them to Vane free of any charge at such points. The petition further alleged that, in June, 1884, the defendant directed Vane to construct two lines westwardly from Hammond in the direction of Chicago, Illinois; that he proceeded to erect and construct such two lines to a point about ten miles east of the court-house in Chicago; that the defendant had failed to pay the freights on the wire and materials; that Vane, at its request, had furnished money to pay such freights and also money to purchase necessary materials used in making the line; that the defendant had committed other breaches of its agreement with Vane, and in consequence owed him a large sum of money; that he had executed the work in all things as directed by the defendant; that when he had completed the six lines to Lake Station, in Lake County, Indiana, the defendant owed him about \$16,000; that he then disconnected the six wires from their westerly connections, and held physical possession of them, for his own protection; that while he so held them, in their disconnect-

ed condition, the receivers, Newcombe and Smith, entered into the following agreement with him, in consideration that he would allow the lines to be connected with other lines running westerly into Chicago:

"Chicago, Ill., Nov. 19th, 1884.

"It is hereby agreed and understood that the telegraph wires on the poles of The Bankers and Merchants' Telegraph Company in the State of Indiana, which were strung by J. E. Vane, and upon which he claims a lien, shall be connected up with the wires of the said Company from Hammond, Indiana, to Chicago, Illinois, now constructed and to be constructed, and shall be used for telegraph business by the receivers of said Company; but it is also expressly understood that such use of said wires shall not be construed in any way, or to any extent, as impairing or interfering with the lien of the said Vane thereon.

"Richard S. Newcombe,
"Jas. G. Smith, *Receivers.*"

That in September, 1884, he caused notice to be given to the defendant of his intention to hold a lien upon its corporate property and earnings, for all work and labor done and performed and all moneys advanced by him to and for its benefit, at its instance and request, and for that purpose filed notices, on the 18th and 19th of September, 1884, in the offices of the recorders of seven counties in Indiana through which the telegraph line runs, the notices being dated September 15th, 1884; that the receivers also owed him \$1,898.83 for work which he did for them after their appointment, in connecting said wires at Lake Station and Hammond with their westward connections, under which employment he erected and completed the wires to a distance of about four miles from the court-house in Chicago, such indebtedness including also the purchase by him of a large amount of materials and the payment of freight bills, and the doing of other work; and that the receivers also owed him other moneys, which he had paid for the wages and expenses of men who performed work for the receivers in respect of the telegraph line, between December, 1884, and February, 1885. The petition prayed for the payment of the claim of Vane out of the first moneys coming into the hands of the receivers, as a superior lien to all claims except those of a like class.

The lien covered by the notices purported to be claimed under the Act of the Legislature of Indiana approved March 18, 1877. (Laws of Indiana of 1877, Special Session, chap. 8, p. 27; also, Rev. Stats. of Indiana of 1881, §§ 5286-5291.)

Sections 1 and 2 of the Act of 1877, being sections 5286 and 5287 of the Revised Statutes, provide as follows:

"SEC. 1. *Be it enacted by the General Assembly of the State of Indiana*, That the employes of any corporation doing business in this State, whether organized under the laws of this State or otherwise, shall be and they are hereby entitled to have and to hold a first and prior lien upon the corporate property of such corporation, and the earnings thereof, for all work and labor done and performed by such employes for such corporation, from the date of their employment by such corporation; which lien shall lie prior to any and all liens created or

acquired subsequent to the date of the employment of such employes by such corporation, except as in this Act provided.

"Sec. 2. Any employe wishing to acquire such lien upon the corporate property of any corporation, or the earnings thereof, whether his claim be due or not, shall file in the recorder's office of the county where such corporation is located or doing business, notice of his intention to hold a lien upon such property and earnings aforesaid, for the amount of his claim, setting forth the date of such employment, the name of the corporation and the amount of such claim, and it shall be the duty of the recorder of any county, when such notice is presented for record, to record the same in the record now required by law for notices of mechanics' liens, for which he shall receive twenty-five cents; and the lien so created shall relate to the time when such employe was employed by such corporation, or to any subsequent date during such employment, at the election of such employe, and shall have priority over all liens suffered or created thereafter, except other employes' liens, over which there shall be no such priority: *Provided*, That where any person, other than an employe, shall acquire a lien upon the corporate property of any corporation located or doing business in this State, and such lien remain a matter of record for a period of sixty days, in any county in this State where such corporation is located or doing business, and no lien shall have been acquired by any employe of such corporation during that period, then and in that case such lien so created shall have priority over the lien of such employe in the county where such corporation is located or doing business, and not otherwise: *Provided, further*, That this section shall not apply to any lien acquired by any person for purchase money."

The notices of lien filed by Vane were all in the following form, the name of the county being different in each case:

"**DE KALB COUNTY:**

"Notice is hereby given to The Bankers and Merchants' Telegraph Company, incorporated and organized under the laws of the State of New York, doing business in the County of De Kalb, in the State of Indiana, and all others interested:

"You are hereby notified that I, James E. Vane, hereby intend to hold a lien upon the poles and wires strung thereon, the switch-boards, telegraph instruments and battery, and all other fixtures and property of said Company, together with all the earnings of said Company in said County of De Kalb. I hold this lien for work and labor done and performed and materials furnished in construction of their line of telegraph through said county, and at their special instance and request, to the amount of sixteen thousand dollars. The labor was performed and materials furnished on and after the 15th day of June, 1884. That he intends to hold this lien upon all the poles, wire strung and unstrung, switch-boards, telegraph instruments and batteries, whether in use or not, and all fixtures and property belonging to said Company in said County of De Kalb, together with earnings thereof, until his claim is paid and satisfied.

"September 15, 1884. JAMES E. VANE."

The receivers put in an answer to the petition, setting up that, as to so much of it as sought to enforce a lien upon the telegraph property and its rents and incomes, Vane did not occupy, in his transactions with the defendant, the relation of an employe, but of a general contractor, and was not entitled to claim or enforce a lien; that he was not entitled to a first lien, because, before he filed his petition, the receivers had executed, under an order of the Supreme Court of New York and under the direction of the circuit court, receivers' certificates to the amount of \$180,000, to be used in the payment of the debts of the defendant, and \$20,000 to be used to complete the construction of its telegraph lines, which certificates were made, by an order of said supreme court, dated November 8, 1884, and an order of the circuit court, dated December 15, 1884, a first charge and lien upon all the property of the defendant within the State of Indiana; that, in pursuance of those orders, the receivers had executed, acknowledged and recorded a mortgage, bearing date November 7, 1884, to secure the payment of the receivers' certificates; that those certificates, to the amount of \$150,000, were outstanding in the hands of persons who took them as innocent purchasers without notice; and that, long before the rendering of the services by Vane, the defendant had executed, acknowledged and recorded a general mortgage upon all its property in Indiana, as well as the other States through which its lines extended, covering its franchises, rents and profits, to secure an issue of bonds amounting to \$10,000,000, which were outstanding, unpaid and in the hands of persons who took the same for value and without notice of any equities against the same. A replication was put in to this answer, and on the 16th of May, 1885, the petition of Vane was referred to a master to take evidence and report the same with his findings thereon.

On the 30th of January, 1886, the master, having taken the evidence produced by the parties, filed his report, containing the following statements:

"Mr. Vane, the petitioner, was employed by the Telegraph Company to put on arms and insulators and to string additional wires on the poles of the Company from Freeport Junction, Ohio, to Lake Station, Indiana, a distance of 248 miles, for \$45 per mile. The Company agreed to furnish and deliver to Vane, at the nearest accessible railway stations, all the necessary material for the work. Vane was to do or furnish the labor necessary to string the wires, etc. He did the work, hiring men for the purpose and assisting in person. The amount owing to him on this account is eleven thousand one hundred and sixty dollars (\$11,160).

"He also put in cross-arms and insulators and strung four wires from Lake Station to Hammond, sixteen miles, at thirty-seven dollars and fifty cents per mile, the Company furnishing material and Vane doing or furnishing the labor. The amount owing to him on this account is six hundred dollars (\$600).

"He also strung two wires from Hammond to the junction of the Chicago Board of Trade lines, 28 miles, at \$20 per mile, for which there is due him five hundred and sixty dollars (\$560).

"During the progress of the work the Company failed to furnish the material as it was required,

so that the men working for Vane were without employment a portion of the time. Vane asked for instructions and was directed by the Company to keep his men together during the delay thus caused, it being the understanding that the Company would pay their board while they were waiting. The master is of the opinion that it is to be fairly inferred from the evidence that the Company would pay for the time thus lost, Vane being required to pay his men as if they were at work.

"Vane also made some advances for freight on material shipped to him, but which he could not obtain possession of until the freight was paid. He also paid out various sums of money for livery hire, telegrams, etc., made necessary by the Company's failure to furnish material promptly.

"He also did extra work on the line, at the request of the Company, which was not covered by the original agreement. The amount due him for this extra work and for the time of his men lost by delay is \$1,951.12. The amount due him for cash advanced to pay freight, livery hire, telegrams, etc., is \$1,298.50.

"August 11, 1884, he was paid \$300; September 11, \$200; total credits, \$500.

"Exhibit No. 1, which was filed March 7, 1885, contains all the foregoing items in detail, and has been audited and approved by the Company. There is no controversy as to the amount. The only real question is as to what preference or lien, if any, has the intervenor.

"The master is of the opinion that, in doing this work, Mr. Vane was an employé of the Company, within the meaning of section 5286, Revised Statutes of Indiana (1881). He has filed his notice, as required by section 5287, in the counties through which the telegraph is built. This lien covers the following items:

For stringing wires, 248 miles, \$45 per mile	\$11,160 00
" putting in cross-arms from Lake Station to Hammond	600 00
" stringing 2 wires from Hammond to Junction, etc.	500 00
" extra work and delay	1,951 12
	<hr/>
Deduct credits	\$14,271 12
	500 00
Bal. due	<hr/>
	\$13,771 12

"I find and report that he has no lien as to the sum of \$1,298.50 for cash paid for freight, livery, etc.

"Vane's claim accrued prior to the order made by the Supreme Court of New York, November 3d, 1884, authorizing the issue of \$150,000 of special receivers' certificates, to secure which a trust deed or mortgage was executed, and I report and find that for said sum of \$13,771.12 Vane is entitled to priority over the lien of the certificates above named.

"Vane also asserts a right to a common-law lien, which he bases on the following facts, which are not controverted: The contract with Vane was made in June, 1884. November 12, 1884, the work was practically done, but the connections were not made. Mr. Vane kept possession of the wires by refusing to allow connections to be made, and turned the ends of the wires down into the ground. He retained such possession until November 20, 1884, when he delivered possession to the receivers, with an agreement that such delivery was not to impair

any rights or liens he might thus have by virtue of such possession. He had such possession when the order allowing the issue of receivers' certificates was made, and also when the certificates were issued, November 11, 1884. I report and find that, by perfecting his claim for a lien under the Statute, Mr. Vane waived the right he had, if any, to assert his common-law lien.

"In addition there is due to Vane from the receivers, for work done for them, \$1,898.33. The work was done after the certificates were authorized by the order of November 3, 1884, but before the issue of the certificates issued by subsequent orders. I report and find that for the sum last named Vane should be postponed as to the issue of \$150,000 of certificates, but that he should be preferred as to those which were subsequently issued."

In February, 1886, the receivers filed exceptions to the report of the master, because of his allowance to Vane of a lien for the \$13,771.12, on the ground that he was an employé of the defendant, within the meaning of section 5286. The exceptions claimed that Vane was a contractor in his agreement with the defendant, and not its employé; that the item of \$600 for putting in cross-arms was not covered by his notice of lien nor by the contract under which the labor was performed, and that he had no lien for that service; and they made a like claim in regard to the item of \$1,951.12.

Vane filed exceptions to the report because the master had found that he was not entitled to a lien for the \$13,771.12, paramount to the holders of receivers' certificates and all other mortgage liens; and had not found that Vane was entitled to a paramount lien over all such other liens for the entire amount of \$15,069.63; and had deducted the \$500 from the \$14,271.12, and not from the \$1,298.50; and had not awarded a lien for the \$1,298.50.

The case was heard on these exceptions by Judge Woods, holding the circuit court. His opinion, delivered in April, 1886 (27 Fed. Rep. 536), recites the material findings of the master, and then says: "In the opinion of the court, the petitioner had no lien at common law or in equity, and was not an employé of the Telegraph Company within the meaning of the Statute referred to by the master. That Statute provides that the employés of any corporation doing business in this State . . . shall be entitled to have and hold a first and prior lien upon the corporate property, . . . and the earnings thereof, for all work and labor done . . . by such employés for such corporation. To be entitled to the benefits of this Statute, and others of like character since enacted, I think it clear that the employé must have been a servant, bound in some degree at least to the duties of a servant, and not, like the petitioner, a mere contractor, bound only to produce or cause to be produced a certain result,—a result of labor, to be sure,—but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party. In respect to the sums found due the petitioner, the report is confirmed; but, to the allowance of a lien, exceptions sustained."

In pursuance of this decision, the court made an order overruling the exceptions of Vane,

and sustaining so much of the exceptions of the receivers as related to the claim for a lien in favor of Vane, but confirming the report as to amounts found to be due to Vane. The order adjudged that Vane had no lien upon the property of the defendant for the \$15,069.62; that that sum was a general floating debt of the defendant, not entitled to any priority; but that the \$1,898.33 was a valid debt of the receivers, payable out of any funds in their hands as such, available for payment of the debts of the trust. Vane has appealed to this court from so much of the decree as disallows his claim for a lien for the \$15,069.62, and from the overruling of his exceptions and the sustaining of the exceptions of the receivers.

It is contended for Vane that he has a lien under section 1 of the Act of 1877. (Section 5286 of the Revised Statutes.) That section gives a first and prior lien upon the corporate property of any corporation doing business in Indiana, whether organized under the laws of that State or otherwise, and upon the earnings of such corporation, to its employés, for all work and labor done and performed by them for the corporation, from the date of their employment by it.

It seems clear to us that Vane was a contractor with the Company, and not an employé within the meaning of the Statute. We think the distinction pointed out by the circuit court is a sound one, namely, that to be an employé within the meaning of the Statute Vane "must have been a servant, bound in some degree at least to the duties of a servant, and not," as he was, "a mere contractor, bound only to produce or cause to be produced a certain result,—a result of labor, to be sure,—but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party."

It is to be noticed that the Statute gives a lien to employés of the corporation only for work and labor done and performed by them for the corporation. It does not give a lien for the value of materials furnished, nor for advances of money made. It is confined to work and labor done and performed, and to work and labor done and performed by employés of the corporation, and to work and labor done and performed by employés of the corporation for the corporation.

In this respect there is a marked difference between the provisions of section 5286 and the provisions of section 15 of the Act of March 8, 1879 (Laws of 1879, p. 22; section 5471 of the Revised Statutes of 1881), which gives a lien, in coal mines, on the mine "and all machinery and fixtures connected therewith, including scales, coal-bank cars, and everything used in and about the mine," to "the miners and other persons employed and working in and about the mines, and the owners of the land or other persons interested in the rental or royalty on the coal mined therein," "for work and labor performed within two months, and the owner of the land, for royalty on coal taken out from under his land, for any length of time not exceeding two months." This Miners' Statute gives a lien to all persons "employed and working in and about the mines," for work and labor performed by them, without stating that they must be employés of the owners of the

mine, or of the persons working it, or of the persons owning the machinery and fixtures, and without stating that they may not be persons working in and about the mine employed by contractors doing work under contract for the owners of the mine or for the owners of the machinery and fixtures.

The general Mechanics' Lien Law of Indiana (section 5293 of the Revised Statutes of 1881), subsequently re-enacted by the Act of March 6, 1883 (Laws of 1883, p. 140), provided that "mechanics, and all persons performing labor or furnishing materials for the construction or repair, or who may have furnished any engine or other machinery for any mill, distillery or other manufactory, may have a lien separately or jointly upon the building which they may have constructed or repaired, or upon any buildings, mill, distillery or other manufactory for which they may have furnished materials of any description, and on the interest of the owner in the lot or land on which it stands, to the extent of the value of any labor done or materials furnished, or for both." This Mechanics' Lien Statute gives a lien upon a building to all persons who perform labor or furnish materials for the construction or repair of the building, even though they do it under a contract, and is not confined to employés of the owner of the building; and it also gives a lien upon a manufactory to persons who may have furnished machinery or materials for the manufactory, even though they may have done so under contract with the owner of the manufactory or under contract with the contractor with such owner.

The Supreme Court of Indiana, in *Colter v. Free*, 45 Ind. 96, in 1873, in construing that Statute, which was section 647 of the then existing Revised Statutes, held that a person who furnished materials, not to the owner, but to the contractor, for the erection of a new building, could acquire and enforce a lien on the building, and on the interest of the owner of the land on which the building stood, to the extent of the value of the materials furnished.

In view of these provisions of other lien statutes of Indiana, the limited language of section 5286 is very marked, and justifies the interpretation that the provisions of that section are to be confined to a special class of persons. It is a rule of interpretation recognized by the Supreme Court of Indiana, in *Stout v. Grant County*, 107 Ind. 848, 848 [5 West. Rep. 686], that "in cases of doubt or uncertainty, Acts *in pari materia*, passed either before or after, and whether repealed or still in force, may be referred to in order to discern the intent of the Legislature in the use of particular terms, or in the enactment of particular provisions; and, within the reason of the same rule, contemporaneous legislation, not precisely *in pari materia*, may be referred to for the same purpose."

The view above taken of the Statute under consideration is supported by adjudged cases. In *Aikin v. Wasson*, 24 N. Y. 482, in 1862, it was held that a contractor for the construction of part of a railroad was not a laborer or servant, within the provision of the General Railroad Act of New York, making stockholders of a railroad corporation personally liable "for all the debts due or owing to any of its labor-

ers and servants, for services performed for such corporation."

In *Munger v. Lenroot*, 32 Wis. 541, in 1878, under a statute which gave a lien on logs or timber, for the amount due for his labor or services, to any person who did or performed any work or services in cutting, felling, hauling, driving, running, rafting, booming, cribbing or towing such logs or timber, it was held that such person was entitled to such lien, not only when employed by the owner of the logs or of the land from which they were cut, but also when employed by a contractor under such owner. The court was of the opinion that the Legislature intended to give the lien absolutely to the laborer, regardless of the question whether he had rendered the services under a contract with the general owner or not. This decision was based upon the special language of the statute, in not excluding a person employed by a contractor.

In *Wakefield v. Fargo*, 90 N. Y. 213, in 1882, it was held that a person employed by a corporation, at a yearly salary, as a book-keeper and general manager, was not a laborer, servant or apprentice, within the provisions of a statute of New York making the stockholders of the corporation "liable for all debts that may be due and owing to their laborers, servants and apprentices for services performed for such corporation." The view taken by the court was that the services referred to were menial or manual services; that he who performed them must be of a class who usually looked to the reward of a day's labor or service for immediate or present support, from whom the company did not expect credit, and to whom its future ability to pay was of no consequence,—one who was responsible for no independent action, but who did a day's work or a stated job under the direction of a superior; that the word "servant" must be limited by the more specific words "laborer" and "apprentice," with which it was associated, and be held to comprehend only persons performing the same kind of service that was due from laborers and apprentices; and that a general manager was not *ejusdem generis* with an apprentice or laborer.

In *Gurney v. Atlantic & G. W. R. Co.* 58 N. Y. 358, in 1874, a case relied on by the appellant, a receiver of a railroad company was directed by an order of court to pay out of moneys in his hands "arrearages owing to the laborers and employes" of the company "for labor and services actually done in connection with" the company's road. Claim was made by a counsellor-at-law for professional services as counsel for the railroad company, rendered prior to the appointment of the receiver. The question raised was whether the language of the order covered employes who had not been in the stated and regular employment of the company. The court held that, in view of the special language of the order, it included the claim for the professional services. It appeared that the order was made as the result of negotiations in regard to which the counsel under whose advice the order was obtained testified that the word "employes" was used in the negotiations "not in any particular or strict sense, but according to its ordinary and general meaning, as including attorney's compensation as well as that of other persons employed by the

corporation." The decision appears to have gone upon the ground that the person who made the claim had rendered "services" in connection with the railroad, and was consequently an employe within the meaning of the order.

We are therefore of opinion that Vane had no lien under the Act of March, 1877 (section 5286 of the Revised Statutes).

It is further contended that Vane had a lien by virtue of the general Mechanics' Lien Law, before referred to, which was re-enacted by the Act of March 6, 1888 (Laws of 1888, p. 140; Elliott's Supplement of 1889, §§ 1688 and 1690), in the following language:

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That mechanics, and all persons performing labor or furnishing material or machinery for erecting, altering, repairing or removing any house, mill, manufactory or other building, bridge, reservoir, system of water-works or other structure, may have a lien, separately or jointly, upon the house, mill, manufactory or other building, bridge, reservoir, system of water-works or other structure, which they may have erected, altered, repaired or removed, or for which they may have furnished material or machinery of any description, and on the interest of the owner of the lot or land on which it stands, or with which it is connected, to the extent of the value of any labor done or materials or machinery furnished, or both."

"SEC. 8. Any person wishing to acquire such lien upon any property, whether his claim be due or not, shall file in the recorder's office of the county, at any time within sixty days after the performing of such labor or furnishing such materials or machinery, notice of his intention to hold a lien upon such property for the amount of his claim, specifically setting forth therein the amount claimed, and giving a substantial description of such lot or land on which the house, mill, manufactory or other building, bridge, reservoir, system of water-works or other structure may stand or be connected with, or to which it may be removed. Any description of the lot or land in a notice of lien will be sufficient, if, from such description or any reference therein, the lot or land can be identified."

In regard to this it is sufficient to say that the notice of lien filed by Vane in September, 1884, did not comply with section 8 of the Statute, in regard to a description of the "lot or land" on which the structure stood upon which he claimed a lien.

A common-law lien and an equitable lien are also claimed. As to the common-law lien the master reported "that, by perfecting his claim for a lien under the Statute, Mr. Vane waived the right he had, if any, to assert his common-law lien." We concur in this view, as to the personal property and earnings of the corporation. As to the poles and wires, they were real estate, on which there could be no lien at common law. In addition to this, Vane gave up any right he had to a common-law lien as to the wires, by giving up possession of them on November 19, 1884. The lien referred to in the paper of that date, signed by the receivers, as a lien claimed by Vane, was the statutory lien

which he had attempted to secure by his notice dated September 15, 1884. Nor do we see any ground for saying that he had or retained an equitable lien.

It is also claimed that the instrument of November 19, 1884, fixed a lien upon the property. We do not so understand it. It conferred no new right upon Vane. It only refers to such lien, if any, as existed,—to a lien claimed by him. Where it speaks of "the lien of the said Vane," it refers to what it had before spoken of as the lien claimed by him. The purport of the paper is simply that the use of the wires by the receivers shall not be construed as impairing or interfering with the lien claimed by Vane, that is, with any lien which existed under the Statute under which he had given and filed his notices, dated September 15, 1884.

Decree affirmed.

EZRA D. FRITTS ET AL., *Plffs. in Err.*,
v.

GEORGE W. PALMER.

(See S. C. Reporter's ed. 282-285.)

Conveyance to foreign corporation, when not void by reason of failure to comply with state law—penalty—forfeiture of lands not imposed—State only can object—question not raised collaterally.

1. A conveyance of Colorado real property to a Missouri corporation is not void because it has not complied with the requirements of the Colorado Constitution and laws, that a corporation cannot do business in that State without a place of business and an agent in the State, nor without filing a certificate designating such place and such agent.
2. The only penalty prescribed by the statutes of Colorado for a foreign corporation, carrying on business in that State before it has the right to do so, is that its officers and agents are personally liable upon its contracts made before such right has been acquired.
3. The additional penalty of the forfeiture to the grantor, or those claiming under him, of the lands in such State conveyed to such foreign corporation before it has acquired the right to do business in the State, is not imposed.
4. Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose.
5. The question whether a corporation has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, concerns only the State. It cannot be raised collaterally by private persons unless there be something in the Statute authorizing them to do so.

[No. 72.]

Submitted Nov. 6, 1889. Decided Nov. 25, 1889.

IN ERROR to the Circuit Court of the United States for the District of Colorado to review a judgment in favor of the plaintiff, George W. Palmer, for the possession of real property in Gilpin County, Colorado. *Reversed.*

The facts are stated in the opinion.

Messrs. L. C. Rockwell, E. A. Reynolds and Bertram Ellis, for plaintiffs in error:
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The deed made by Groshon to the Comstock Mining Company, whereby the grantor assumed to convey the property in dispute, was not void, because the company had not, as a foreign corporation, observed the Constitution and statutory requirements in that behalf imposed upon such corporations before they were authorized to do business within the State of Colorado.

Harris v. Runnels, 53 U. S. 12 How. 79 (18: 901); *Reynolds v. First Nat. Bank*, 112 U. S. 405 (28: 783); *Union Nat. Bank v. Matthews*, 98 U. S. 628 (25: 190); *National Bank of Genesee v. Whitney*, 108 U. S. 99 (26: 443); *Swope v. Leffingwell*, 105 U. S. 8 (26: 989); *The Manistee*, 5 Biss. 381; *Barnes v. Suddard*, 4 West. Rep. 184, 117 Ill. 287.

The conveyance is good unless the State interferes.

Cross v. De Valle, 68 U. S. 1 Wall. 1, 13 (17: 515, 518); *Ferguson v. Neville*, 61 Cal. 356; *Baird v. Bank of Washington*, 11 Serg. & R. 411; *Leasure v. Hillegas*, 7 Serg. & R. 813; *Banks v. Politauz*, 3 Rand. (Va.) 186.

Mr. Joseph Shippen, for defendant in error:

A State can prohibit foreign corporations from purchasing and holding real estate within its limits.

Story's Conflict of Laws, §§ 427, 428; *Paul v. Virginia*, 75 U. S. 8 Wall. 168 (19: 357); *Ducat v. Chicago*, 77 U. S. 10 Wall. 415 (19: 973); *U. S. v. Fox*, 94 U. S. 815 (24: 192); *American & F. Christian Union v. Yount*, 101 U. S. 852 (25: 888); *Thompson v. Waters*, 25 Mich. 214; *Carroll v. East St. Louis*, 67 Ill. 568; *Starkweather v. American Bible Soc.* 72 Ill. 50; *Semple v. Bank of British Columbia*, 5 Sawy. 88, 394; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 537 (27: 1024); *Belfe v. Rundell*, 108 U. S. 226 (26: 839); *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 11 (26: 644); *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 588 (10: 274); *New York Dry Dock v. Hicks*, 5 McLean, 111.

A State may prescribe the terms upon which a foreign corporation shall be allowed to carry on its business in the State.

Cooper Mfg. Co. v. Ferguson, 118 U. S. 732 (28: 1189); *Philadelphia Fire Assn. v. New York*, 119 U. S. 111 (30: 344); *Pembina C. S. Min. & Milling Co. v. Pennsylvania*, 125 U. S. 181 (31: 650).

Colorado, by its Constitution and statutes, prohibited any foreign corporation from doing business (which included purchasing and holding real estate) in that State, except upon compliance with certain conditions.

Cooper Mfg. Co. v. Ferguson, 118 U. S. 737 (28: 1187); *Re Comstock*, 8 Sawy. 218; *Bank of British Columbia v. Page*, 6 Or. 481; *Uiley v. Clark-Gardner Lode Min. Co.* 4 Colo. 869; *Northwestern Mut. L. Ins. Co. v. Overholt*, 4 Dill. 287; *Franklin Ins. Co. v. Louisville & A. Packet Co.* 9 Bush (Ky.) 590; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520.

The Comstock Mining Company had not the legal capacity to purchase or hold or convey real estate in the State of Colorado.

Boyce v. St. Louis, 29 Barb. 650; *Starkweather v. American Bible Soc.* 72 Ill. 50; *Land Grant R. & Trust Co. v. Coffey County*, 6 Kan. 245; 3 Washburn, Real Property, 588; *Bundy v. Birdsall*, 29 Barb. 81; *Jackson v. Cory*, 8 Johns. 888; *Hornbeck v. Westbrook*, 9 Johns. 74; *Hulick*

v. *Seovil*, 9 Ill. 190; *Russell v. Topping*, 5 McLean, 194; *Angell & Ames on Corp.* § 162; *Hayward v. Davidson*, 41 Ind. 214; *Lamb v. Lamb*, 6 Biss. 420.

Plaintiff, as grantee of Groshon, can assert the invalidity of said prior conveyance to said corporation, and the deed of trust made by said corporation, and is entitled to recover in this action.

Keen v. Coleman, 89 Pa. 801; *Lowell v. Daniels*, 2 Gray, 168; *Thorne v. Travelers' Ins. Co.* 80 Pa. 26; *Bigelow on Estoppel*, 353; 2 *Parsons on Contracts*, 799; *Abbott v. Omaha Smelting & Ref. Co.* 4 Neb. 416.

The deed does not stop the grantor, as estoppel by deed must be by a valid deed.

Bigelow on Estoppel, Part II, cixi; *Pells v. Webquist*, 129 Mass. 469; *Caffrey v. Dudgeon*, 38 Ind. 512, 520.

There can be no estoppel in opposition to a public statute.

Fairbairn v. Gilbert, 2 T. R. 169; *Bank of U. S. v. Owens*, 27 U. S. 2 Pet. 538 (7: 508); *Fowler v. Scully*, 72 Pa. 456.

Mr. Justice Harlan delivered the opinion of the court:

This is an action in the nature of ejectment to recover the possession of certain real property in Gilpin County, Colorado, namely, the North Comstock, Grand View, Clipper and Comstock lodes, and a building lot in Central City, in the same county, together with the dwelling-house thereon, the fee and possession of all which property were claimed by the plaintiff, the present defendant in error. The defendants admitted their possession of the premises described in the complaint, except the Clipper lode, and alleged their ownership and right of possession of the other property. They distinctly disclaimed all interest in the Clipper lode, and denied that they were or had ever been in possession of it. A trial by jury was waived in writing by the parties, and the case was heard on an agreed statement of facts, upon which the court was asked to declare the law and enter judgment accordingly. Judgment was rendered in favor of the plaintiff for the possession of all the property described in the complaint, including the Clipper lode. The question to be determined is whether the judgment is supported by the agreed facts.

These facts are in substance as follows: The common source of title is William Groshon, who, on the 16th of June, 1877, at Central City, in the State of Colorado, conveyed, with warranty, all the property described in the complaint, to the Comstock Mining Company, a corporation organized under the laws of Missouri for the purpose of carrying on mining business, and with the object, expressed in its articles of incorporation, of purchasing, owning and controlling mining property, both real and personal, in the State of Colorado, and of conducting a mining business therewith. This deed was duly recorded in the proper local office on the 25th of June, 1877. Before the purchase from Groshon the company was engaged in the prosecution of its mining business at and near Central City, where it established an office.

On the day of the execution of Groshon's

deed, the company made to Ezra D. Fritts its three promissory notes, aggregating thirty thousand dollars, which were intended to be used and were used in part payment of the price of the property conveyed to it; and, in order to secure the payment of the notes, it executed to Thatcher, as trustee, a deed of trust upon the property, except the Clipper lode, conditioned that on default in the payment of either of the notes, or the interest thereon, the trustee might sell and dispose of the said mining property. That deed of trust was duly recorded on the 26th of June, 1877.

On the 5th of January, 1878, default having occurred in the payment of the notes, the deed of trust was foreclosed under the power of sale contained in it, and on that day Thatcher executed, acknowledged and delivered his deed for all said real estate and mining property (except the Clipper lode) to Fritts. That deed was duly recorded January 7, 1878.

The defendants claimed title and possession by virtue of divers mesne conveyances, in due form, from the company and its assigns under the above deed of trust, for all of the property, excepting the Clipper lode, which has never been conveyed by it.

On the 18th of April, 1878, Groshon executed, acknowledged and delivered his deed of quitclaim of all the real estate and mining property in the complaint described to Samuel S. Porter. That deed was delivered to Porter on the 20th of May, 1878, but has never been recorded. The latter, by his deed of quitclaim, executed May 20, 1878, conveyed to defendant Palmer. The latter deed was delivered to the grantee on the 25th of May, 1878, but it remains unrecorded. Afterwards, June 28, 1879, Palmer filed in the office of the clerk and recorder of the county where the property is situated notice, according to law, of the bringing of this suit, and the object thereof.

The Comstock Mining Company at the time of its purchase from Groshon had not, nor has it since that time, complied or attempted to comply with section ten of article fifteen of the Constitution of Colorado, nor with sections twenty-three and twenty-four of chapter nineteen of the General Laws of that State, otherwise known as sections 280 and 281 of chapter 19 of the General Statutes of Colorado, 1888, prescribing the terms and conditions upon which foreign corporations may do business in that State.

A copy of the Incorporation Laws of Missouri, under which this company was organized, was, at the time of its organization, on file in the office of the Secretary of State of Colorado, but was not filed by it. Its articles of incorporation were filed in the office of the clerk and recorder for Gilpin County, where its business interests were located, on August 10, 1877, and a copy of the Incorporation Laws of Missouri, under which the company was organized, was also on file in the same office at and after the time the company was organized.

The defendants, during the time of their possession of the property, have held the same in good faith under the above deeds, and have paid taxes legally assessed and levied upon it, to the amount of \$400; and plaintiff has paid no taxes thereon. They have put improve-

ments upon the property, in the way of building and repairing the dwelling-house described in the complaint, of the value of \$350.

It is clear, from the facts agreed, that the object of Groshon's conveyance to the Comstock Mining Company was to pass to that corporation whatever interest he had in the property. It is equally clear that under the trust deed to Thatcher, the sale and conveyance to Fritts, and the subsequent mesne conveyances to the defendants, the latter acquired whatever interest the Comstock Mining Company got by Groshon's deed to it.

But it contended that no title or interest whatever passed from Groshon, by his deed of June 16, 1877, even as between him and the company, and, consequently, it was competent for him, at his pleasure, and notwithstanding he received the consideration for which he stipulated, and even after the sale and conveyance of the property under the deed of trust, to make to other parties a quit-claim deed that would override, not only his conveyance to the Comstock Mining Company, but all subsequent conveyances based upon it.

This proposition is based upon certain provisions of the Constitution and laws of Colorado relating to foreign corporations.

The Constitution of that State declares that "no foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served." Art. XV. § 10.

The statutory provisions for failing to comply with which the Comstock Mining Company is alleged to have taken nothing by Groshon's conveyance to it, are these:

"Sec. 260. Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served; and such corporations shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. And no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members shall purchase or hold real estate in this State, except as provided for in this Act; and no corporation doing business in the State, incorporated under the laws of any other State, shall be permitted to mortgage, pledge or otherwise incur its real or personal property situated in this State, to the injury or exclusion of any citizen, citizens or corporations of this State who are creditors of such foreign corporation, and no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other State, shall take effect as against any citizen or corporation of this State, until all its li-

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abilities due to any person or corporation in this State at the time of recording such mortgage have been paid and extinguished.

"Sec. 261. Every company incorporated under the laws of any foreign state or kingdom, or of any State or Territory of the United States beyond the limits of this State, and now or hereafter doing business within this State, shall file in the office of the Secretary of State a copy of their charter of incorporation, or, in case such company is incorporated by certificate under any general incorporation law, a copy of such certificate and of such general incorporation law, duly certified and authenticated by the proper authority of such foreign State, kingdom or Territory." Gen. Stat. Col. 1888, c. 19.

Precisely what was meant by the words, in section 260, "except as provided for in this Act," is difficult to tell, since the Act does not indicate any particular mode in which a foreign corporation may acquire real estate in Colorado. But, perhaps, the reasonable interpretation of the Statute is that a foreign corporation shall not purchase or hold real estate in Colorado, for purposes of its business, until it first acquires, in the mode prescribed by the local law, the right to do business in that State.

No question is made in this case—indeed, there can be no doubt—as to the validity of these constitutional and statutory provisions, so far, at least, as they do not directly affect foreign or interstate commerce. In *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, 782 [28: 1187, 1189], this court said that "the right of the people of a State to prescribe generally by its Constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the State, has been settled by this court." It may be assumed, therefore, that the Comstock Mining Company, being a corporation of another State, had no right to do business in the State of Colorado until after it had one or more known places of business within its limits, and an authorized agent designated upon whom process could be served, nor until it had made and filed in the proper office the certificate prescribed by section 260 of the Statute relating to foreign corporations. It may also be assumed, for the purposes of this case, that this company violated the law of that State when it purchased the premises here in controversy without having, in the mode prescribed by the statutes of Colorado, previously designated its principal place of business in that State, and an agent upon whom process might be served.

But it does not follow that the title to the property conveyed to the Comstock Mining Company remained in Groshon, notwithstanding his conveyance of it to that company, in due form, and for a valuable consideration.

The Constitution and laws of Colorado, it should be observed, do not prohibit foreign corporations altogether from purchasing or holding real estate within its limits. They do not declare absolutely or wholly void, as to all persons, and for every purpose, a conveyance of real estate to a foreign corporation which has not previously done what is required before it can rightfully carry on business in the State. Nor do they declare that the title to

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such property shall remain in the grantor, despite his conveyance. So far as we are aware, the only penalty imposed by the statutes of Colorado upon a foreign corporation carrying on business in the State before acquiring the right to do so is found in section 262 of the same chapter, which provides: "A failure to comply with the provisions of sections 23 and 24 [sections 260 and 261] of this Act shall render each and every officer, agent and stockholder of any such corporation, so failing therein, jointly and severally personally liable on any and all contracts of such company made within this State during the time that such corporation is so in default." The fair implication is that, in the judgment of the Legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that State. It is not for the judiciary, at the instance or for the benefit of private parties claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting, for the benefit of such parties, the estate thus conveyed to the corporation and by it conveyed to others. If Groshon, the grantor of the Comstock Mining Company, had himself brought this action, the injustice of his claim would be conceded. But the present plaintiff, who asserts title under a quit-claim deed from Groshon made after the property had passed, by the sale under the deed of trust, from the mining company, cannot, in law, occupy any better position than the original grantor would have done if he had himself brought this action. If the Legislature had intended to declare that no title should pass under a conveyance to a foreign corporation purchasing real estate before it acquires the right to engage in business in the State, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been clearly manifested. If the construction placed by the plaintiff upon the Constitution and statutes of Colorado be sound, there would be some ground to say that a foreign corporation, taking a conveyance of real estate for purposes of its business in Colorado, before it had acquired the right to do business there, would have no standing in the courts of that State for the purpose of having the estate so acquired protected against trespasses upon it. And yet the contrary has been held by the Supreme Court of Colorado in *Uiley v. Clark-Gardner Lode Min. Co.* 4 Colo. 369. That was an action of trespass brought by a New York corporation. The declaration in one count charged the defendants with breaking and entering upon certain claims of the Gardner lode and breaking ore, etc. The other count was *de bonis asportatis*. The defendants filed a special plea in abatement, alleging that the plaintiff was a foreign corporation, and had never complied with the above statutory provisions as to filing a certificate designating its principal place of business in the State and an authorized agent upon whom process could be served. The court, waiving any expression of opinion as to what would be

its decision if the plea had been one in bar of the action, held that the prohibitions in respect to foreign corporations, while they extended to the carrying on of business before complying with the laws of the State, did not abridge the right of a foreign corporation to sue in the courts of Colorado.

The views we have expressed are supported by several adjudications in this court in cases somewhat analogous to the present one, among which are those arising under sections 5186 and 5187 of the Revised Statutes of the United States. The first of those sections authorizes national banking associations to loan money on personal security. The other section provides: "A national banking association may purchase, hold and convey real estate for the following purposes, and for no others: *First*, such as shall be necessary for its immediate accommodation in the transaction of its business. *Second*, such as shall be mortgaged to it in good faith by way of security for debts previously contracted. *Third*, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. *Fourth*, such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts to it. But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

In *Union Nat. Bank v. Matthews*, 98 U. S. 621, 627 [25: 188, 189] the question was directly presented whether a national bank was entitled to the benefit of a deed of trust upon real estate, which, with the note described in it, was taken, not as security for, or in satisfaction of, debts previously contracted in the course of its dealings, but for a loan made by the bank at the time the deed of trust was assigned to it. The Supreme Court of Missouri held the deed of trust to be void in the hands of the bank, because its loan was made upon real-estate security in violation of the statute. But this court, after observing that the result insisted upon did not necessarily follow, said: "The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined." Again: "Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose."

In *National Bank of Genesee v. Whitney*, 103 U. S. 99, 108 [26: 443, 444], which involved the validity of a mortgage to a national bank, to secure future advances made to the mortgagor, the right of the bank to enforce the mortgage was sustained upon the principles announced in *Union Nat. Bank v. Matthews*. The court said: "Whatever objection there may be to it as security for such advances from the prohibitory provisions of the statute, the objection

can only be urged by the government." To the same effect are *Swope v. Leffingwell*, 105 U. S. 3 [26: 939], and *Reynolds v. First Nat. Bank*, 112 U. S. 405, 412 [28: 733, 736].

In *Smith v. Shelley*, 79 U. S. 12 Wall. 353, 361 [20: 430, 431], which was an action of ejectment, the question was collaterally raised as to the validity of the title acquired by a banking institution, under a deed of the premises, in consideration of a certain sum paid by it to the grantor. The bank was created by an Act of the territorial Legislature of Nebraska, with power "to issue bills, deal in exchange, and to buy and possess property of every kind." But when that Act passed, there was in force an Act of Congress which provided that "No Act of the territorial Legislature of any of the Territories of the United States, incorporating any bank or any institution with banking powers or privileges, hereafter to be passed, shall have any force or effect whatever, until approved and confirmed by Congress." The Act of the territorial Legislature incorporating the bank, above referred to, never was approved or confirmed by Congress. It was urged, as an objection to the deed made to the bank—upon which deed one of the parties relied—that it was not a competent grantee to receive title. This court said: "It is not denied that the bank was duly organized in pursuance of the provisions of an Act of the Legislature of the Territory of Nebraska; but, it is said, it had no right to transact business until the charter creating it was approved by Congress. This is so, and it could not legally exercise its powers until this approval was obtained; but this defect in its constitution cannot be taken advantage of collaterally. No proposition is more thoroughly settled than this, and it is unnecessary to refer to authorities to support it. Conceding the bank to be guilty of usurpation, it was still a body corporate *de facto*, exercising at least one of the franchises which the Legislature attempted to confer upon it; and, in such a case, the party who makes a sale of real estate to it is not in a position to question its capacity to take the title, after it has paid the consideration for the purchase. If, prior to the execution of the deed, there had been a judgment of ouster against the corporation at the instance of the government, the aspect of the case would be different." See also *Myers v. Craft*, 80 U. S. 13 Wall. 295 [20: 563]; *Jones v. Guaranty & I. Co.* 101 U. S. 622, 628 [25: 1030, 1035]; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 451 [28: 764, 768].

To the above cases may be added those holding that an alien may take by deed or devise and hold against anyone but the sovereign until office found. *Cross v. De Valle*, 68 U. S. 1 Wall. 1, 13 [17: 515, 518]; *Gouverneur v. Robertson*, 24 U. S. 11 Wheat. 332 [6: 486]; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 628 [25: 188, 190]; *Phillips v. Moore*, 100 U. S. 208 [25: 608]. Also, those holding that the question whether a corporation, having capacity to purchase and hold real estate for certain defined purposes, or in certain quantities, has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, concerns only the State within whose limits the property is situated. It cannot be raised collaterally by private persons 132 U. S.

unless there be something in the statute expressly or by necessary implication authorizing them to do so. *Cowell v. Colorado Springs Co.* 100 U. S. 55, 60 [25: 547, 549]; *Jones v. Habersham*, 107 U. S. 174, 186 [27: 401, 406].

It results from what has been said that the court erred in rendering judgment for the plaintiff for any part of the premises described in the complaint.

The judgment is reversed, with directions to enter judgment upon the agreed statement of facts for the defendants.

Mr. Justice Miller, dissenting:

I earnestly dissent from the opinion of the majority of the court. I do not enter into the question of the circumstances under which a foreign corporation can do business within the limits of the State of Colorado under section 23 of the General Statutes of 1883 of that State, nor do I here consider or attach importance to the question of how far a party dealing with a foreign corporation which has not complied with the rules prescribed by the State to enable it to do business in the State is estopped by the presumption that, in making contracts with it, it has recognized its official existence and its right to contract. I base my dissent in the present case upon the following emphatic language in the laws of that State:

"No foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members shall purchase or hold real estate in this State except as provided for in this Act."

It is very clear that the words "as provided for in this Act" have relation to the acts prescribed for all corporations, of filing with the Secretary of State, and the recorder of deeds of the county in which that business is carried on the necessary statement of their corporate existence, properly certified, and the appointment of agents in the State residing in its principal place of business. The language I have just cited from this Statute is unambiguous, and is not a declaration of powers and rights conferred upon these corporations; but it is prohibitory, and declares that no corporation shall purchase or hold real estate that has not complied with this requirement. It has been a recognized doctrine of this court for a great many years, perhaps a century, that the transfer of title to real estate, whether by inheritance, by purchase and sale, or by any other mode by which title to property is acquired, is rightfully governed by the laws of the State in which the land is situated. The policy of permitting corporations to hold real estate has always been a restricted one. Corporate bodies, whether for public use or for private purposes, have always been subjects of limitation on their right to hold real estate. It may be prohibited altogether. It may be allowed with distinct limitations as to amount either in quantity or in value. In this respect it is wholly within the control of legislative action. I can conceive of cases where corporations have been authorized to acquire a limited amount of real estate, such as the Legislature may conceive to be useful and necessary to the purpose for which they are organized, or to take property for specific uses, in which the question as to whether they have exceeded that amount or perverted the use may

be one for the State alone, and not of any private citizen. But the positive declaration that a corporation shall not purchase or hold real estate, which is not a grant of power, but an express denial of its power to hold any real estate under the circumstances mentioned, is in my opinion destructive of the right to hold any real estate at all under those circumstances. Whenever it is shown that any of these corporations have not complied with the requirements of the Statute, they are forbidden to purchase or hold real estate. Any such purchase is therefore void. It is the positive declaration of the law of the land. The title does not pass, and it needs no inquest of the State to establish that fact. The title which would have passed if the corporation had a right to purchase does not pass. It remains in the party who attempted to grant or convey it. The grantee can neither purchase nor hold real estate. The assumption of the opinion of the court is that it may purchase and it may hold real estate. I have not time to give the authorities on this subject. They are numerous; but they are generally applicable to cases in which the granting power of the corporation is wanting in sufficient language to enable it to purchase and hold, and not to statutes which are in their terms prohibitory, forbidding and peremptory.

HERMAN ROYER, *Appl.*,

SOLOMON ROTH ET AL.

(See S. C. Reporter's ed. 201-206.)

Invalid patent for treating rawhides—no patentable combination nor invention.

1. The patent, No. 172,846, granted to Herman Royer, January 18, 1876, for an improvement in machines for treating rawhides, is invalid.
2. There is no patentable combination of the automatic shifting device with the drum of the fulling machine. It is a mere aggregation of parts.
3. The shifting device being old, its application to the fulling machine did not require the exercise of invention.

[No. 83.]

Submitted Nov. 7, 1889. Decided Nov. 25, 1889.

APPEAL from a decree of the Circuit Court of the United States for the District of California dismissing a suit in equity for the infringement of letters-patent for an improvement in machines for treating rawhides. *Affirmed.*

The facts are stated in the opinion.

Mr. M. A. Wheaton for appellant.

Mr. Manuel Eyre for appellee.

Mr. Justice Blatchford delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the District of California, by Herman Royer against Solomon Roth and L. P. Degen, to recover for the infringement of letters-patent No. 172,846, granted to the plaintiff January 18, 1876, on an application filed November 15, 1875, for an improvement in machines for treating rawhides.

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The bill states that the invention consisted in "combining with the drum of a rawhide fulling machine, operating to twist the hide alternately in one direction and then in the other, a shifting device for the purpose of making the operation automatic and continuous."

Each defendant put in a separate answer denying that the plaintiff was the inventor of such shifting device, and alleging want of novelty, with proper averments.

After a replication to the answers, proofs were taken, the case was brought to a hearing and the circuit court dismissed the bill. The decree states that the plaintiff first conceived of the combination of an automatic reverser attached to the drum of a rawhide fulling machine, operating to twist the leather in one direction and the other, for the purpose of making the operation automatic and continuous, as described and claimed in the patent; that, at the request of the plaintiff, one Clerc, a mechanic, made the automatic reverser described in the patent, and in October, 1867, delivered the same to the plaintiff, who attached it to his fulling machine; that the combination was new with the plaintiff, and was useful, and his use thereof was secret until he applied for the patent; that it was not obvious and was not known whether the new combination could be used successfully for the practical treatment of rawhide, which was the work for which the combined machine was intended, until after it had been tested and tried by the plaintiff; that it was obvious to any skilled mechanic that an automatic reverser could be applied to the drum of a rawhide fulling machine so as to make it reverse its motion automatically at any desired fixed intervals; that the patent does not cover any patentable invention; and that, for that reason alone, the bill is dismissed.

The specification says: "The object of my invention is to provide an improvement in a rawhide fulling machine, for which letters-patent were granted to me, and it consists in an automatic device by which I am enabled to run the machine in one direction for a sufficient length of time and then reverse it, this process continuing automatically until the leather is finished."

The drawings show the machine as operated by belts, but the specification states that gears or friction couplings could be used if desired, and the action of the machine still be automatic. The machine employed for fulling rawhides, or forming them into leather, has a drum, A, the central shaft of which has upon its lower end a bevel gear. With this gear two pinions mesh at opposite sides, one of the pinions being mounted upon a solid shaft, which passes through the hollow shaft of the other pinion, and has a driving-pulley keyed to it. Another driving-pulley is keyed to the hollow shaft, and a loose pulley runs between them. When the belt turns one of the keyed pulleys, the machine will operate in one direction, and when the belt is shifted to the other keyed pulley, it will operate in the opposite direction. In order to make such action automatic, there is a belt-shifter, which is a part of, or attached to, a sliding bar. That bar is operated by a lever, which is hinged or pivoted, and works in a slot or link upon the bar, so that when turned from side to side it will slide the bar in one direction

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or the other. A weight is secured to the top of the lever, so that as soon as the lever passes the centre it will fall by its own weight and suddenly shift the belt. In order to operate this lever, there is another sliding bar, which moves below and parallel with the sliding bar first mentioned, the second bar having pins upon each side of the lever, so that when the second bar is moved it will shift the lever. The second bar has a nut projecting downward from it, and there is a screw formed upon a horizontal shaft so as to fit the nut. A belt from a pulley on the solid shaft extends to a pulley on the last-named horizontal shaft, and by its action the screw will be turned in one direction until the lever has passed the centre and fallen over so as to shift the belt to the other pulley, when the whole mechanism will be moved in an opposite direction until the screw has again moved the second sliding bar and reversed the lever. The specification states that the machine is thus made automatic in its action and can be left until the work is entirely finished; and that a frictional coupling or reversing gear might be used in place of a belt, but would not work as well.

The claim of the patent is as follows: "In combination with the drum A of a rawhide fulling machine, operating to twist the leather alternately in one direction and the other, a shifting device for the purpose of making the operation automatic and continuous, substantially as described."

The evidence is conclusive that one Clerc, as early as 1864, in San Francisco, made an automatic shifting device the same as that described in the patent, and attached it to a washing machine, and continued from that time to make such automatic reversers and put them into use; and that, in 1867, at the request of the plaintiff, he made the shifting device described in the patent, which the plaintiff attached to his fulling machine. The only difference between the shifting device made by Clerc for the washing machines, and that made by him for the plaintiff, was that in the washing machine reverser the screw-shaft was driven by two gears, one on each end of it, while the one described in the patent is driven by a belt; and that the washing machine was horizontal, while the plaintiff's machine was upright, in consequence of which the horizontal machine required a spur gear, while the upright machine had a bevel gear. But these changes were such as any skillful mechanic could make. The plaintiff, in giving his order to Clerc to make the reverser, gave him no directions as to how to construct it, and only gave him a drawing of the fulling machine to which it was to be attached.

The operation of the automatic reverser in connection with the fulling machine is precisely the same as its operation in connection with the washing machine, or with any other machine to which it can be applied. There is no modification of its action produced by attaching it to the fulling machine.

The plaintiff testifies that, before he had the automatic reverser, his fulling machine would run in one direction until the belt was shifted by hand; that if the hides got too hot he had to stop the motion and reverse it; and that he had also to stop the action of the machine when the

automatic reverser was attached to it, if the hides got too hot. It also appears, from the plaintiff's testimony, that from 1867, when he attached the automatic reverser to his machine, he was occupied for four years in experimenting with the machine, before he perfected the process of fulling the hides so that the machine would turn out satisfactory work regularly and smoothly; that the difficulty was not with the automatic reverser, because that worked and reversed in the same manner when first attached, in 1867, that it did in 1871; that the difficulty with the machine, which caused these experiments occupying four years, was that the hides would not double backward uniformly; that when they were wedged or packed the automatic reversing apparatus would not stop the machine or reverse it soon enough to prevent injury; that the hides would double twice, and would tear off from the shaft before the machinery could be stopped; that the machine would often reverse before the unwinding was completed, and thus the enlargements of the two folds or doubles would meet, and the hides be torn from the shaft; that as yet he had not perfected any process for satisfactorily producing the article now known as fulling rawhide; that to do so he varied the condition of the hides as to moisture, until he found that, at the right degree of dampness, the hides would double backward with practical regularity; that he also several times changed the means by which he fastened the hides to the shaft; that to make the article in question, the hides had to be made soft and pliable by being subjected to a severe and long continued mechanical operation, such as twisting or doubling back and forth; that, to do this, the hides had to be in a certain condition as to moisture, neither too dry nor too wet; that he had, therefore, to experiment by changing the degree of moisture by slight variations, until he found the proper degree; that he had to discover some mechanical means by which all parts of every hide could be subjected to an equal and uniform amount of mechanical action, so that no hard spots would be left in the hide; that, some parts of a hide being three times as thick as other parts of the same hide, it was difficult to discover whether there was a degree of moisture at which the hides could be successfully treated in the machine, because it took much more soaking to moisten the thick parts of the hide than it did the thin; that he finally learned how to moisten the entire hide uniformly by peculiar ways of folding it while being moistened, and hanging it so that some parts of the hide would be longer in water than other parts; that there was also a great difference in the texture of different parts of a hide; that no two hides are alike as to thickness and texture; and that he did not overcome these difficulties until 1871.

It is quite apparent, from this recital of the difficulties encountered by the plaintiff, none of which are alluded to in the specification of the patent, that if he invented anything patentable, it consisted in some process of treating the hides, so as to produce the merchantable article of fulling rawhide. But there is no suggestion of any such invention in the specification or the claim.

There is no patentable combination of the automatic shifting device with the drum of the

fulling machine. It is a mere aggregation of parts. The shifting device operates automatically to reverse the action of the fulling machine in precisely the same way that it operates when applied to any other machine; and, the shifting device being old, its application to the fulling machine did not require the exercise of invention. *Double-Pointed Tack Co. v. Two Rivers Mfg. Co.* 109 U. S. 117, 120, 121 [27: 877, 878].

The same view was taken of this patent by Judge Drummond in the case of *Royer v. Chicago Mfg. Co.* 20 Fed. Rep. 853, decided by him in the Circuit Court of the United States for the Northern District of Illinois, in June, 1884, in which he held that the invention was not patentable, because it was merely the application of an old device used in connection with a washing machine to an analogous use.

The principle has been applied by this court in various cases. *Pomace Holder Co. v. Ferguson*, and cases there collected, 119 U. S. 335, 338 [30: 406, 407]; *Thatcher Heating Co. v. Burtis*, 121 U. S. 286, 295 [30: 942, 945]; *Dreyfus v. Searle*, 124 U. S. 60 [31: 352]; *Hendy v. Golden State & Miners Iron Works*, 127 U. S. 370, 375 [32: 207, 209].

Decree affirmed.

HENRY C. DAHL, *Ptff. in Err.*,

v.

SALY RAUNHEIM.

(See S. C. Reporter's ed. 260-268)

Placer mining patent—equitable owner—action to quiet title—vein or lode—evidence of—adverse claim.

1. Where a person has complied with all the proceedings essential for the issue of a patent for placer mining ground, he is the equitable owner of the mining ground, and the government holds the premises in trust for him to be delivered upon the payments specified.

2. Being entitled to a patent, he has a right to ask a determination of any claim asserted against his possession which may throw doubt upon his title.

3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral and other deposits within its boundaries.

4. The subsequent discovery by the defendant of a lode, two or three hundred feet outside of the boundaries of the ground, does not create any presumption that a vein or lode existed within them.

5. That it was placer ground is conclusively established against the defendant by the fact that no adverse claim was asserted by him to the plaintiff's application for a patent of the premises as such ground.

[No. 85.]

Submitted Nov. 7, 1889. Decided Nov. 25, 1889.

IN ERROR to the Supreme Court of the Territory of Montana to review a judgment of that court affirming a judgment and decree of the Second Judicial District Court of Montana Territory in favor of the plaintiff, Saly Raunheim, adjudging and decreeing that he is the owner of and entitled to possession of the premises described in the complaint and quieting

his title as against the defendant or any person claiming under him. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 6 Mont. 167.

Mr. Wm. H. DeWitt, for plaintiff in error:

In an action of this nature, the plaintiff must be in possession of the premises at the time of the commencement of the action.

§ 354, Montana Code Civ. Proc.; *Lyle v. Rollins*, 25 Cal. 437; *Rico v. Spence*, 31 Cal. 504; *Ferrie v. Irving*, 28 Cal. 645; *Pralus v. Jefferson G. & S. Min. Co.* 84 Cal. 558; *Wolverton v. Nichols*, 5 Mont. 89, 119 U. S. 485 (30: 474).

The plaintiff must prove, not only a possession constructively, but one consistent with his claim; that is, in this case, it must be a placer mining possession.

Attwood v. Fricot, 17 Cal. 38; *Correa v. Freitas*, 42 Cal. 389.

Placer mining ground is, in law and in fact, that which is available and valuable for placer mining purposes.

Alford v. Barnum, 45 Cal. 482; *Ah Yew v. Choate*, 24 Cal. 562; *U. S. v. Iron Silver Min. Co.* 128 U. S. 673 (32: 571); *Colorado Coal & Iron Co. v. U. S.* 123 U. S. 307 (31: 182).

(No counsel for defendant in error.)

Mr. Justice Field delivered the opinion of the court:

This is an action to quiet the title of the plaintiff below to certain placer mining ground, forty acres in extent, situated in Silver Bow County, Montana, of which he claims to be the owner, and in a portion of which the defendant claims to have some right and interest, and for which portion he has applied for a patent. The plaintiff asserts title under a location of the ground as a placer claim on the 22d of February, 1880, by parties from whom he purchased.

The defendant asserts title to a portion of that ground, being three acres and a fraction of an acre in extent, as a lode claim under a location by the name of the Betsy Dahl Lode, made subsequently to the location of the premises as placer mining ground, and subsequently to the application by the plaintiff for a patent therefor. That application was made on the 16th of July, 1881, and the register of the local land office caused notice of it to be published as required for the period of sixty days. All the other provisions of the law on the subject were also complied with. See *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 653 [26: 875, 881]. To this application no adverse claim to any portion of the ground was filed by the defendant or any other person, and the statute provides that in such case it shall be assumed that the applicant is entitled to a patent upon certain prescribed payments, and that no adverse claim exists. The statute also declares that thereafter no objection of third parties to the issue of a patent shall be heard, except it be shown that the applicant has failed to comply with the requirements of the law. No such failure was shown by the defendant. He is therefore precluded from calling in question the location of the claim, or its character as placer ground.

The only position on which the defendant can resist the pretensions of the plaintiff is that the placer ground, for a patent of which he ap-

plied, does not embrace the lode claim. The effect to be given to that position depends upon the answer to the question whether at the time of his application any vein or lode was known to exist within the boundaries of the placer claim, which was not included in his application. Section 2338 of the Revised Statutes provides that when one applies for a placer patent, who is at the time in the possession of a vein or lode included within its boundaries, he must state that fact, and then on payment of the sum required for a vein or lode and twenty-five feet on each side of it at five dollars an acre, and two dollars and a half an acre for the placer claim, a patent will issue to him covering both the placer claim and the lode. But it also provides that, where a vein or lode is known to exist at the time within the boundaries of a placer claim, the application for a patent, which does not also include an application for the vein or lode, will be construed as a conclusive declaration that the claimant of the placer claim has no right of possession to the vein or lode; and also that where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral and other deposits within its boundaries.

It does not appear in the present case that a patent of the United States has been issued to the plaintiff; but it appears that he has complied with all the proceedings essential for the issue of such a patent. He is therefore the equitable owner of the mining ground, and the government holds the premises in trust for him to be delivered upon the payments specified. We accordingly treat him, in so far as the questions involved in this case are concerned, as though the patent had been delivered to him. Being entitled to it, he has a right to ask a determination of any claim asserted against his possession which may throw doubt upon his title.

When it can be said that a lode or vein is known to exist in a placer mining claim, within the meaning of section 2338 of the Revised Statutes, was considered to some extent in *Reynolds v. Iron Silver Min. Co.* 116 U. S. 687 [29: 774], and *Iron Silver Min. Co. v. Reynolds*, 124 U. S. 874 [31: 466], and also in *Noyes v. Mantle*, 127 U. S. 848, 858 [32: 168, 170], and some of the difficulties in giving an answer that would be applicable to all cases were there stated. In the present case no difficulty arises, for the question was left to the jury and decided by them. The court instructed them to the effect that if they believed that the premises were located by the grantors and predecessors in interest of the plaintiff as a placer mining claim in accordance with law, and they continued to hold the premises until conveyed to the plaintiff, and the plaintiff continued to hold them up to the time of his application for a patent therefor, and at the time of such application there was no known lode or vein within the boundaries of the premises claimed, their verdict should be for the plaintiff.

The jury, having found a general verdict for the plaintiff, must be deemed to have found that no such lode as claimed by the defendant existed when the application of the plaintiff for a patent was filed. We may also add to what is thus concluded by the verdict that there was

no evidence of any lode existing within the boundaries of his claim, either when the plaintiff made his application or at any time before. The discovery by the defendant of the Dahl lode two or three hundred feet outside of those boundaries does not, as observed by the court below, create any presumption of the possession of a vein or lode within those boundaries, nor, we may add, that a vein or lode, existed within them.

It is earnestly objected to the title of the plaintiff that he did not present any proof that the mining ground claimed by him was placer ground. It appeared that the ground had been surveyed and returned by the surveyor-general of Montana to the local land office as mineral land, and the defendant, in asserting the possession of a lode upon it, admits its mineral character. That it was placer ground is conclusively established in this controversy, against the defendant, by the fact that no adverse claim was asserted by him to the plaintiff's application for a patent of the premises as such ground. That question is not now open to litigation by private parties seeking to avoid the effect of the plaintiff's proceedings.

Several questions presented by the plaintiff in error in his brief we do not notice, because they arise only upon the motion made by him for a new trial. The rulings upon such a motion are not open to consideration in this court.

Judgment affirmed.

HENRY C. DAHL, *Plff. in Err.*,
v.

THE MONTANA COPPER COMPANY.

(See S. C. Reporter's ed. 264-267.)

Patent for placer ground—estoppel—effect of lode or vein, known to exist—question not raised by pleadings.

1. Where plaintiff applied for a patent for placer ground, and complied with the law, and no adverse claim was filed by defendant during the period of the publication of notice of the application, the latter is precluded from questioning plaintiff's right to the patent and from objecting to the location or its character as placer ground.
2. If a lode claim is subsequently located by defendant on the premises, the only question open to him in an action by plaintiff to quiet his title is whether the lode or vein claimed by defendant was known to exist at the time of plaintiff's application, none having been included therein.
3. The incompetency of a foreign corporation to own property in a Territory, without having complied with the provisions of the territorial law in that respect, cannot be considered in this court, unless set up in the pleadings in the court below.

[No. 86.]

Submitted Nov. 7, 1889. Decided Nov. 25, 1889.

IN ERROR to the Supreme Court of the Territory of Montana to review a judgment affirming a judgment and decree of the District

Court of the Second District of Montana Territory, in favor of plaintiff, in an action to quiet the title to certain placer mining grounds in Silver Bow County, Montana, claimed by the plaintiff, The Montana Copper Company, under a location made in March, 1879, against the assertion of ownership by defendant to a portion of the premises as a lode claim, under location made in March, 1881. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 6 Mont. 131.

Mr. W. H. DeWitt for plaintiff in error.
(No counsel for defendant in error.)

Mr. Justice Field delivered the opinion of the court:

This is an action to quiet the title to certain placer mining ground, twenty acres in extent, in Silver Bow County, Montana, claimed by the plaintiff below, The Montana Copper Company, under a location made in March, 1879, against the assertion of ownership by the defendant to a portion of the premises as a lode claim under a location made in March, 1881.

The plaintiff applied for a patent for its placer ground in November, 1880, and notice of the application was published by the register of the local land office, and all other provisions of the statute required in such cases were complied with. No adverse claim was filed by the defendant or anyone else during the period of publication. The Dahl lode claim was not located until after that period had expired. The defendant is therefore precluded from questioning the right of the plaintiff to a patent for the premises, and, of course, from objecting either to the location or its character as placer ground. The only question open to him in this controversy is whether the lode or vein claimed by him was known to exist at the date of the plaintiff's application, none having been included in such application, and upon that question a jury have passed, and found specially that no lode or vein was then known to exist within the boundaries of the placer claim.

The case is similar in this respect to the one just decided, *Dahl v. Raunheim*, ante, p. 324. But the plaintiff in error endeavors to raise another question in this court, namely, as to the competency of The Montana Copper Company, the plaintiff below, to do business in the Territory, and, consequently, to maintain any suit respecting its property, because it does not appear that it has complied with the conditions imposed by the Statute of the Territory to its transacting business there. That Statute, which was passed in July, 1879, provided that all foreign corporations organized under the laws of any State or Territory of the United States, or by virtue of any special Acts of the Legislative Assembly of such State or Territory, or of any foreign government, should, before doing business within the Territory, file in the office of its secretary and in the office of the county recorder of the county wherein they intend to carry on business, an authenticated copy of their charter or certificate of incorporation, and also a statement verified by their president and secretary, and attested by a majority of the board of directors, showing:

First. The name of such incorporation, and the location of its principal office or place of

business, without this Territory; and, if it is to have any place of business or principal office within this Territory, the location thereof.

Second. The amount of its capital stock.

Third. The amount of its capital stock actually paid in money.

Fourth. The amount of its capital stock paid in any other way, and in what.

Fifth. The amount of the assets of the incorporation, and of what the assets consist, with the actual cash value thereof.

Sixth. The liabilities of such incorporation, and, if any of its indebtedness is secured, how secured, and upon what property.

The Statute also provided that such corporation or joint-stock company should file at the same time and in the same offices a certificate under the signature of its president, or other acting head, and its secretary, stating that the corporation had consented to be sued in the courts of the Territory in all causes of action arising within it, and that service of process might be made upon some person, a citizen of the Territory, whose name and place of residence should be designated, and that such service should be taken and held to be as valid to all intents and purposes as if made upon the company in the State or Territory under the laws of which it was organized.

The Statute also provided a forfeiture of ten dollars a day for every day in which such foreign corporation should, after four months from the publication of the Act, neglect to file the statements and certificates mentioned, and declared that all acts and contracts made by such incorporation, or any agent or agents, during the time it should fail and neglect to file the statements and certificates, should be void and invalid as to such corporation. In the present action the plaintiff alleges in its complaint that it is a corporation created under the Laws of New York, doing business in Silver Bow County, in the Territory of Montana, and is the owner of the property in controversy. The answer of the defendant does not deny its incorporation, or its right to do business in that county, but only its ownership of the property. No question is therefore raised on the pleadings as to its competency to do business within the Territory for want of compliance with the provisions of the territorial law. The question at issue on the pleadings and on the trial in the court below was confined to the ownership of the mining ground. Without, therefore, considering the validity and force of the provisions of that law (Congress having permitted corporations, whether formed within or without that Territory, to explore for and hold mining claims on the public domain, *McKinley v. Wheeler*, 180 U. S. 630 [32:1048]), or whether, if they are valid, any parties except the government of the Territory can allege a disregard of them, to defeat the title of the corporation to its property (*Fritts v. Palmer*, 182 U. S. 282, ante, p. 317), it is sufficient in this case to say that such incompetency cannot be considered unless set up in the pleadings in the court below. A failure to comply with the provisions of the law will not be presumed in the absence of any allegation on the subject. The objection cannot be urged for the first time in this court.

Judgment affirmed.

JARED E. REDFIELD, *Plff in Err.*,

v.

WILLIAM P. PARKS ET AL

(See S. C. Reporter's ed. 239-252.)

Government not amenable to the Statute of Limitations nor the doctrine of laches—Statute, when begins to run in ejectment—legal title—action based on patent for land—void tax deed—not sufficient to give color of title under Statute.

1. No state Statute of Limitations can affect the rights of the United States; it is not amenable to the Statute of Limitations or the doctrine of laches.
2. In the courts of the United States, in an action of ejectment based upon a title derived from the government, the Statute of Limitations does not begin to run until the date of the government patent for the land.
3. Plaintiff in ejectment must recover on the legal title, and cannot recover, in the courts of the United States, upon the equitable title evinced by his certificates of purchase made by the register of the land office; and he therefore cannot commence the action until the making of the patent for the land.
4. An Arkansas tax deed is void where the land was sold for taxes on a day not authorized by law.
5. When a deed, founded on a sale for taxes, is introduced in support of the bar of a possession under Statutes of Limitations, it is of no avail if it appears upon its face and by its own terms to be absolutely void. Such a deed cannot create color of title which will bring the case within such Statutes.

[No. 27.]

Submitted April 15, 1889. Decided Nov. 18, 1889.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas to review a judgment for the defendants in an action in the nature of ejectment to recover possession of real estate, upon a trial by the court without a jury. *Reversed, and, upon the findings of fact by the court, ordered that the circuit enter judgment for plaintiff.*

The facts are stated in the opinion.

Mr. Sol F. Clark, for plaintiff in error:

To constitute a color of title under the Statute of Limitations the adverse claimant must believe the deed or will under which he claims gives him a sound title.

Ege v. Medlar, 39 Pa. 98, 99; *McCall v. Neely*, 3 Watts, 72; *Attwood v. Pricot*, 17 Cal. 48; *Buckley v. Taggart*, 62 Ind. 238; *Mississippi & T. R. Co. v. Devaney*, 42 Miss. 555; *Sedgwick & Wait's Trial of Titles to Land*, § 775; *Lebanon Min. Co. v. Rogers*, 8 Colo. 84; *Crispen v. Hannavan*, 50 Mo. 544; *Fugate v. Pierce*, 49 Mo. 447; *Bradley v. West*, 60 Mo. 41; *Chapman v. Templeton*, 58 Mo. 465; *Hannibal & St. J. R. Co. v. Clark*, 68 Mo. 871; *Close v. Samm*, 27 Iowa, 510; *Texas Land Co. v. Williams*, 51 Tex. 62.

And to be in good faith the party must

honestly believe he has a good title, and his purchase must be because he wants the land to cultivate, or for some useful purpose.

McCracken v. San Francisco, 16 Cal. 686; *Den v. Hunt*, 20 N. J. L. 498; *Baker v. Swan*, 32 Md. 355; *Foulkes v. Bond*, 41 N. J. L. 547.

If Harper was a tenant at all, it was a tenancy at will, or by sufferance, and was determined upon the sale of the premises.

Tiedeman on Real Property, 213, 714; *Doe v. Thomas*, 6 Eng. L. & Eq. 487; *Hill v. Jordan*, 30 Me. 367; *Morse v. Goddard*, 13 Met. 177; *Howard v. Merriam*, 5 Cush. 568; *Stedman v. Gassett*, 18 Vt. 846; *Hemphill v. Tevis*, 4 Watts & S. 585.

Under bare color of title, constructive adverse possession will not extend beyond the parts and parcels of land upon which actual possession is taken.

Thompson v. Burhans, 79 N. Y. 100; *Chandler v. Spear*, 22 Vt. 406; *Pepper v. O'Dowd*, 39 Wis. 588, 550; *Kimball v. Stormer*, 65 Cal. 116; *Cairo & F. R. Co. v. Parks*, 32 Ark. 131; *Radcliffe v. Scruggs*, 46 Ark. 96, 104.

The Statute of Limitations, by adverse constructive possession, cannot commence to run against the owner until the patent issues.

Smith v. Garza, 15 Tex. 150; *Farley v. Smith*, 39 Ala. 38; *Beach v. Gabriel*, 29 Cal. 580; *De Miranda v. Toomey*, 51 Cal. 165; *Duke v. Thompson*, 16 Ohio, 84; *Thomas v. Hatch*, 3 Sumn. 170; *Kennedy v. Townsley*, 16 Ala. 239.

A tax deed, to be color of title, must have been received in good faith.

Winstanley v. Meacham, 58 Ill. 97; *Dalton v. Luras*, 63 Ill. 337; *Holloway v. Clark*, 27 Ill. 486.

Where a deed is void because the sale is void, it gives neither seisure nor right to enter upon the premises.

Brookings v. Woodin, 74 Me. 224; *Wallingford v. Fiske*, 24 Me. 387.

An unauthorized sale passes neither title nor color of title.

McKee v. Lamberton, 2 Watts & S. 114; *Cranmer v. Hall*, 4 Watts & S. 36; *Knox v. Cleveland*, 18 Wis. 245; *Allen v. Morse*, 72 Me. 502.

Where a sale is void, a pretended tax deed is void upon its face.

Bois v. Merriam, 5 Fed. Rep. 439; *McGavock v. Pollack*, 13 Neb. 585.

And a sale is void where it was not made on a day authorized by law.

Chandler v. Keeler, 46 Iowa, 599; *Butler v. Delano*, 43 Iowa, 350.

Mr. Daniel W. Jones, for defendants in error:

Plaintiff in ejectment must prove that he has the legal estate and the right of entry, and that defendant is in possession.

Miller v. McIntyre, 81 U. S. 6 Pet. 61 (8: 320); *Daniel v. Lefevre*, 19 Ark. 202; *Fleming v. Johnson*, 26 Ark. 423; 2 Greenl. on Ev. § 804.

An action of ejectment cannot be maintained in a federal court on an equitable title.

Foster v. Mora, 98 U. S. 425 (25: 191); *Sheirburn v. DeCordova*, 65 U. S. 24 How. 423 (16: 741); *Fenn v. Holms*, 62 U. S. 21 How. 481 (16: 198); *McCool v. Smith*, 66 U. S. 1 Black, 459 (17: 218); *Litchfield v. Dubuque &*

NOTE.—Sale of land for taxes; strict compliance with statute necessary. See note to *Williams v. Peyton*, 17 U. S. 4 Wheat. 77 (4: 518).

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P. R. Co. 74 U. S. 7 Wall. 270, 272 (19: 150, 151); *Percifull v. Platt*, 86 Ark. 456, 465.

Any instrument having a grantor and grantee, and containing a description of the land intended to be conveyed, and apt words for their conveyance, gives color of title.

Hardin v. Orate, 60 Ill. 215; *Platt County v. Goodell*, 97 Ill. 84; *Thomas v. Stickle*, 82 Iowa, 71-77; *Toll v. Wright*, 87 Mich. 98-98; *Pillow v. Roberts*, 54 U. S. 18 How. 472 (14: 228); *Logan v. Jelks*, 34 Ark. 547-549; *Osofer v. Brooks*, 20 Ark. 542; *Elliott v. Pearce*, 20 Ark. 508; *Hall v. Law*, 102 U. S. 461 (26: 217); *Osterman v. Baldwin*, 73 U. S. 6 Wall. 124 (18: 732); *Beard v. Dansby*, 48 Ark. 184; *Hodges v. Eddy*, 38 Vt. 845; *Bell v. Longworth*, 6 Ind. 278-277.

Good faith is not necessary to sustain color of title under the Statutes of Limitation.

Osofer v. Brooks, 20 Ark. 542; *Ringo v. Woodruff*, 48 Ark. 486; *Mooney v. Cooledge*, 30 Ark. 655; *Logan v. Jelks*, 34 Ark. 549; *Brooks v. Bruyn*, 65 Ill. 894; *McMullin v. Erwin*, 58 Ga. 429; 1 Whart. Law of Ev. 3d ed. § 366.

No particular acts are necessary to constitute actual possession. Control and dominion, evidenced by any acts, give and constitute actual possession.

Coryell v. Cain, 16 Cal. 578; *Webber v. Clarke*, 74 Cal. 11; *Lord Advocate v. Blantyre*, L. R. 4 App. Cas. 770, 791; *Jones v. Williams*, 2 Mees. & W. 381; *Ellicott v. Pearl*, 35 U. S. 10 Pet. 442 (9: 475); *Scott v. Delany*, 87 Ill. 148; *Burton v. Carruth*, 1 Dev. & B. L. 2; *English v. Johnson*, 17 Cal. 116; *Den v. Hunt*, 20 N. J. L. 492; *Beaupland v. McKean*, 28 Pa. 124.

It is not necessary that a claimant should occupy the land claimed by him in person in order to be entitled to the benefit of the Statute of Limitations. He can occupy by a tenant or agent.

Gregg v. Forsyth, 65 U. S. 24 How. 182 (16: 788); *Martin v. Judd*, 81 Ill. 488, 492.

The uninterrupted adverse possession of two or more persons holding in privity, one under the other, following in succession, without leaving the property occupied vacant, for the time prescribed by the Statute of Limitations, will create the statutory bar.

Christy v. Alford, 58 U. S. 17 How. 601 (15: 256).

The amendment of the complaint, setting up the title, is equivalent to a new action. The Statute of Limitations continued to run until the amendment was made.

Sicard v. Davis, 31 U. S. 6 Pet. 124 (8: 842); *Wilkes v. Elliot*, 5 Cranch, C. C. 611; *Lagow v. Neilson*, 10 Ind. 188.

The land sued for was not exempt from taxation.

St. Louis, I. M. & S. R. Co. v. Loftin, 30 Ark. 693; *Union Pac. R. Co. v. McShane*, 89 U. S. 22 Wall. 460 (22: 751).

As soon as The Mississippi, Ouachita and Red River Railroad Company paid the price for the land and received its certificate, the contract of purchase became complete; the lands were segregated from the public domain and became private property, and thereafter taxable.

Witherspoon v. Duncan, 21 Ark. 240, 71 U. S. 4 Wall. 210 (18: 889); *Diver v. Friedheim*, 328

48 Ark. 208; *Carroll v. Safford*, 44 U. S. 3 How. 441 (11: 671); *Smith v. Hollis*, 46 Ark. 24.

Mr. Justice Miller delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Eastern District of Arkansas. The action in that court was in the nature of ejectment to recover possession of real estate, brought by Jared E. Redfield, the present plaintiff in error, against William P. Parks, Charles Harper and others. The case was submitted to the court without a jury, which made a finding of facts on which was rendered a judgment for the defendants.

The principal issue in the case before that court was on the defense under the Statute of Limitations. The plaintiff relied upon, and introduced in evidence, a patent from the United States dated April 15, 1875, conveying the property to The Mississippi, Ouachita and Red River Railroad Company, reciting the purchase by that company of the land in controversy and the payment of \$594.48 for it.

The plaintiff, Redfield, purchased this land at a judicial sale, on a judgment against that company, for the sum of five hundred dollars, and received a deed under that purchase. It further appears from the findings of the court that the railroad company made payment in full for the land September 10, 1866, and received at that time the certificate of the register of the land office. The approval of this entry for the issue of a patent was made at the General Land Office in Washington, June 1, 1874. The circumstances under which the delay in the issue of a patent was had are not stated.

The defendants relied upon a deed made by the county clerk of Lafayette County, Arkansas, to W. P. Parks and James M. Montgomery, on the 11th day of August, 1871, upon a sale for taxes for the year 1868, and upon adverse possession under the Statute of Arkansas of two years in regard to claims under tax sales, and the general Statute of Limitation of seven years.

This action was commenced by the plaintiff on the 11th day of April, 1882. The court announced the following conclusions of law:

"1st. That said tax deed to Parks and Montgomery for said land is void, because the land was sold for the taxes of 1868 on a day not authorized by law.

"2d. That under the laws of this State, notwithstanding said tax deed is void upon its face, for the reason stated, it constitutes a claim and color of title sufficient to put in motion the Statute of Limitations in favor of any person in possession under it.

"3d. That the possession taken by Parks and Montgomery of said land under said tax deed, in the manner set out in the finding of facts, constitutes in law actual, peaceable, open, notorious and adverse possession of the whole of said land; and said possession of said land having been taken by Parks and Montgomery as early as the month of February, 1874, and maintained continuously by them and their grantees down to the trial of this cause, the plaintiff's right of action to recover said land is barred by the two years' Statute of Limitation contained in section 4475 of Mansfield's

Digest, and also by the seven years' Statute of Limitation contained in section 4471 of the same Digest."

Among the requests asked by the plaintiff and refused by the court were the following declarations of law:

"8th. The plaintiff's title to the lands in this case, and that of those under whom he claims, dates from the issuance of the patent of the United States to The Mississippi, Ouachita and Red River Railroad Company, on the 15th day of April, 1875, and the Statute did not commence running in behalf of the defendants, or any of them, until such patent was issued."

"8th. That no adverse possession of land can be acquired while the title is still in the United States government, and that the patent issued on the 15th day of April, 1875, did not relate back, so as to make the possession of the defendants adverse prior to the date of the patent."

"9th. That neither the plaintiff, nor the railroad company under which he claims, could have maintained a suit of ejectment in the courts of the United States for the possession of the land described in his complaint on an equitable title, nor until the legal title had passed out of the government on the 15th April, 1875; and this action did not accrue to them until the date of the patent."

"10th. That, this suit having been commenced on the 11th day of April, 1882, within seven years from the date of the patent, the plaintiff's cause of action was not barred by the Statute of Limitations."

"11th. That the deed of V. V. Smith, clerk, not being a sheriff's deed or an auditor's deed, or a deed commonly called a donation deed, is not within the terms of the two years' Statute pleaded by defendants (§ 4117, Gantt's Digest), and this action is not barred by that Statute."

These rulings upon the law of the case by the court present two distinct propositions, on which error is assigned here. One of these is that which holds the seven-year Statute of Limitations, which is the general period of limitation prescribed for the benefit of adverse possession, to be a good defense in this case. The other is the same holding in regard to the two years' Limitation Law.

It is apparent from the finding of the facts that the action, which was commenced on the 11th day of April, 1882, was within the seven years allowed by the Statute of the time that the cause of action accrued, if that is to be computed from the 15th day of April, 1875, the date of the patent introduced by plaintiff. That such is the law in regard to the action of ejectment in the courts of the United States has been repeatedly decided. The foundation of this rule is the proposition that time does not run against the government; that no Statute of Limitation affects the rights of the government unless there is an express provision to that effect in the Statute, and even then it cannot be conceded that state legislation can in this manner imperil the rights of the United States or overcome the general principle that it is not amenable to the Statute

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of Limitations or the doctrine of laches. The facts found in the present case leave it beyond question that the legal title to the property in controversy was in the United States until the issuing of the patent to the railroad company.

In the courts of the United States, where the distinction between actions at law and suits in equity has always been maintained, the action of ejectment is an action at law, and the plaintiff must recover on the legal title. If it be shown that the plaintiff has not the legal title, that the legal title at the time of the commencement of the action or at its trial is in some other party, the plaintiff cannot recover. The facts in the present case show that this title to the land in controversy was in the United States until the 15th day of April, 1875. Up to that time the Statute of Limitations could not begin to run in bar of any action dependent on this title. The plaintiff could not sue or recover in the courts of the United States upon the equitable title evinced by his certificate of purchase made by the register of the land office. His title, therefore, being derived from the United States, the right of action at law to oust the defendants did not commence until the making of that patent.

In the case of *Lindsay v. Miller*, 81 U. S. 6 Pet. 666 [8: 588], the defendants relied upon a patent issued by the Commonwealth of Virginia, dated March, 1789, under the survey and entry made in January, 1788, and duly recorded in that year. They then proved possession for upwards of thirty years. The plaintiff introduced a patent from the United States, in which was the legal title, dated December 1, 1824, thirty-five years after the patent issued by the Commonwealth of Virginia. The action was brought in 1832.

This court, in regard to the issue thus made, expressed itself in the following terms:

"That the possession of the defendants does not bar the plaintiff's action is a point too clear to admit of much controversy. It is a well-settled principle that the Statute of Limitations does not run against a State. If a contrary rule were sanctioned, it would only be necessary for intruders upon the public lands to maintain their possessions until the Statute of Limitations shall run, and then they would become invested with the title against the government, and all persons claiming under it. In this way the public domain would soon be appropriated by adventurers. Indeed, it would be utterly impracticable, by the use of any power within the reach of the government, to prevent this result. It is only necessary, therefore, to state the case in order to show the wisdom and propriety of the rule that the Statute never operates against the government. The title under which the plaintiff claimed emanated from the government in 1824. Until this time there was no title adverse to the claim of the defendants. There can therefore be no bar to the plaintiff's action."

The case of *Bagnell v. Broderick*, 88 U. S. 18 Pet. 486 [10: 235], which has been a leading case in this court for many years, was an action of ejectment in which a patent from the United States to John Robertson, Jr., was relied on by the plaintiff as being the origin of

his title. The defendants relied upon certain proceedings in the United States land office in Missouri by which the property was deemed to have been appropriated under the Act of Congress concerning New Madrid lands which had been lost by the earthquake, and had been certified to Robertson, and a deed from Robertson to the parties under whom defendants claimed. But this court held that the patent of the United States, issued long afterwards to Robertson, was the strictly legal title on which plaintiff was bound to recover, and in making the decision the following language is used:

"But suppose the plat and certificate of location had been made and returned to the recorder in the name of Morgan Byrne; and that it had been set up as the better title in opposition to the patent adduced on behalf of the plaintiff in ejectment; still, we are of opinion the patent would have been the better legal title. We are bound to presume, for the purposes of this action, that all previous steps had been taken by John Robertson, Jr., to entitle himself to the patent, and that he had the superior right to obtain it, notwithstanding the claim set up by Byrne; and having obtained the patent, Robertson had the best title (to wit, the fee) known to a court of law.

"Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal government in reference to the public lands declares the patent the superior and conclusive evidence of legal title; until its issuance the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment."

Perhaps the case which presents the whole of this question in the strongest light is that of *Gibson v. Chouteau*, 80 U. S. 13 Wall. 92 [20: 584]. That was a writ of error from this court to the Supreme Court of Missouri, and that court had held that, under the statutes of that State by which an action of ejectment could be sustained upon an equitable right only, the bar of the Statute of Limitations began to run when the right of action under such equitable title accrued. The case was several times before the Supreme Court of that State, which finally decided in favor of the defendants on the plea of the Statute of Limitations, although the patent under which plaintiff claimed to recover had been issued within the ten years which that Statute allowed. In delivering its opinion that court used the following language:

"But there is another principle upon which we think the Statute may be made to operate here as a bar to the plaintiff's action, and that is the fiction of relation whereby the legal title is to be considered as passing out of the United States through the patent at its date, but as instantly dropping back in time to the date of the location as the first act of inception of the conveyance, to vest the title in the owner of the equity as of that date, and make it pass from him to the patentee named through all the intermediate conveyances, and so that the two rights of entry and the two causes of action are thus merged in one, and the Statute may be held to have operated on

both at once. The legal title, on making this circuit, necessarily runs around the period of the statute bar, and the action founded on this new right is met by the Statute on its way and cut off with that which existed before." 39 Mo. 588.

This is precisely the principle asserted in the case before us. The Mississippi, Ouachita and Red River Railroad Company, under whose patent the plaintiff claims, had made the entry and received the certificate of that entry and of the payment of the money for this land, September 10, 1856. The patent on this certificate was not issued until April 15, 1875, which was nineteen years after the entire equitable interest in the land in controversy had been vested in the railroad company by virtue of the payment of the money and the register's certificate. As the title of Redfield had its inception in this proceeding, it is now argued, and the circuit court must have so decided, that the Statute of Limitations, instead of leaving it to commence with the issue of the patent, did run through the whole course of the possession of the defendant after the date of the issue of the register's certificate in 1856. Whether the statutes of Arkansas would have authorized an action to recover the possession by virtue of the register's certificate or not, it is precisely the same principle as that asserted by the Supreme Court of Missouri in the case of *Gibson v. Chouteau*. The opinion of this court, delivered by Mr. Justice Field in that case, states with great clearness the principle that a Statute of Limitation does not run against the State unless it is so expressly declared, and adds that, "As legislation of a State can only apply to persons and things over which the State has jurisdiction, the United States are also necessarily excluded from the operation of such statutes." With regard to the relation back to the inception of the title the court says: "The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued."

In regard to the principle asserted by the Supreme Court of Missouri, the opinion says:

"The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title. The defendants in this case were strangers to that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder. The Statute of Limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon, under the prac-

tice of the State. It left the right of entry upon the legal title subsequently acquired by the patent wholly unaffected.

"In the federal courts, where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title. For the enforcement of equitable rights, however clear, distinct equitable proceedings must be instituted. The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the government conveyance. If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or canceling the patent. But in the action of ejectment in the federal courts the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title. . . .

"But neither in a separate suit in a federal court, nor in an answer to an action of ejectment in a state court, can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the Statute of Limitations of the State, be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of the patent, under state legislation, in whatever form or tribunal such occupation be asserted." 80 U. S. 13 Wall. 101, 104 [20: 537, 538].

These principles are illustrated by other cases in this court, such as *Rector v. Ashley*, 78 U. S. 6 Wall. 142 [18: 738]; *United States v. Thompson*, 98 U. S. 486 [25: 194].

The question of the two years' Statute of Limitation of Arkansas presents other considerations. That Statute is in the following language:

"No action for the recovery of any lands, or for the possession thereof, against any person or persons, their heirs or assigns, who may hold such lands by virtue of a purchase thereof, at a sale by the collector, or commissioner of State lands, for the nonpayment of taxes, or who may have purchased the same from the State by virtue of any Act providing for the sale of lands forfeited to the State for the nonpayment of taxes, or who may hold such lands under a donation deed from the State, shall be maintained, unless it shall appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the lands in question within two years next before the commencement of such suit or action."

There can be no question but that more than two years had elapsed after the issue of the patent of the United States, under which plaintiff asserts title, and after his cause of action had accrued, during which the defendants were in possession of a part, if not the

whole, of the land in controversy. Therefore, if the circumstances of that possession are such as to bring it within the purview of this Statute, the possession was a bar to recovery. On this subject the court declared as conclusions of law: 1st. That the tax deed under which defendants claimed is void, because the land was sold for taxes of 1868 on a day not authorized by law; 2d. That under the laws of this State, notwithstanding the said tax deed is void upon its face, for the reason stated, it constitutes a claim and color of title sufficient to put in motion the Statute of Limitations in favor of any person in possession under it; 3d. That the possession taken by Parks and Montgomery of said land under said tax deed, in the manner set out in the finding of facts, constitutes in law actual, peaceable, open, notorious and adverse possession of the whole of said land; and said possession of said land having been taken by Parks and Montgomery as early as the month of February, 1874, and maintained continuously by them and their grantees down to the trial of this cause, the plaintiff's right of action to recover said land is barred by the two years' Statute of Limitation contained in section 4475 of Mansfield's Digest, and also by the seven years' Statute of Limitation contained in section 4471 of the same Digest.

We think it very clear that the judge was correct in holding this tax deed to be void. It was not merely void by extrinsic facts shown to defeat it, but was absolutely void on its face. But we think that the court erred in holding that such an instrument could create color of title which would bring the case within the foregoing Statute of Limitations.

The case of *Moore v. Brown*, 52 U. S. 11 How. 414 [18: 751], brought the question before this court. The court says:

"It is disclosed upon the face of the deed that the auditor sold the land short of the time prescribed by the Act. It was not, then, a sale according to law. That must have been as well known by the purchaser as it was by the auditor."

After a somewhat elaborate opinion it was certified to the circuit court, from which the case had come by division of opinion, "that the paper offered in evidence by the defendant is a void deed upon the face of it, and was not admissible as evidence for the purpose for which it was offered,"—which was to support the possession under the Statute of Limitations.

A similar decision was made in the case of *Walker v. Turner*, 22 U. S. 9 Wheat. 541 [6: 155].

Many of the States of the Union have enacted what are called short Statutes of Limitation, the object of which is to protect rights acquired under sales of real estate for taxes. The general purpose of these statutes is to fix a period of time running in favor of the holder under such tax titles, after which the validity of that title shall not be questioned for any irregularity in the proceedings under which the land was sold. This object was generally attained by the enactment of short Statutes of Limitations, by means of which

the party in possession under such defective titles can, by pleading this Statute, make his title good.

The brief of counsel in this case produces many instances of cases decided in the courts under statutes of this class; and the general principle pervading them is well expressed by the Court of Appeals of Kentucky in the case of *Trustees Ky. Sem. v. Payne*, 8 T. B. Mon. 161, in which the court says:

"Instead of twenty years mentioned in the General Act, but seven years are required by the Act of 1809; but, to form a bar to an action, something more is required by the latter Act than an adverse possession for seven years."

In *Waterson v. Dovee*, 18 Kan. 228, the court held that the tax deed, which upon its face showed that it was void, did not support the possession as a bar under the short Statute of Limitations in that State which applied to actions for the recovery of lands sold for taxes. The court, in that case, said, quoting from the previous case of *Shoat v. Walker*, 6 Kan. 65:

"A tax deed to be sufficient, when recorded, to set the Statute of Limitation in operation, must of itself be prima facie evidence of title. . . . It is not necessary that it be sufficient to withstand all evidence brought against it to show that it is bad; but it must appear to be good on its face. . . . When the deed discloses upon its face that it is illegal, when it discloses upon its face that it is executed in violation of law, the law will not assist it. No action under the Statute of Limitations can then be brought in to aid its validity."

Similar decisions have been made in the cases of *Mason v. Crowder*, 85 Mo. 526; *Sheehy v. Hinds*, 27 Minn. 259; *Outler v. Hurlbut*, 29 Wis. 152; *Gomer v. Chaffee*, 6 Colo. 314; *Wofford v. McKinna*, 23 Tex. 86.

We do not discover in the Statute of Arkansas, nor in the decisions of its courts cited by counsel for defendant, anything to contravene these views, and we think that both the weight of authority and sound principle are in favor of the proposition that when a deed founded on a sale for taxes is introduced in support of the bar of a possession under these Statutes of Limitations, it is of no avail if it can be seen upon its face and by its own terms that it is absolutely void. We are satisfied, therefore, that in regard to the defense under both Statutes of Limitation, the declarations of law by the court were erroneous, and for that reason its judgment is reversed. And as the finding of facts by the court is before us, and these are the only matters worth attention, it is ordered that the circuit court enter judgment for the plaintiff.

CHARLES MARCHAND, *Appt.*,

FREDERICK EMKEN.

(See S. C. Reporter's ed. 195-200.)

Patent right—manufacture of hydrogen peroxide—inventive faculty—visionary proposition.

1. The patent No. 273,569, granted to Charles Marchand March 6, 1888, for an improvement in the

manufacture of hydrogen peroxide, is invalid for want of novelty.

2. Giving to oxygenated water a well-known rotary motion is not an exercise of inventive faculty.

3. The patentee's claim to be enrolled among the list of inventors is based upon propositions too theoretical and visionary for acceptance.

[No. 87.]

Argued Oct. 25, 1889. Decided Nov. 25, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York dismissing a suit in equity for infringement of letters-patent No. 273,569, granted to Charles Marchand March 6, 1888, for an improvement in the manufacture of hydrogen peroxide. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 23 Blatchf. 435, 26 Fed. Rep. 629.

Messrs. B. F. Lee and W. H. L. Lee for appellant.

(No counsel for appellee.)

Mr. Justice Blatchford delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of New York, by Charles Marchand against Frederick Emken, to recover for the infringement of letters-patent No. 273,569, granted to the plaintiff March 6, 1888, for an improvement in the manufacture of hydrogen peroxide.

The specification says: "This invention has reference to the manufacture of hydrogen peroxide, or oxygenated water, by addition of barium or calcium binoxide to an acid (sulphuric, nitric, acetic, oxalic, hydrochloric, hydrofluoric, hydrofluosilic, and the like), the binoxide having been mixed with water. Heretofore hydrogen peroxide has been made by adding the barium or calcium binoxide, mixed with water, to the diluted acid, the binoxide being added from time to time in small quantities, the vessel in which the operation is conducted being set in a refrigerating medium, and the liquid being agitated or stirred to facilitate the reaction. The stirring has been performed by hand. The present invention is based on the fact or discovery that the reduction of the barium or calcium binoxide takes place under conditions much more favorable in point of rapidity and yield when the acid to be neutralized is given a movement of rotation, both vertically and horizontally, by a screw or other suitable means, which at the same time creates both constant and ever-changing eddies, the said movement of rotation being imparted continuously during the addition of the binoxide. The present invention consists, therefore, first, in imparting to the acid a movement of rotation, the time required for the chemical reaction being thereby lessened, while the reaction itself is more complete."

The specification gives a description of the apparatus, which it says is preferably to be employed and forms part of the invention, in substance as follows: There is a receptacle for the acid, and a jacketing vessel, in which the receptacle rests, for containing the refrigerant or cooling medium. There is a rotating screw

and a vertical power-shaft. The acid receptacle need not be of any particular size, but a good capacity is from five hundred to one thousand gallons. It is preferably hemispherical, but may be cylindrical, frusto-conical, or of other suitable form; and it is made of or lined with material adapted to resist the action of the acid. For use with hydrofluoric acid, a sheet-iron or, better, a copper vessel lined with lead may be used, or one of platinum, gold or silver, or one otherwise rendered non-corrodible. The screw is provided with helicoidal blades, ordinarily two, three or four in number, set obliquely on the arbor or screw-shaft. The blades are preferably pierced with holes. The screw is suspended in the receptacle, being detachably connected with the lower end of the power-shaft by two pieces, one fixed to the power-shaft and the other to the screw-shaft, and clamped together by bolts. On the screw-shaft, above the top of the receptacle, is fixed a disc of wood or other suitable material, which catches the oil from the bearings of the power-shaft, and other foreign matters that otherwise would be liable to fall into the receptacle. The power-shaft is suspended in its bearings by suitable collars, which enable it to support the screw, and is driven from a horizontal shaft, through beveled gearing, or by other well-known or suitable mechanical means. The length of the screw-shaft is such that the blades of the screw do not in operation touch or scrape the interior of the receptacle. The jacketing vessel is of ordinary or suitable construction. The cooling medium commonly employed therein may be placed in it. The vessel being filled with the cooling medium, the proper quantities of acid and water (say twenty parts, by weight, of acid to one hundred parts of water, or other suitable proportions) are placed in the receptacle. The screw is put in motion, and the binoxide of barium or calcium, in the state of a more or less thick emulsion or milk, is added in small quantities. The revolving screw imparts a movement of rotation more or less rapid to the liquid, producing eddies therein and constantly changing the material, and the chemical reaction takes place very regularly and completely. Sufficient binoxide is added to secure the complete neutralization of the acid without rendering the hydrogen peroxide too alkaline. After a certain time, which varies with the quantity of the article manufactured and the amount of binoxide employed, and during which the screw may be stopped, but is preferably kept in revolution, the production of the hydrogen peroxide is finished. It only remains to allow the matters in suspension to settle and to decant the clear liquor. If it is desired to obtain the hydrogen peroxide in a state of greater purity than results from the above, the clear liquor is subjected to special chemical treatment, which, as it constitutes no part of the present invention, is not described.

Only the first claim of the patent is involved in this suit. That claim reads as follows: "1. The method of making hydrogen peroxide by cooling the acid solution, imparting thereto a continuous movement of rotation, as well in vertical as in horizontal planes,—such, for example, as imparted by a revolving screw in a receptacle,—and adding to said acid solution the binoxide in small quantities, while maintain-

ing the low temperature and the rotary or eddying movements, substantially as described."

The answer sets up, among other defenses, that the alleged invention and patent do not contain any patentable subject matter. After a replication, proofs were taken, and, on a hearing, the court, held by Judge Coxe, entered a decree dismissing the bill, with costs. From this decree the plaintiff has appealed. The opinion of the court is found in 23 Blatchf. 485, and 26 Fed. Rep. 629.

It appears from the record that the first claim was three times rejected by the Patent Office, and was then, on appeal, allowed by the examiners-in-chief, who said in their decision: "In the present case, the essence of the invention resides in imparting to the liquid, while making hydrogen peroxide as above, a peculiar motion—one which cannot be given by hand—a continuous movement of rotation, horizontally in opposite directions from the centre, or radially and vortically, or nearly so, according to the shape of the vessel, a vortical motion designated in German as *Wirbelbewegung*, the movement of a smoke ring, making what may be termed a ring vortex." They suggested an amendment to the specification, to make it clear that the invention was "no more than in this particular art, all the other steps being old, imparting to the liquid undergoing chemical change this old motion, this motion produced, for example, by the egg-beater."

The opinion of the circuit court says: "It is not pretended that the complainant discovered hydrogen peroxide, or the method of adding barium, mixed with water, from time to time, to the diluted acid, or the necessity for stirring or agitating the liquid. Neither did he invent the obliquely-bladed screw, the hemispherical receptacle, the jacketing vessel, or any part of the apparatus described in the specification. All this was old and well known. The patent itself illustrates how extremely circumscribed was the theatre of invention." It then refers to the fact that the descriptions, in the specification, of the prior process and of the patented process are substantially the same, except that in the former the stirring was performed by hand, and in the latter it is performed by machinery. The opinion then proceeds: "The question, then, seems to be narrowed down to this: Does it constitute invention to stir, by a well-known and simple mechanical device, what had before been stirred by hand? The complainant desired to manufacture in large quantities what had before been produced chiefly in the laboratory. He knew how hydrogen peroxide had been made; every step in the formula was familiar. A mixture that needed stirring, and a vessel provided with a revolving stirrer, were ready at his hand. He put the former into the latter. This was all. The objecting of agitating the liquid, while making hydrogen peroxide, is to keep the barium, which is three times as heavy as water, suspended in the acid, so that its particles may come in contact with the particles of acid. Whether they come in contact while going round, rising, settling or remaining stationary, can make no difference. Divest the case of the air of mystery with which it is environed, and it seems simple enough. The complainant's predecessors knew that to keep the barium up

in the solution they must stir it. The complainant knew this. Unlike them, however, he manufactured on a scale large enough to make it essential to employ a power-shaft. The oar-shaped sticks which formerly went round and round by hand now go round and round by machinery." The court then refers to the contention of the plaintiff that, by the method set out in the patent, a movement was given to the acid which had never before been imparted to it in the manufacture of hydrogen peroxide, because "the liquid is thrown out towards the circumference of the vessel at the bottom, rises at the sides, returns to the center, and then descends, to be again thrown out at the bottom, while at the same time it is carried round and round;" and says that this, "being reduced to still simpler language, means that the machine will stir large quantities of the liquid more thoroughly than the hand-worked paddles." It adds: "The pretense that the complainant had discovered some occult and wonder-working power, in the motion of a screw revolving in the bottom of a tub, is not sustained by the proof. Whether the contents of the tub be oxygenated water, or soap, or lye, or tartaric acid, the action will be the same. That rotary, eddying motions in liquid will result from the revolving screw, that the liquid will rise highest at the periphery of the tub, and thus have the tendency, at the top, to fall towards the center, were well understood operations of centrifugal force. As every device, apparatus, formula, law of nature, motion and ingredient adopted by the complainant was old, the patent must be held invalid, unless it can be said that giving to oxygenated water a well-known rotary motion springs 'from that intuitive faculty of the mind put forth in the search for new results or new methods, creating what had not before existed, or bringing to light what lay hidden from vision.' (*Hollister v. Benedict & B. Mfg. Co.* 118 U. S. 59, 72 [28: 901, 905]). No such faculty has been tasked in giving form to this patent. There is here no sufficient foundation upon which to rest a claim which, if construed as broadly as the complainant insists it should be, practically makes all pay tribute who stir the mixture in question by machinery, and by hand also, provided substantially the same movement can be produced by hand-stirring, and this seems to be a disputed question upon the proof. The complainant's claim to be enrolled upon the list of inventors is based upon propositions too theoretical and visionary for acceptance." See also *Dreyfus v. Searle*, 124 U. S. 60 [31: 852]; *Crescent Brewing Co. v. Gottfried*, 128 U. S. 188 [32: 390].

A careful consideration of the evidence and of the arguments on the part of the appellant (no brief having been submitted on the part of the appellee) induces us to concur in the views of the circuit court.

Decree affirmed.

THE CITY OF CLEVELAND, *Plff. in Err.*,
v.
HENRY KING.

(See S. C. Reporter's ed. 295-304.)

Duty of city to keep streets in repair—when city liable for damages for breach of that duty.

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1. When a duty to keep streets in repair is enjoined on municipal corporations by a statute, a right of action for damages caused by a neglect to perform such duty arises by the common law.
2. Although a city only allows a reasonable part of a street to be used for depositing building materials thereon, and requires the builder to indicate the locality of such materials by proper lights, that does not relieve the city from the duty to prevent the street from being so occupied as to endanger passers-by, nor from the damages arising from a breach of such duty.

[No. 89.]

Argued Nov. 8, 1889. Decided Nov. 25, 1889.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio to review a judgment in favor of plaintiff in an action for damages for personal injuries sustained by him in consequence of the failure of the City of Cleveland to keep its streets in proper and safe condition for use by the public.

Affirmed.

The facts are stated in the opinion.

Opinion below, 28 Fed. Rep. 835.

Mr. Allan T. Brinsmade, for plaintiff in error:

The City of Cleveland cannot be made liable in an action of this kind unless made so by statute.

Cooley on Torts, 622; *Frazer v. Lewiston*, 76 Me. 581; *Hewison v. New Haven*, 34 Conn. 136-139, 37 Conn. 475; *Hill v. Boston*, 122 Mass. 344-380.

Police officers cannot be regarded as servants or agents of the city.

NOTE.—*Liability of municipal corporations and individuals for obstructions in streets or want of repair thereof—Nuisances in streets.*

Cities and towns which voluntarily accept their charters from the State, clothing them with special privileges to be exercised for the benefit of their citizens and committing to them exclusive control over streets, alleys and highways within their limits, are liable in an action for damages to any person specially injured by their failure to keep such streets, alleys and highways in suitable repair. 2 *Thomp. Neg.* 753, § 12; *Albrittin v. Huntsville*, 60 Ala. 436, 31 Am. Rep. 46; *O'Neill v. New Orleans*, 30 La. Ann. 220, 31 Am. Rep. 221; *Noble v. Richmond*, 31 Gratt. 271, 31 Am. Rep. 726.

In some States this rule is denied. *McCutcheon v. Homer*, 49 Mich. 483, 38 Am. Rep. 212; *Navasota v. Pearce*, 46 Tex. 525, 28 Am. Rep. 279; *Young v. Charleston*, 20 S. C. 116, 47 Am. Rep. 827; *Tranter v. Sacramento*, 61 Cal. 271; *Pray v. Jersey City*, 32 N. J. L. 384.

A town is not civilly liable for an injury caused by a defect in a highway in the absence of a statute fixing such liability. *Altnow v. Sibley*, 30 Minn. 186, 44 Am. Rep. 191.

In Kansas a township is not liable in a civil action for damages for neglecting to keep a highway in a safe condition. *Eikenberry v. Bazaar Twp.* 22 Kan. 556.

Obstructions necessitated by erecting buildings may not be a nuisance. *State v. Omaha*, 14 Neb. 265, 45 Am. Rep. 108; *Clark v. Fry*, 8 Ohio St. 358; *Wood v. Mears*, 12 Ind. 515.

Or an exhibition of wild animals in the streets under license. *Little v. Madison*, 49 Wis. 605, 35 Am. Rep. 738. *Contra*, *Little v. Madison*, 42 Wis. 643; *Cole v. Newburyport*, 129 Mass. 594, 37 Am. Rep. 304.

Or moving buildings in streets. *Graves v. Shattuck*, 35 N. H. 267.

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Robinson v. Greenville, 42 Ohio St. 625; *Norristown v. Fitzpatrick*, 94 Pa. 121; *Western Hom. Medical College v. Cleveland*, 12 Ohio St. 375; *Campbell v. Montgomery*, 53 Ala. 527.

A municipal corporation is not liable for a personal injury occasioned on its streets by persons making an unlawful use of its streets, as by coasting.

La Fayette v. Timberlake, 88 Ind. 380; *Altwater v. Baltimore*, 81 Md. 482.

Municipal corporations are not insurers of the safety of their public ways, or the lives and limbs of pedestrians.

Chase v. Cleveland, 6 West. Rep. 817, 44 Ohio St. 505-518; 2 Dillon, Mun. Corp. § 1019; *Joliet v. Seward*, 86 Ill. 402, 404, 405; *Hume v. New York*, 47 N. Y. 639.

A city is not liable for the acts of a person it licenses to use its streets unless the thing authorized is intrinsically dangerous, or the municipal authorities have notice of the negligence of its licensees.

Warsaw v. Dunlap, 9 West. Rep. 361, 112 Ind. 576.

Messrs. Richard Bacon and E. K. Wilcox, for defendant in error:

The duty imposed by the charter of a municipal corporation to keep its streets and highways in repair is a perfect corporate duty, for the breach of which the municipal corporation must answer in damages.

Campbell v. Montgomery, 53 Ala. 527; *Barnes v. District of Columbia*, 91 U. S. 547 (28:442); *West v. Brockport*, 16 N. Y. 161, note; *Vanduyke v. Cincinnati*, 1 Disney (O.) 582; *Western Hom. Medical College v. Cleveland*, 12 Ohio St.

375; *Robinson v. Greenville*, 42 Ohio St. 625; *Cardington v. Frederick*, 48 Ohio St. —; *McCarthy v. Syracuse*, 46 N. Y. 194.

Ignorance of the defect, which is the result of a clear and unmistakable omission, is itself negligence.

Boucher v. New Haven, 40 Conn. 456.

Notice to a town of a defect in a highway may be inferred from the notoriety of the defect and its continuance for such a length of time as to lead to the presumption that the proper officers of the town knew, or with proper vigilance and care might have known, of it.

Reed v. Northfield, 13 Pick. 94-98; *Manchester v. Hartford*, 30 Conn. 118; *Storrs v. Utica*, 17 N. Y. 104; *Buffalo v. Holloway*, 7 N. Y. 493; *Baltimore v. O'Donnell*, 58 Md. 110; *Detroit v. Corey*, 9 Mich. 165; *Child v. Boston*, 4 Allen, 41.

Mr. Justice Harlan delivered the opinion of the court:

This is an action to recover damages for personal injuries which the defendant in error, who was the plaintiff below, alleges were sustained by him in consequence of the failure of the City of Cleveland, by its officers and servants, to exercise due care in keeping one of its streets in proper and safe condition for use by the public. At the trial the City objected to the introduction of any evidence in behalf of the plaintiff, on the ground that the petition did not state facts sufficient to constitute a cause of action. The objection was overruled and the defendant excepted. When the evidence for the plaintiff was concluded, the defendant asked a peremptory instruction in its

A rope across a street by order of the municipal authorities to allow a parade of the fire department. *Simon v. Atlanta*, 67 Ga. 618, 44 Am. Rep. 739.

A stairway on the street side of a building not encroaching upon the sidewalk. *Fitzgerald v. Berlin*, 51 Wis. 81, 37 Am. Rep. 814.

A post at the corner of a city street to protect a shade-tree, though partly concealed by grass and weeds. *Wellington v. Gregson*, 31 Kan. 99, 47 Am. Rep. 482.

But a hackney-coach stand may be a nuisance, notwithstanding a city ordinance permitting it. *Branahan v. Cincinnati Hotel Co.* 39 Ohio St. 638, 48 Am. Rep. 457; *Dennis v. Sipperly*, 17 Hun, 69; *Turner v. Holtzman*, 54 Md. 145.

A water tank in the center of a street occupying one half of its width, and the erection and operation of a steam engine in connection therewith. *Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77.

A market house. *Savannah v. Wilson*, 49 Ga. 476; *State v. Mobile*, 5 Port. (Ala.) 279.

But a city having established a market in a portion of a street condemned for that purpose, no action, it has been held, can be maintained by an adjoining owner, by reason of the incidental obstruction of the street by the collecting of wagons in the neighborhood and the sale of produce therefrom, where the same is under police regulation. *Henkel v. Detroit*, 49 Mich. 249, 43 Am. Rep. 464.

A collection of carts in the streets for the reception of slops has been held a nuisance. *People v. Cunningham*, 1 Denio, 524.

But a sleigh standing ten or fifteen minutes in a village road is not an obstruction for which the town is liable. *Sikes v. Manchester*, 59 Iowa, 65.

A temporary obstruction caused by the delivery of cars on skids across a sidewalk may not be a nuisance, provided sufficient space is left on the other side of the roadway. *Mathews v. Kelsey*, 58 182 U. S.

Me. 56; *Welsh v. Wilson*, 2 Cent. Rep. 749, 101 N. Y. 254.

A fruit stand. *Barling v. West*, 29 Wis. 307. *Contra*, *State v. Berdett*, 73 Ind. 135, 38 Am. Rep. 117.

A brick wall, the remains of a burnt building on the edge of a sidewalk (*Kiley v. Kansas City*, 69 Mo. 102); but not at a distance from a public street. *Cain v. Syracuse*, 29 Hun, 105, 95 N. Y. 83.

A municipal corporation is liable for injuries caused by dangerous excavations left unguarded in its streets. *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780; *Ironton v. Kelley*, 38 Ohio St. 50; *Circleville v. Neuding*, 41 Ohio St. 465; *Dressell v. Kingston*, 32 Hun, 538; *Brusso v. Buffalo*, 90 N. Y. 679; *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325.

That the work is placed in the hands of a contractor will not relieve the corporation from liability (*Welsh v. St. Louis*, 73 Mo. 71; *Brusso v. Buffalo*, 90 N. Y. 679; *Jacksonville v. Drew*, 19 Fla. 103, 45 Am. Rep. 5; *Dressell v. Kingston*, 32 Hun, 538); though it has no control over the work and the contractor stipulates that he shall be liable for accidents. *Wilson v. Wheeling*, 19 W. Va. 323.

Obstructions in the highway frightening horses: *Bennett v. Lovell*, 12 R. I. 106, 84 Am. Rep. 623 (tubing and machinery left in highway); *Millarkey v. Foster*, 6 Or. 373, 25 Am. Rep. 531; *Clinton v. Howard*, 42 Conn. 294 (pile of stones); *Lake v. Milliken*, 62 Me. 240; *Jones v. Housatonic R. Co.* 107 Mass. 261 (barrel of whitewash left in highway); *Piollet v. Simmers*, 106 Pa. 95.

A municipal corporation may be liable for suffering objects to remain in the road calculated to frighten horses. *Bennett v. Fifield*, 13 R. I. 139, 43 Am. Rep. 17; *Crissey v. Hestonville, M. & F. Pass. R. Co.* 75 Pa. 88; *Stanley v. Davenport*, 54 Iowa, 468; 87 Am. Rep. 216 (steam motor). *Contra*, *Sparr v. St. Louis*, 4 Mo. App. 572 (in the latter case the use was lawful); *Young v. New Haven*, 39 Conn. 435 (steam

behalf. This motion was denied, and to that ruling of the court an exception was taken. After the whole evidence was closed, and the court had charged the jury, the defendant asked an instruction to the effect that there was not sufficient legal proof of negligence on the part of the City, its officers or agents, to entitle the plaintiff to recover. This request having been denied, an exception was taken to the ruling of the court. The case having been submitted to the jury, a verdict was returned for ten thousand dollars against the City. Upon that verdict a judgment was rendered for the plaintiff.

The petition, after referring to Bank Street as a common public street and highway in the City of Cleveland for the free passage and travel, at all times, of persons on foot and with horses and vehicles, and averring that, under the statutes of Ohio, the duty rested upon the City to cause the street to be kept open, in repair, and free from nuisances, alleged that the defendant, on the 12th day of November, 1879, wrongfully placed, and permitted to be placed, large quantities of dirt, sand, rubbish, stones, boxes and other materials for building purposes, in and across said street at or near and before a building owned by one Rosenfeld, and negligently and wrongfully suffered and permitted the same to extend across and occupy more of the street than was reasonable or necessary, namely, more than one half of its width, and to remain and continue on the above day and

during the night time of that day, unprotected and unguarded, without a sufficient number of lights, or in such a manner as to be distinctly seen by those using the street. It was further alleged that, in consequence of such carelessness, negligence and improper conduct on the part of the City, the plaintiff, while lawfully passing in a buggy along Bank Street in the night time, was, by reason of said dirt, sand, rubbish, stones, boxes and other materials in the street, overturned with great force and violently thrown upon the street, whereby, and without fault or negligence upon his part, one of his legs was broken, and he was otherwise permanently injured and disabled.

The answer of the City put in issue all the material averments of the petition, and, in addition, alleged that if the plaintiff was injured it was due to his own negligence, and not because of any want of care on the part of the defendant.

At the trial the plaintiff was permitted, against the defendant's objection, to read in evidence two sections of certain ordinances of the City relating to the placing in the streets of material for building purposes. They are as follows:

"SEC. 4. No person shall place or cause to be placed on any street, lane, alley or public ground any material for building purposes without the written permission of the Board of

roller); *Chicago v. Hoy*, 75 Ill. 530 (dead animal); *Fritsch v. Allegheny*, 91 Pa. 228; *Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 400.

If the town, city or other public corporation, charged by law with the care of highways, permits objects to remain thereon, which from their nature have a tendency to frighten horses of ordinary gentleness and docility, and the horse of the traveler, himself in the exercise of due care, takes fright at such an object and runs, and, notwithstanding due efforts to restrain him on the part of his driver, damages ensue, the corporation must pay such damages. *Agnew v. Corunna*, 20 Cent. Law Jour. 108, note; *Dimock v. Suffield*, 30 Conn. 129; *Morse v. Richmond*, 41 Vt. 435; *Foshay v. Glen Haven*, 25 Wis. 288; *Kelley v. Fond du Lac*, 31 Wis. 179; *Card v. Ellsworth*, 65 Me. 547; *Winship v. Enfield*, 42 N. H. 197. But see *Cook v. Montague*, 115 Mass. 571; *Agnew v. Corunna*, 55 Mich. 423.

The statutory liability of a city for personal injuries is confined to defects in the streets arising from their being out of repair, and does not cover objects on the street but forming no part thereof, as, e. g., a pile of lumber encroaching thereon. *McArthur v. Saginaw*, 58 Mich. 357.

It is the duty of a city, charged with constructing sewers and with keeping them in repair, to exercise needful diligence, prudence and care to ascertain whether they become obstructed; and for a failure to do so it is liable. *Barton v. Syracuse*, 36 N. Y. 54, 37 Barb. 222; *McCarthy v. Syracuse*, 46 N. Y. 194; *Hudson v. Tabor*, L. R. 1 Q. B. Div. 225, 16 Eng. Rep. (Moak) 298, note.

Though if a citizen obstruct the street of a city, it is not liable to one injured thereby until it has notice, actual or constructive, from the length of time the obstruction remains, thereof. *Griffin v. New York*, 9 N. Y. 456.

A corporation will not be answerable for damages caused by a defective condition of its highways produced by some act not its own,—as, the act of a wrong-doer, a sudden flood, or other casualty,—unless actual notice had come to it of such defect, and a reasonable time had elapsed to repair the

same, or unless sufficient time had elapsed in which the corporation might have discovered the defect and repaired it. In the latter case the courts will presume that the city had notice, or charge it with liability because of its negligence in not knowing. *Bassett v. St. Joseph*, 53 Mo. 200; *Schweickhardt v. St. Louis*, 2 Mo. App. 571; *Doherty v. Waltham*, 4 Gray, 596; *Harper v. Milwaukee*, 30 Wis. 385; *Prideaux v. Mineral Point*, 43 Wis. 513; *Mack v. Salem*, 6 Or. 275; *Dorlon v. Brooklyn*, 44 Barb. 604; *Sweet v. Gloversville*, 13 Hun, 303; *Kinney v. Troy*, 11 Cent. Rep. 454, 108 N. Y. 537; *Wilson v. Watertown*, 3 Hun, 508; *Todd v. Troy*, 61 N. Y. 608; *Kuns v. Troy*, 6 Cent. Rep. 498, 104 N. Y. 344; *Pomfrey v. Saratoga Springs*, 7 Cent. Rep. 44, 104 N. Y. 459; *McGinty v. New York*, 5 Duer, 674; *Hart v. Brooklyn*, 36 Barb. 226; *Seaman v. New York*, 3 Daly, 147; *Kaveny v. Troy*, 11 Cent. Rep. 342, 108 N. Y. 571; *Bush v. Geneva*, 3 Thomp. & C. 409; *Chicago v. Langlass*, 66 Ill. 361; *Peru v. French*, 55 Ill. 317; *Reed v. Northfield*, 13 Pick. 94; *Doulon v. Clinton*, 33 Iowa, 397; *Rowell v. Williams*, 29 Iowa, 210; *Boucher v. New Haven*, 40 Conn. 453; *Bill v. Norwich*, 39 Conn. 222; *Rice v. Des Moines*, 40 Iowa, 641; *Clark v. Corinth*, 41 Vt. 443; *Ozier v. Hinesburgh*, 44 Vt. 220; *Hume v. New York*, 47 N. Y. 639; *Jansen v. Atchison*, 16 Kan. 358; *Chicago v. Murphy*, 34 Ill. 224; *Fahey v. Harvard*, 62 Ill. 28; *Lobdell v. New Bedford*, 1 Mass. 153; *Harriman v. Boston*, 114 Mass. 241; *Howe v. Plainfield*, 41 N. H. 136; *Hubbard v. Concord*, 35 N. H. 52; *Ward v. Jefferson*, 24 Wis. 342; *Colby v. Beaver Dam*, 34 Wis. 235; *Goodnough v. Oshkosh*, 24 Wis. 549, 23 Wis. 300; *Hall v. Fond du Lac*, 42 Wis. 274; *Mosey v. Troy*, 61 Barb. 531; *Reinhard v. New York*, 2 Daly, 243; *Manchester v. Hartford*, 30 Conn. 118; *Townsend v. Des Moines*, 42 Iowa, 637; *Schmidt v. Chicago & N. W. R. Co.* 38 Ill. 405; *Chicago v. McCarthy*, 75 Ill. 602; *Cusick v. Norwich*, 40 Conn. 375; *Chicago v. Fowler*, 60 Ill. 322; *Chicago v. Crocker*, 2 Ill. App. 279; *Weightman v. Washington*, 66 U. S. 1 Black, 39 (17: 52); *Noble v. Richmond*, 31 Gratt. 271; *Atlanta v. Perdue*, 53 Ga. 608; *Fort Wayne v. De Witt*, 47 Ind. 391.

City Improvements. Such permission shall specify the portion of the sidewalk and street to be used and the period of said use, which shall not exceed two months, and in no case shall any person use more than one half of the sidewalk and half of the street. The council may at any time revoke such license. At the expiration of the permission or on the revocation of it said person shall remove said material from the street."

"Sec. 14. Whenever any person or persons, whether contractor or proprietor, shall be engaged in the erection or repairing of any building or other structure whatever within the City, and shall cause or permit any building materials, rubbish or other thing to be placed on any public street, lane, alley or sidewalk or other place in the City where persons pass and repass; and whenever any person or persons who shall be engaged in constructing any sewer or laying any gas, water or other pipes or conductors in or through any of the streets, lanes, alleys, highways, sidewalks or other places in the City where persons pass and repass, whether by appointment of the City or its agents, or as contractor, it shall be the duty of all such persons to protect, with a sufficient number of lights, the materials, rubbish, goods, wares and merchandise, heaps, piles, excavation or other things so caused or permitted by them to be or remain in or at any of the places above mentioned, and in such manner as to be distinctly seen by all passers-by, and to continue such lights from dusk until daylight during every night while any obstructions of the above-mentioned description are allowed to remain in or at such places; and every person who shall neglect the duty imposed by this section shall, in addition to the penalty imposed by this chapter, be liable for all damages to persons and property growing out of such neglect."

He was also permitted, against the defendant's objection, to read in evidence two permits given by the City, through its Board of Improvements, one to E. Rosenfeld, dated July 16, 1879, and the other to Frank Kosterling, dated September 19, 1879; each permit authorizing the person named therein to occupy one half of the sidewalk and one third in width of the street in front of the premises owned by Rosenfeld, during a period of sixty days from the date of the permit, for the purpose of placing building materials thereon, subject, however, to the provisions of the ordinance requiring that such materials be protected "with a sufficient number of lights, from dusk until daylight, during every day that the same shall remain," and to the condition that the person neglecting that duty should be liable to the penalty imposed by the ordinance, and for all damages to person or property growing out of such neglect.

There was evidence before the jury tending to show that when the plaintiff was passing on Bank Street about seven o'clock in the evening of November 12, 1879, the buggy in which he was riding ran against a mortar-box placed by Kosterling in the street, and used by him for purposes of building on Rosenfeld's premises, and was overturned, whereby he was thrown violently to the street, and seriously and permanently injured in his body. There was al-

so evidence tending to show that the obstructions placed in the street by Kosterling were not indicated by lights or signals, so as to give warning to persons passing in vehicles; that a greater width of street was occupied by these building materials than was justified by the permits granted by the Board of Improvements; and that the failure of the plaintiff, and of the person driving the buggy in which he was riding, to see the mortar-box in time to avoid running against it was not due to any want of care upon the part of either, but to the absence of signals or lights upon the box.

There was evidence on behalf of the City tending to show that the plaintiff, and the person with whom he was riding, might, with reasonable diligence, have seen the mortar-box before the buggy came in contact with it; also, that a proper light was placed on the mortar-box about dark of the evening when the accident in question occurred.

The charge to the jury was very full, covering every possible aspect of the evidence, and sufficiently indicating the legal propositions which, in the judgment of the court below, were applicable to the case.

Among other things, the court said: "The plaintiff had the right to the use of the street, in going from the hotel to the depot, unobstructed and free from danger, but subject, however, to such incidental, temporary or partial obstructions as are necessarily occasioned in the building or repair of houses fronting upon the streets over which he passed; but in using the street he must exercise reasonable and ordinary care to avoid obstructions, if any be found thereon. In the night time he had the right to suppose, in the absence of signals of danger, that the street was not dangerously obstructed or dangerous to pass over; but in passing over it he must exercise ordinary care and prudence to avoid any dangerous obstructions, both in the observation of obstructions, their locality and character, and the speed used in passing along the street. If any obstructions attracted his attention, he should be more careful to avoid any others that might be in the street and near the same; or if he knew that there were building materials located in the street in front of a new building, in driving along he must exercise reasonable care to avoid running upon any such obstructions. The City had a right to allow Rosenfeld to use a reasonable part of the street for the purpose of depositing therein building materials with which to erect his building, and the same could rightfully be used by Mr. Kosterling, the builder or contractor, for that purpose."

Again: "The principal negligence complained of by the plaintiff is that, being in the night time, no lights were placed at or near the materials, sufficient to warn him of danger as he passed along the street. Having provided in the permits to Rosenfeld and Kosterling, the contractor, that in the night time sufficient lights should be placed by them at or near materials placed and remaining in the street to warn persons passing along thereof of dangerous obstructions, the City had a right to suppose such lights were so placed in the night time. Whilst it was the general duty of the City to keep its streets in safe condition for the use of persons passing over the same, and liable for

injuries caused by its neglect or omission to keep them in repair and reasonably safe, yet, in such a case, the basis of the action being negligence, it is not liable for an injury resulting from such negligence unless it had notice or knowledge of the defect that caused the injury before it was sustained; or, in the absence of express or direct notice, such notice or knowledge may be inferred from facts and circumstances showing that such want of proper lights to denote dangerous obstructions existed for a sufficient period of time and in such a public and notorious manner as that the officers representing the City, or those in the employment of the City for the purpose of removing obstructions in the City, in the exercise of ordinary care and diligence, ought to have known of such want of proper guards in the night time.

"The City is not an insurer of the absolute safety of persons passing along its streets in the night time. It is only required to exercise ordinary care for such safety, and in judging of what would be ordinary care you are to take into account the great number of streets and their mileage contained in the City. If the City, or the officers or employes representing it, had such notice or knowledge, direct or implied, as I have stated, then it was its duty to see that proper lights in the night time were placed at or near the obstructions, such as would be sufficient to warn persons of reasonable and ordinary prudence of the presence of such obstructions, and, failing to do so, it would be liable for injuries resulting from such failure."

By section 2640 of the Revised Statutes of Ohio, title *Municipal Corporations*, it is provided that "the council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance." 1 R. S. Ohio, Title XII, Div. 8, ch. 18, Glanque's ed. p. 600.

The City concedes that, if there was any liability at all on its part, the charge of the court correctly announced the principles of law applicable to the case. If the obstruction in question was on Bank Street unnecessarily, or for an unreasonable length of time or was there without proper lights or other guards to indicate its locality, and such condition of the street at the time the plaintiff was injured existed with the knowledge of the City, either actual or constructive, for a sufficient length of time to remedy it by the exercise of proper diligence, the liability of the City cannot be doubted, in view of the decisions of the Supreme Court of Ohio and of this court, unless, as contended by the defendant, the plaintiff, notwithstanding the negligence of the City in not keeping the street open and free from nuisance, could, by due care, have avoided the injuries he received.

In the case of *Cardington v. Frederick*, which will appear in 46 Ohio St., the Supreme Court of Ohio construed the above section in connection with section 5144, which, among other things, provides that an action for a nuisance shall abate by the death of either party. That was an action against an incorporated village, founded upon a petition alleging that a street

used by the public was so unskillfully and negligently constructed and left by the defendant as to be in an unsafe condition, and allowed to become out of repair and obstructed by the rubbish and refuse of the village, so that it was highly dangerous; and that the plaintiff, while lawfully passing along the street, accidentally, and without fault on her part, was precipitated down an embankment, whereby she was greatly bruised and injured.

The court held the action to be one for a nuisance, and in harmony with the principles announced upon this general subject in *Barnes v. District of Columbia*, 91 U. S. 540, 547 [23: 440, 442], said: "The statute (sec. 2640, Rev. Stats.) gives to municipal corporations the care, supervision and control of all public highways, etc., and requires that the same shall be kept open, and in repair, and free from nuisance. In effect it is a requirement that the corporation shall prevent all nuisances therein; and when by allowing a street to become so out of repair as to be dangerous, the corporation itself maintains a nuisance, a suit to recover for injuries thereby occasioned is for damage arising from a nuisance, or 'for a nuisance.' The statute does not give a remedy, it but enjoins the duty. And when a duty to keep streets in repair is enjoined on municipal corporations, either by a statute in the form now in force or by a provision which authorizes them to pass ordinances for regulating streets and keeping them in repair, and gives power to levy taxes for that purpose, and presumably to obtain a fund for satisfying claims for damages, a right of action for damages caused by such neglect arises by the common law."

This language leaves no room to doubt the liability of the City of Cleveland for the damages sustained by the plaintiff if it was guilty of the negligence charged in the petition, and if the plaintiff was not himself guilty of negligence that materially contributed to his injury. The fact that the permits to Rosenfeld and Kosterling only authorized them to occupy one half of the street for the purpose of depositing building materials thereon, and required them to indicate the locality of such materials by proper lights, during the whole of every night that they were left in the street, did not relieve the City of the duty of exercising such reasonable diligence as the circumstances required, to prevent the street from being occupied by those parties in such a way as to endanger passers-by in their use of it in all proper ways. Whether that degree of diligence was exercised by the City, through its agents; whether its officers had such notice or knowledge of the use of Bank Street, in the locality mentioned, by the parties to whom the above permits were granted, as was inconsistent with the safety of passers-by using it with due diligence; whether, in fact, the materials and obstructions placed by Kosterling on the street were sufficiently indicated by signal lights or otherwise, during the night time; and whether the plaintiff was himself guilty of such negligence as contributed to his injury,—were questions fairly submitted to the jury, and are not open for consideration in this court.

The objection that the petition did not state facts constituting a good cause of action, is not well taken. The allegations were broad

enough to admit proof of such knowledge or notice upon the part of the City of the condition of Bank Street as would fix its liability to the plaintiff. If the defendant desired a fuller statement of the cause of action, the proper course was to indicate its wishes by a motion to require the plaintiff to make more specific his allegations as to negligence.

The motion to exclude all evidence upon the part of the plaintiff and the motion for a verdict in behalf of the defendant were properly denied. The question of negligence, in all of its aspects, was peculiarly for the jury.

As no error of law was committed at the trial, the judgment is affirmed.

JOHN B. WINTERS ET AL., *Appts.*,

v.

DAVID B. ETHELL, Executor of GEORGE F. SETTLE, ET AL.

(See B. C. Reporter's ed. 207-210.)

What is not a final decree—cross-complaint—time for appeal.

1. In an action for an injunction and an accounting, and for the payment to plaintiff of what shall be found due to him on such accounting, a decree which merely enjoins the defendant and orders an accounting before a referee is not a final one, and is not appealable.
2. Nor does it make any difference that the decree dismisses the cross-complaint of defendant; that was not a separate suit. There was but a single decree, entitled in the original suit.
3. The right of defendant to appeal from the decree, so far as his cross-complaint is concerned, will be preserved; and time will run against him, as to the present decree of the court below, only from the entry of a final decree, after the accounting.

[No. 96.]

Argued Nov. 12, 1889. Decided Nov. 25, 1889.

APPPEAL from a judgment of the Supreme Court of the Territory of Idaho affirming a decree of the District Court of the Second Judicial District of Idaho Territory, enjoining defendants and ordering an accounting. *Dismissed.*

The facts are stated in the opinion.

Mr. M. Kirkpatrick for appellants.

Messrs. Samuel Shellabarger and Jeremiah M. Wilson for appellees.

Mr. Justice Blatchford delivered the opinion of the court:

This is a suit brought in the District Court of the Second Judicial District of Idaho Territory, in and for the County of Alturas, by George F. Settle and Jacob Reeser against John B. Winters, Frank Ganahl and John Winkelbach.

The complaint alleges, that the plaintiffs, being the owners of a mining property, licensed the defendants to work it on the terms and conditions expressed in a written agreement and a supplemental agreement, for a definite period; that, under the agreement, the defendants were to work the mine during that period at their own expense, keep the property free from liens, and pay to the plaintiffs, as a con-

sideration, one half of the gross proceeds from the mine; that, if the defendants should pay to the plaintiffs, on or before November 27, 1883, the termination of the said period, out of the proceeds of the mine, or otherwise, \$40,000, the plaintiffs should convey the property to the defendants; that, in the event of such payment by the defendants to the plaintiffs within the time specified any and all sums theretofore received by the plaintiffs from the defendants as consideration for the use and working of the mine should be credited upon and deducted from the \$40,000; that, if the defendants should fail to comply with any of their agreements, or should not, on or before the day named, pay the \$40,000 to the plaintiffs, they should forfeit all rights under the agreement, and no longer work the property; that the defendants proceeded to work the mine, and continued, during the period mentioned, to extract large quantities of gold and silver ore from it; that, on the 24th of November, 1888, the agreement was extended, in writing, to December 27, 1883; that the defendants had paid to the plaintiffs only \$21,000 out of the \$40,000, which sum was realized out of the working of the mine, and was not in excess of the one half of its gross proceeds; that the defendants were continuing to work the mine, and were insolvent, and, during the thirty days' extension of time, had extracted and removed large quantities of ore, for which they had failed to account to the plaintiffs; and that the defendants threatened to continue to extract the ore.

The prayer of the complaint is for an injunction restraining the defendants during the pendency of the suit, and also by a final order on the hearing, from entering upon or interfering with the possession of the property, or from extracting or removing from the mine any rock or ore, and for an accounting by the defendants with the plaintiffs concerning all rock or ore taken from the mine by the defendants, and for the payment by them to the plaintiffs of a moiety thereof; and that the amount found to be due to the plaintiffs upon such account be decreed to be a lien upon all rock or ore remaining in the hands of the defendants.

After a demurrer to the complaint had been overruled, the defendants put in an answer to it. They also filed a cross-complaint, praying that the plaintiffs might be decreed specifically to execute and perform their contract to convey the property to the defendants, on receiving from them the remainder of the purchase money which might be equitably due therefor, and for an injunction, to be made perpetual on the hearing, restraining the plaintiffs from interfering with the possession by the defendants of the mining claim and the works and openings leading thereto.

This cross-complaint was answered by the plaintiffs, and the case was tried by the court on evidence, oral or documentary, adduced by the respective parties. It made certain findings of fact and conclusions of law, and entered a decree adjudging that the defendants be enjoined perpetually from entering upon or interfering with the possession of the mining claim mentioned in the complaint; and that the plaintiffs were entitled to an accounting with the defendants of and concerning all rock and ore taken from the mine by the defendants during

the term mentioned, and not already accounted for; and referring it to a referee to take and state such account. The decree further adjudged that the defendants take nothing by their cross-complaint; that it be dismissed; that they were not entitled to any order restraining the plaintiffs from the enjoyment of the premises, prior to or pending any appeal that might be taken; and that the plaintiffs recover from the defendants their costs.

On an appeal by the defendants to the Supreme Court of the Territory from that judgment, it was affirmed. The defendants have brought the case here by appeal, and briefs have been filed by both parties, on the merits. But we are of opinion that the decree was not a final one, and is not appealable.

The judgment of the supreme court simply affirmed the judgment of the district court. As regards the relief sought by the plaintiffs, the latter judgment merely enjoined the defendants, and ordered an accounting by them before a referee concerning the rock and ore taken by them from the mine. The bill prays for such injunction, and for such accounting, and for the payment to the plaintiffs of what shall be found due to them upon such accounting. In this respect the decree is of the same character with that considered by us in *Keystone Manganese & Iron Co. v. Martin* [ante, p. 275], decided November 11, 1889, where the decree was held not to be final or appealable.

Nor does it make any difference that the decree in the present case dismisses the cross-complaint of the defendants. The filing of the cross-complaint was not the institution of a separate suit, but grew out of the original complaint. There was but a single decree, and that was entitled in the original suit. The right of the defendants to appeal from the decree, so far as their cross-complaint is concerned, will be preserved; and time will run against them, as to all parts of the present judgment of the district court, only from the time of the entry of a final decree after a hearing under the accounting which is to be had. *Ayers v. Chicago*, 101 U. S. 184, 187 [25: 838, 840].

Appeal dismissed.

L. D. BROWN ET AL., *Appts.*,
v.
WILLIAM RANK.

(See S. C. Reporter's ed. 216-219.)

Practice in Washington Territory—action at law.

1. By the practice in Washington Territory, law causes cannot be reviewed on appeal without an assignment of errors, but equity causes may be.
2. An action at law is not transformed into an equity cause because one of the defenses is an equitable one, on which judgment is rendered for defendant, on demurrer thereto, the judgment being one dismissing the action, and being also rendered on the other legal defenses.

[No. 99.]

Submitted Nov. 13, 1889. Decided Nov. 25, 1889.

A PPEAL from a judgment of the Supreme Court of the Territory of Washington dis-

missing an appeal from a judgment of the District Court of the Second District of Washington Territory, for a non-compliance with the practice in that Territory. *Affirmed.*

The facts are stated in the opinion.

Mr. Leander Holmes for appellants.

Messrs. A. H. Garland and W. W. Upton for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court:

Appellants commenced a possessory action, in the nature of ejectment, against appellee, in the District Court of the Second Judicial District of Washington Territory, by complaint in the ordinary form. To this the defendant filed an answer, denying title in plaintiffs, and otherwise equivalent to the plea of not guilty; and in addition pleaded affirmatively four defenses, setting up, among other things, the ten years' Statute of Limitations upon actions for the recovery of real property. (§§ 25, 26, Code Wash. Ter. 1881, 89.) The fourth affirmative defense was addressed to the judge of the district court, and alleged a variety of facts constituting, appellants contended, an equitable defense, if any at all, which they denied.

The plaintiffs filed a demurrer in these words:

"And now come the plaintiffs and demur to the second, third and fourth separate answers and defenses of defendant herein, for the reason that they do not state facts sufficient to constitute a defense to this action."

This demurrer was disposed of, and judgment rendered as follows:

"This case coming on for hearing upon demurrer to the answer, and having been submitted to the court on briefs of counsel of plaintiffs and defendant, and the court, having fully considered the questions presented by the pleadings on file in this case, overrules the demurrer to the answer; to which ruling or decision the counsel for plaintiffs then excepted and gave notice of his intention to appeal; and the counsel for plaintiffs having elected to stand upon the ruling of the court upon said demurrer, and not to reply or further plead to the answer, the case is now here dismissed with costs against the plaintiffs, to be taxed, and that execution issue therefor. Whereupon counsel for plaintiffs excepted and gave notice of appeal to the supreme court."

Appeal was accordingly prosecuted to the territorial Supreme Court, under the Act of the Territory "in relation to the removal of causes to the Supreme Court," approved November 23, 1888. (Laws Wash. Ter. 1888, 59.) It was held in *Bremer v. Burgess*, 2 Wash. Ter. 290, that this Act was cumulative and complete within itself, and did not repeal sections 458, 459 and 460 of the Code of 1881, relating to appeals and writs of error (Code Wash. Ter. 1881, 114), and that cases might be brought up to the Supreme Court of the Territory, either by the procedure prescribed in the Code or that in the Statute of 1888. The Code provided for service of a notice of appeal or writ of error, which should contain, among other things, in case of appeal, "a particular description of every decision, ruling, order or decree," by which appellant claimed to have been ag-

grieved, and which he relied upon as ground for reversal or modification; and "in case of a writ of error, a particular description of the errors assigned." These requisitions were omitted in the Act of 1888, but at its July Term of that year the Supreme Court adopted a rule which required, in all law causes brought up under that Act, an assignment of errors to be made in writing, filed and served, substantially as provided for in section 458 of the Code.

No assignment having been made, the appeal was dismissed for non-compliance with the rule in that particular (*Brown v. Hazard*, 2 Wash. Ter. 464), and the case comes before us on appeal from the judgment of dismissal.

As the rule did not require such assignment in an equity cause, the question passed upon was whether this cause should be held as one in equity or at law, and the court decided that it was the latter.

The Act of Congress of April 7, 1874 (18 Stat. 27), "concerning the practice in territorial courts and appeals therefrom," provided that it should not be necessary "in any of the courts of the several Territories of the United States to exercise separately the common-law and chancery jurisdictions vested in said courts; and that the several codes and rules of practice adopted in said Territories respectively, in so far as they authorize a mingling of said jurisdictions or a uniform course of proceeding in all cases, whether legal or equitable, be confirmed; . . . *Provided*, that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law."

By subdivision 4 of section 76 of the Code of the Territory it was provided that "when the relief sought is of an equitable nature, the complaint shall be addressed to the judge of the district in which the action is brought;" by subdivision 8 of section 88, that "the defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both;" and by section 445, that "every final judgment, order or decision of a district court, or judge thereof, in actions of an equitable nature, where equitable relief is sought, or where chancery jurisdiction has been exercised, shall be reviewed in the supreme court by appeal."

Referring to these provisions, appellants' counsel contends that the fourth affirmative defense (and he insists that the first should be taken with it), being an equitable defense, the cause, by the action taken thereon, became "transformed into a cause in chancery."

But the demurrer was to the second, third and fourth affirmative defenses, and the defendant had also pleaded the general issue. The judgment upon demurrer held the three affirmative defenses good. The final judgment was one dismissing the action at law, and, upon the pleadings as they stood, was not a judgment in the exercise of chancery jurisdiction. The supreme court correctly held that the cause was at law and not in equity, and this being so, it is not denied that the dismissal for non-compliance with the rule necessarily followed.

The judgment is affirmed.

182 U. S. U. S., Book 83

THE CONTINENTAL LIFE INSURANCE COMPANY, of Hartford, Connecticut,
Plff. in Err.,

v.
W. J. CHAMBERLAIN, Admr. of RICHARD STEVENS.

(See S. C. Reporter's ed. 804-812.)

Insurance agent, when act of binds the company—application for insurance—false answers—estoppel—effect of signing application—when applicant not bound, but company bound, by statement in application.

1. When the law of the State provides that a person who solicits or procures applications for insurance shall be held to be the agent of the insurance company, and such agent fills up the application, his act in doing so is the act of the company.
2. If the applicant for insurance, under such circumstances, fully states the facts to the agent at the time the application is being prepared by him, and the agent writes the answers to the questions in the application erroneously, and contrary to the facts stated by the applicant, the insurance company is estopped from making a defense in an action on the policy, by reason of the falsity of such answers.
3. The applicant, by signing the application thus prepared, does not agree that the writing of the answers to the questions contained in the application is his act, and not the act of the company.
4. Where the agent writes in the application that the applicant has no other insurance, although the applicant told him that he had certificates of membership in co-operative companies, which the agent said were not considered insurance by him, the company is bound by the agent's interpretation, and estopped from asserting the contrary.

[No. 100.]

Submitted Nov. 13, 1889. Decided Nov. 25, 1889.

IN ERROR to the Circuit Court of the United States for the Northern District of Iowa to review a judgment against an Insurance Company upon a policy of insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. J. L. Carney, for plaintiff in error: If the warranty be a statement of facts, it must be literally true.

Jeffries v. Economical Mut. L. Ins. Co. 89 U. S. 22 Wall. 48 (22: 883); *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Cazenove v. British Equitable Assur. Co.* 6 C. B. N. S. 487.

Stevens was bound to make truthful answers. *Etna L. Ins. Co. v. France*, 91 U. S. 511 (28: 401); *Price v. Phoenix Mut. L. Ins. Co.* 17 Minn. 514; *Day v. Mutual Ben. L. Ins. Co.* 1 McArthur. 41, 29 Am. Rep. 565; *Kelsey v. Universal L. Ins. Co.* 85 Conn. 225; *Miles v. Connecticut Mut. L. Ins. Co.* 8 Gray, 580; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381; *Miller v. Mutual Ben. L. Ins. Co.* 81 Iowa, 282.

That the knowledge of the agent was notice to or knowledge by the Insurance Company is a familiar rule, but not applicable to the facts of this case.

Union Mut. L. Ins. Co. v. Wilkinson, 80 U. S. 13 Wall. 222 (20: 617); *American L. Ins. Co. v. Mahone*, 88 U. S. 21 Wall. 152 (22: 598).

The applicant is presumed to have read the application, and is bound by its statements. *New York L. Ins. Co. v. Fletcher*, 117 U. S. 581 (29: 938); *May on Ins. 124*; *Chase v. Hamilton Ins. Co.* 20 N. Y. 58.

The plaintiff was bound by the statements made in the application, whether he knew them or not.

Jennings v. Chenango County Mut. Ins. Co. 2 Denio, 75; *Brown v. Cattaraugus County Mut. Ins. Co.* 18 N. Y. 387; *Shawmut Mut. F. Ins. Co. v. Stevens*, 9 Allen, 333; *Bleakley v. Niagara Dist. Mut. Ins. Co.* 16 Grant, Ch. 198; *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519 (29: 934).

The retention of the policy, with copy of application annexed, was an approval of the application and of its statements.

American Ins. Co. v. Neiberger, 74 Mo. 167; *Richardson v. Maine Ins. Co.* 46 Me. 894; *Moore v. State Ins. Co.* 72 Iowa, 414; *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247; *Ryan v. World Mut. L. Ins. Co.* 41 Conn. 168; *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 547 (24: 675).

The applicant is not estopped from insisting that the policy was void.

Waynesboro Mut. F. Ins. Co. v. Conover, 98 Pa. 384, 42 Am. Rep. 618; *Guernsey v. American Ins. Co.* 17 Minn. 104; *Catoir v. American L. Ins. & Trust Co.* 83 N. J. L. 487; *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 5; *Van Allen v. Farmers Joint Stock Ins. Co.* 64 N. Y. 469.

The powers of the agent, Boak, were expressly limited in preparing the application to merely writing down the answers of the applicant.

Armstrong v. State Ins. Co. 61 Iowa, 218; *Oritcheff v. American Ins. Co.* 58 Iowa, 404; *May on Ins. 156*; *Bacon on Benefit Societies and Life Ins. par. 158*; *Cleaver v. Traders Ins. Co.* 8 West. Rep. 815, 65 Mich. 527.

Mr. D. D. Chase, for defendant in error:

The law in Iowa is that an agent with Boak's powers, in taking an application, binds the company by the knowledge communicated to him when the application was made, and the company cannot restrict its liability.

Boetcher v. Hawkeye Ins. Co. 47 Iowa, 258; *Miller v. Mutual Ben. L. Ins. Co.* 81 Iowa, 216; *Williams v. Niagara F. Ins. Co.* 50 Iowa, 568.

A stipulation in the policy that the soliciting agent was the agent of the assured does not alter the rule, and is a fraud on the assured.

Rowley v. Empire Ins. Co. 36 N. Y. 550; *Walsh v. Atha L. Ins. Co.* 80 Iowa, 138; *McArthur v. Home Life Assn.* 73 Iowa, 336; *Kausal v. Minnesota Farmers Mut. F. Ins. Assn.* 81 Minn. 17; *Stone v. Hawkeye Ins. Co.* 68 Iowa, 737; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 240 (24: 691).

Mr. Justice Harlan delivered the opinion of the court:

This action is upon a policy of insurance on the life of Richard Stevens, the intestate of the defendant in error. There was a verdict and judgment against the Insurance Company.

The policy recites that "it is issued and accepted upon the condition that the provisions and requirements printed or written by the

Company upon the back of this policy are accepted by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed." The signatures here referred to are those of the president and secretary of the Company.

The application for insurance was taken in Iowa by one Boak, a district agent of the Company in certain named counties of the State, fourteen in number, having written authority "to prosecute the business of soliciting and procuring applications for life insurance policies within and throughout said territory."

Among the numerous questions propounded in the application was the following: "Has the said party [the applicant] any other insurance on his life; if so, where and for what amounts?" The answer, as it appears in the application, is: "No other." That answer, as were all the answers to questions propounded to the applicant, was written by the Company's agent, Boak. In reference to the above question and answer, the latter testified: "I asked him [Stevens] the question if he had any other insurance, as printed in the application and as we ask every applicant, and he told me he had certain certificates of membership with certain co-operative societies, and he enumerated different ones, and said he did not know whether I would consider that insurance or not. I told him emphatically that I did not consider them insurance, and we had considerable conversation about it. He wanted to know my authority for saying I did not consider them insurance. I gave him my authority—gave him my reasons—and he agreed with me that these co-operative societies were in no sense insurance companies, and in that light I answered the question 'No.'" Q. "Did you tell him at the time that the proper answer was 'No,' after he had stated the facts?" A. "I did." Q. "Who wrote the answer in there?" A. "I did."

The application also contained these clauses: "And it is hereby covenanted and agreed that the statements and representations contained in this application and declaration shall be the basis of and form part of the contract or policy of insurance between the said party or parties signing this application and the said Continental Life Insurance Company, which statements and representations are hereby warranted to be true, and any policy which may be issued upon this application by the Continental Life Insurance Company and accepted by the applicant, shall be so issued and accepted upon the express condition that if any of the statements or representations in this application are in any respect untrue, or if any violation of any covenant, condition or restriction of the said policy shall occur on the part of the party or parties signing this application, then the said policy shall be null and void, and all moneys which may have been paid on account of said policy shall be forfeited to the said Company."

"And it is hereby further covenanted and agreed that the officers of the said Company at the home office of the said Company, in Hartford, Conn., alone shall have authority to determine whether or not the policy of insurance shall be issued on this or any application, or whether or not any insurance shall take effect under this or any application."

"And it is hereby further covenanted and agreed that no statements or representations made or given to the person soliciting this application for a policy of insurance, or to any other person, shall be binding on the said Company, unless such statements or representations be in writing in this application when the said application is received by the officers of the said Company at the home office of the said Company, in Hartford, Conn."

Among the "Provisions and Requirements" printed on the back of the policy are the following:

"11. The contract between the parties hereto is completely set forth in this policy and the application therefor, taken together, and none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing signed by the president or secretary of the Company, whose authority for this purpose will not be delegated.

"12. If any statement made in the application for this policy be in any respect untrue this policy shall be void, and all payments which shall have been made to the Company on account of this contract shall belong to and be retained by the Company: *Provided, however*, That discovery of the same must be made by the Company and notice thereof given to the assured within three years from the date hereof."

It was admitted on the trial that at the date of Stevens' application he had insurance in co-operative companies to the amount of \$12,000.

The Company contended in the court below that by the terms of the policy it was discharged from liability by reason of the answer, "No other," to the question as to other insurance on the life of the applicant, its contention being that the certificates of membership in co-operative societies constituted insurance, which should have been disclosed in the written answer to that question.

The court below charged the jury, in substance, that if at the time the application was being prepared, Stevens fully stated the facts to the agent, Boak, and the latter came to the conclusion that certificates in co-operative companies did not mean insurance within the view the defendant took of insurance, and in that view wrote the answer that there was no other insurance, then it was the Company, by its agent, that made the mistake, and for such mistake the responsibility cannot be placed upon the assured. Again: "If, therefore, you find under the evidence that Stevens did state fully and fairly the facts in regard to those different insurances in co-operative companies to the agent, and the agent, knowing all these facts, wrote the answer in the application as it is contained therein, the defendant is now estopped from making defense by reason of the fact that Stevens did have insurance in these co-operative companies."

It must be assumed upon the record before us that Boak had authority from the defendant to prosecute the business of soliciting and prosecuting applications for policies; that Stevens acted in good faith, and made to the Company's agent a full disclosure of every fact involved in the question as to whether he had other insurance upon his life; that he was

informed by the agent that insurance in co-operative societies was not deemed such insurance as the Company required to be stated; and that Boak upon his own responsibility, as agent of the defendant, though with the knowledge and assent of Stevens, wrote the answer "No other," assuring the applicant at the time that such was the proper answer to be made.

Is the Insurance Company estopped, under these circumstances, to dispute its liability upon the policy? This question, the plaintiff insists, must receive an affirmative answer upon the authority of *Union Mut. L. Ins. Co. v. Wilkinson*, 80 U. S. 18 Wall. 222 [20: 617]; *American L. Ins. Co. v. Mahons*, 88 U. S. 21 Wall. 152 [22: 598], and *New Jersey Mut. L. Ins. Co. v. Baker*, 94 U. S. 610 [24: 268]; while the defendant contends that the case of *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519 [29: 984], requires it to be answered in the negative. An extended statement of those cases is not necessary, and therefore will not serve any useful purpose; for the present case can be determined upon its special facts and upon grounds that did not exist in any of the others.

By the first section of an Act of the Legislature of Iowa, approved March 31, 1880, entitled "An Act Relating to Insurance and Fire Insurance Companies" (Laws of Iowa, 1880, ch. 311, p. 209), it is provided that "any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding."

The second section, among other things, requires all insurance companies or associations, upon the issue or renewal of any policy, to attach to the policy, or indorse thereon, a true copy of any application or representations of the assured, which, by the terms of the policy, are made a part thereof, or of the contract of insurance, or are referred to therein, or which may in any manner affect the validity of the policy. The third section relates only to policies of fire insurance. The last clause in the Act is in these words: "All the provisions of this chapter shall apply to and govern all contracts and policies of insurance contemplated in this chapter, anything in the policy or contract to the contrary notwithstanding."

In *Cook v. Federal Life Assn.* 74 Iowa, 746, 748, where the question arose as to the scope of the above Statute, the Supreme Court of Iowa said: "Considering the title of the Act and all of its provisions, it seems to us to be very clear that it applies in its first and second sections to all kinds of insurance. There can be no doubt that section one applies to any and all classes of insurance, whether life, fire, marine, insurance of live stock, or any other kind of insurance; and the same may be said of the second section. To hold otherwise would, it seems to us, be inconsistent with and repugnant to the title of the Act. If all insurance was not contemplated, the title would have been, simply, 'An Act Relating to Fire Insurance Companies.'" The object of this legislation is manifest. But if any doubt on the subject existed, it is removed by the case of *St. Paul F. & M.*

Ins. Co. v. Shaver, 76 Iowa, 282, 288, in which it was said: "The purpose of the Statute was to settle, as between the parties to the contract of insurance, the relation of the agents through whom the negotiations were conducted. Many insurance companies provided in their applications and policies that the agent by whom the application was procured should be regarded as the agent of the assured. Under that provision they were able to avail themselves, in many cases of loss, of defenses which would not have been available if the solicitor had been regarded as their agent, and many cases of apparent hardship and injustice arose under its enforcement, and that is the evil which was intended to be remedied by the Statute, and it ought to be so interpreted as to accomplish that result."

This Statute was in force at the time the application for the policy in suit was taken, and therefore governs the present case. It dispenses with any inquiry as to whether the application or the policy, either expressly or by necessary implication, made Boak the agent of the assured in taking such application. By force of the Statute, he was the agent of the Company in soliciting and procuring the application. He could not, by any act of his, shake off the character of agent for the Company. Nor could the Company by any provision in the application or policy convert him into an agent of the assured. If it could, then the object of the Statute would be defeated. In his capacity as agent of the Insurance Company, he filled up the application—something that he was not bound to do, but which service, if he chose to render it, was within the scope of his authority as agent. If it be said that, by reason of his signing the application, after it had been prepared, Stevens is to be held as having stipulated that the Company should not be bound by his verbal statements and representations to its agent, he did not agree that the writing of the answers to questions contained in the application should be deemed wholly his act, and not, in any sense, the act of the Company, by its authorized agent. His act in writing the answer, which is alleged to be untrue, was, under the circumstances, the act of the Company. If he had applied in person, at the home office, for insurance, stating in response to the question as to other insurance the same facts communicated by him to Boak, and the Company, by its principal officer, having authority in the premises, had then written the answer "No other," telling the applicant that such was the proper answer to be made, it could not be doubted that the Company would be estopped to say that insurance in co-operative societies was insurance of the kind to which the question referred, and about which it desired information before consummating the contract. The same result must follow where negotiations for insurance are had, under like circumstances, between the assured and one who in fact, and by force of the law of the State where such negotiations take place, is the agent of the Company, and not in any sense an agent of the applicant.

It is true that among the "Provisions and Requirements," printed on the back of the policy, is one to the effect that the contract between the parties is completely set forth in the policy

and in the application, and "none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing signed by the president or secretary of the Company, whose authority for this purpose will not be delegated." But this condition permits—indeed, requires—the court to determine the meaning of the terms embodied in the contract between the parties. The purport of the word "insurance" in the question, "Has the said party any other insurance on his life?" is not so absolutely certain as, in an action upon the policy, to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was answered. Such proof does not necessarily contradict the written contract. Consequently, the above clause, printed on the back of the policy, is to be interpreted in the light of the Statute and of the understanding reached between the assured and the Company by its agent when the application was completed, namely, that the particular kind of insurance inquired about did not include insurance in co-operative societies. In view of the Statute and of that understanding, upon the faith of which the assured made his application, paid the first premium and accepted the policy, the Company is estopped, by every principle of justice, from saying that its question embraced insurance in co-operative associations. The answer of "No other" having been written by its own agent, invested with authority to solicit and procure applications, to deliver policies, and, under certain limitations, to receive premiums, should be held as properly interpreting both the question and the answer as to other insurance.

The judgment is affirmed.

THE OREGON IMPROVEMENT COMPANY, *Plff. in Err.*,

v.

THE EXCELSIOR COAL COMPANY.

(See S. C. Reporter's ed. 215, 216.)

Infringement of patent—evidence.

In an action for the infringement of a reissued patent, in which the complaint alleges that the reissued patent is for the same invention as the original patent, and the answer denies such allegation, it is error for the court, on the trial, to exclude the original patent as evidence.

[No. 1198.]

Submitted Nov. 11, 1889. Decided Nov. 25, 1889.

IN ERROR to the Circuit Court of the United States for the Northern District of California to review a judgment for plaintiff in an action for the infringement of a reissued patent. *Reversed.*

The facts are stated in the opinion.

Messrs. Sidney V. Smith and John A. Wright, for plaintiff in error:

The court cannot see affirmatively and beyond doubt that the error complained of worked

no injury, and therefore it will reverse the judgment.

Gilmer v. Higley, 110 U. S. 47 (28: 62); *Maryland v. Baldwin*, 112 U. S. 493 (28: 823); *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 108 (30: 300).

Mr. J. J. Scrivner, for defendant in error:

The reissued patent is prima facie evidence that it is for the same invention as that of the original patent, and any subsequent inquiry before a court and a jury is limited to the question of fraud.

Hussey v. Brailley, 5 Blatchf. 184; *Philadelphia & T. R. Co. v. Stimpson*, 89 U. S. 14 Pet. 448 (10: 585); *Stimpson v. West Chester R. Co.* 45 U. S. 4 How. 880 (11: 1020); *O'Reilly v. Morse*, 56 U. S. 15 How. 62 (14: 601); *Battin v. Taggart*, 58 U. S. 17 How. 74 (15: 37); *Woodworth v. Stone*, 8 Story, 749; *Doughty v. West*, 2 Fish. Pat. Cas. 553; *Seymour v. Osborne*, 78 U. S. 11 Wall. 516 (20: 88).

Mr. Justice Blatchford delivered the opinion of the court:

This is an action at law brought by The Excelsior Coal Company, a corporation, against The Oregon Improvement Company, another corporation, in the Circuit Court of the United States for the Northern District of California, for the infringement of a reissued patent.

The complaint avers that, on the surrender of the original patent, a new patent was issued to the patentee "for the same invention, for the residue of the term then unexpired for which the said original letters-patent were granted." The answer of the defendant denies "each and every, all and singular, the allegations" contained in the complaint. The case was tried before a jury, and resulted in a verdict of \$7,000 for the plaintiff, for which, with costs, judgment was entered. To review this judgment the defendant has brought a writ of error.

There is a bill of exceptions, which states that the plaintiff read in evidence, without objection, the reissued patent, a copy of the specification of which, with the drawings, is set forth, and put in other evidence tending to show its right to recover damages; that the defendant, "to sustain the issues on its part," offered in evidence a duly certified copy of the original patent, a copy of which, with the drawings, is set forth; that the plaintiff objected to the introduction of the original patent, on the ground that the same was immaterial and irrelevant to any defense raised by the answer; that the court sustained the objection; and that the defendant excepted to such ruling.

We are of opinion that the circuit court committed an error in excluding the original patent. It was relevant evidence upon the question whether the reissue was "for the same invention" as the original, and the issue on that subject was sufficiently raised by the averment of the complaint and the denial in the answer. The defendant was entitled to try that question in a formal manner, and it could not do so unless the original patent was introduced in evidence.

The judgment is reversed, and the case is remanded to the circuit court, with a direction to award a new trial.

182 U. S.

THE CITY OF CHANUTE, *Plff. in Err.*,

v.

WILBUR F. TRADER.

(See S. C. Reporter's ed. 210-214.)

Mandamus to compel tax to pay judgment—writs of error to execution of process—affirming judgment on motion—subdivision 5 of Rule 6—motion to dismiss or affirm.

1. A proceeding by mandamus to compel the levy of a tax to pay a judgment is in the nature of execution. The rights of the parties to the judgment, in respect of its subject matter, were fixed by its being rendered.
2. Prosecution of writs of error to the execution of process to enforce judgments will not be permitted when no real ground exists therefor.
3. On motion to dismiss a writ of error brought to review a judgment granting a peremptory writ of mandamus commanding the officers of a city to levy a tax to pay a judgment against it, with which motion is united a motion to affirm the judgment, this court will affirm the judgment if the reasons for taking the writ of error are frivolous and if it was taken for delay only, notwithstanding this court has jurisdiction.
4. This court, in such a case, will, in the exercise of its inherent power and duty to administer justice, and independently of subdivision 5 of Rule 6, reach the mischief by affirming the action below.

[No. 1509.]

Argued Nov. 11, 1889. Decided Nov. 25, 1889.

IN ERROR to the Circuit Court of the United States for the District of Kansas to review a judgment granting a peremptory writ of mandamus compelling the officers of the City of Chanutte to levy a tax to satisfy a judgment. On motion to dismiss and affirm. *Judgment affirmed.*

The facts are stated in the opinion.

Messrs. John Hutchings, Samuel Shellabarger and J. M. Wilson in support of motion.

Mr. A. G. Safford in opposition.

Mr. Justice Blatchford delivered the opinion of the court:

Wilbur F. Trader recovered a judgment in the Circuit Court of the United States for the District of Kansas against the City of Chanutte, on the 4th of December, 1885, for \$7,702.12, damages and costs, on certain bonds and coupons issued July 1, 1872, by the City of Tioga. Each bond stated that the City of Tioga was "indebted to the Tioga Flouring Mill Company in the sum of five hundred dollars, lawful money of the United States, with interest from the date hereof, at the rate of ten per cent per annum, as provided by law, and payable semi-annually, as per interest coupons hereto attached, the principal being due in ten years from date hereof and with the interest thereon payable at the office of the Farmers' Loan and Trust Company in the City of New York, to the bearer."

On the 27th of July, 1888, Trader served a notice on the City of Chanutte, addressed to the mayor and councilmen of the City, requesting them to levy a tax on the taxable

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property within the City to pay and satisfy the judgment. It does not appear that any execution has been issued on the judgment.

On the 9th of July, 1889, Trader applied to the circuit court for a writ of mandamus requiring the officers of the City to levy a tax to satisfy the judgment. An alternative writ was issued on that day. In answer to the writ the City set up, by way of plea in bar, that the original judgment was void because the circuit court had no jurisdiction of the subject matter of the action, as appeared from the petition in it, which set forth a copy of one of the bonds sued on. The point urged was that the bond was not payable to the Tioga Flouring Mill Company or order, nor to bearer, and that only the interest was payable to the bearer.

On a hearing on the writ and return, the circuit court, on October 14, 1889, rendered a judgment granting a peremptory writ commanding the officers of the City to levy the tax. A bill of exceptions was allowed, and the City has brought a writ of error. The defendant in error now moves to dismiss the writ of error and unites with it a motion to affirm the judgment.

Subdivision 5 of Rule 6 of this court was first promulgated November 4, 1878 (97 U. S. vii). It reads as follows: "There may be united, with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

At the same term, in *Whitney v. Cook*, 99 U. S. 607 [25: 446], this court, speaking by Chief Justice Waite, said that the rule implied that there should appear on the record "at least some color of right to a dismissal." He added: "Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the Rule enforced both according to its letter and spirit. Parties should not be subject to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

The practice of not entertaining a motion to affirm unless there is some color of right to a dismissal has since been frequently sustained by this court. *Hinckley v. Morton*, 103 U. S. 764 [26: 458]; *Independent School District of Ackley v. Hall*, 106 U. S. 428 [27: 237]; *Davies v. Corbin*, 118 U. S. 687 [28: 1149]; *Walston v. Nevin*, 128 U. S. 578 [32: 544]; *New Orleans v. Louisiana Construction Co.* 129 U. S. 45 [32: 607]; *The Alaska*, 130 U. S. 201 [32: 923].

In *Micas v. Williams*, 104 U. S. 556 [26: 842], there was a motion to affirm united with a motion to dismiss a writ of error. The affidavits in opposition to the latter motion showed jurisdiction as to the amount involved, though on the record as it stood when the motion was made there was color of right to a dismissal. But the court affirmed the judgment on the ground that the writ was taken for delay only.

In *The S. C. Tryon*, 105 U. S. 267 [26: 1026],

there was a motion to affirm a decree united with a motion to dismiss the appeal in an admiralty suit. The ground for making the motion to dismiss was that there was no bill of exceptions but only a finding of facts and conclusions of law. The court overruled that ground, but it is difficult, from the report of the case, to see what color of right there was to a dismissal. Yet it affirmed the decree on a consideration of the findings of fact.

In *Swope v. Leffingwell*, 105 U. S. 8 [26: 939], there was a motion to affirm united with a motion to dismiss a writ of error to a state court. The motion to dismiss was made on the ground that there was no federal question involved. The court held that it had jurisdiction, but affirmed the judgment on the ground that the case on the merits was governed by previous decisions.

In the present case there does not appear to be any ground for contending that this court has no jurisdiction, yet we are entirely satisfied that the reasons assigned for taking the writ of error are frivolous, and that it was taken for delay only. The principal of the bonds is payable to bearer as well as the interest. The principal is stated to be due in ten years, and, with the interest, to be payable to the bearer. This is too plain for discussion, and disposes of the point that the original payee in the bonds was a citizen of Kansas, and thus of the same State with the debtor, and could not have sued on the bonds in the circuit court, and so the plaintiff could not.

But without putting a different interpretation on subdivision 5 of Rule 6 from that which has hitherto prevailed, we are of opinion that the judgment in the present case must be affirmed. A proceeding by mandamus to compel the levy of a tax to pay a judgment is in the nature of execution. The rights of the parties to the judgment, in respect of its subject matter, were fixed by its being rendered. If the prosecution of writs of error to the execution of process to enforce judgments is permitted when no real ground exists therefor, such interference might become intolerable. This court, in the exercise of its inherent power and duty to administer justice, ought, independently of subdivision 5 of Rule 6, to reach the mischief, by affirming the action below. This is a proper case for doing so.

Judgment affirmed.

UNITED STATES, *Plff. in Err.*,

BRADLEY BARLOW ET AL.

(See S. C. Reporter's ed. 271-282.)

Increase of mail service—allowance for, obtained by fraud—allowance for expedited service,

NOTE.—Money paid by mistake, when recovered; mistake of fact or law.

In an action for money paid under a mutual mistake of facts, it is no defense that the mistake arose from a want of care on the part of the plaintiff, unless the other party has suffered loss in consequence of the mistake; but when statements were made by the defendant which induced the plaintiff

made upon mistake of fact, may be recovered back—conditions imposed by statute—money paid on mistake of fact—can be recovered back—mistake in value.

1. The Postmaster-General may order an increase of service in carrying the mail, by enlarging the distance, by a new route, or by requiring a greater number of trips between the terminal points, and by allowing therefor a *pro rata* increase on the contract pay.
2. Where the allowance for expediting the service over a new route was made upon fraudulent representations, the money paid therefor may be recovered, although the fraud was not participated in or countenanced by the officers of the Department who acted in the matter.
3. Where the allowance was made to the contractors for the expedited service upon a clear mistake of fact as to what additional men and animals were required for such service, and the money was paid in ignorance of the fact that no additional number had been employed in that service, the United States may recover the moneys paid on such allowance. §§ 3061, 4057, Rev. Stat.
4. The determination of the Postoffice Department of the amount of compensation for the expedited service cannot defeat the express declaration of the statute prescribing the conditions upon which contracts with the Department shall be made.
5. Where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back.
6. A mere mistake in the estimate of the value of an uncertain and speculative subject is not suffi-

cient to authorize the recovery of moneys paid upon the erroneous estimate.
[No. 81.]

Argued Oct. 29, 30, 1889. Decided Dec. 2, 1889.

IN ERROR to the Circuit Court of the United States for the District of Colorado to review a judgment for the defendants in an action by the United States to recover from the defendants, sub-contractors for carrying the mails, moneys paid to them under a mistake of fact caused by their false representations as to the services. *Reversed.*

The facts are stated in the opinion.

Reported below, 26 Fed. Rep. 903.

Mr. Wm. A. Maury, Assistant Attorney-General, for plaintiff in error:

In the case of contracts, the officer making them must have had authority to bind the government.

The Floyd Acceptances, 74 U. S. 7 Wall. 676 (19: 173); *Cooke v. U. S.* 91 U. S. 889 (23: 237); *Moffat v. U. S.* 112 U. S. 24, 81 (28: 623, 625).

Action for money had and received may be maintained whenever the defendant has received money belonging to the plaintiff, which in equity and good conscience he ought to refund to him.

Lockwood v. Kelsea, 41 N. H. 187; *Wiseman v. Lyman*, 7 Mass. 288, 289; *Moore v. Mandelbaum*, 8 Mich. 448; 1 Steph. N. P. 846; *Biss v. Dickason*, 1 T. R. 285; *U. S. v. Cosgrove*, 26 Fed. Rep. 908; *Griffith v. U. S.* 32 Ct. Cl. 165.

Messrs. Nat'l Wilson and Shellabarger & Wilson, for defendants in error:

The action of an executive officer in exercising a discretionary power vested in him by law in determining mixed questions of law and fact

to act, and the plaintiff relied upon those statements, if they were untrue, though no fraud be charged or proved, he can recover. *Ely v. Padden*, 18 N. Y. S. R. 53.

It is well settled in New York that in general, in an action for money paid under a mutual mistake of facts, it is no defense that the mistake arose from a want of care on the part of the plaintiff, unless the other party has suffered loss in consequence of the mistake. *Kingston Bank v. Eltinge*, 40 N. Y. 391; *Union Nat. Bank v. Sixth Nat. Bank*, 48 N. Y. 452; *Duncan v. Berlin*, 60 N. Y. 151; *Lawrence v. American Nat. Bank*, 54 N. Y. 432; *National Bank of Commerce v. National Mechanics Bkg. Assn.* 55 N. Y. 211; *Mayer v. New York*, 68 N. Y. 455.

A court of equity will relieve parties from a mutual mistake of fact, but not when ignorance or mistake is confined to one party, and no unconscientious advantage is taken by fraud or concealment by the other. *Moran v. McLarty*, 75 N. Y. 25; *Paine v. Jones*, 75 N. Y. 593; *Jackson v. Andrews*, 59 N. Y. 244.

So held, upon the trial of a disputed claim under a general assignment for benefit of creditors, where the claimant had received a percentage of his claim, and executed an assignment of the balance to the assignee for the debtor's benefit, supposing it to be a mere receipt on account, and not being able to read it because of defective vision. *Re Potter*, 10 Daly, 188.

The principle that money voluntarily paid cannot be recovered back, *held*, not applicable to a case where the commissioners of highways of several towns being engaged in the common enterprise of building a bridge, the commissioners of one of the towns paid more than their share to laborers and for materials, it being held that they might recover

such excess of payment from the other commissioners. *Surdam v. Fuller*, 51 Hun, 500, 2 Alb. L. J. 406.

Whether the principle that money voluntarily paid cannot be recovered back applies to the case of a public officer who pays out public moneys, *quære*. *People v. Lawrence*, 6 Hill, 244; *Onondaga County v. Briggs*, 2 Denio, 26.

An owner of lands who, with knowledge of the facts, pays a sum specifically as one year's interest on the sum claimed to be due upon a mortgage affecting the premises, cannot, upon showing that a lesser amount was in fact due, recover back or claim a credit for the excessive payment. Although not estopped by the payment from questioning the validity of the mortgage debt, the payment being voluntary, upon a disputed claim, cannot be recovered back. *Bennett v. Bates*, 94 N. Y. 354; *Waring v. Somborn*, 82 N. Y. 604; *New York & H.J.R. Co. v. Marsh*, 12 N. Y. 308; *Ritter v. Phillips*, 53 N. Y. 587; *Flower v. Lance*, 59 N. Y. 603.

In cases of mutual mistake going to the essence of the contract it is not necessary that there should be any presumption of fraud. *Russell v. Brownell*, 20 N. Y. Week, Dig. 504.

The husband of a tenant in a house belonging to plaintiff assumed to be plaintiff's agent, and contracted to sell the same to defendant, receiving on account of the purchase price a sum of money which he forwarded to plaintiff, telling him, however, that it was on account of rent due from the sender's wife. In ejectment to recover the property, *held*, that as defendant parted with the money under misapprehension and mistake of fact, and plaintiff neither relinquished nor advanced anything upon its receipt, defendant was entitled to recover back the amount. *Evans v. Garlock*, 37

committed to his judgment and discretion for decision is final and cannot be inquired into or reviewed by any other tribunal, in the absence of any law authorizing such review.

Marlon v. Mott, 25 U. S. 12 Wheat. 19 (6: 537); *Belcher v. Linn*, 65 U. S. 24 How. 522 (16: 757); *Bartlett v. Kane*, 57 U. S. 16 How. 273 (14: 931); *U. S. v. Arredondo*, 31 U. S. 6 Pet. 691 (8: 547); *Rankin v. Hoyt*, 45 U. S. 4 How. 327 (11: 996); *Stairs v. Peaslee*, 59 U. S. 18 How. 524 (15: 475); *U. S. v. Speed*, 75 U. S. 8 Wall. 77 (19: 449); *U. S. v. Schurz*, 102 U. S. 401 (26: 173); *Johnson v. Towles*, 80 U. S. 13 Wall. 72 (20: 485); *Warren v. Van Brunt*, 86 U. S. 19 Wall. 653 (22: 222); *French v. Ryan*, 93 U. S. 169 (23: 812); *Marquez v. Frisbie*, 101 U. S. 475 (25: 801); *Vance v. Burbank*, 101 U. S. 514 (25: 929); *Quinby v. Conlan*, 104 U. S. 426 (26: 802); *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 645 (26: 878); *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 450, 451 (27: 228); *Baldwin v. Stark*, 107 U. S. 464 (27: 526); *Ehrhardt v. Hogaboom*, 115 U. S. 87 (29: 846).

The action of the Postmaster-General in allowing and paying the additional compensation cannot be reviewed or impeached except for mistake or fraud.

Story, Eq. Jur. §§ 146, 148; *Griffith v. U. S.* 22 Ct. Cl. 165, and cases cited; *Page v. Bent*, 2 Met. (Mass.) 874; *Marshall v. Hubbard*, 117 U. S. 415 (29: 919); *Smith v. Richards*, 83 U. S. 13 Pet. 87 (10: 42); *Blease v. Garlington*, 92 U. S. 1 (23: 521).

When the case shows that it is the duty of the defendant to pay, the law imputes to him a promise. This promise is always charged in the declaration, and must be so charged in order to maintain the action.

Cary v. Curtis, 44 U. S. 8 How. 247 (11: 576); *Curtis v. Fiedler*, 67 U. S. 2 Black, 474 (17: 274); *Liverpool, N. Y. & P. Steamship Co. v. Emigration Comrs.* 113 U. S. 33 (28: 899); 1 Wait's Act. and Def. 394, and cases cited.

Mr. Justice Field delivered the opinion of the court:

This action is brought by the United States to recover from the defendants, sub-contractors for carrying the mail, moneys paid to them under a mistake of fact caused by their false representations as to the services. It appears that on the 15th of March, 1878, one Luke Voorhees entered into a contract with the United States, represented by the Postmaster-General, to carry the mail over a route designated as No. 88,146, from Garland to Ouray, in the State of Colorado, passing by Lake City and several other places mentioned, and back, seven times a week, for \$19,000 a year, for a term beginning July 1st, 1878, and ending June 30th, 1882.

On the 28th of September, 1878, Voorhees made a sub-contract with the defendants, Barlow and Sanderson, by which they agreed to transport the mails over the route mentioned, for the period designated, and to perform the service required by his contract with the United States, in consideration whereof they were to receive the pay which was or might become due to him. They were recognized and accepted by the Postoffice Department as sub-contractors for the service.

The distance between Garland and Lake City was one hundred and fifty miles, and the time prescribed for the service over it was twenty-seven hours, or five miles and fifty-five hun-

Hun, 533. See *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Justh v. National Bank of Com.* 56 N. Y. 433; *Newton v. Porter*, 69 N. Y. 133; *Pennell v. Deffell*, 4 De G. M. & G. 372, 388; *Cardwell v. Hicks*, 37 Barb. 458; *Weaver v. Barden*, 49 N. Y. 292; *Utica Bank v. Van Gieson*, 18 Johns. 436; *Kington Bank v. Eltinge*, 40 N. Y. 391; *Union Nat. Bank v. Sixth Nat. Bank*, 43 N. Y. 452, aff'd 1 Lans. 13, and distinguishing *Stephens v. Brooklyn Board of Education*, 79 N. Y. 138; *Southwick v. First Nat. Bank*, 84 N. Y. 420.

An indorser cannot recover back the amount of a note which he paid in ignorance of the rule of law that he was not liable because he had not received notice of presentment and dishonor. *Baldwin v. Rood*, 22 N. Y. Week. Dig. 383.

The complaint in an action against the City of New York alleged that the plaintiff had been a police justice during a specified period, and had been entitled during such period to a salary of \$10,000 per annum, and that for a portion of that time he was paid but \$5,000. Defendant put in issue the claim, and set up by way of counterclaim that while the salary was but \$5,000 the city paid plaintiff \$10,000 per annum for a portion of the time by mistake, and claimed to recover the alleged excess so paid. *Held*, that plaintiff could not recover upon his claim, nor defendant upon its counterclaim, because the payment was voluntary. *Cox v. New York*, 23 N. Y. Week. Dig. 355, aff'd Ct. of Appeals, 5 Cent. Rep. 335, 103 N. Y. 519.

Payment of an assessment by a referee in foreclosure pursuant to the decree is made by coercion of law, and will not prevent a recovery back of the amount so paid by the owner of the equity of redemption after the assessment has been vacated.

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Peyser v. New York, 70 N. Y. 497; *Brehm v. New York*, 39 Hun, 533.

A sale of land by an assignee in bankruptcy, and his deed pursuant thereto without covenant for title, may be avoided and the purchase money recovered back, upon the ground of a mutual mistake as to the existence of the subject of the contract, where the assignee, though he acted in good faith, and both parties assumed that he had title as such, had in fact no title at all. *Clark v. Post*, 45 Hun, 265.

Mistake by the owner of mortgaged property as to the amount which he had paid on such mortgage by reason of which he reconveyed the property and settled his liability with the mortgagee on certain terms, held insufficient, in the absence of an agreement, to sustain an action at law to recover the amount of such overlooked payment. *Roberts v. Ellwood*, 24 N. Y. Week. Dig. 135.

An action to recover back an amount paid for an assignment of a bond and mortgage upon a mutual mistake as to the amount due thereon was sustained as to such excess, in *First Presbyterian Society v. Ayer*, 4 N. Y. S. R. 338.

Where a depositary pays over moneys in his hands to a receiver in supplementary proceedings, under an order permitting such payment, under the mistaken idea that the order absolutely directs such payment, it may recover back such money as having been paid under mistake. *Syracuse Sav. Bank v. Hess*, 23 N. Y. Week. Dig. 230.

As to payment by mistake, see note to *McFerran v. Taylor*, 7 U. S. 3 Cranch, 270 (2: 436), and note to *Hunt v. Rhodes*, 26 U. S. 1 Pet. 1 (7: 27).

As to voluntary payments and money illegally exacted, see note to *Bank of U. S. v. Bank of Washington*, 31 U. S. 6 Pet. 8 (3: 229).

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dredths of a mile per hour. The distance between Lake City and Ouray by the route designated was forty-six miles, and the time prescribed by the contract for the transportation of the mails over it was thirty hours, that is, one mile and fifty-three hundredths of a mile per hour. The portion of this latter line which lay between a place known as Mineral Point and Ouray, a distance of only ten miles, passed over mountains upon which the mails could be carried only a part of the year—in the winter only by men on snowshoes, and at other times only by pack horses. There was, in consequence, great irregularity in the delivery of the mails upon this portion of the route, and much complaint followed, leading, in October, 1878, to its abandonment and the substitution in its place of a line making a detour around the mountains of one hundred and ten miles, passing by way of Barnum, which afforded a good, practicable road easily traveled with wagons.

The present action has grown out of the orders of the Postoffice Department in making this change of line, and expediting the service over it, and providing increased compensation for the additional service. The compensation allowed by the original contract, as mentioned above, was \$19,000 a year, which, the distance being one hundred and ninety-six miles, was at the rate of about \$96.93 a mile. At that rate the compensation for the additional service was allowed, amounting to \$10,688.26 a year.

The time prescribed by the original contract for the service between Lake City and Ouray by way of Mineral Point across the mountains—thirty hours, that is, at the rate of one mile and fifty-three hundredths of a mile an hour—was owing to the great difficulties attending the crossing of the mountains, as already mentioned. When the line was changed to one making a detour of the mountains by way of Barnum, over a road easily traversable by wagons, it was an obvious duty to the public that the service at the rate of one mile and fifty-three hundredths of a mile per hour should be expedited.

Petitions for a change of that portion of the route which led over the mountains came from officers of the Counties of Ouray and Hildale, in which the proposed new line was to run, and they represented that over its whole distance there was a wagon road by which the mail could be carried the year round. On the 30th of September, 1878, whilst the Postoffice Department had before it the question of opening a new line between Lake City and Ouray, the defendant Sanderson addressed a letter to the second assistant postmaster-general, suggesting that, in lieu of the temporary service ordered between Barnum and Ouray, such service should be made by embracing Barnum in the route No. 88,146 between Garland and Ouray, increasing the distance one hundred and ten miles, "and expediting the schedule from the present, at the *pro rata* rate of seventy-two hours, to thirty-six hours between Lake City and Ouray." On the same day Sanderson was consulted by the Postoffice Department, or at least was requested to give an estimate, as to the additional number of horses and men which would be required for the increased expedition proposed, and in response to the request he

wrote to the Department the following letter, verified by his oath:

"WASHINGTON, Sept. 30, 1878.

"Hon. THOS. J. BRADY, Second Asst Postmaster-General:

"Sir: To perform the service on route No. 88,146, between Lake City and Ouray, on the present schedule of seventy-two hours, requires twenty-two horses and eleven men, and to perform the same service on a schedule of thirty-six hours it will require (66) sixty-six horses and twenty-two men.

"(Signed) J. L. Sanderson.

"Subscribed and sworn to before me this 30th day of September, 1878.

"(Signed) J. H. Herron,
"Notary Public."

There was no existing schedule prescribing seventy-two hours for carrying the mail between Lake City and Ouray, as assumed by Sanderson. As the schedule of time prescribed in the original contract between those places over the mountains was at the rate of one mile and fifty-three hundredths of a mile an hour, he assumed that rate as the existing schedule for the new and easily traversable line of one hundred and ten miles, which would require at the same slow pace seventy-two hours. Notwithstanding the obvious error of this assumption, the evidence tended to show that the Postoffice Department acted upon his representations and estimates. Having extended the route one hundred and ten miles, and allowed the additional compensation provided by the statute upon such extension, it also allowed compensation for expediting the service on the new line, upon this extravagant estimate, at the rate of \$15,994.77 a year. That sum for the increased expedition was regularly paid during the term of the original contract.

It is admitted that no additional horses and men for which this allowance was made were ever employed. Neither the horses nor the men exceeded the number originally employed to perform the service, and the defendant Sanderson testified that no greater number was necessary to perform it within the thirty-six hours mentioned, and that he never afterwards corrected his estimate, but continued to draw pay from the government as though the additional horses and men were employed.

It appears that the sums thus allowed and paid to the sub-contractors, for stock and carriers which were never required and never employed, aggregated \$59,592.98, constituting the principal item in the amount claimed in this action.

On the trial, the plaintiffs requested the court to instruct the jury, among other things, to the effect, *first*, that if they believed that service on a portion of the route between Lake City and Ouray by way of Barnum was expedited and extra compensation allowed for such expedition upon the supposition that sixty-six horses and twenty-two men would be necessary to carry the mail on that portion upon a schedule of thirty-six hours, and there was in fact no increase in the number of horses and men required above the number which the defendants swore were necessary to perform the service upon a schedule of seventy-two hours, then the plain-

tiffs were entitled to recover the sums paid upon such allowance, for in that event they were paid in violation of law; and, *second*, that in determining the questions in issue the jury could only consider the number of horses and men actually necessary to carry the mail, irrespective of the number of men and horses required by the defendants as carriers of passengers and freight.

The court refused to give these instructions, and charged the jury substantially as follows: That if the agreement for compensation for the additional service was made without authority of law and in excess of all provisions of the statute, the government could not recover any part of the consideration paid the defendants for carrying the mail, unless in the making of the contract there was fraud, participated in and countenanced by the officers of the Department who acted in the matter; that if they were of opinion that the parties combined and agreed to raise the compensation to an extraordinary figure, with a view to benefit the defendants, knowing that the compensation was excessive, the government could recover it back; but if they were of opinion that those parties acted honestly and fairly, and in the belief that they were dealing fairly with each other, and that the compensation for the services to be performed was reasonable, there could be no recovery, without reference to what the service actually cost, and without reference to what turned out afterwards with respect to the force required. To the refusal of the court to give the instructions requested, and to the instructions given, the plaintiffs excepted. The jury found a verdict for the defendants, upon which judgment was rendered in their favor, to review which the case is brought to this court.

The Statutes upon which the government relies to recover in this case, upon the facts presented, are contained in sections 3960, 3961 and 4057 of the Revised Statutes. Those sections are as follows:

"SEC. 3960. Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service; and when any such additional service is ordered, the sum to be allowed therefor shall be expressed in the order, and entered upon the books of the Department; and no compensation shall be paid for any additional regular service rendered before the issuing of such order.

"SEC. 3961. No extra allowance shall be made for any increase of expedition in carrying the mail unless thereby the employment of additional stock and carriers is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution."

"SEC. 4057. In all cases where money has been paid out of the funds of the Postoffice Department under the pretense that service has been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and in all

other cases where money of the Department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion or misconduct of any officer or other employé in the postal service, the Postmaster-General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon."

In their amended complaint the plaintiffs claim not only the amount allowed and paid each year for the expedited service, but also the amount allowed and paid each year, namely, \$10,668.26, for the additional service by the new line from Lake City to Ouray. It would seem from what took place on the trial that the latter amount was claimed on the ground that that route was a distinct one from that prescribed in No. 38,146, and that the contract for its service could only be made after advertisement for bids. The judge who tried the case below was of that opinion, and so instructed the jury; but we are unable to agree in that view. The new line became necessary to avoid an almost impassable portion of the original route, and changes of that kind can be authorized by the Postmaster-General within the established regulations of the Postoffice Department. Those of 1873 provide in terms, that "the Postmaster-General may order an increase or extension of service on a route by allowing therefor a *pro rata* increase on the contract pay." Such increase of service may be made by enlarging the distance to be traveled when that will better accomplish the object of the original contract, as well as by requiring a greater number of trips between specified points. That object was accomplished in this case by the increase of distance from the detour around the mountains. The carrying of the mails between the original terminal points was thereby greatly facilitated. The compensation allowed for this additional service over the hundred and ten miles of increased route was in accordance with section 3960 of the Revised Statutes in the exact proportion which the original compensation bore to the original service. There was no excess in the allowance.

But the amount allowed for the expedited service over the new line stands upon a different footing. The evidence produced on the trial tended to show that the allowance of \$15,994.77 each year for that service was made upon a false estimate of the additional expenses which would be required; that a slight consideration of the subject would have exposed its error; and that officers of the Department and the subcontractors were well acquainted with the fact that the new line was one that could be more easily traveled. It appeared by the petitions presented to the Department that the change of route was asked because such was the condition of the new line desired, while the line of the original route between Mineral Point and Ouray was impassable for the greater part of the year, and then only by pack horses or on snowshoes. To apply the same schedule time to both lines between the same points—the original and the new one—was to ignore the known differences in the character of the roads over them, as disclosed by the evidence on file in the Department. It is true the head of the Department and those who stand immediately

under him as assistants or deputies are unable in person to supervise all the estimates made in so extensive a Department as that of the Post-office, and, therefore, great reliance is placed upon the judgment in those matters of clerks and subordinate officers. Irregularities and favoritism and corrupt practices are therefore sometimes found to exist which escape observation and detection. It was to avoid fraud and mistakes from this as well as from other causes that sections 3961 and 4057 were adopted.

Section 3961 declares that "no extra allowance shall be made for any increase of expedition in carrying the mail unless thereby the employment of additional stock and carriers is made necessary." And section 4057, after providing that "in all cases where money has been paid out of the Postoffice Department under the pretense that service has been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor," declares that "in all other cases where money of the Department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion or misconduct of any officer or other employé in the postal service, the Postmaster-General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon."

These sections would seem to cover the present case. It cannot be pretended that the allowance for expediting the service over the new route was not made upon erroneous representations. It is admitted that such was their character. Whether they were fraudulent as well as erroneous was a matter to be left to the jury, and, if fraudulent, their influence in vitiating the payment and authorizing the recovery of the moneys cannot be affected by knowledge of their character and participation in the result sought to be obtained by any subordinate officers of the Department. Whether they participated in the fraud or were simply imposed upon by the defendants, cannot change the legal liability of the latter. The court therefore erred in instructing the jury that in such cases there could be no recovery of the money unless the fraud was participated in and countenanced by such officers.

But, aside from any consideration of the question of fraud, the evidence produced at the trial tended to show that the allowance was made to the sub-contractors, for the expedited service, upon a clear mistake as to what additional number of men and of animals were required for such service, and that the money was paid in ignorance of the fact that no additional number had been employed in the performance of that service. Such being the evidence, the plaintiffs were entitled to the instructions asked which are mentioned above. It is no answer to say that the amount of compensation for the expedited service was a matter for the determination of the Postoffice Department. Its determination cannot operate to defeat the express declaration of the Statute prescribing the conditions upon which contracts with the Department shall be made. If an allowance is founded upon a clear mistake of fact, not a

mere error of judgment, and payments are in consequence made, the Statute provides that "the Postmaster-General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest," which means that if such mistake be established in the action of the Department a recovery must follow.

We admit that where matters appertaining to the postal service are left to the discretion and judgment of the Postmaster-General, the exercise of that judgment and discretion cannot in general be interfered with, and the results following defeated. But the very rule supposes that information upon the matters upon which the judgment and discretion are invoked is presented to the officer for consideration, or knowledge respecting them is possessed by him. He is not at liberty, any more than a private agent, to act upon mere guesses and surmises, without information or knowledge on the subject. If the defendant Sanderson intended no fraud by his letter of September 30, 1878, to the assistant postmaster-general, which he verified by his oath; if, in contradiction to his positive assertions, his testimony can be taken, that he did not know at the time anything about the matter in relation to which he was writing, and that the officers of the Department were well aware that he had no knowledge or information of the subject,—then they acted upon his guesses only, and not upon evidence upon the subject, and their decision cannot be received as conclusive. It would be, indeed, a mischievous doctrine in its consequences if a decision thus made could conclude the government from recovering its money paid for additional stock and carriers which were never required and never employed in its service.

It is also true that where the subjects in relation to which the contract of parties is made are necessarily of an uncertain and speculative character or value, and that is known to the parties, a mere mistake by them in their estimate of the value is not deemed sufficient to authorize a recovery of the moneys paid upon the erroneous estimate. If this were a case of that description no recovery could be had. But whether it was so or not was the very issue in the cause to be determined by the jury upon the evidence.

It is familiar law that an action may be maintained to recover back money paid as the price of articles sold, or of work done, when the articles are not delivered or the work not done. The reason is that the consideration for the payment has failed. It is not perceived that the principle of law sought to be applied in this case is in any essential particular different. If the contract for extra allowance was void by reason of fraud or clear mistake, the action becomes simply one for the return of moneys paid for services of stock and carriers never rendered, but which when payment was made were believed to have been rendered. As in the case of goods not delivered, or work ordered not done, the consideration to the party paying has failed. As said by *Baron Parkes* in *Kelly v. Solari*, 9 Mees. & W. 54, 58, "Where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue, and the

money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it." See also *Townsend v. Crowley*, 8 C. B. N. S. 477; *Strickland v. Turner*, 7 Exch. 208. Reasons for the application of the rule are much more potent in the case of contracts of the government than of contracts of individuals; for the government must necessarily rely upon the acts of agents, whose ignorance, carelessness or unfaithfulness would otherwise often bind it, to the serious injury of its operations.

The judgment must be reversed, and the cause remanded for a new trial, and it is so ordered.

L. N. YOUNG ET AL., *Appts.*,

v.

L. H. EWART, Administrator.

(See S. C. Reporter's ed. 287-271.)

Removal of cause from state court to United States court—diverse citizenship at time of removal and at commencement of suit.

1. Under the Act of March 2, 1867, it is essential, in order to a removal of a cause from a state court to a United States court, where there are several plaintiffs or several defendants, that all the necessary parties on one side must be citizens of the State where the suit is brought, and all on the other side must be citizens of another State or States, and the proper citizenship must exist when the action is commenced as well as when the petition for removal is filed.
2. As it does not appear in this case from the petition and affidavits, or in the record, that diverse citizenship as to the parties therein named existed at the commencement of the suit, nor that diverse citizenship existed between the complainant and all the necessary defendants at the time the petition and affidavits were severally filed, the cause was not properly removed, and the state court has never lost jurisdiction.

[No. 75.]

Submitted Nov. 6, 1889. Decided Dec. 2, 1889.

APPEAL from a decree of the District Court of the United States for the District of West Virginia, determining the amounts due to and priorities of creditors of John N. Clarkson, and directing the sale of certain real estate, in an action commenced in the Circuit Court of Kanawha, West Virginia, and removed therefrom into the first above-named court. *Reversed and remitted, with a direction to remand the cause to the state court.*

The facts are stated in the opinion.

Mr. T. B. Swann for appellants.

Messrs. S. A. Miller and J. F. Brown for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court:

In December, 1865, Milton Parker filed his bill in the Circuit Court of Kanawha County, West Virginia, against John N. Clarkson and some seventy other defendants, seeking the marshaling of assets and the subjection of Clarkson's property to the satisfaction of certain judgments held by the complainant

against him, which appears to have been treated, and may be considered, as having been intended to bring all Clarkson's creditors into concourse, and after the adjustment of the liens of those having security, to devote any remaining property, or any surplus arising upon the securities, to the discharge of his liabilities. The cause was referred to a commissioner to take, state and report an account of the property owned by Clarkson, and the liens thereon and their priorities, and various reports were made in the premises.

On the 8th day of July, 1871, C. G. Hussey & Company and John Johns, assignees of John N. Clarkson in bankruptcy, described in an order of the circuit court of that date as defendants, filed their petition and affidavit, sworn to by "J. N. Clarkson, a party to the above-mentioned suit," for the removal of the cause into the United States Court for the District of West Virginia, in these words:

"Your petitioners, John Johns, assignee of J. N. Clarkson in bankruptcy, and a citizen and inhabitant of the State of Virginia, and C. G. Hussey and Charles Avery, partners in business, using the name of C. G. Hussey & Company, and citizens and inhabitants of the State of Pennsylvania, respectfully represent unto your Honor that they are parties defendants and also plaintiffs on a bill of review and petition in a suit pending in chancery in your Honor's court, in Kanawha County, in which Milton Parker is complainant and John N. Clarkson and others are defendants.

"That among the defendants are E. Hemmings, S. Thornburg, A. H. Beach, Henry Chappell, J. H. Brown, Ann Thomas, J. M. Laidley and J. D. Lewis and J. C. Ruby, all of whom are citizens and inhabitants of the State of West Virginia; that said suit is now pending in said Circuit Court of Kanawha County, and in said suit there is a controversy between your petitioners in different rights, and the aforesaid parties, citizens and inhabitants of the State of West Virginia, in which said suit is pending; that the matter in dispute exceeds the sum of \$500, exclusive of costs. Your petitioners have reason to and do believe, that from prejudice or local influence they, nor either of them, will not be able to obtain justice in such state court; they file this petition for the removal of said cause of Parker v. Clarkson and others, now pending in the Circuit Court for Kanawha County, West Virginia, unto the District Court of the United States, held at Charleston, West Virginia, the same being in the district where this suit is pending," etc.

The cause was thereupon ordered to be removed as prayed.

On the 10th day of April, 1872, another order was entered in the case by the state circuit court, reciting that a mistake had been made in respect to the filing of a bond upon removal, and the bond being now filed, the court directs such removal on the petition of July 8th, 1871, and "on the affidavit of the said C. G. Hussey, this day filed, the sufficiency of which affidavit and bond is hereby approved by this court."

The affidavit referred to is as follows:

"Your petitioners, C. G. Hussey and Charles Avery, partners in trade, using the name, firm

and style of C. G. Hussey & Co., and citizens and inhabitants of the State of Pennsylvania, respectfully represent unto your Honor that they are parties defendants, and also parties plaintiffs on petition and bill of review in a cause pending, on the chancery side of your Honor's court, in Kanawha County, West Virginia, in which Milton Parker is complainant and John N. Clarkson *et al.* are defendants.

"That among the defendants are E. Hemmings, A. H. Beach, H. Chappell, J. A. Brown, J. D. Lewis, J. M. Laidley, all of whom are citizens and inhabitants of the State of West Virginia; that said suit and bill of review therein are now pending in said court for Kanawha County, W. Va.

"That in said suit and bill of review there is a controversy between your petitioners, in different rights, and the aforesaid parties, citizens and inhabitants of the State of West Virginia, in which State said suit is pending; that the matter so in controversy and dispute exceeds the sum of \$500, exclusive of costs.

"Your petitioners have reason to and do believe that from prejudice or local influences they will not be able to obtain justice in said state court.

"They file this petition for the removal of said cause of Parker v. Clarkson *et al.* now pending in the Circuit Court for Kanawha County, West Virginia, unto the District Court of the United States for the District of West Virginia (having circuit court powers), held at Charleston, West Virginia, same being in the district where this suit is now pending."

January 21, 1873, the record was filed and cause docketed in the United States court. Various proceedings were afterwards taken therein, and a decree was rendered on the 12th day of December, 1886, determining the amounts due to, and priorities of, some of the creditors, and directing the sale of certain real estate. From this decree the pending appeal was prosecuted.

The record is in a confused and imperfect condition, but it shows, among other things, that C. G. Hussey & Company were judgment creditors of Clarkson, and Hussey and his partner are described in both petitions as citizens and inhabitants of the State of Pennsylvania. In the first petition, nine persons, and, in the second, six, are designated from among the defendants as citizens and inhabitants of the State of West Virginia. It is stated in the first petition that Clarkson's assignee in bankruptcy was, at the time of filing it, a citizen and inhabitant of the State of Virginia. The assignee did not join in the second, although his name is signed by attorney to the bond given on removal.

There was no separable controversy here (*Fidelity Ins. T. & S. D. Co. v. Huntington*, 117 U. S. 280 [29: 898]; *Ayers v. Chicago*, 101 U. S. 184, 187 [25: 838, 840]); but if there were, the provision as to the removal of such a controversy has no application to a removal on the ground of local prejudice, under the Act of March 2, 1867 (chap. 196, 14 Stat. 558), upon which these petitions were based. *Jefferson v. Driver*, 117 U. S. 272 [29: 897].

The provisions of that Act are reproduced in the third subdivision of section 639 of the Revised Statutes, and it was and is essential, in order to such removal, where there are several plaintiffs or several defendants, that all the necessary parties on one side must be citizens of the State where the suit is brought, and all on the other side must be citizens of another State or States, and the proper citizenship must exist when the action is commenced as well as when the petition for removal is filed. *Sewing Machine Co's Case*, 85 U. S. 18 Wall. 553 [21: 914]; *Vannevar v. Bryant*, 88 U. S. 21 Wall. 41 [22: 476]; *American Bible Soc. v. Groce*, 101 U. S. 610 [25: 847]; *Cambria Iron Co. v. Ashburn*, 118 U. S. 54 [80: 60]; *Hancock v. Holbrook*, 119 U. S. 586 [30: 538]; *Fletcher v. Hamlet*, 116 U. S. 408 [29: 679]. It does not appear from either of these petitions and affidavits, or elsewhere in the record, that diverse citizenship as to the parties therein named existed at the commencement of the suit, nor that diverse citizenship existed between the complainant and all the necessary defendants at the time the petitions and affidavits were severally filed. The cause was not properly removed, and the state court has never lost jurisdiction. *Stevens v. Nichols*, 130 U. S. 280 [32: 914]; *Orehore v. Ohio & M. R. Co.* 181 U. S. 240 [33: 144], and cases cited.

The decree is reversed and the record remitted to the district court, with a direction to remand the cause to the state court.

WILHELM PICKHARDT ET AL., *Plffs. in Err.*,

EDWIN A. MERRITT, late Collector of the PORT OF NEW YORK.

(See S. C. Reporter's ed. 252-259.)

Customs statutes, interpretation of—goods manufactured after passage of Act imposing duties—words as commercially understood—similitude—aniline dyes.

1. In interpreting customs statutes, commercial terms are to be construed according to the commercial understanding in regard to them.
2. This rule is applicable in this case, although the articles in question were unknown when the Statute was enacted which imposed the duties exacted.
3. The fact that, at the date of an Act imposing duties, goods of a certain kind had not been manufactured, does not withdraw them from the class to which they belong, when the language of the Statute clearly and fairly includes them. It is sufficient if it so includes them according to commercial understanding.
4. In an action to recover back an excess of duties illegally exacted upon dyes, the rate of duty paid on them being that imposed by the Statute on "aniline dyes," it is not error for the court to charge the jury that the question was whether the articles fell within the description of aniline dyes, as commercially known, or bore a similitude to articles which fell within that description as they were known when the Statute was enacted; and that the jury were to look at the term "aniline dyes" according to its then commercial usage.
5. It was not error to charge the jury that if the dyes, according to the understanding of commercial men, would, when imported, be included

in the class known as aniline dyes, they were subject to duty as aniline dyes.

[No. 97.]

Argued Nov. 12, 13, 1889. Decided Dec. 2, 1889.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment for the defendant in an action brought against the Collector of the Port of New York to recover duties paid under protest on importations. *Affirmed.*

The facts are stated in the opinion.

Messrs. Benj. F. Thurston and Livingston Gifford, for plaintiffs in error:

It is a general rule of interpretation of customs statutes to construe commercial names of articles according to the commercial understanding at the time.

Two Hundred Chests of Tea, 22 U. S. 9 Wheat. 430 (8: 128); *Elliott v. Swartwout*, 85 U. S. 10 Pet. 137 (9: 878); *U. S. v. One Hundred and Twelve Casks of Sugar*, 88 U. S. 8 Pet. 277 (8: 944); *Curtis v. Martin*, 44 U. S. 8 How. 106 (11: 516); *Maillard v. Lawrence*, 57 U. S. 16 How. 251 (14: 925); *Arthur v. Morrison*, 96 U. S. 108 (24: 764); *Arthur v. Lahey*, 96 U. S. 112 (24: 766); *Arthur v. Davies*, 96 U. S. 135 (24: 810); *Greenleaf v. Goodrich*, 101 U. S. 278 (25: 845); *Robertson v. Salomon*, 180 U. S. 412 (32: 995); *Barber v. Schell*, 107 U. S. 617 (27: 490); *Arthur v. Butterfield*, 125 U. S. 70 (31: 648).

That general rule is inapplicable. In all cases where it has been applied the article in question had a commercial name at the time the law was enacted, and the commercial evidence relied upon related to that period.

The admission of evidence and the charge touching upon what these articles were called in commerce about the time of the trial were error.

Newman v. Arthur, 199 U. S. 132, 138 (27: 883, 885).

It was an error to admit evidence of what these colors were called at a date subsequent to their date of entry and the exaction of duty, which constitutes this cause of action.

Homer v. Austin, 68 U. S. 1 Wall. 486 (17: 688); *Reiche v. Smythe*, 80 U. S. 13 Wall. 162 (20: 566); *Greenleaf v. Goodrich*, 101 U. S. 278, 284 (25: 845, 847).

Mr. O. W. Chapman, Solicitor-General, for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court:

This is an action at law, brought in the Circuit Court of the United States for the Southern District of New York, by Wilhelm Pickhardt and Adolph Kuttroff against Edwin A. Merritt, Collector of the Port of New York, to recover duties paid under protest on importations into that Port from Hamburg, the entries having been made at the custom-house in January and February, 1879. There were proper protests and appeals to the Secretary of the Treasury, and decisions by that officer. The goods were dyes or colors called naphthylamine red, orange II, orange IV and resorcine red J. At the trial, before Judge Wheeler and a jury, there was a verdict for the defendant, and a judgment in his favor for costs, to review which the plaintiffs have brought a writ of error

The Collector assessed a duty upon the articles in question of 50 cents per pound and 85 per cent *ad valorem*, under that provision of schedule M of section 2504 of the Revised Statutes, 2d ed. p. 479, which reads as follows: "Paints and dyes—aniline dyes and colors, by whatever name known: fifty cents per pound, and thirty-five per centum *ad valorem*." The plaintiffs claimed, in their protest, that the articles were not aniline dyes, and were liable to a duty of only 20 per cent *ad valorem*, under section 2516 of the Revised Statutes, which provides that "there shall be levied, collected and paid on the importation of all raw or unmanufactured articles, not herein enumerated or provided for, a duty of ten per centum *ad valorem*; and on all articles manufactured in whole or in part, not herein enumerated or provided for, a duty of twenty per centum *ad valorem*."

The course of legislation on the subject of duties on aniline dyes has been as follows: By section 11 of the Act of June 80, 1864, chap. 171 (13 Stat. 212), the following duty was imposed: "On aniline dyes, one dollar per pound and thirty-five per centum *ad valorem*." By section 21 of the Act of July 14, 1870, chap. 255 (16 Stat. 264), the following duty was imposed: "On aniline dyes and colors, by whatever name known, fifty cents per pound, and thirty-five per centum *ad valorem*;" and by section 22 of the same Act, p. 266, picric acid, which appears to be not chemically an aniline dye, but a phenol dye, though obtained from coal-tar, was made free of duty. The provision of the Act of 1870 in regard to aniline dyes and colors was carried into the Revised Statutes, enacted in 1874, as was also the provision in regard to picric acid.

The question sought to be raised by the plaintiffs in the present case could not arise under the Revised Statutes as amended by the Act of March 3, 1883, chap. 121, because, under title 33, section 2502, schedule A, as enacted by the Act of March 3, 1883 (23 Stat. 498), the following duty is imposed: "All coal-tar colors or dyes, by whatever name known, and not specially enumerated or provided for in this Act, thirty-five per centum *ad valorem*;" and picric acid was not included by name in the list of articles made free of duty by section 2503 as enacted by the Act of March 3, 1883. The articles in question, which, it is claimed, were not aniline dyes or colors, are admitted to be "coal-tar colors or dyes."

The plaintiffs claimed on the trial, and claim here, that the words "aniline dyes and colors, by whatever name known," are words of description, and not words used in a general commercial sense. They therefore introduced a good deal of evidence for the purpose of showing that the articles in question were, physically and chemically, not aniline dyes or colors, though derived from coal-tar. It was shown that none of those articles were known in commerce at the time the Revised Statutes were enacted, resorcine red J having been known first in 1875, orange II and IV in 1877, and naphthylamine red in 1878. On the other hand, the defendant introduced testimony for the purpose of showing that the articles in question were known in trade, when imported, as "aniline dyes," and that in 1874 the term

"aniline dyes" had been applied in trade to all dyes derived from coal-tar, or artificial dyes.

The testimony on the part of the plaintiffs tended to show that the articles in question were not chemically aniline colors; that naphthylamine red and orange II and IV were azo colors; that resorcline red J was an eosine color; that picric acid was a phenol color; that aniline colors had high tinctorial power, as compared with natural colors, while the tinctorial power of azo colors was no higher than that of natural colors; that aniline colors attached themselves to fabrics without manipulation, easily and directly, while azo colors attached themselves with more difficulty, being assisted by mordants; that aniline colors were wanting in fastness, while azo colors were relatively fast; that aniline colors were generally on the blue shades, either blues, or violets, or reds which contained blue or green, while azo colors had exactly the shades that aniline colors lacked,—yellows, orange, and yellowish reds; that aniline colors were not fast to acids or alkalis, while azo colors were relatively fast to both acids and alkalis, and were sometimes even brightened or cleared by acids and alkalis; that aniline colors combined readily with albumen, which was largely used as a mordant and in photography, while azo colors did not combine with albumen; and that aniline colors were not acid, unless sulphonated, while azo colors were always acid. In regard to resorcline red J the plaintiffs gave evidence tending to show that an aniline color could be used as a dye, while resorcline red could not be used generally as a dye; that an aniline color could not be used generally or efficiently for paints, while resorcline red was generally used as a pigment for paints; and that the color of an aniline dye was a crimson, running up to violet or bluish red, while the color of resorcline red was scarlet or yellowish red.

The plaintiffs insist that the court erred at the trial in admitting evidence to show what the importations in question were called in trade at the time of the trial in 1884, which was ten years after the Revised Statutes were enacted, and five years after the entries took place; that it also erred in admitting evidence to show the signification of the words "aniline dyes and colors," as a commercial term, in contradistinction to a descriptive term; and that it erred in refusing to charge the jury, as requested by the plaintiffs, as follows: "That the term 'aniline dyes and colors, by whatever name known,' is not used in a general commercial sense, but as a descriptive term, and primarily includes only such dyes as are in fact aniline by their constitution;" and also: "That, in determining the question at issue, to instruct the jury to disregard all the testimony of the defendant as to the general name under which the articles in question were bought and sold."

They complain that the court erred in charging the jury that, if any of the articles in question would be, according to the understanding of commercial men, dealers in the articles and importers of them, included in the class of articles known as aniline dyes, by whatever name they had come to be known at the time in question, they were subject to the duty imposed on aniline dyes; that Congress used the term "aniline dyes" as applied to a class of

articles which, in June, 1874, had acquired that name by reputation and use among dealers in and importers of such articles; and that the Statute was made for the future.

They also complain that the court refused to charge the jury, as requested by the plaintiffs, as follows: "That it is immaterial how the articles in question were regarded in trade, and that the plaintiffs are entitled to a verdict if they are satisfied, upon a fair preponderance of testimony, that the dyes in question are a new and different dye from the aniline dyes known in 1874, and are not in fact aniline dyes, unless the jury should find similitude under the Statute." They also complain that the court refused to charge the jury, as requested by the plaintiffs, as follows: "If the jury find that the plaintiffs' goods were not known in commerce until since June, 1874, the plaintiffs are entitled to recover, unless the jury find they bear the statutory similitude to the aniline dyes and colors known in 1874." In regard to each of these last two requests, the court declined to charge otherwise than as it had already charged.

They further complain that the court erred in refusing to charge, as requested by the plaintiffs, that, if the jury should find, upon a fair preponderance of testimony, that the articles in question "were used as a substitute and in place of cochineal, and not as a substitute for any aniline dye known at the time of their introduction, the plaintiffs, on that branch of the case, are entitled to a verdict." In regard to that request, the court said that the general instruction to the jury on the subject was sufficient.

We think that the objections to evidence before recited, and the objections before mentioned to particular parts of the charge of the court, and to the refusals of the court to charge, and to its refusal to charge otherwise than as it had charged, are untenable.

The court instructed the jury that if the four articles in question, according to the understanding of commercial men, dealers in and importers of them, would, when imported, "be included in the class of articles known as aniline dyes, by whatever name they had come to be known," they were subject to duty as aniline dyes, and the defendant was entitled to a verdict. We see no objection to this instruction. It was in accordance with the established rule that, in interpreting customs statutes, commercial terms are to be construed according to the commercial understanding in regard to them. Nor is this rule inapplicable to this case because the articles in question were unknown in 1874, when the Statute was enacted. As the court said to the jury, the law was made for the future; and the term "aniline dyes and colors, by whatever name known," included articles which should be commercially known, whenever afterwards imported, as "aniline dyes and colors." In *Neuman v. Arthur*, 109 U. S. 182 [27: 888], it was held that the fact that, at the date of an Act imposing duties, goods of a certain kind had not been manufactured, does not withdraw them from the class to which they belong, when the language of the Statute clearly and fairly includes them. But it is sufficient if it so includes them according to commercial understanding.

The bill of exceptions states as follow: "In the course of the trial a large amount of testimony was introduced, on behalf of both parties, as to the similitude or resemblance, under Revised Statutes, section 2499, of the dyes and colors of the plaintiffs' importations and various dyes and colors known in trade of this country, and by chemists from 1869 to time of trial, as aniline dyes and colors, it being contended upon the part of the defendant that the importations of the plaintiffs, if not specified under and covered by the term 'aniline dyes,' yet that they were chargeable as aniline dyes by similitude."

Section 2499, thus referred to, reads as follows: "There shall be levied, collected and paid, on each and every non-enumerated article which bears a similitude, either in material, quality, texture or the use to which it may be applied, to any article enumerated in this title, as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles, on which different rates of duty are chargeable, there shall be levied, collected and paid, on such non-enumerated article, the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable."

On the question of similitude the court instructed the jury that if the articles in question did not fall within the class of articles known as "aniline dyes," or either of them did not, the jury were then to proceed to the consideration of the question arising under section 2499 of the Revised Statutes, as to similitude; that, if the four articles did not fall within the class of "aniline dyes," then the question would be whether any one of them bore a similitude, either in "material, quality, texture or the use to which it may be applied," to what were known as aniline dyes at the time the Revised Statutes were enacted; that, if it did, it was dutiable at the same rate as aniline dyes were; that the word "texture" did not apply to the subject; that, if any one of the articles bore a similitude or resemblance, in material or quality, to what were known as aniline dyes in 1874, it was dutiable at the same rate as an aniline dye; that if either of them bore a similitude in the use to which it might be applied, to aniline dyes known and in use in 1874, it was dutiable at the same rate as an aniline dye; that the mere application to the dyeing of fabrics would not create the similitude, but that, if there was a similitude in the mode of use, a similitude in the same kind of dyeing, producing the same colors in substantially the same way, so as to take the place of aniline dyes in use, there would be a similitude in use; that, if all the articles were neither aniline dyes nor bore such similitude, the plaintiffs were entitled to a verdict for the full amount they claimed; that, if any less than all of them were neither aniline dyes nor bore such similitude, the plaintiffs were entitled to a verdict, as to those, for the amount of duties

charged which ought not to have been charged; that the question was whether the articles fell within the description of "aniline dyes or colors, by whatever name known," as commercially known, or bore a similitude to articles which fell within that description, as they were known in 1874; that the jury were not to consider "aniline dyes" as a term synonymous with "coal-tar dyes;" and that they were to look at the term "aniline dyes" according to its commercial usage in 1874.

The plaintiffs excepted to that part of the charge in regard to similitude which had reference to the expression "similitude in material," and to that part which related to "similitude in the same kind of dyeing," and also requested the court to charge the jury, "in respect to similitude of quality," that the mere quality of producing color, or dyeing, was not a sufficient similitude to warrant the jury in finding a verdict for the defendant by reason of similitude. In response to this request, the court said that it had already instructed the jury that the mere fact that the articles would color was not a similitude. The plaintiffs also excepted to the charge of the court as to similitude in use.

We are of opinion that the charge on the subject of similitude submitted the question properly to the jury; and that it was not error to refuse the request to charge, that, if the jury should find that any one of the articles was used as a substitute and in place of cochineal, and not as a substitute for any aniline dye known at the time of its introduction, the plaintiffs, as to that branch of the case, were entitled to a verdict.

Other questions are raised in the bill of exceptions which we do not deem it necessary to notice particularly. We see no error in the record.

Judgment affirmed.

JOSEPH E. YOUNG, *Appt.*,

THE TOWNSHIP OF CLARENDON
and THE MICHIGAN AIR LINE
RAILROAD COMPANY.

(See S. C. Reporter's ed. 340-356.)

Power of municipality to issue bonds—Michigan town bonds—title, when did not vest in railroad company—laches—trust property—substantial equity.

1. A municipality has no power to issue its negotiable bonds in aid of a railroad, except by legislative permission.
2. Bonds of a Town in Michigan, delivered to the state treasurer, under the Michigan Act of March 22, 1866, as trustee for the Town and for the Railroad Company for which they were issued, which were never indorsed and delivered by him to the Company as required by said Act, never became operative.
3. Title to such bonds did not vest in the Company by the delivery of them to the treasurer and the compliance by the Company with the provisions of such Act; they could only be delivered to the Company so as to pass the title, on the certificate of the governor. Such certificate, under such

Act, was a condition precedent to the power of the treasurer to deliver.

4. A creditor of the Railroad Company who endeavors, by suit in equity, to reach and subject to the payment of his debt the alleged equitable debt of the Town to the Company by reason of the non-delivery of the bonds to the Company and their return to the Town, may be defeated by the laches of the Company in the pursuit of its rights against the Town.
5. Such bonds [were not perfected instruments, and did not become trust property in the hands of the treasurer, and cannot be followed as such into any hands to which they may be traceable.
6. On a bill in the nature of a bill for specific performance or for an equitable garnishment, the court may inquire where is the substantial equity in the case.

[No. 84.]

Argued Oct. 23, 1889. Decided Dec. 9, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Michigan, dismissing a suit in equity for an account between The Michigan Air Line Railroad Company and the Township of Clarendon brought by a creditor of such Company in reference to certain alleged town bonds, and asking for a decree against said Town in favor of such creditor for the sum shown to be due from said Town to said Company, to be applied to the satisfaction of a judgment against the Company. *Affirmed.*

Reported below, 26 Fed. Rep. 805.

Statement by *Mr. Justice Lamar*:

On the 24th of February, 1885, the appellant exhibited in the Circuit Court of the United States for the Eastern District of Michigan his bill, in the nature of a creditor's bill, against the appellees.

The bill avers that, on the 12th of November, 1884, the appellant obtained a judgment against the Railroad Company for the sum of \$355,865.24; that an execution upon the judgment was issued, and was returned *nulla bona*; that the judgment is still unpaid; and that the Railroad Company is a corporation, organized on the 28th of August, 1868, by a consolidation of two companies—one organized under the laws of Michigan, and the other under those of Indiana, which consolidated Company was itself, on October 8, 1880, again consolidated with the St. Joseph Valley Railroad Company, retaining, however, its name of The Michigan Air Line Railroad Company.

The bill also alleges that after the first consolidation as aforesaid, and on the 23d of March, 1869, the Legislature of Michigan passed "An Act to Enable any Township, City or Village to Pledge its Aid, by Loan or Donation, to any Railroad Company now Chartered or Organized, or That May Hereafter be Organized, Under and by Virtue of the Laws of the State of Michigan, in the Construction of its Road." Said Act authorized the issue of aid bonds. In its fifth and sixth sections it provided as follows:

"Sec. 5. Whenever any such bonds as provided by provisions of this Act shall have been issued as therein specified, the same shall be delivered by the person, persons or officers having charge of the same to the treasurer of

this State, who shall give a receipt therefor and hold the same as trustee for the municipality issuing the same and for the railroad company for which they were issued, and to be disposed of by said treasurer, in discharge of his trust, as hereinafter provided.

"Sec. 6. . . . Such bonds shall be safely kept by such treasurer for the benefit of the parties interested, and be disposed of by him in the following manner:—that is to say, whenever any railroad company in aid of which any of such bonds may have issued, shall present to said treasurer a certificate from the governor of this State that such railroad company has in all respects complied with the provisions of this Act, and is thereby entitled to any of such bonds, the same or such of said bonds as said company shall be entitled to receive, shall be delivered to said company, the treasurer first cutting therefrom, canceling and returning to the municipality the past-due coupons. The treasurer shall indorse upon each of said bonds the date of such delivery and to whom the same were delivered, and the same shall draw interest only from the time when so delivered; and the treasurer shall notify the clerk of the township or recorder or clerk of the city issuing the same of the date of the delivery of its bonds to such railroad company. . . . And in case any bonds so delivered to said treasurer by any such township or city shall not, within three years from the time when the same were received by him, be demanded in compliance with the terms of this Act, the same shall be canceled by said treasurer and returned to the proper officers of the township or city issuing the same."

The bill further avers that, in conformity with the provisions of this Act, the electors of the Township, on the 21st day of June, 1869, voted to pledge the aid of the Township by the loan of \$10,000, to be paid by its 10 per cent bonds at par, upon certain terms and conditions in said vote stated, among which were, that the road should be located and constructed through said Township; that the time of payment of each of those bonds was to be postponed a year in the event of the non-completion of the road-bed and the ironing before the 1st of November, 1869; and that the Company would pay yearly to the Township a sum equal *pro rata* to the dividends paid stockholders; and said sums were to be in extinguishment of the interest on the bonds, and the excess over 10 per cent, if any, to be applied on the principal. The bonds thus voted were issued in pursuance of said Act, and were delivered to the state treasurer, to be by him held as trustee for both the Township and the Company on the terms and conditions of the Act, as aforesaid.

The bill then avers that the Railroad Company, in consideration of the Township's action, and relying thereon, entered upon the construction of said railroad, and, previous to the 1st of February, 1871, had fully constructed and ironed said road through the Township; and, at the time of the delivery of the bonds to the state treasurer, as aforesaid, had duly executed and delivered to the Township the agreement specified in the terms on which the aid was voted, and had performed every condition precedent to the earning of said bonds, and

had become fully entitled to have the same delivered by the treasurer, except that it had not secured the certificate of the governor as required by said Act. While the road, however, was in the process of construction, the Supreme Court of the State of Michigan, on the 28th of May, 1870, declared the Act in question to be unconstitutional; but as the Railroad Company had already expended the sum of a million of dollars and upwards in construction, it could not stop, but went on and completed the road in full compliance with all the conditions of the vote. The Company then applied to the governor for his certificate under the Statute, exhibiting to him proofs of its title to receive the bonds; but he refused to give the same, giving as his sole reason for such refusal the judgment of the Supreme Court aforesaid.

The bill then avers that on May 28th, 1872, the Township, knowing the premises, and without the knowledge or consent of the Company, and in violation of the law and of the trust aforesaid, and in fraud of the Company's rights, induced the state treasurer, who had full knowledge of the foregoing facts, to surrender to the Township the said bonds and the coupons thereunto attached; that the Township has since retained the same, and withheld them from the Company; that said bonds and coupons, by reason of all the premises, became in justice and equity the property of said Railroad Company and the Township became bound thereon according to their tenor and effect; that the said Township is therefore equitably indebted to said Company to the whole amount of said bonds and coupons, with the interest thereon to the present time; and that the appellant is entitled to the said amount, towards the satisfaction of his judgment against the Company.

To this end an account is prayed to be stated between the Company and the Township, the appellees, and a final decree against the Township for the sum shown to be due, in favor of the appellant, is asked.

The bill was dismissed by the circuit court on demurrer, 26 Fed. Rep. 805; and the cause comes here on appeal by the complainant.

Messrs. John D. Conely and Alfred Lucking, for appellant:

The Railroad-Aid Act is unconstitutional.

People v. Salem, 20 Mich. 452.

The subscription passed to the new Company by the consolidation.

New Buffalo Twp. v. Cambria Iron Co. 105 U. S. 78 (26: 1024); *Nugent v. Putnam County*, 86 U. S. 19 Wall. 241 (22: 88); *Ohio & M. R. Co. v. Wheeler*, 66 U. S. 1 Black, 286-297 (17: 180-183); *Clark v. Barnard*, 108 U. S. 436 (27: 780); *Graham v. Boston, H. & E. R. Co.* 118 U. S. 161 (30: 196).

The first consolidated Company existed when the aid was voted, and as the Town dealt with that Company and voted the aid to it, the legality of its consolidation cannot be attacked.

Toledo & A. A. R. Co. v. Johnson, 55 Mich. 456.

It is never necessary to set out the evidence of facts, but only facts themselves.

Wilson v. Eggleston, 27 Mich. 257-261; *Palm-ster v. Pere Marquette Lumber Co.* 81 Mich. 188, 184; *Williams v. Hubbard*, 1 Mich. 448-451; *Story's Eq. Pl.* § 240.

The aid voted was by a loan of the bonds of the Township.

Stanley v. Nye, 51 Mich. 232; *New Buffalo Twp. v. Cambria Iron Co.* 105 U. S. 78 (26: 1024).

A court of equity will treat as having been done what ought to have been done.

Knight v. Legh, 4 Bing. 589; *Outhouse v. Outhouse*, 18 Hun, 180.

By the delivery to the treasurer and by the performance of the conditions, the title to the bonds vested in the Company.

Couch v. Meeker, 2 Conn. 802; *Taylor v. Thomas*, 18 Kan. 217; *Jackson v. Catlin*, 2 Johns. 248; *People v. Salem*, 20 Mich. 452; *Taylor v. Ypsilanti*, 105 U. S. 60 (26: 1008); *Olcott v. Fond du Lac County*, 83 U. S. 16 Wall. 678 (21: 382); *Douglass v. Pike County*, 101 U. S. 677 (25: 968).

A court cannot, by judicial decision, destroy acquired contract rights.

Concord v. Robinson, 121 U. S. 165-171 (30: 885-888); *Moultrie County v. Rockingham Sav. Bank*, 92 U. S. 631, 635 (25: 631, 638).

The Railroad Company could not have procured a mandamus.

People v. Governor, 29 Mich. 820; *Smith v. Bourbon County*, 127 U. S. 105 (32: 78).

Where the trustee has violated his trust by an illegal conversion of the trust property, the *cestui que trust* has a right to follow the trust property.

Oliver v. Piatt, 44 U. S. 8 How. 338-401 (11: 622); *Seymour v. Freer*, 75 U. S. 8 Wall. 202-214 (19: 306-310); *May v. LeClair*, 78 U. S. 11 Wall. 217-231 (20: 50-58); *Duncan v. Jaudon*, 82 U. S. 15 Wall. 165 (21: 142); *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54 (26: 693).

Messrs. Isaac Marston and W. K. Gibson, for appellees:

The Indiana corporation had no power or authority to consolidate.

Green's Brice on Ultra Vires, 633 n, and cases cited; *Clearwater v. Meredith*, 68 U. S. 1 Wall. 25 (17: 604); *Peninsular R. Co. v. Tharp*, 28 Mich. 506; *Mansfield, C. & L. M. R. Co. v. Drinker*, 30 Mich. 124.

No matter what power the Michigan Company possessed, there would be no legal consolidation.

State v. Consolidation Coal Co. 46 Md. 1; *Furnum v. Blackstone Canal Corp.* 1 Sumn. 46, 62; *State Treasurer v. Auditor-Gen.* 46 Mich. 284; *Ohio & M. R. Co. v. Wheeler*, 66 U. S. 1 Black, 286 (17: 180).

Every requirement of the Statute must be complied with.

Peninsular R. Co. v. Tharp, 28 Mich. 506; *Marquette, H. & O. R. Co. v. Langton*, 32 Mich. 251.

It is not enough that the new Company is a corporation *de facto*, unless there have been dealings with it of such a character as to raise an estoppel.

Rodgers v. Wells, 44 Mich. 411; *Tuttle v. Michigan A. L. R. Co.* 85 Mich. 247, 253.

It must appear that the creditor has completely exhausted his remedy at law.

Freeman v. Michigan State Bank, Walk. Ch. 62; *Wharton v. Fitch*, Walk. Ch. 143; *Albany City Bank v. Dorr*, Walk. Ch. 817; *Adsit v. Butler*, 87 N. Y. 585; *Walseo v. Seligman*, 18 Fed. Rep. 415; *Bassett v. Orr*, 7 Biss. 296.

The corporation is guilty of laches, and should set forth its excuse clearly in its bill.

Richards v. Mackall, 124 U. S. 188 (31: 896).

An escrow takes effect undoubtedly upon the performance of the condition upon which it is deposited, without any formal delivery by the depository. Suit can then be brought.

Couch v. Meeker, 2 Conn. 802; *Taylor v. Thomas*, 18 Kan. 217; *Jackson v. Catlin*, 2 Johns. 248.

The corporation must point out why it could not or did not obtain the information, where it seeks to excuse its delay.

New Albany v. Burke, 78 U. S. 11 Wall. 96 (20: 155); *Marsh v. Whitmore*, 88 U. S. 21 Wall. 185 (22: 485); *Richards v. Mackall*, 124 U. S. 188 (31: 896).

For a creditor's bill to be maintainable, all legal remedies must have been exhausted.

Adair v. Butler, 87 N. Y. 586; *Taylor v. Bowker*, 111 U. S. 110 (28: 868).

The bonds are not equitable assets, subject to be reached by a bill in the nature of a creditor's bill.

Hayward v. Andrews, 106 U. S. 672-675 (27: 271, 272); *Smith v. Bourbon County*, 127 U. S. 105 (32: 78).

The plaintiff has no rights superior to those of the Railroad Company.

Smith v. Bourbon County, 127 U. S. 105, 110 (32: 78, 76).

If a claim sued at law would have been barred, it is barred in equity.

Carrol v. Green, 92 U. S. 509-516 (23: 788-740); *Godden v. Kimmell*, 99 U. S. 201-210 (25: 481-484); *Harpenden v. Reformed Prot. Dutch Church*, 41 U. S. 16 Pet. 455 (10: 1029); *German-American Seminary v. Kiefer*, 48 Mich. 112; *Webster v. Gray*, 87 Mich. 87; *Dubois v. Campau*, 87 Mich. 248.

A court will not construe exceptions into a Statute of Limitations.

Sacia v. De Graaf, 1 Cow. 856; *Buckinghamshire v. Drury*, Wilms. 177, cited in *Beckford v. Wade*, 17 Ves. Jr. 87; *Edwards v. Ross*, 58 Ga. 147; *Blades v. Stokes*, 1 Bart. (Tenn.) 812; *Demarest v. Wynkoop*, 8 Johns. Ch. 129; *Bank of Alabama v. Dalton*, 50 U. S. 9 How. 522 (18: 242).

The laches of the plaintiff forms an insuperable obstacle to his recovery. He is merely a creditor, and can have no greater rights than the Railroad Company.

Smith v. Bourbon County, 127 U. S. 105 (32: 78); *Badger v. Badger*, 69 U. S. 2 Wall. 87, 94, 95 (17: 886, 888); *Bowman v. Wathen*, 42 U. S. 1 How. 189, 198 (11: 97); *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 618 (24: 855, 858); *Preston v. Preston*, 95 U. S. 200 (24: 494); *Godden v. Kimmell*, 99 U. S. 201 (25: 481).

Bill should set forth the impediments to an earlier prosecution.

Richards v. Mackall, 124 U. S. 188 (31: 896); *Marsh v. Whitmore*, 88 U. S. 21 Wall. 185 (22: 485).

No general rule can be laid down as to what lapse of time will constitute laches.

Graham v. Boston, H. & E. R. Co. 118 U. S. 161 (30: 196); *Sullivan v. Portland & K. R. Co.* 94 U. S. 896 (24: 324); *Burke v. Smith*, 88 U. S. 16 Wall. 890 (21: 861); *Harwood v. Cincinnati & C. A. L. R. Co.* 84 U. S. 17 Wall. 79 (21: 558); *Davison v. Davis*, 125 U. S. 90 (31: 635); *Hayward v. Eliot Nat. Bank*, 96 U. S. 611 (24: 182 U. S.

855); *Brown v. Buena Vista County*, 95 U. S. 157, 160 (24: 422, 423); *New Albany v. Burke*, 78 U. S. 11 Wall. 96 (20: 155).

Question of laches is properly raised by demurrer.

Mercantile Nat. Bank v. Carpenter, 101 U. S. 567 (25: 815); *Lansdale v. Smith*, 106 U. S. 391 (27: 219); *Speidel v. Henricks*, 120 U. S. 877 (30: 718).

The Township is not owing the railroad any liquidated sum whatever.

Stanley v. Nye, 51 Mich. 285.

A person has the right to determine the party to whom he will make a loan, and no one, either by legislative authority or otherwise, can give a third party the right to call for the loan or take the place of the debtor.

Scotland County v. Thomas, 94 U. S. 682 (24: 219); *Henry County v. Nicolay*, 95 U. S. 619 (24: 894); *Marsh v. Fulton County*, 77 U. S. 10 Wall. 876 (19: 1040); *Empire Trp. v. Darlington*, 101 U. S. 87 (25: 878); *Harshman v. Bates County*, 92 U. S. 569 (23: 747); *Menasha v. Haerard*, 102 U. S. 81 (26: 88); *Green County v. Conness*, 109 U. S. 104 (27: 873).

Before the road is completed through the Town, the bonds are declared unconstitutional, and the offer may be said thereby to be withdrawn and terminated.

Concord v. Portsmouth Sav. Bank, 92 U. S. 625 (23: 628); *Fairfield v. Gallatin County*, 100 U. S. 47 (25: 544); 1 Parsons on Contracts, 482; *Shuey v. U. S.* 92 U. S. 73 (23: 697); *Eliason v. Henshaw*, 17 U. S. 4 Wheat. 225 (4: 556); *Payne v. Cave*, 8 T. R. 148.

One party cannot be bound without the other.

Routledge v. Grant, 4 Bing. 655; *Quick v. Wheeler*, 78 N. Y. 300; *McDonald v. Bewick*, 51 Mich. 79; *Piney Shoe & L. Co. v. Kurtz*, 84 Mich. 89; *Stevens v. Corbitt*, 88 Mich. 458, 461; *Michigan Midland & O. R. Co. v. Bacon*, 88 Mich. 466; *Wilkinson v. Heavenrich*, 58 Mich. 577.

The rights of the holders of railroad-said bonds are to be determined by the law as it was judicially construed when the bonds were put on the market as commercial paper.

Green County v. Conness, 109 U. S. 104 (27: 873); *Douglass v. Pike County*, 101 U. S. 677, 687 (25: 968, 971).

Mr. Justice Lamar delivered the opinion of the court:

We consider the decisive question in this case to be that of the laches in pursuit of the Railroad Company's right against the Township. In this view the controversy must be narrowed to a single issue. The Township, which is the defendant below, and which defends separately, claims that the cause of action accrued either 18 or 14 years before this bill was filed—18 years if the conversion of the bonds by the Township and the treasurer be considered the gravamen, and 14 years if it be the governor's refusal to issue his official certificate; that since the Statutes of Limitation in Michigan, touching these questions, vary from 6 to 10 years, the cause of action is long since barred at law as to the Railroad Company; that it is, therefore, barred also in equity and lost by laches in its assertion; and that since the appellant by this bill is prosecuting a demand in the nature

of a garnishment, and the Railroad Company's right is barred both at law and in equity, therefore that of the appellant is also barred. The appellant seeks to avoid the force of this position by claiming that the bonds had been so far perfected by the dealings between the parties that the Railroad Company was entitled to have them from the state treasurer; that such being the case, the tort of the Township and of the treasurer in converting them could not impair the rights of the Company; that, therefore, the Company was and is entitled to waive the tort and sue directly on the bonds, as in the case of lost or stolen bonds; that only a few of such bonds, if delivered, would have been barred at the time of the filing of the bill, since most of them were so drawn as to mature within 10 years of that time; and, finally, that as the Company was thus still in possession of an enforceable demand, the appellant could avail himself of it by this bill.

The controlling question presented, therefore, is this: Were the bonds in question so dealt with by the parties as at any time to vest in the Railroad Company a right to sue directly on the bonds themselves, as distinguished from a right to sue for their nondelivery or because of their cancellation? That question cannot be satisfactorily or properly answered without constant reference to the exceptional character of the circumstances by which these bonds were deprived of their value. It is not the case of a common negotiable instrument put forth by a natural person as obligor; but it is that of a railroad-aid bond sought to be put forth by the municipality. In such case the nature of the bonds, their force and effect, their value and character while in the hands of the state treasurer, the rightfulness and sufficiency of their issue, and all kindred questions, must be referred to the Statute authorizing them. In this case the Statute is the Act of 1869. It is the touchstone. Whatever might be the rule in ordinary cases, so far as the Act goes, it controls here, being the enabling Act; outside of it there was no power whatever to issue these bonds. By an unbroken current of decisions by this court, and by all other courts, too numerous to mention, it is settled law that a municipality has no power to make a contract of this character, except by legislative permission. It is manifest that, such being the case, the Legislature in granting such permission can impose such conditions as it may choose; and even where there is authority to aid a railroad and incur a debt in extending such aid, it is also settled that such power does not carry with it any authority to execute negotiable bonds except subject to the restrictions and directions of the enabling Act. *Wells v. Pontotoc County*, 102 U. S. 625 [26: 122]; *Olafson v. County v. Brooks*, 111 U. S. 400 [28: 470]; *Kelley v. Milan*, 127 U. S. 189 [32: 77].

The analogy offered between the case at bar and a lost bond is misleading. There is, in fact, no analogy. There is no doubt about the right of the owner of a bond lost or stolen to sue on it, and in the absence of it to give secondary evidence of its contents; but the very statement of the principle assumes the existence of the instrument. A bond lost or a bond stolen is out of the personal possession and control of the owner, it is true; but it is also an

instrument that has become executed, to which those things have been done that were needed to give it legal existence as an actionable obligation.

But here the very question to be determined is, whether there ever were any bonds. It is a question, in substance, of the very existence of the instruments themselves. As before remarked, the Act of 1869 fixes the rights of parties in this case. All the questions concerning the execution of the bonds in controversy must be referred to that Statute, tested by it, and decided in strict conformity with its terms. It is an enabling Act, conferring a power not before existent, and any departure from its requirements cannot be allowed. *Harshman v. Bates County*, 92 U. S. 569 [28: 747].

In the case of *Sheboygan County v. Parker*, 70 U. S. 8 Wall. 93, 96 [18: 83, 84], this court said: "The commissioners or board of supervisors of a county, in the exercise of their general powers as such, have no authority to subscribe stock to railroads, and bind the people of the county to pay bonds issued for that purpose, without special authority conferred upon them by the Legislature. But when special authority is given to the people of a county to do these acts, and bind themselves by the issue of such bonds, the Legislature may properly direct the mode in which it shall be effected. The persons specially appointed to act as agents for the people have a ministerial duty to perform in issuing the bonds, after the people, at an election held for the purpose, have assented that they shall be bound."

In the case of *Anthony v. Jasper County*, 101 U. S. 693 [25: 1005], the Township of Marion had, by authority, subscribed in aid of the railroad. Afterwards the Legislature passed an Act requiring such bonds to be registered and certified by the auditor of the State. The court said (p. 696 [1008]): "There can be no doubt that it is within the power of a State to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liability. Other circumstances may exist which will give the holder of them an equitable right to recover from the municipality the money which they represent, but he cannot enforce the payment, or put them on the market as commercial paper. The Act now in question is, we think, of this character. It in effect provides that no bond issued by counties, cities or incorporated towns shall be valid, that is to say, completely executed, until it has been countersigned or certified in a particular way by the state auditor. For this purpose, after being executed by the corporate authorities, it must be presented to that officer, and he must inquire and determine whether all the requirements of the law authorizing its issue have been observed, and whether all the conditions of the contract in consideration of which it was to be put out have been complied with. To enable him to do this, evidence must be submitted which he is required to file and preserve. If he is satisfied, the registry is made, and the requisite certificate indorsed on the bonds. This being done, the execution of the bond is complete, and, under the law, it may then be negotiated, that is to say, put on the market as valid commercial paper. . . .

When the bonds now in question were put out, the law required that to be valid they must be certified to by the auditor of State. In other words, that officer was to certify them before their execution was complete, so as to bind the public for their payment. We had occasion to consider in *McGarrahan v. New Idria Min. Co.* 96 U. S. 816 [24: 680], the effect of statutory requirements as to the form of the execution of patents to pass the title of lands out of the United States, and there say: 'Each and every one of the integral parts of the execution is essential to the validity of a patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires.' The same rule applies here. The object to be accomplished is the complete execution of a valid instrument, such as the law authorizes public officers to put out and bind for the payment of money the public organization they represent. For this purpose the law has provided that the instrument must not only be signed and sealed on behalf of the county court of the county, but it must be certified to or countersigned by the auditor of state. . . . In order to recover in this case it became necessary for the plaintiff to prove that the bonds from which the coupons sued on were cut had been executed according to law. He did prove that they were signed by the presiding justice and clerk of the court, and were sealed with the seal of the court. This, before the Act of March 30, 1872, would have been enough, but after that more was necessary. The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties.' The bonds in that case were declared void. See also to the same effect *Coler v. Claburne*, 131 U. S. 103 [38: 146].

Turning now to the Statute involved in the case at bar, we find its directions, among others, to be as follows:

"Such bonds shall bear interest at the rate of not exceeding 10 per cent per annum, and shall have attached thereto the necessary and usual interest coupons, corresponding in dates and numbers with the bonds to which they are attached, which shall be signed by written signatures by the same person or persons executing such bonds. Such bonds shall, if issued by a city, be executed by the mayor and clerk or recorder thereof, as the case may be, under the seal of the said city; and if issued by a township, they shall be executed by the supervisor and clerk thereof; and if any city or township issuing such bonds shall have a seal, the same shall be impressed upon each of such bonds. The bonds and coupons attached thereto shall be payable at the office of the treasurer of the county in which such township or city may be situate. Whenever any such bonds as provided by provisions of this Act shall have been issued as therein specified, the same shall be delivered by the person, persons or officers having charge of the same to the treasurer of this State, who shall give a receipt therefor and hold the same as trustee for the municipality

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issuing the same and for the railroad company for which they were issued, and to be disposed of by said treasurer in discharge of his trust as hereinafter provided. Upon receipt of any such bonds from any township or city in aid of any such railroad company, the treasurer of this State shall immediately register or record the same in a book or books to be kept by him for that purpose in his office, which record shall show the amount, date and number of each bond, the rate of interest which it bears, by what township or city issued, to the benefit of what railroad company the same are issued, and the time when payable, which record shall be always open for the inspection of any citizen of this State or other interested person. Such bonds shall be safely kept by such treasurer for the benefit of the parties interested, and be disposed of by him in the following manner—that is to say, whenever any railroad company, in aid of which any of such bonds may have issued, shall present to said treasurer a certificate from the governor of this State that such railroad company has in all respects complied with the provisions of this Act, and is thereby entitled to any of such bonds, the same, or such of said bonds as said company shall be entitled to receive, shall be delivered to said company, the treasurer first cutting therefrom, canceling and returning to the municipality the past-due coupons. The treasurer shall indorse upon each of said bonds the date of such delivery and to whom the same were delivered, and the same shall draw interest only from the time when so delivered; and the treasurer shall notify the clerk of the township or recorder or clerk of the city issuing the same of the date of the delivery of its bonds to such railroad company. . . . And in case any bond so delivered to said treasurer by any such township or city shall not, within three years from the time when the same were received by him, be demanded in compliance with the terms of this Act, the same shall be canceled by said treasurer and returned to the proper officers of the township or city issuing the same."

A critical analysis of this Statute indicates this to have been the plan: In the preparation and perfecting of the plan persons described by certain official titles, and probably selected because of their titles, were to participate.

(1.) The bonds were to be "executed," that is to say, written or printed, signed and sealed, by the supervisor and clerk of the township. Here the powers of those persons ceased. They could not perfect the instruments by delivery. The word "executed," used in the Statute in connection with the acts mentioned, manifestly does not import the final delivery; for that is expressly directed to be done by the treasurer. Such delivery as they could make was clearly not the technical delivery needed to complete the bonds as negotiable instruments, because the power to hand over to the payee was not conceded to them in any event. The delivery which they were directed to make to the treasurer in his capacity of statutory trustee was only such as amounted to a "giving up" or the "committing" of them to the treasurer for his safe-keeping. The word was used in its ordinary and popular sense, not in the technical one.

(2.) To the governor, and the governor alone, was given the power to determine whether the bonds should ever in fact issue, and if issued, when they should issue. For to him was committed the decision of the important question whether the railroad had performed its part of the common undertaking. His certificate was to be the evidence of that fact, and the only admissible authentication of it to the trustee, the depository. So far as the investigation and determination of that question were concerned, and the certifying of it, the governor was to discharge that function in the process of issuing the bonds which was imposed on the auditor in the case of *Anthony v. Jasper County*, *supra*, the difference being that in that case the certificate was to be indorsed on the bonds themselves, but not so in this case.

The state treasurer was appointed to be a trustee for both the township and company; to receive the bonds, to register them, and to finish their clerical execution, using the word in its popular sense, by his indorsements on them of the date of delivery, and of the person to whom delivered. Such indorsements are clearly a part of the very form of the completed bond, as laid down in *Anthony v. Jasper County*, *supra*. He was also to cancel them, and to return them so canceled to the township authorities if not demanded in three years; and, finally, if demanded in compliance with the terms of the Act within the three years, to complete their execution (using the word in its technical sense) by delivering them. Such, as we understand it, was the intention of the Legislature. If it be said that such details are useless and technical, a sufficient answer is, so the Statute is written, and the courts cannot unmake or modify it.

As already shown, the Legislature in this class of cases has the right to provide the processes by which the contract is to be perfected. Moreover, we do not think these details are either useless or technical. When it is remembered that the whole policy of allowing contracts of this class has been deprecated by some of the oldest publicists and jurists, and that the negotiable form of such bonds has often led to the imposing of great burdens on municipalities for which there has been no return, we are not disposed to criticise the care of a Legislature to establish a system of even rather severe checks as a condition to its concession of such extraordinary powers.

The appellant claims that the bonds were perfected instruments when delivered to the state treasurer—that the ministerial duties had been performed in full. The argument proceeds largely upon the idea that, as to this transaction, the township and its agents, the supervisor and clerk, were a complete and rounded organism, distinct from the state treasurer, and capable of dealing with the treasurer as if he were a third party—in making delivery to him, for instance. We do not so regard it. All the steps directed by the Statute to be taken leading up to the final act of delivery to the railroad company constitute one progressive process. To adopt the language of the court in *McGarrahan v. New Idria Min. Co. supra*, "Each and every one of the integral parts of the execution is essential to the validity of the bond."

We hold, therefore, that since the bonds were never indorsed and delivered by the treasurer, as required by the Statute, they never became operative. The act of delivery is essential to the existence of any deed, bond or note. Although drawn and signed, so long as it is undelivered it is a nullity; not only does it take effect only by delivery, but also only on delivery. *Bayley v. Taber*, 5 Mass. 286; *Marvin v. McCullum*, 20 Johns. 288; *Ward v. Churn*, 18 Gratt. 801; *Lovejoy v. Whipple*, 18 Vt. 379.

The appellant, however, contends that these bonds were, in effect, delivered—that "by the delivery to the treasurer and by the performance of the conditions the title to the bonds vested in the Company, the state treasurer holding them as trustee for the Township and for the Railroad Company." We cannot concur in this view. The law in reference to escrows seems to be involved in some uncertainty. What the effect is of a performance of the conditions by the grantee, the instrument remaining in the hands of the depository—whether, in such case, the second delivery by the depository is or is not necessary to give effect to the deed—are questions about which the courts yet differ. But concede the appellant's position to be correct, as a general rule, yet that general rule does not necessarily control this case. These are extraordinary instruments, and certain fundamental questions of power to contract and of details of execution underlie any action brought upon them, which render the usual rules in regard to escrows very unsafe guides. Too much stress cannot be laid on the necessity for consulting the Statute.

Even in the case of an ordinary escrow, nothing passes by the deed until the condition is performed. *Cathoun County v. American Emigrant Co.* 93 U. S. 124 [28: 826]. Here the condition prescribed by the Statute as that upon which the delivery was to be made to the Railroad Company, and on which the bonds were to be perfected instruments in its hands, was never performed. On this point the Statute seems to be very simple and clear. Indeed, it would be difficult to make it more clear. By its very terms, the bonds received by him in their uncompleted condition were to be by the state treasurer "safely kept;" and for three years after their reception could only be parted with by him in one way—that is, to the Railroad Company interested, on its production of the governor's certificate. On that condition could they be delivered, not on any other. The certificate was not a mere formal act on the part of the governor, but was a condition precedent to the power of the treasurer to deliver. The Statute is not only emphatic on this point, but also repetitious in its emphasis. Section 5 says, the bonds are "to be disposed of by said treasurer in discharge of his trust as hereinafter provided;" and section 6 provides that "such bonds shall be safely kept by such treasurer for the benefit of the parties interested, and be disposed of by him in the following manner:—that is to say, whenever any railroad company . . . shall present to said treasurer a certificate from the governor," etc.; also, that "in case any bond so delivered to said treasurer . . . shall not within three years . . . be demanded in com-

pliance with the terms of this Act, the same shall be canceled by said treasurer," etc. The certificate was designed to be the treasurer's sole authority to deliver. The question whether the railroad company had "in all respects complied with the provisions of this Act" was one that he could not inquire into except by consulting the governor's certificate. This was his only and conclusive evidence, by the very terms of the Statute. The company's compliance with the provisions of the Act gave it the right to receive the governor's certificate; but it did not confer the right to receive the bonds. That was given by the governor's certificate alone. Had the treasurer made delivery without the certificate, he would have acted without authority of law, and the bonds would have been voidable in the hands of the company. *Anthony v. Jasper County, supra.* These requirements are not novel. They are matters of administrative detail fixed by the Statute. We cannot declare them to be merely directory, or annul them by construction. It does not matter, so far as the question of the statutory power of the treasurer is concerned, that the failure of the company to produce the certificate might not be because of any fault in the company. The failure might be due to the governor's mistaken view of the law, or to his misconception of the facts, or even to his willful refusal to discharge his official duty—all is immaterial to this aspect of the statutory scheme. A miscarriage in this particular was one of the risks taken by the company. The company knew the Statute—was held by the law to know and understand it. It contracted with the township through the Statute, and could so contract with it in no other way. Availing itself of the Statute, it must take it *cum onere*. If the governor failed to give the certificate when he should, and could not be reached by a mandamus, those were but features of the company's risk.

There is another provision of the Statute in question which supports the foregoing views. It is the direction that when the treasurer should make the delivery to the company he should cut the over-due coupons from the bonds and cancel them; and that he should at the same time indorse the bonds with the date of that delivery, from which date the bonds should bear interest. Had the Legislature inserted in the Statute a declaration, in set and formal phrase, that it should be the issue of the bonds on the governor's certificate and not the completion by the railroad company of the portion of its contract that should perfect the bonds and give them effect, such declaration would not, in any degree, be clearer than this provision. *Lonejoy v. Whipple, supra.* It is to be observed that no question arises in this case of a bona fide purchaser of bonds improperly issued. The appellant stands exactly in the shoes of the Railroad Company, and his rights are no greater. *Smith v. Bourbon County*, 127 U. S. 105 [82: 78].

Holding these views, it is unnecessary to pursue this discussion further. Whether the railroad acquired a cause of action against the Township by the failure to deliver the bonds, or by their cancellation prior to the lapse of the three years fixed by the Statute, on the one hand, or the whole project was a mere fiasco,

on the other, and, if such cause of action arose, what was its precise nature and form,—are matters rather of curious speculation than of practical consequence. If no real cause of action arose, that is the end of the matter. If it did arise, then its form and nature are immaterial, since all forms are barred alike, being actionable as of the then date. It is not even suggested that any other method exists by which to escape the bar save the one considered and hereinbefore rejected. We consider the question of the constitutionality of the Act of 1869, herein mooted again, to be fully settled by the case of *Taylor v. Ypsilanti*, 105 U. S. 60 [26: 1006]; but this case is decided on other grounds, and it is unnecessary to dwell on that question.

It is further claimed by the appellant that the bonds in question were invested by the Statute with the character of trust property, and that, therefore, they can be followed into any hands to which they may be traceable; and that that right is not subject to the limitation prescribed for a conversion. To this view there are two answers: first, the fact that the bonds were never perfected instruments, as already decided; and, while the treasurer returned them canceled a few weeks prior to the lapse of the three years fixed by the Statute, that error became immaterial from this point of view so soon as the three years did expire; secondly, the laches of the Railroad Company in pressing what claim it may have had. *New Albany v. Burke*, 78 U. S. 11 Wall. 96 [20: 155].

We apply the doctrine of laches to this case with the less reluctance, because after all we see but little of substantial merit in the bill. The scheme contemplated was a loan, not a donation. A loan on rather indifferent security, perhaps, but a loan nevertheless. While therefore it is possible that a loan may be so proposed and accepted as to give to the intended borrower a cause of action for any failure to perform the agreement, and a right to recover damages at law, yet on a bill in the nature either of a bill for specific performance or for an equitable garnishment the court may well inquire where is the substantial equity in the case.

The decree of the circuit court is affirmed.

THE HASTINGS AND DAKOTA RAILROAD COMPANY, *Pff. in Err.*,

v.

JULIA D. WHITNEY ET AL.

(See S. C. Reporter's ed. 357-366.)

Entry of public lands, effect of—homestead entry—grant to railroad company—effect of cancellation of homestead entry—rights under subsequent entry—decisions of Land Department.

1. Lands, originally public, cease to be public after they have been entered at the Land Office and a certificate of entry has been obtained.
2. A homestead entry of land embraced within the limits of a land grant afterwards made by Act of Congress to a Railroad Company, excepted the land from the operation of the railroad grant.

2. The cancellation of the homestead entry after the grant to the railroad and the definite location of its line of road, did not inure to the benefit of the Railroad Company, but the land reverted to the government and became a part of the public domain, subject to appropriation by the first legal applicant.
4. A person who made a homestead entry of the same land and received a government patent therefor, after such cancellation of the first entry, is entitled to hold the same as against the Railroad Company.
5. Although the decisions of the Land Department on matters of law are not binding on this court, yet, on questions similar to the one involved in this case, they are entitled to great respect.

[No. 49.]

Argued Oct. 31 and Nov. 1, 1889. Decided Dec. 9, 1889.

IN ERROR to the Supreme Court of the State of Minnesota to review a decree of that court, reversing a decree of the District Court of Ramsey County, Minnesota, decreeing a homestead entry of land void and that the title was vested in the plaintiff, The Hastings and Dakota Railroad Company, and that the entry of the defendant, Julia D. Whitney, was unauthorized. *Decree of the Minnesota Supreme Court affirmed.*

The facts are stated in the opinion.

Mr. Gordon E. Cole, for plaintiff in error: The Turner homestead entry was void on its face.

Grignon v. Astor, 48 U. S. 2 How. 819-841 (11:283); *Comstock v. Crawford*, 70 U. S. 3 Wall. 396-403 (18: 84-87); *Mohr v. Manierre*, 101 U. S. 417-425 (25: 1052-1055).

If not void on its face, it was void in fact, for want of jurisdiction of the officers to allow the entry.

Union Pac. R. Co. v. Watts, 2 Dill. 310; *Minnesota v. Bachelder*, 68 U. S. 1 Wall. 109 (17: 551); *Lindsey v. Hawes*, 67 U. S. 2 Black, 554-558 (17: 265-267); *Ounningham v. Ashley*, 55 U. S. 14 How. 377 (14: 462); *Comegys v. Vasee*, 28 U. S. 1 Pet. 212 (7: 108); *Garland v. Wynn*, 61 U. S. 20 How. 8 (15: 802); *Barnard v. Ashley*, 59 U. S. 18 How. 43 (15: 285); *Lytle v. Arkansas*, 68 U. S. 22 How. 198 (16: 806); *Silver v. Ladd*, 74 U. S. 7 Wall. 219 (19: 138).

The prior title must prevail.

Ryan v. Central Pac. R. Co. 99 U. S. 382 (25: 305); *Wright v. Roseberry*, 121 U. S. 488 (30: 1039); *Schulenberg v. Harriman*, 88 U. S. 21 Wall. 44-60 (22: 551-554).

The right of homestead settlement had not attached to the lands at the time of the location of the road.

Wilcox v. Jackson, 38 U. S. 13 Pet. 498 (10: 264); *Wolcott v. Des Moines Nav. & R. Co.* 72 U. S. 5 Wall. 681 (18: 689); *Leavenworth, L. & G. R. Co. v. U. S.* 92 U. S. 738 (23: 634); *Newhall v. Sanger*, 92 U. S. 761 (23: 769); *Kansas Pac. R. Co. v. Dunmeyer*, 118 U. S. 629 (28: 1122).

The construction of the Land Department is immaterial.

Knisken v. Hastings & D. R. Co. 2 Copp's Pub. Land Laws, 558; *Larson v. St. Paul R. Co.* 2 Copp's Pub. Land Laws, 62; *Graham v. Hastings & D. R. Co.* 9 Copp's Land Owner, 286; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406 (29: 928).

(No counsel for defendants in error.)

Mr. Justice Lamar delivered the opinion of the court:

This is an action, somewhat in the nature of a suit in equity, originally brought in the District Court of Ramsey County, Minnesota, by The Hastings and Dakota Railroad Company (a corporation organized under the laws of that State), against Julia D. and John Whitney, to recover a tract of about eighty acres of land situated in that county, for which the defendants have a United States patent.

The material facts in the case are undisputed, and are substantially as follows: By the Act of July 4, 1866, Congress granted to the State of Minnesota, for the purpose of aiding in the construction of a railroad from Hastings, through the Counties of Dakota, Scott, Carver and McLeod, to such point on the western boundary of the State as the Legislature of the State might determine, every alternate section of land designated by odd numbers, to the amount of five alternate sections per mile on each side of the road. The Act further provided that "in case it shall appear that the United States have, when the lines or route of said roads are definitely located, sold any section, or part thereof, granted as aforesaid, or that the right of preemption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or preemption has attached as aforesaid, which lands, thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by said State of Minnesota for the purposes and uses aforesaid." 14 Stat. 87.

On the 7th of March, 1867, the Legislature of Minnesota accepted this grant, and transferred it over to the plaintiff. The Railroad Company complied with all the terms and conditions of the Acts of Congress and of the Legislature of the State of Minnesota, and, on or about the 7th of March, 1867, definitely located its line of road by filing its map in the office of the commissioner of the General Land Office.

The land which is the subject of this controversy fell within what are known as the ten-mile limits of the aforesaid grant, when the line of road was definitely located.

The case being brought on for trial on evidence produced by the respective parties, the court made and filed its findings of fact and conclusions of law, the essential parts of which are as follows:

"Claiming to act under the provisions of section 2298 of the Revised Statutes of the United States, one Bentley S. Turner, on the 8th of May, 1865, then being a soldier in the army of the United States, and actually with his regiment in the State of Virginia, made an affidavit and caused the same to be filed in the local land office of the district wherein said land was situate. Said affidavit was made before his command-

ing officer in the State of Virginia, and stated that said Turner was the head of a family, a citizen of the United States, and a resident of Franklin County, New York. Application was made through one Conwell, whom said Turner constituted his attorney for that purpose, upon said affidavit, to enter said land as a homestead. Said affidavit did not state that Turner's family or any member thereof was residing on the land, or that there was any improvement thereon; and, as a matter of fact, no member of his family was then residing, or ever did reside, on said land, and no improvement whatever had ever been made thereon by anyone. Thereupon, upon being paid their fees by said Conwell, the register and receiver of said land office allowed said entry, and the same stood upon the records of said local land office and upon the records of the General Land Office uncanceled until September 30th, 1872, when said entry was canceled by the proper officers of the United States. It does not appear that any specific reason was assigned for said cancellation, nor does the reason for said cancellation appear, save as it may be furnished by the facts aforesaid. On the 7th day of May, 1877, without notice to the plaintiff, the defendant Julia D. Whitney, then a single woman, by name Julia D. Graham, who has since intermarried with said defendant John Whitney, did enter said land at the local land office as a homestead, and thereafter, in the usual course of business, the officers in charge of the General Land Office of the United States caused a patent of the United States for said land to be issued in due form, and delivered to said defendant Julia, who ever since May 7th, 1877, has been and now is in the actual occupancy of said premises, holding the same under said patent. Said land is of the value of six hundred dollars (\$600)."

After making these findings of fact, and holding as a conclusion of law that the alleged entry of Turner was absolutely void, that the title to the land in dispute was, under the land grant to the State, vested in the plaintiff, and that the entry of Julia D. Whitney thereon was unauthorized and of no effect, the court entered a decree in favor of the plaintiff in error.

On an appeal by the defendant to the Supreme Court of the State that decree was reversed, without any order for a new trial. Such reversal, under the laws of Minnesota, is, in effect, the final judgment of the highest court of that State in which a decision of the cause could be had, and the case has been brought here by a writ of error.

Section 1 of the Act of March 21, 1864, 18 Stat. 35 (now section 2203 of the Revised Statutes), under which Turner's homestead entry was made, provides as follows:

"In case of any person desirous of availing himself of the benefits of this chapter, but who, by reason of actual service in the military or naval service of the United States, is unable to do the personal preliminary acts at the district land office which the preceding sections require, and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a bona fide improvement and settlement have been made, such person may make the affidavit required by law

before the officer commanding in the branch of the service in which the party is engaged, which affidavit shall be as binding in law, and with like penalties, as if taken before the register or receiver; and upon such affidavit being filed with the register by the wife or other representative of the party, the same shall become effective from the date of such filing, provided the application and affidavit are accompanied by the fee and commissions as required by law."

The question presented for our consideration is, whether, upon the facts found and admitted, the homestead entry of Turner upon the land in controversy excepted it from the operation of the land grant under which plaintiff in error claims title.

The doctrine first announced in *Wilcox v. Jackson*, 38 U. S. 13 Pet. 498 [10: 264], that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it, or to operate upon it, although no exception be made of it, has been reaffirmed and applied by this court in such a great number and variety of cases that it may now be regarded as one of the fundamental principles underlying the land system of this country.

In *Witherspoon v. Duncan*, 71 U. S. 4 Wall. 210 [18: 339], this court decided, in accordance with the decision in *Carroll v. Safford*, 44 U. S. 3 How. 441 [11: 671], that "lands originally public cease to be public after they have been entered at the land office, and a certificate of entry has been obtained." And the court further held that this applies as well to homestead and preemption as to cash entries. In either case, the entry being made, and the certificate being executed and delivered, the particular land entered thereby becomes segregated from the mass of public lands, and takes the character of private property. The fact that such an entry may not be confirmed by the land office on account of any alleged defect therein, or may be canceled or declared forfeited on account of non-compliance with the law, or even declared void, after a patent has issued, on account of fraud, in a direct proceeding for that purpose in the courts, is an incident inherent in all entries of the public lands.

In the light of these decisions the almost uniform practice of the Department has been to regard land upon which an entry of record valid upon its face has been made, as appropriated and withdrawn from subsequent homestead entry, preemption settlement, sale or grant until the original entry be canceled or declared forfeited; in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws. The correctness of this holding has been sustained by this court in the case of *Kansas Pac. R. Co. v. Dunmeyer*, 118 U. S. 629 [28: 1122], and the principle applied to a Railroad Grant Act, which contained the same exceptions as those embodied in the Act under which the plaintiff in error claims title to the tract in controversy. In that case a homestead claim had been made and filed in the land office by one Miller, and there recognized by a certificate of entry, before the line of the company's road

was located. Subsequently to the location he abandoned his entry and took a title under the railroad company, and his homestead entry was canceled. One G. B. Dunmeyer then entered the land under the Homestead Law, claiming that, by the cancellation for abandonment, it had passed back into the mass of public lands and was not brought within the grant; and upon that claim ousted the defendant in error, who afterwards brought his action against the railroad company for a breach of covenant, obtaining a judgment in the court below, which was afterwards affirmed by this court.

The court said, *Mr. Justice Miller* delivering its opinion: "The record shows that, on July 25, 1866, Miller made a homestead entry on this land which was in every respect valid. . . . It also shows that the line of definite location of the company's road was first filed . . . September 21, 1866.

"In the language of the Act of Congress, this homestead claim had attached to the land, and it therefore did not pass by the grant. Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do.

"It is argued by the company that, although Miller's homestead entry had attached to the land, within the meaning of the excepting clause of the grant, before the line of definite location was filed by it, yet when Miller abandoned his claim, so that it no longer existed, the exception no longer operated, and the land reverted to the company—that the grant by its inherent force reasserted itself and extended to or covered the land as though it had never been within the exception.

"We are unable to perceive the force of this proposition.

"No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist within the grant, though this road, and others with grants in similar language, have more than once passed through military reservations for forts and other purposes, which have been given up or abandoned as such reservations, and were of great value.

"Nor is it understood that, in any case where lands had been otherwise disposed of, their reversion to the government brought them within the grant.

"Why should a different construction apply to lands to which a homestead or preemption right had attached? Did Congress intend to say that the right of the company also attaches, and whichever proved to be the better right should obtain the land?"

Counsel for plaintiff in error contends that the case just cited has no application to the one we are now considering, the difference

being that in that case the entry existing at the time of the location of the road was an entry valid in all respects, while the entry in this case was invalid on its face, and in its inception; and that this entry having been made by an agent of the applicant, and based upon an affidavit which failed to show the settlement and improvement required by law, was, on its face, not such a proceeding, in the proper land office, as could attach even an inchoate right to the land.

We do not think this contention can be maintained. Under the Homestead Law three things are needed to be done in order to constitute an entry on public lands: first, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered. If either one of these integral parts of an entry is defective, that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards canceled on account of these defects by the commissioner, or on appeal by the Secretary of the Interior; or, as is often the practice, the entry may be suspended, a hearing ordered, and the party notified to show by supplemental proof a full compliance with the requirements of the Department; and on failure to do so the entry may then be canceled. But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants. In the case before us, at the time of the location of the Company's road, an examination of the tract books and the plat filed in the office of the register and receiver, or in the land office, would have disclosed Turner's entry as an entry of record, accepted by the proper officers in the proper office, together with the application and necessary money—an entry the imperfections and defects of which could have been cured by a supplemental affidavit or by other proof of the requisite qualifications of the applicant. Such an entry attached to the land a right which the road cannot dispute for any supposed failure of the entry-man to comply with all the provisions of the law under which he made his claim. A practice of allowing such contests would be fraught with the gravest dangers to actual settlers, and would be subversive of the principles upon which the munificent railroad grants are based.

As was said in the *Dunmeyer Case*, *supra*: "It is not conceivable that Congress intended to place these parties [homestead and preemption claimants on the one hand and the railway company on the other] as contestants for the

land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations."

A question somewhat analogous in principle to the one in this case arose in *Newhall v. Sanger*, 92 U. S. 761 [23:769]. In that case, Newhall claimed under a patent issued to the Western Pacific Railroad Company for land supposed to be within the grant made by the Act of July 1, 1862 (12 Stat. 489), and that of July 2, 1864 (18 Stat. 856), and Sanger claimed under a subsequent patent which recited, among other things, that the former patent had been erroneously issued. The land in controversy had been within the boundaries of a claim made under a Mexican grant, which was pending in the Land Department of the United States at the time the order withdrawing the railroad lands from entry was made. The Mexican claim was rejected a few days thereafter because of its fraudulent character. Under that state of facts, the contention of the railroad company was, that, the Mexican claim having been declared invalid, the land in controversy became subject to the operation of the granting Acts, and, therefore, passed to the company. But this court declared otherwise, and held that the land never became subject to the grant, and that the claimant under the second patent had the better title.

In addition to this, section 2806 of the Revised Statutes provides:

"Where a party at the date of his entry of a tract of land under the Homestead Laws, or subsequently thereto, was actually enlisted and employed in the army or navy of the United States, his services therein shall, in the administration of such Homestead Laws, be construed to be equivalent, to all intents and purposes, to a residence for the same length of time upon the tract so entered," etc.

That Act is a curative Act, or, rather, one putting a construction upon the prior Act of 1864, under which the Turner entry was made. The effect of it is to declare service in the army or navy of the United States by the applicant, at the date of an entry made under the Act of 1864, equivalent to actual residence upon the land by him. In that view of the case the affidavit in the Turner entry was sufficient; for in contemplation of law, he was then residing upon the tract embraced in his entry.

The conclusion at which we have arrived is in harmony with the later rulings of the Land Department. See *Graham v. Hastings & D. R. Co.* (this case) 1 Land Dec. 363; *St. Paul, M. & M. R. Co. v. Forseth*, 3 Land Dec. 446; *So. Minn. R. E. Co. v. Gallipean*, 3 Land Dec. 166; *Hastings & D. R. Co. v. United States*, 3 Land Dec. 479; *St. Paul, M. & M. R. Co. v. Leech*, 3 Land Dec. 506; *Hastings & D. R. Co. v. Whitnall*, 4 Land Dec. 249, and many others of like tenor and effect.

It is true that the decisions of the Land Department on matters of law are not binding upon this court, in any sense. But on ques-

tions similar to the one involved in this case they are entitled to great respect at the hands of any court. In *United States v. Moore*, 95 U. S. 760, 763 [24:588, 589], this court said: "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. . . . The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret." See also *Brown v. United States*, 113 U. S. 568, 571 [28:1079, 1080], and cases there cited; *United States v. Burlington & M. R. R. Co.* 98 U. S. 384, 341 [25:198, 200]; *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 414, 418 [28:794, 796].

Other subsidiary questions have been argued by counsel for plaintiff in error, but they are all virtually disposed of in the foregoing.

For the foregoing reasons we concur with the court below that Turner's homestead entry excepted the land from the operation of the railroad grant; and that upon the cancellation of that entry the tract in question did not inure to the benefit of the Company, but reverted to the government and became a part of the public domain subject to appropriation by the first legal applicant, who, as the record shows, was the defendant in error, Julia D. Whitney, *née* Graham.

The decree of the Supreme Court of Minnesota is affirmed.

NANCY A. BRADLEY, Wife of J. H. SCHREIN, ET AL., *Appts.*,

v.

HORACE B. CLAFLIN ET AL.

(See S. C. Reporter's ed. 379-383.)

Suit to strengthen title to land—mortgage, when not merged in title—mortgage to wife, when prior lien—omission to record mortgage—conveyance, when does not defeat mortgage.

1. A person who has received a conveyance of the legal title to real estate from his debtor may institute other proceedings against that debtor, in relation to the same property, to strengthen his title or establish his lien.
2. A mortgage, which, in Louisiana, a wife has by statute on her husband's real estate for her money which came to his hands, though not registered, is not merged in a simulated and fraudulent title conveyed by her husband as *dation en paiement*.
3. In that State, where a wife has a right of mortgage for such money, and has received a conveyance from her husband of property which did not transfer to her a clear title, and has resorted to her original right of mortgage by recording it against the property before any other lien has accrued on the property, such mortgage constitutes a prior and superior lien.
4. The omission of the wife to record her mortgage only deprives it of force as to third persons who, at the time of its recording, have perfected liens on the property of the husband.
5. A conveyance by the husband to his wife of property, as *dation en paiement*, which is subse-

quently set aside, does not defeat her right to a mortgage for her dotal or paraphernal property.

[No. 110.]

Argued Nov. 14, 1889. Decided Dec. 9, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana, dismissing a cross-bill on demurrer, and decreeing that the lien of the complainants on the property conveyed by John H. Scheen to Nancy A. Bradley, his wife, is superior and paramount to the mortgage claim of said wife on said property. *Reversed.*

The facts are stated in the opinion.

Opinion below, 27 Fed. Rep. 420.

Messrs. Walter H. Rogers and B. B. Foreman, for appellants:

There is no common law of the United States.

Kendall v. U. S. 87 U. S. 12 Pet. 621 (9:1181).

Questions as to title to real estate and mortgages and liens thereon and their rank and priority must be determined by the law of the State where the property is situated.

Suydam v. Williamson, 65 U. S. 24 How. 427 (16: 742); *McCormick v. Sullivan*, 23 U. S. 10 Wheat. 202 (6: 300); *Green v. Neal*, 81 U. S. 6 Pet. 297 (8: 402); *Ewing v. St. Louis*, 72 U. S. 5 Wall. 413 (18: 657).

The word "privilege" is equivalent, in Louisiana, to a statutory lien.

Stetson v. Gurney, 17 La. Ann. 162; *First Municipality v. Hall*, 2 La. Ann. 549; *Fontenot v. Soileau*, 2 La. Ann. 774; *Shropshire v. Russell*, 2 La. Ann. 961; *Shaw v. Grant*, 13 La. Ann. 62.

When creditors make a *cessio bonorum* (surrender in insolvency under the state law), all of their property passes under the exclusive control of the insolvent court.

Dwight v. Smith, 9 Rob. (La.) 32; *Dwight v. Simon*, 4 La. Ann. 490.

The equitable lien given by a creditor's bill in a State where the common law prevails, can have no existence in a State where the common law and its complement, the chancery law, does not prevail, and when all liens or their equivalent privileges are expressly prohibited, unless established by express statute.

Squire v. Lincoln, 187 Mass. 408; *Trow v. Lovett*, 122 Mass. 571; *Powers v. Raymond*, 137 Mass. 488; *Jones v. Green*, 68 U. S. 1 Wall. 831 (17: 553); *Day v. Washburn*, 65 U. S. 24 How. 852 (16: 712); *Sloane v. Ohniquy*, 23 Fed. Rep. 218.

If the conveyance *dation en paiement* was set aside, the previously recorded mortgage would revive and attach to the property.

Bowman v. McKleroy, 14 La. Ann. 594; *Chaffe v. Morgan*, 80 La. Ann. 1807; *New Orleans Ins. Assn. v. Labranche*, 81 La. Ann. 889; *Spencer v. Goodman*, 83 La. Ann. 909; *Johnson v. Waters*, 111 U. S. 640 (28: 547); *Adams v. Preston*, 63 U. S. 22 How. 488 (16: 277).

Partners are joint owners.

Skillman v. Purnell, 8 La. Ann. 494; *Baca v. Ramos*, 10 La. Ann. 417; *McKee v. Griffin*, 23 La. Ann. 419.

The court erred in decreeing a partnership creditor to have a preference on individual property to an individual creditor.

Bernard v. Dufour, 17 La. Ann. 506; *Poydras v. Laurans*, 6 La. Ann. 771.

Mr. W. W. Howe for appellee.

Mr. Justice Miller delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Julius Lisso and John H. Scheen constituted a mercantile partnership engaged in business in the Town of Coushatta, Louisiana. Horace B. Claffin, Edward E. Eames and others, constituting the firm of H. B. Claffin & Co., of the City of New York, were creditors of Lisso and Scheen, and on the 4th day of December, 1878, they commenced, in the proper state court of Louisiana, a suit with an attachment against Lisso and Scheen and their wives, Clara Forchheimer and Nancy A. Bradley, and others, in accordance with the law and practice of Louisiana. The attachment was levied upon property, real estate mainly, which is the subject of controversy in this case. The suit was afterwards removed into the circuit court of the United States. The record of the case in the circuit court commences with a bill in chancery filed on the 18th day of November, 1879, in that court by H. B. Claffin *et al.* against Julius Lisso *et al.* To this suit Lisso and Clara Forchheimer, his wife, and John H. Scheen and Nancy A. Bradley, his wife, are made defendants. This bill, after giving the names of the persons composing the partnership of plaintiffs, who are citizens of New York, and of the defendants, who are citizens of Louisiana, alleges that the defendants Lisso and Scheen are indebted to the plaintiffs in the sum of \$9,580.14 on promissory notes, which are described in the bill, and on an open account. It then sets out the commencement of the suit and attachment of December 4, 1878, and that certain property was seized under that attachment as the partnership and individual property of Lisso and Scheen, a schedule of which is said to be annexed to the bill. The plaintiffs further allege that by said seizure they have acquired a just and valid lien upon the property seized under the laws of Louisiana. They allege that said Lisso and Scheen obtained the goods sold by complainants to them by false representations as to their solvency made to plaintiffs in New York, and in contemplation of the fraud and insolvency hereinafter set forth:

"Among other assets they reported the real estate herein mentioned, which they declared to be and which is justly worth upwards of \$20,000. That thereafter, and on or about the 23d November, 1878, being entirely insolvent, and largely indebted not only to your orators, but to others, the said Julius Lisso and John H. Scheen did conspire and collude with their said wives and their said wives with them, to cheat, hinder, delay and defraud your orators, by making a pretended, simulated and fraudulent transfer of all the real estate of the said Lisso and Scheen unto their said wives, respectively, including alike the partnership and individual real property of said Lisso and Scheen in the Town of Coushatta and Parish of Red River, and also the interest in the telegraph line described in the deeds.

"That said pretended, simulated and fraudulent transfers were made on the 23d day of November, 1878, and recorded in the office of the parish recorder at Coushatta, and were by

acts before D. H. Hayes, notary public, and for greater certainty your orators annex hereto and refer to said acts as a part of this bill.

"Now your orators aver that said acts purported to be *dations en paiement*, but they allege and charge that they and each of them was and is illegal, fraudulent, simulated and void, and worked and still work great injury to your orators; that they were and each of them was made when the transferors were solvent; that after such transfers the transferors had not property enough left to pay orators' claims; that the said transferees and each of them knew of the insolvency of the said Lisso and Scheen, and was a party to and colluded in said fraud. They further show that the price named in said pretended *dations en paiement* or transfers was wholly inadequate and fraudulent; and they show that even if the said acts or transfers had and have any reality in law, they gave and give an unjust and unlawful preference and are null and void; but they expressly aver and charge that the said Lisso and the said Scheen owed their said wives nothing whatever at the time of said pretended transfers, whether on paraphernal account or otherwise.

"And your orators exhibit this their bill, as well in aid of the proceedings in said suit No. 8883, as for such discovery and relief as they may be entitled to in the premises."

The prayer of the bill is, that defendants may be required to answer, "and that the said transfers, or *dations en paiement*, passed before D. H. Hayes, notary public, on the 28d November, 1878, may be declared to be simulated, fraudulent, injurious, illegal, null and void, and all the property therein described subjected to the just claims of and debts due your orators as aforesaid, and sold to pay the same; and that the debts due and owing to your orators may be duly liquidated by proper decree as to the said defendants, Lisso and Scheen, as well as to the other defendants."

Other proceedings of a similar character were instituted against the same defendants at about the same time by Henry Bernheim *et al.*, Simon August *et al.* and Charles F. Claffin *et al.* Bills identical in their language with those of Claffin & Co. were filed against defendants. They were afterwards, by an agreement of counsel and the order of the court, consolidated and tried together as one cause. In these cases thus consolidated there was, by consent of all the parties in open court, as shown by the record, entered a decree on January 23, 1883. This decree declared—

"That as to the act of conveyance, or *dation en paiement*, recited in the bills of complaint herein made by the defendant, John H. Scheen, unto the defendant, Nancy A. Bradley, his wife, by act passed before D. H. Hayes, notary, Parish of Red River, November 28d, 1878, and filed for record and recorded in said parish in conveyance and mortgage books the same day, and whereof a certified copy has been filed as an exhibit herein November 26th, 1879, and is now annexed hereto as part hereof, be, and the same hereby is, in all things revoked, annulled and set aside, and the property therein described and purporting thereby to be conveyed to said Mrs. Nancy A. Bradley, wife of John H. Scheen, declared to have been the property

of said John H. Scheen, at the time the bills of complaint herein were filed, to wit, November 18th, 1879, and is hereby subjected to the just claims, demands and judgments of the complainants herein, subject to provisions hereinafter made, which judgments of complainants herein against said Julius Lisso and John H. Scheen *in solido* are as follows:

"H. B. Claffin & Co. v. Lisso & Scheen, No. 8883, of the docket of this court, \$9,580.14, with interest as therein set forth.

"H. Bernheim & August v. Lisso & Scheen, No. 8880, \$655.38, with interest as therein set forth.

"August, Bernheim & Bauer v. Lisso & Scheen, No. 8881, \$2,326.36, with interest as therein set forth.

"Claffin & Thayer v. Lisso & Scheen, No. 8822, \$2,298.57, with interest as therein set forth.

"And it is further ordered that any mortgage claims which said Mrs. Scheen may have against said property described in said deed of November 23, 1878, be, and the same are hereby, reserved for further decision."

This reservation had reference to a claim by Mrs. Bradley, the wife of Scheen, under a mortgage which she asserted on the property in controversy, filed in the proper parishes where the land in question lay, where they were duly recorded, namely, in the proper office at Bienville, April 30, 1879, and that of the Parish of Red River, June 6, 1879. After the consent decree had been rendered, Mrs. Bradley was permitted to file an answer and cross-bill against complainants in the original suit, setting up her claim under this mortgage, to which there were a demurrer and answer, also replications. On the 19th of December, 1885, the following agreement was filed, by which the case came on to be heard on the bills, answers and demurrers:

"Claffin *et al.* } Nos. 8896-99.—Four consolidated causes.
v.
Lisso *et al.* }

"To save time and expense to both sides, it is agreed that the complainants may withdraw their replication to answer of Mrs. Nancy A. Bradley, wife, etc., filed April 26th, 1884, and their answer to said Mrs. Bradley's cross-bill filed, and the said Mrs. Bradley may withdraw her replication to said answer (with rights, however, reserved to both parties to renew said pleadings and reinstate the issues as hereinafter reserved), and that complainants may file their annexed demurrers and the cause may be set down on the bills, answers and demurrers.

"In case said demurrers are overruled, the answers and replications above mentioned may be renewed and stand restored to the record, and cause proceed on traverse and issues thereby made as if they had not been withdrawn, the object of this agreement being to present in the simplest and least expensive manner the questions raised by said demurrers.

"Dec. 19th, '85.

"Kennard, Howe & Prentiss, for complainants.

"W. H. Rogers, for defendants."

The decree of the court, rendered on February 6, 1886, declared:

"That the demurrers of the complainants

herein to the said cross-bill of the said Mrs. Nancy A. Bradley, wife of John H. Scheen, be, and the same hereby are, sustained, and the said cross-bill dismissed.

"It is further ordered and decreed that the lien, privilege and preference of the complainants herein on the property or its proceeds described in the conveyance thereof, made November 8, 1878, from said John H. Scheen to said Nancy A. Bradley, his wife, by act before D. H. Hayes, notary public for the Parish of Red River (which conveyance has been revoked as to the complainants by the decree herein of January 22, 1888, and which property has been subjected to the judgments of the complainants in said decree specially detailed), be, and are hereby, recognized, declared and made executory, and are adjudged to be in all respects superior and paramount to all and any mortgage claim or other debt or demand of the said Mrs. Nancy A. Bradley, wife of said John H. Scheen, set up in this cause, and are declared to be a first lien, privilege and preference on the said property, its proceeds, fruits, revenues, rents and profits."

It is from this decree that the present appeal by Mrs. Bradley, wife of Scheen, is taken, and all other questions are by the original consent decree and by the state of the record eliminated from the case, except that which concerns the validity of the mortgage of Mrs. Bradley on account of the paraphernal property which passed to her husband, for which this mortgage was inscribed. It is necessary to add that in the progress of this case the attachments which had been issued and levied on the property in controversy were dissolved, and that an ordinary judgment was rendered personally against Lisso and Scheen for their indebtedness to the parties plaintiff to this suit. It is therefore clear that the plaintiffs derived no aid in establishing their lien upon the property by reason of these attachments, and it seems to be conceded in the argument of counsel that such lien as they may have commenced with the filing of their bills on the 18th of November, 1879. The object of those bills, it will be observed, was to set aside the conveyance made by Lisso and Scheen to their wives, of November 23, 1878, which is said to be a *dation en paiement* under the Louisiana law, that is, a proceeding by which the husband, in this case, conveyed to his wife certain real estate, which she accepted as payment *pro tanto*, to wit, at \$10,000, on her debt against him arising out of her paraphernal property that came into his control; and although the subsequent mortgage instituted by Mrs. Scheen, which it was supposed would cover the property now in controversy, had been recorded in the proper parishes April 30, 1879, and June 6, 1879, which was in one instance seven months and the other nearly six months before the bill of complaint was filed, no reference is made in that bill to this mortgage and no attempt made to have it declared void or set aside, but the plaintiffs were content to take a decree setting aside the first conveyance of November 23, 1878; and it is only by reference to the reservation in the decree that any notice is taken of the mortgage of Mrs. Bradley.

As there is no answer to Mrs. Bradley's cross-bill, and as the case before us rests altogether upon the sufficiency of the allegations of that

bill to establish her right under that mortgage, we must look to that alone to determine the question. Mrs. Bradley sets out in very distinct terms that her husband at various times received from her father advancements made to her and from her estate, which are specifically set out and amount to the sum of \$29,321.23, for which she claims interest at the rate of five per cent per annum. By the law of Louisiana the assertion of this claim of a wife against a husband and against his property is an *ex parte* proceeding, by which the wife, with certain formalities, makes out an account of the foundation of her claims against her husband, and has it recorded in the proper book of records of the parish or parishes where the lands of her husband lie. Until this is done her claim affects no other person, and this act of recording what is called a mortgage is the initial proceeding by which the claim against her husband's property is made effective. But after it is so recorded all persons are bound to take notice of the existence of the claim, as though the husband had himself executed a mortgage to his wife to secure the payment of the debt. What may be set up by creditors of the husband or by purchasers of his real estate to defeat the claim thus instituted, it is not necessary to inquire in this case, because no attack is made upon the justice of the claims of Mrs. Bradley against her husband nor upon the regularity of the proceedings by which this mortgage was instituted. No answer being filed to the cross-bill, the statements in it are to be taken as true so far as they are pertinent to the question before the court. It is thus admitted by the demurrer to the bill that Scheen had, prior to the 30th day of April, 1879, received of the paraphernal and dotal property of Mrs. Bradley coming through her father the sum alleged in her bill, \$29,321.23, for which he was indebted to her, and that she followed the course pointed out by the law in establishing what the statute of Louisiana calls a mortgage on his real estate to secure the payment of that indebtedness. No fraud is alleged by appellees in regard to this transaction. No denial of its truth is made in the record. Some attempt is made in the way of argument to assert the priority of the appellees because their attachment was levied upon the property before a record was made of appellant's mortgage, but with the dissolution of that attachment any lien which could depend upon it fell. In the language of counsel for the appellees in this case, the attachments having been dissolved on technical grounds only judgment for the money demand was rendered in each case in June, 1880. As these judgments were rendered long after the recording of Mrs. Bradley's mortgage, they could not effect a lien prior to hers, and by the dissolution of the attachments no lien acquired by them could affect her interest at all.

The ground on which the invalidity of this mortgage is asserted by appellees is that at the time Mrs. Bradley had it inscribed in the proper book the property was her own, and the title to it was in her by reason of the conveyance made by Scheen to her in payment of his debt to her, which was the subject of the controversy between the parties, and which was set aside in the consent decree rendered January 22, 1888. It is asserted in argument that, because the title

and ownership of that property was in her at the time she inscribed the mortgage now in controversy, she could not in such a proceeding create a valid mortgage on her own property; that at that time Scheen, her husband, against whom the mortgage lien was asserted, had no title or interest in the property, and that therefore the proceeding was of no effect. This proposition is earnestly insisted upon by counsel, and seems to have been the one on which the circuit court rested its decision dismissing Mrs. Bradley's bill. (27 Fed. Rep. 420.) We are not referred to any clause of the Code of Louisiana which asserts this principle, nor have we been able to find it in any article or section of that code. It seems to be counsel's inference from the general state of the law concerning mortgages and the title to real estate. Reference is made in the brief of counsel to the case of *Townsend v. Miller*, 7 La. Ann. 683, and to the cases of *Miller v. Sherry*, 69 U. S. 2 Wall. 249 [17: 880], and *Lyon v. Robbins*, 46 Ill. 279, which are also mentioned in the opinion of the judge who decided the case below; but these cases only concern the effect to be given to a decree rendered in favor of a judgment creditor setting aside a prior conveyance of the debtor as a fraudulent obstruction in the way of the judgment creditor. None of them establish the doctrine contended for in this case, that a person who has received a conveyance of the legal title to real estate from his debtor may not institute other proceedings against that debtor in relation to the same property to strengthen his title or establish his lien, if it is his interest to do so. That this may be done under the English system of equitable jurisprudence is well established, and no reason can be seen, either in law or in equity, why a party who has received such conveyance, coming to see that his title through it is not perfect, that the conveyance itself may be void or voidable, and that thereby he may lose the debt or consideration of the conveyance, may not institute any proceeding known to the law, and not unjust or inequitable, by which his defective title may be strengthened or his original lien made effectual and established in regard to the property. One of the most common instances of this character, very similar in its nature to the transaction now under consideration, is that of a mortgagee who, by the English common law, was treated as holding the legal title with an equity of redemption in the mortgagor, but who accepts a conveyance of that equity of redemption to himself by the mortgagor as payment of the debt secured by the mortgage. In such case it may happen that the mortgagor has created other liens or incumbrances upon the property between the execution of the mortgage and that of the deed conveying to the mortgagee the equity of redemption. If this conveyance of the equity of redemption is to be treated as absolute payment of the debt secured by the mortgage, which, as between the mortgagor and mortgagee, it is intended to be, then, the mortgage being paid off and discharged, and of no further effect, the parties who have obtained a lien subsequent to that mortgage, but prior to the sale to the mortgagee, would find their lien to be a prior incumbrance upon the property, and superior to the title conveyed by the mortgagor to the mortgagee. To prevent

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this injustice, equity has established the principle that by holding the possession of his mortgage, and not making any release or satisfaction, he may continue to have the benefit of that mortgage as a lien prior to that of the parties whose rights have intervened, and thus he takes the title, which is intended to be a discharge of that debt as between him and his debtor, while he holds the mortgage itself to be so far alive as to protect him against the subsequent incumbrances on his own land. The analogy of that principle of equitable jurisprudence to the case before us is obvious. In both cases, because equity requires it, the common-law doctrine of merger of the two titles does not occur. In favor of the party whose interest would otherwise suffer, they are both kept alive. In this case the mortgage which the law gave Mrs. Bradley on her husband's real estate for her money which came to his hands, though not registered, was not merged in the simulated and fraudulent title conveyed by her husband as *dation en paiement*. *Forbes v. Moffatt*, 18 Ves. Jr. 884; *Mulford v. Peterson*, 85 N. J. L. 127; *Mallory v. Hitchcock*, 29 Conn. 127; *Slocum v. Catlin*, 23 Vt. 137; *Wickersham v. Reeves*, 1 Iowa, 413.

By the Code of Louisiana, article 3319 (3387):

"The wife has a legal mortgage on the property of her husband in the following cases:

"1. For the restitution of her dowry, and for the reinvestment of the dotal property sold by her husband, and which she brought in marriage, reckoning from the celebration of the marriage.

"2. For the restitution or reinvestment of dotal property, which came to her after the marriage, either by succession or donation, from the day the succession was opened or the donation perfected.

"3. For the restitution or reimbursement of her paraphernal property."

We understand this article as declaring the existence of such mortgage or lien from the time when the dotal or paraphernal property of the wife was received by the husband. *Scheen v. Chaffe*, 86 La. Ann. 220. Certainly such is the meaning of the article as between the husband and wife. But as to other parties, it is declared by section 3347 that "no mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated;" and by section 3349, that when the evidence of such legal mortgage existing in favor of a married woman shall not exist in writing, then "a written statement, under oath, made by the married woman, her husband, or any other person having knowledge of all the facts, setting forth the amount due to the wife, and detailing all the facts and circumstances on which her claim is based, shall be recorded."

The appellant in this case having this undisputed right of mortgage for the \$29,321.23 set out in her bill, and perceiving that it might be lost either by the fraud of her husband in making the conveyance to her or by some other imperfection, by which it did not transfer to her a clear title to the property mentioned in the conveyance, resorted to her original right of mortgage against the property, which she undertook to make effectual by recording it, as

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the law required, in the parishes where the real estate lay. She thus, as in the case of the mortgage mentioned in the English equity jurisprudence, reverted to her original right, which was prior to all the conveyances and all the suits about this property set out in this record; and as it was inscribed before any lien accrued to the appellees on that property, or any right to appropriate it to the payment of that debt, it is not perceived why her mortgage does not constitute a prior and superior claim to theirs.

There is found running through the whole of this record an attempt to control the action of the circuit court of the United States in the case by the introduction of proceedings had in the local court of Louisiana, which would have undoubted jurisdiction if it were not for the prior commencement of proceedings in the circuit court in the present case. These state court proceedings originated in a surrender by Lisso and Scheen of all their property of whatever description for the benefit of all their creditors, after the proceedings in this case had been commenced and the appointment by the Tenth District Court of the Parish of Red River of a syndic, namely, Christopher Chaffe, Jr., to take charge of all their assets, convert them into money, and pay it out on the debts of the firm of Lisso & Scheen. In that proceeding, which of course could not oust the circuit court of the United States of its jurisdiction to proceed in the present case already before it, Mrs. Bradley filed her claim under the original *dation en paiement* made by Scheen to her, and her mortgage, the same that is in controversy here, asserting the superiority of her claim on the real estate in controversy in this suit against the syndic and the creditors whom he represented. That case, so far as Mrs. Bradley was concerned, followed very much the same course as the present case, and it came twice before the Supreme Court of Louisiana. The first of these cases, that of *Chaffe v. Scheen*, is reported in 34 La. Ann. 684. The question there had relation to the validity of the same conveyance by Scheen to his wife as a *dation en paiement*, in which the court declared that conveyance to be void in the following language:

"For these reasons, and after thorough and prolonged study of the question, and of all the law and the facts bearing on it, we are forced to the conclusion that this act of giving in payment was null and void and without effect as to the creditors of J. H. Scheen."

But the court in that case declared that whatever other claims Mrs. Scheen may have against her husband, J. H. Scheen, are reserved to her with the right to prosecute them in such mode and manner as the law may provide. Subsequently Mrs. Scheen did prosecute in the District Court of the Parish of Red River her claim under the mortgage, which is now the subject of controversy, and that case, which also went to the Supreme Court of Louisiana, and is reported in 36 La. Ann. 217, was decided in her favor as to the validity of the mortgage. The court says: "The greater part of the indebtedness claimed grows out of the husband collecting and using the moneys realized on promissory notes taken on the sales of lands, and alleged as stated, to have been donated to the plaintiff." The court says further: "The

validity of these donations is not questioned by the donor nor his heirs, nor his creditors, and we cannot perceive any right in the creditors of Scheen to raise such objection. It is sufficient that the husband received or collected the funds in question as agent of his wife, and under color of the right claimed by her and recognized by him." "The most serious contest," says the court, "is in regard to the legal mortgage claimed. One of the grounds was that it was not inscribed prior to the 1st of January, 1870." To this the court replies "that the omission to register at that time only deprived the mortgage of force with respect to third persons, who at that date had mortgages or pledges upon the property of the husband that are so far superior to the claims of the wife. So far as relates to the husband and his property, the mortgage in favor of the wife, if there existed one, continued to exist without registry, and if recorded subsequently took effect as to third persons from the date of its registry. The evidence of plaintiff's legal mortgage against her husband was recorded in the Parish of Red River in 1879, and its effect upon the immovables in that parish surrendered by the insolvent was properly recognized by the judgment." There was then considered a question as to the registry in the Parish of Bienville, which seems not to have been proved, and which was left open for further consideration. Although the direct question of the effect of the prior conveyance of Scheen as *dation en paiement* is not referred to in this last report, it is obvious that the whole case was a proceeding in the Tenth District Court of the Parish of Red River in regard to the rights of the syndic Chaffe in this property; and, in the one case, that part of it which related to the *dation en paiement*, the court in the first of these reports declared that conveyance void, but remitted Mrs. Bradley to her rights, if she had any, under the mortgage inscribed April 30th, 1879; and that, when the proceedings to enforce that right came before the same court, it declared the mortgage to be valid for all property within the parish where it was recorded. It must necessarily have considered the effect of the previous conveyance in payment which it had set aside, upon the mortgage it now declared to be valid. It can hardly be believed that if that prior conveyance constituted any lawful obstruction to the right of Mrs. Bradley to record and assert her mortgage, which the court said had existed long prior to any of these proceedings as between her and her husband, and which was made effectual when it was recorded, it would not have been considered and referred to. It is a fair, if not a necessary, inference from these two cases, that the counsel engaged in them and the court which decided them did not perceive in the conveyance of Scheen to his wife anything which defeated her right to the mortgage for her dotal or paraphernal property. The question as to the validity of that mortgage, after the court had set aside the conveyance as *dation en paiement*, was precisely the same as the one in the circuit court of the United States, whose decree we are called to revise, and we think we are safe in following the decision of the Supreme Court of Louisiana on the same facts under Louisiana law. The result of these considerations is,

that the decree of the circuit court dismissing Mrs. Bradley's bill is reversed, and the case remanded to that court for further proceedings.

SAM KLEIN ET AL., as FRIEBERG, KLEIN & COMPANY, *Piffs. in Err.*,

SOLOMON HOFFHEIMER ET AL., as
HOFFHEIMER BROS.

(See S. C. Reporter's ed. 367-379.)

Statements of vendor, when evidence—acts and declarations, when res gestæ—burden of proof—immaterial testimony—fraud upon creditors—damages for conversion.

1. One who has sold his interest in property cannot by his own subsequent statements of the nature of the transaction defeat the title he has transferred; yet if his statements are made in the presence of one of the defendants, who, as partners, were the purchasers of the property, who concurs in such statements, they are admissible against him and his partners, in an action to subject the property or its avails to the debt of a creditor of the seller, on the ground that the sale was fraudulent as to creditors.
2. Where an assignment of notes and accounts belonging to an insolvent debtor was a part of a transaction by which his whole property was distributed to certain of his creditors in fraud of the others, whatever was said or done by any of the parties, in the transaction, or by one of the assignees, in furtherance of the transaction, is part of the *res gestæ*, and is evidence against all of such parties.
3. Where one of the firm to which such choses in action were assigned testified that he knew at the time of the transaction that the assignor was insolvent, and that he received all or nearly all of the notes and accounts due the assignor in payment of the debt of his firm, it was not error for the court to charge that the burden of proof was upon the firm to show the fairness of the transaction, although in their answer as defendants they denied having any property of the debtor.
4. Testimony which is immaterial, and which could have done no harm, is not ground of reversal.
5. It was not error for the court to charge (the jury that, under the circumstances, if defendants took more of the debtor's property than what appeared to be reasonably worth the amount of their debt, it was a fraud upon the other creditors.
6. Where defendants fraudulently converted notes and accounts, the property of an insolvent debtor, they are liable to a creditor of the latter not only for the money collected on such notes and accounts, but for the value of those which remain in their hands, not exceeding the amount of the creditor's debt.

[No. 112.]

Argued Nov. 14, 15, 1889. Decided Dec. 9, 1889.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas to review a judgment in favor of plaintiffs against garnishees for property and money in their hands of plaintiffs' debtor. *Affirmed.*

The facts are stated in the opinion.

Messrs. M. F. Morris and Leo N. Levi for plaintiffs in error.

Mr. George Hoadly for defendants in error.

Mr. Justice Miller delivered the opinion of the court:

This is a writ of error to the Circuit Court for the Northern District of Texas.

Hoffheimer Brothers brought suit in the District Court of Dallas County, Texas, for a debt of \$11,329.79, against Strauss & Levy, of that place, a firm composed of A. Strauss and J. J. Levy, in which suit they applied for and obtained a writ of garnishment against Frieberg, Klein & Co., who were residents of the same county and doing business in Dallas. This writ was served upon Frieberg, Klein & Co. through Joseph Seinsheimer, a member of the firm, in the County of Galveston, on the 15th day of August, 1885. The writ required the garnishees to answer upon oath "what, if any, they were indebted to said Strauss & Levy, and were when this writ was served upon them, and what, if any, effects of said Strauss they have in their possession, and what when the writ was served." To this they made the following answer on oath:

"Now come Frieberg, Klein & Co., garnishees herein, and, answering the writ of garnishment heretofore served upon them, say that they are not now indebted to Strauss & Levy, or either of them, and were not when this writ was served; that they have no effects of Strauss & Levy, or either of them, in their possession, and had none when this writ was served; that they know of no person indebted to Strauss & Levy, or either of them, or who have in their possession effects belonging to Strauss & Levy, or either of them."

This answer was controverted by Hoffheimer Brothers, who took issue upon it by a plea which alleged that said garnishees "combined, colluded and confederated together with said Strauss & Levy for the purpose and with the intent to hinder, delay and defeat the creditors of said Strauss & Levy in the collection of their debts, and that in furtherance of said combination, at said time and with the intent aforesaid, said garnishees secretly and covinously procured and received from said Strauss & Levy all the books, accounts, notes, choses in action and other evidences of indebtedness then owing to said Strauss & Levy by divers and sundry persons to these plaintiffs unknown, but amounting in the aggregate to about the sum of thirty-two thousand dollars, and that said garnishees thereafter immediately commenced to collect said claims, pretending to be owners thereof. These plaintiffs are not informed as to the amount of such claims which had been collected by said garnishees at the time said writs of garnishment were filed herein, but they are informed and believe that at the time the writs of garnishment were served, as well as at the time the said answers were filed, said garnishees had then collected a very large amount upon said claims—it is believed more than sufficient to pay off and discharge the claims of these plaintiffs against said Strauss & Levy—and that the said garnishees then had and still have the money so collected, and that said garnishees then had in their possession said claims not so collected by them."

The case was afterwards transferred to the circuit court of the United States, and the plaintiffs having obtained judgment against Strauss & Levy for the sum of \$11,787.15, a trial was had in that court before a jury on the issues made between Hoffheimer Brothers and Frieberg, Klein & Co., garnishees. In that trial the jury returned a verdict in favor of the plaintiffs for the sum of \$11,829.79, and the court rendered judgment upon that verdict, and declared that when it should be paid or collected it should constitute a credit for that amount on the judgment in favor of plaintiffs against Strauss & Levy. It is to reverse this judgment that the garnishees, Frieberg, Klein & Co., have brought the present writ of error.

The errors assigned relate to the admission of evidence against objections of plaintiffs in error, and to the charge of the court to the jury, and to the refusal to charge as requested by them. A bill of exceptions was taken which purports to give the proceedings on the trial, and which, while it does not expressly state that it includes all the testimony given in the case, is probably a correct statement of all that was said and done pertinent to the issues now presented.

It appears from this bill of exceptions that Strauss & Levy were engaged in Dallas as wholesale dealers in liquors and cigars on the 10th day of August, 1885, and were at that time seriously embarrassed in their business; that Frieberg, Klein & Co. were also wholesale dealers, in Galveston, Texas, with a house in Dallas; that Strauss & Levy were indebted to Frieberg, Klein & Co. by notes and accounts in the probable sum of about \$15,000; and that on the 10th day of August aforesaid, just after dinner, Klein was in the office of Strauss & Levy, when Mr. Bradford, a lawyer, came in. He had a paper in his hand, and demanded payment of them of a claim not then due. They said they would pay it when due, and Bradford talked about suing them. Klein says he knew that Bradford was the attorney for the Bradstreet Commercial Agency, and he became alarmed, and demanded payment for the debt due his firm. They told him they had no money, but they had notes and accounts which they assigned to Frieberg, Klein & Co. in payment of their debt on his demand. The notes and accounts were assigned to Frieberg, Klein & Co. by a written instrument in which Strauss & Levy assigned and transferred to Frieberg, Klein & Co., in full payment and satisfaction of their indebtedness to that firm of the sum of \$15,789, "all of our accounts mentioned on a sheet attached marked A, and the notes now held by Frieberg, Klein & Co. as collateral security, besides the notes this day handed Mr. Klein in person, which notes, with aforementioned accounts, amount in the aggregate to the estimated value of \$15,000." This instrument is dated the same day, August the 10th. Mr. Klein states that late on the night of the 10th a Mr. Rhinehart came to his house and showed him a telegram, and stated that Strauss and Levy were outside and wanted to know what to do about their business matters. At their solicitation he went with them to the residence of Mr. L. M. Crawford, a lawyer, after one o'clock in the morning of the 11th. Mr. Crawford said that his papers were ready, and he was go-

ing to attach. It appears that during that night papers were prepared for attachment in favor of several creditors living in the Town of Dallas. Among these attaching creditors were Marx & Kempner, Addie Lowenstein, Oliver & Griggs, and perhaps others. The order in which these attachments should be levied or issued so as to give priority among themselves was determined during these interviews, in all of which Mr. Klein took an active part, directing himself the displacement of this order of priority in one case to the dissatisfaction of Strauss and Levy when they found it out, who thus found some of their own friends, whom they intended to make safe by these attachments, postponed to some others; and it is obvious from the testimony, that Klein, and Strauss and Levy, and Crawford, the lawyer, and some of the other parties to those suits sat down during that night and morning and arranged for the issuing of attachments sufficient in amount to absorb all the property owned by Strauss & Levy, and that Hoffheimer, and perhaps many other creditors, were left without protection and without any means of making their debts, so that between the time when Bradford, the lawyer, made his demand that evening, after dinner, and daylight next morning, all the assets of the partnership of Strauss & Levy had been divided between the parties who met that night, and that not by any assignment, but by a contrivance by which Frieberg, Klein & Co. got the choses in action, whether notes or accounts, due to Strauss & Levy, and the visible property was secured to the other persons engaged in the transaction by attachments issued with the consent and active assistance of Strauss & Levy, and apportioned among these different parties in accordance with an arrangement which met the assent of all of them. It will be observed that in the reply of Hoffheimer & Co., by which they took issue on the answers of the garnishees, they state that prior to the service of the writ of garnishment said garnishees combined, colluded and confederated together with said Strauss & Levy for the purpose and with the intent to delay, defeat and hinder the creditors of said Strauss & Levy in the collection of their debts; and the question which came before the jury for trial turned upon the truth of this allegation. There is much other testimony in the bill of exceptions showing the interference of Klein, and occasionally of one of his partners, in the proceedings, by which this combination or conspiracy was carried out. Whether it is sufficient to establish it or not, it was for the jury to say, if they were properly instructed, and if no improper testimony was admitted. It is obvious that there is sufficient testimony to justify a jury in the inference that Mr. Klein was the presiding genius in the appropriation and distribution of the assets of Strauss & Levy.

Before we come to the matters on which the assignments of error are made, it is proper to make one or two things a little more clear than they seem at first sight. The transfer of the notes and accounts of Strauss & Levy to Frieberg, Klein & Co. was not an assignment to secure payment of the debt of the former to the latter, but it purports upon its face to be, and was treated by the parties throughout as, an absolute sale of those notes and accounts in

full satisfaction of the debt due by the insolvent firm. The case is not to be treated, therefore, in its subsequent consideration, as one in which Frieberg, Klein & Co. held these notes and accounts as security for their debt, but as one in which they became the owners of them absolutely, if the transaction was fair and honest.

Another point to be considered is, how far this transfer or assignment of the notes and accounts was a part of the transaction by which the whole property of the insolvent firm of Strauss & Levy was appropriated during the twelve or fifteen hours within which the matter was completed. It is earnestly insisted by counsel for plaintiffs in error that the transaction between Klein and Strauss & Levy in the afternoon of the 10th was totally distinct from those which took place that night in regard to the attachments, and that therefore nothing said or done by Strauss or Levy, or by any of the parties, or their agents, whose attachments were levied after the execution of the paper transferring the notes and accounts to Frieberg, Klein & Co., can be used as evidence against the validity of that transfer. If the entire proceedings of that afternoon and night are to be considered as one transaction, intended to distribute the assets of Strauss & Levy to certain creditors to the exclusion of others, then whatever was said or done by any of those parties in regard to that transaction is evidence against all of them, and the acts of Mr. Klein in furtherance of this combination, though some of them may have occurred after he had obtained the transfer of a part of the assets of Strauss & Levy to himself and partners, must be considered as part of the *res gesta*. We are of opinion that the short time consumed in the whole transaction, the active interference of Mr. Klein in all its stages and in securing priority for certain friends of his, and of Strauss & Levy in the attachments, and the fact that the whole property of the insolvent debtors was intended to go to certain individuals to the exclusion of others by consent of the parties engaged, constituted one transaction, in which Mr. Klein's acts and doings were part of the *res gesta*, and as such are admissible evidence.

With these principles in view we approach the assignments of error, the first of which relates to the introduction of testimony objected to by defendants below. The testimony of John W. Edmondson, who was in the employ of Marx & Kempner, one of the firms whose attachments were included in the proceedings we have mentioned, stated that the suit and attachments of Marx & Kempner were filed by the authority of Klein, and that Klein, Strauss and Levy, and Crawford, the attorney, had told him so. He also said that in September, 1886, he had a conversation with Strauss and Levy, at which Klein and Marx were present. In that conversation Strauss and Levy said they had received from Hoffheimer Brothers on the 10th of August, about nine or ten o'clock at night, a telegram which referred to their matters in such a way as to alarm them. That they then went with the telegram to Klein, about one o'clock that night, and with Klein to the house of Crawford, the lawyer, and there conferred together. It was then agreed "between all of them that confidential debts should

be attached for as follows: Crawford & Crawford, Marx & Kempner, Wertheim & Schiffer, Oliver & Griggs and Addie Lowenstein. Crawford & Crawford were to come first and Marx & Kempner next; but Sam Klein had it fixed so that next day when the attachments were levied that of Oliver & Griggs was levied ahead of Marx & Kempner." "Some statements were made by Levy that the attachment was agreed on, in which August Cohn, brother-in-law of Levy, was indorser on one of the notes. Levy said that he had taken legal advice, and would knock all the attachments out of court and give away how the whole thing was done, and let none of the confidential debts be paid a dollar rather than Cohn should suffer."

There is much more of this showing the secret arrangements by which the property of the insolvents was to be disposed of as the parties present had determined. Edmondson said that Klein, who was present, concurred in all that Strauss and Levy said. He further testified that Klein had said in that conversation that in consideration of the agreement of Marx & Kempner to hold August Cohn harmless, they gave Marx & Kempner a note of Cohn indorsed by Strauss & Levy, and by Frieberg, Klein & Co.

The objection to this testimony seems to be upon the ground that Strauss and Levy, after they had parted with their interests in the property, could not, by their own confessions, or statements of the nature of the transaction, defeat the title they had transferred to Frieberg, Klein & Co. But it will be remembered that this conversation was in the presence of Klein, one of the defendants, and that the bill of exceptions states that he concurred in all that was said. It was therefore admissible against him and his partners as a statement which he agreed to at the time of the conversation, and which he should have contradicted if it were untrue.

With regard to the letter attached to Edmondson's deposition as an exhibit, from J. J. Levy to M. Marx, of the firm of Marx & Kempner, it might possibly be admissible, though written August 31st, twenty days after the attachment proceedings, as showing that Levy understood that in those proceedings his friend Cohn was to be taken care of. Otherwise it is entirely immaterial, and could not have worked the defendants any harm.

After the testimony of Edmondson, the deposition of H. Kempner, of the firm of Marx & Kempner, was introduced. He testified to a conversation with Mr. Klein in Galveston on the Sunday morning after the attachment suits had been instituted, in which he said: "Now, Mr. Klein, being that you were the leader and manager for the attachment suits, why is it that you did not carry out the instructions of Strauss & Levy, and put Marx & Kempner second in the order of attachment?" He replied that he felt in honor bound to put Oliver & Griggs ahead of Marx & Kempner, because he had recommended them for accommodation. He said that he had done all that he could for Marx & Kempner; that Strauss had insisted that Addie Lowenstein should be put in as a creditor in attachment for three thousand, but he, Klein, had objected, and it was compro-

mised on the one thousand named in her suit. She is the sister-in-law of Strauss.

As this testimony relates to what Klein himself, one of the defendants, said, and as it tends to show his own recognition of the fact that he had been a controlling spirit in the attachment proceedings, we do not see what objection can be urged to it.

Objection is made to the testimony of Chapman Bradford, offered in rebuttal, to the effect that he had seen in the store of Pascal Tucker, in Brownwood, several barrels of whiskey marked "S. & L., Dallas." This testimony seems to have been offered in rebuttal of the testimony of Klein, who had declared that Tucker had been book-keeper for Strauss & Levy, and had afterwards moved to Brownwood, and was keeping a store there; that "none of Strauss & Levy's goods were shipped to Tucker; he received none of them. I shipped all of them to Frieberg, Klein & Co., at Galveston." This was his own firm. So far as the testimony of Bradford tended to contradict this statement of Klein, no objection can be seen to its admissibility; and if neither Klein's testimony nor Brown's testimony is material to the issue, it seems to be so utterly useless that defendants could not be hurt by it.

Two principal objections are made to the charge of the court. The first of these, and perhaps the more important, is that the court placed the burden of proof upon the garnishees to establish the fairness of the transaction by which they obtained possession of the notes and accounts of the insolvent debtors. The argument is that the defendants, by virtue of the statute, answered certain interrogatories which had been propounded to them in the garnishee process; that that answer is to be taken as evidence in their favor; and that, as they positively denied having any property or credits of the insolvent debtors in their hands, or being in any way indebted to them, this answer should stand as a *prima facie* case in their favor to be overcome by proof on the part of the plaintiffs. It is also true that in the traverse of this answer made by plaintiffs they set out the affirmative allegation that "prior to the service of the writ of attachment and writ of garnishment the garnishees combined, colluded and confederated together with said Strauss & Levy for the purpose and with the intent to hinder, delay and defeat the creditors of said Strauss & Levy in the collection of their debts, and that in furtherance of said combination, at said time and with the intent aforesaid, said garnishees secretly and covinously procured and received from said Strauss & Levy all the books, accounts, notes, choses in action, and other evidences of indebtedness then owing to said Strauss & Levy by divers and sundry persons to these plaintiffs unknown, but amounting in the aggregate to about the sum of thirty-two thousand dollars, and that said garnishees thereafter immediately commenced to collect said claims, pretending to be owners thereof." If this allegation is not true in substance, the plaintiffs had no case against Frieberg, Klein & Co., and the burden of the issue was, therefore, primarily upon them. But Klein and another member of that partnership were sworn as witnesses, and what they said as witnesses, being minutely descriptive of what was done,

is much more important in ascertaining the truth than their general denial that they held the property of the insolvent debtors or owed them anything. In the testimony of Klein himself it was made very clear that he was aware, at the time of the transaction by which he obtained their choses in action, that Strauss & Levy were insolvent, or at least were in failing circumstances and unable to pay their debts; and that he received from them all or nearly all of the notes and accounts due them, and professed to take them in payment of the debt of his firm. It was not unreasonable, therefore, that the court should charge that, under these circumstances, Klein and his partners should establish the fairness of the proceeding by which they came into the possession of these notes and accounts.

The substance of the charge of the court, of which complaint is made, is that, "if the jury believe from proof in the case that plaintiffs had a valid, existing, unsatisfied claim against Strauss & Levy for something over eleven thousand dollars, and that Strauss & Levy were insolvent on the 10th day of August, 1885, and that Klein knew, or might have known, that fact, and that under the circumstances he on behalf of garnishees took the bills receivable, and that garnishees had received and collected the sum of nearly ten thousand dollars, and have still uncollected bills of value, you will find the garnishees liable, unless you believe also from the proof that the garnishees were, in fact and in good faith, creditors of Strauss & Levy in the full sum claimed by said garnishees, and that the dealings of Klein on behalf of the garnishees, with Strauss & Levy, on the 10th day of August, were, in fact, fair and honest, and had with a single purpose of obtaining satisfaction of their debt, and that he received no more therefor than was reasonably worth the amount of said garnishees' said debt." We think that this was a fair statement of the law on the subject. The whole case was before the jury. The insolvency of Strauss & Levy was known, or might have been known, to Klein, and, therefore, when he undertook to deal with the assets of this insolvent firm by taking a very large part of it in payment of his own debt, a circumstance which he knew must leave many other creditors either wholly or partly unprotected and without means for payment, it was proper that all his dealings in that matter should be fair and honest; that his claim should be a just one; that he should receive no more than what was reasonably necessary to pay his debt; and that if the transaction was tainted with any fraud or unjust interference with the rights of creditors it should not stand. In other words, the preliminary statement of those facts made a case which required of the garnishees a fair and satisfactory explanation of the remarkable proceedings of Mr. Klein and his partners in the whole transaction.

The language we have cited also shows that there is no ground for the argument of counsel that the jury were instructed that if the garnishees received anything more, even a dollar, than was due to them of the assets of the insolvent debtors, the transaction was therefore void. Fair play and honest dealing did require that while they had the right, as is admitted by the court, to secure their debt or to take pay-

ment for it, provided it was done fairly and honestly, and that Strauss & Levy had a right to pay them out of their assets in preference to other creditors, yet it was right and proper that they should take no more of these assets in which other creditors were interested than was, in the language of the court, "reasonably worth the amount of the garnishees' debt." Of course this reasonable amount did not mean that it should be measured to a dollar or to a cent. It did not mean if what they took turned out to be worth a little more than their debt, if the notes and accounts yielded a little more than the debt in the end, that thereby the whole transaction was to be void, but it meant, and that we think was sound law, that in presence of the circumstances under which the transfer was made, if defendants took more than what appeared to be reasonably worth the amount of their debt, it was a fraud upon the other creditors; and the court, in giving the converse of this proposition, said that if the garnishees on that day received no more from the insolvent debtors than was reasonably sufficient to satisfy their claim, the jury were to find for the garnishees.

The court also instructed the jury that if they found for the plaintiffs, they were to return a verdict for the amount of money shown by proof to have been received by the garnishees, and the value of the uncollected bills, if the sum of these did not exceed plaintiff's debt. It is said that the garnishees could only be liable for the sum which they had actually collected out of these notes and accounts, and that, as to any of them remaining in their hands, they could not be held accountable in this proceeding. If the transfer of these choses in action to the garnishees had been a fair assignment by way of security out of which they were to pay their debt, if so much of it could be collected, then the remainder of the choses in action, whether valuable or not, could be returned by them, without liability; but, as we have seen, the case goes upon the idea of a fraudulent conversion by Frieberg, Klein & Co. of assets of the insolvent debtors. By this fraud the control of the assets passed to them, and we are of opinion that, if liable at all, they were liable not only for the money collected on such notes and accounts, but for the value of those which remained in their hands to at least, as the court instructed, an amount sufficient to pay the debt of Hoffheimer Brothers against Strauss & Levy. Whether there was, or not, such amount was a question left to a jury, and the jury found that there was. They must have found, under the instructions of the court, that enough of the assets collected remained in their hands, either in the shape of money collected or of notes and accounts yet uncollected but valuable, to pay the debt of Hoffheimer Brothers against Strauss & Levy. In this we see no error to the prejudice of the plaintiffs in error, and the judgment is therefore affirmed.

WOLF BACHRACK, *Plff. in Err.*,

v.

ANTHONY B. NORTON ET AL.

(See S. C. Reporter's ed. 337-340).

Action on marshal's bond—nonresident may be assignee—laws of Texas.

132 U. S.

1. An action on a marshal's bond, against him and his sureties, for wrongful taking of goods of plaintiff under an attachment issued out of the circuit court of the United States, arises under the laws of the United States, and is therefore within the jurisdiction of the circuit court, without any averment of citizenship of the parties.
2. An assignment of a debtor's property for the benefit of his creditors is not void because the assignee is not a resident or citizen of the State where the assignment is made and the debtor resides, provided he complies with the conditions prescribed by the law.
3. A resident and citizen of Missouri can lawfully be an assignee, under the laws of Texas in regard to assignments by insolvents for the benefit of their creditors.

[No. 116.]

Argued Nov. 15, 1889. Decided Dec. 9, 1889.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas, to review a judgment dismissing a suit on a marshal's bond against him and his sureties to recover for his wrongful taking of plaintiff's goods under an attachment. *Reversed.*

The facts are stated in the opinion.

Messrs. H. G. Robertson and Sawnie Robertson for plaintiff in error.

Messrs. John Johns and D. A. McKnight, for defendants in error:

It is a well-settled rule that a deed of assignment against the policy or terms of a statute is void against non-consenting creditors.

Burrill on Assignments, § 352; *Jaffray v. McGee*, 107 U. S. 365 (27:496); *Schoolfield v. Johnson*, 11 Fed. Rep. 297; *Heelan v. Hoagland*, 10 Neb. 511; *Bonne v. Carter*, 20 Neb. 566; *Edwards v. Mitchell*, 1 Gray, 239; *Pike v. Bacon*, 21 Me. 280; *Raleigh v. Griffith*, 37 Ark. 153; *Churchill v. Whipple*, 41 Wis. 611; *Keovil v. Donaldson*, 20 Kan. 168; *Henderson v. Pierce*, 7 West. Rep. 261, 108 Ind. 462.

Mr. Justice Bradley delivered the opinion of the court:

This is an action on a marshal's bond, against him and his sureties, to recover damages for his wrongful taking of the goods of the plaintiff under an attachment issued out of the Circuit Court of the United States for the Northern District of Texas, against one Myerson. According to the decision in *Feibelman v. Packard*, 109 U. S. 421 [27:984], it is a case arising under the laws of the United States, and is therefore within the jurisdiction of the circuit court without any averment of citizenship of the parties.

The plaintiff avers that Myerson had previously assigned the goods to him for the benefit of his creditors, and sets out a copy of the assignment. The defendants demurred to the petition, or, in the language of the Texas practice, filed a special exception, the principal ground of which was that it appears by the petition that the plaintiff was a resident and citizen of Missouri, and therefore could not lawfully be an assignee under the laws of Texas. The court below entertained this view and sustained the exception, and the plaintiff having declined to amend, the cause was dismissed. The question therefore is, whether the view taken by the court below was, or was not, erroneous.

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The assignment was made on the 22d day of October, 1880, under the Act of the Legislature of Texas, approved March 24th, 1879, which was before this court in the case of *Cunningham v. Norton*, 125 U. S. 77 [81: 624]. In that case the provisions of the Act were examined *in extenso*, and we held that it was intended to favor general assignments by insolvents for the benefit of their creditors, and to sustain them, notwithstanding technical defects, provided they assigned all the property of the debtor. The assignment in the present case is substantially the same in form as in the case of *Cunningham v. Norton*. The only material difference (if it is material) is the fact that the assignee was a resident of the State of Missouri, and not of Texas. As to this, the allegation of the petition is, "that at the time of making of said assignment he (the plaintiff) was a resident of the City of St. Louis and State of Missouri; but that, while holding his domicile in said State last named, his business lay in the State of Texas, and for the greater part of the year, before and since said time of the making of said assignment, he was in said State of Texas in pursuance of his calling in said State; that at, before and since the time of said assignment he was, in pursuance of his calling, frequently in said County of Grayson, in which county he had business interests. That at the time of making said assignment said Myerson was a resident of Grayson County, Texas, where he was conducting his business, and where said goods, wares and property, before and at the time of making said assignment, were situated, and where said assignment was made." Some two or three years after this assignment was made, viz., April 7th, 1883, an amending Act was passed which, amongst other things, required that the assignee of an insolvent debtor under the Act should be a resident of Texas; but the Act of 1879 had no such requirement. The only word in the whole Act which could be construed to imply it was in the 6th section, which required the assignee to execute a bond with sureties, and directed that the bond should be filed with the county clerk of his county. We think that this expression was insufficient to raise the implication contended for. It probably only meant that the bond should be filed with the clerk of the county where the debtor resided and carried on business.

Independently of a statute on the subject, we do not see why, as a mere matter of law, an assignment should be held void because the assignee is not a citizen or resident of the State where the assignment is made and the debtor resides, provided he complies with the conditions prescribed by the law. A citizen or resident of another State may, in a particular case, be a very proper assignee. A large part of a debtor's assets may be located in a State other than that in which he resides. If a nonresident assignee should for any reason be deemed an improper person to act as such, the court having jurisdiction of the matter could, according to the laws of Texas, remove him and appoint another in his place. It was the object of the Act of 1879 to uphold, rather than to set aside, assignments; to aid defects, rather than to allow them to defeat the purpose of the debtor and the rights of his creditors. In *Windham v.*

Patty, 63 Tex. 490; the court held that the failure of the assignee to give a bond ought not to defeat the assignment, but that the creditors might apply for the appointment of another assignee to fulfill the trust. The 14th section of the Act of 1879 declares that "if any assignee becomes unsuitable to perform the trust, refuses or neglects so to do, or mismanages the property, the county judge or judge of the district court may, upon the application of the assignor, or one or more of the creditors, upon reasonable notice to all parties interested, by publication or otherwise, as such judge may direct, remove such assignee, and, in case of vacancy by death or otherwise, shall appoint another in his place, who shall have the same powers and be subject to the same liabilities as the original assignee."

One or two other objections to the assignment are made under the special exception, but we do not deem it necessary to discuss them. They are clearly untenable. In our judgment it was error in the court below to allow the exception and dismiss the action.

The judgment must be reversed, and the cause remanded, with instructions to overrule the exceptions, and take such further proceedings in the case as to law and justice may appertain.

F. H. AYERS ET AL., *Plffs. in Err.*,
v.

A. E. WATSON.

(See S. C. Reporter's ed. 394-406.)

Impeaching witness by former declarations—effect of death of witness.

1. Before former declarations of a witness can be used to impeach or contradict him, his attention must be called to those declarations, with particularity as to time, place and circumstances, so that he can deny or explain them.
2. Where three trials of the same case have been had, in each of which the same deposition of the same witness has been given in evidence, and in the taking of such deposition he was cross-examined, and on those trials no reference was made to a former deposition of his in another suit, nor any attempt to call his attention to it, and by his death subsequently he is placed beyond the power of explanation, then, on a fourth trial of the case, contradictory declarations of his in such former deposition cannot be used to impeach his testimony.

[No. 119.]

Argued Nov. 19, 1889. Decided Dec. 9, 1889.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas to review a judgment in an action of ejectment in favor of the plaintiff below. *Reversed.*

The facts are stated in the opinion.

Mr. Wm. E. Earle, for plaintiffs in error: To impeach a witness by showing that he has made a statement materially different from the facts sworn to by him, a foundation must be laid by questioning the witness as to such statement.

U. S. v. Dickinson, 2 McLean, 325; *Chapin v. Siger*, 4 McLean, 378.

Mr. W. Hallett Phillips, for defendant in error:

The deposition of Johnson was admissible.

George v. Thomas, 16 Tex. 92; *Stroud v. Springfield*, 23 Tex. 665; *Weider v. Carroll*, 29 Tex. 833; *Evans v. Hurt*, 84 Tex. 118; *Smith v. Russell*, 87 Tex. 255.

Declarations of deceased witnesses may be proved to fix the location of corners and lines.

Hurt v. Evans, 49 Tex. 814; *Coleman v. Smith*, 55 Tex. 254; *Tucker v. Smith*, 68 Tex. 478; *Hunnicutt v. Peyton*, 102 U. S. 833 (26: 113); *Clement v. Packer*, 125 U. S. 810 (31: 721).

Mr. Justice Miller delivered the opinion of the court:

This is an action of ejectment brought by Watson, the original plaintiff, in the District Court for the County of Bell, in the State of Texas, and afterwards removed into the Circuit Court of the United States for the Northern District of that State. It was twice tried before a jury, which failed in each of these trials to come to an agreement. It was tried a third time, which resulted in a verdict and judgment for the plaintiff. A writ of error was taken to that judgment, by which it was brought to this court and reversed. The case is reported as *Ayers v. Watson*, 113 U. S. 594 [28: 1093]. It was thereupon remanded to the circuit court for a new trial, where a verdict was again had for the plaintiff, and the judgment rendered on that verdict is before us for review.

The details of the controversy may be found in the report of the case above mentioned. While it was pending in the District Court of Bell County the following agreement between the parties was made, which simplifies the case very much:

"A. E. Watson }
v. }
Frank Ayers et al. }

"It is agreed and admitted by the defendants, for the purpose of this trial at this term of the court, that A. E. Watson, plaintiff in this cause, is entitled to all the right, title and interest granted by the State of Texas to the heirs of Walter W. Daws on September 16, A. D. 1850, said land patented being one third of a league, described in said patent No. 542, vol. 8, and which said land is described in plaintiff's petition; but defendants say that said one third of a league of land so patented as aforesaid to the heirs of Walter W. Daws is covered by the grant of the government of Coahuila and Texas to Maximo Moreno of eleven leagues of land, as set forth more fully in defendants' petition; which said eleven-league grant is an older and superior title to that of plaintiff's and the title to which is in the defendants in this cause.

"X. B. Saunders,
"W. T. Rucker,
"F. H. Sleeper and
"A. M. Monteith,
"Attys for Defendants."

By this agreement it will be seen that the sole question at issue was whether the land in controversy was covered by the eleven-

league grant to Maximo Moreno. A plat of that survey is found in the bill of exceptions. On the trial which resulted in the judgment which we are now called to reconsider, and which, as we understand it, was the fourth time the case has been tried by a jury, the defendant introduced the deposition of F. W. Johnson, the surveyor who had made the survey under the Moreno grant. It seems that his deposition had been taken twice in this action, and, though the details of those trials are not before us, it had no doubt been used in them. But prior to the trial which we are now reviewing, he had died. It appears from the bill of exceptions that in these depositions he had been cross-examined by plaintiff's counsel. Plaintiff in rebuttal to this testimony of Johnson offered in evidence a deposition of the said Johnson taken in 1880, in a suit between other parties, in which his testimony with regard to the matters to which he testified in the depositions offered by defendant varied materially from these latter depositions. To the introduction of this deposition of 1880 the defendants objected, and, their objection being overruled, took this exception. As we think the judgment of the court below must be reversed on account of this ruling, all that relates to it in the bill of exceptions is here reproduced:

"It was admitted by both parties that the upper and lower corners on the river of the Maximo Moreno 11-league grant are extant as called for in the original grant to Maximo Moreno, and their corners are not in dispute.

"The defendant read in evidence the depositions of F. W. Johnson, taken in 1878 and 1880, in which he testified that he was principal surveyor for Austin's colony. . . . The first survey made was the Maximo Moreno 11-league survey. This survey was commenced at the point opposite the mouth of the Lampasas River, as called for in the field notes of the grant, and a line was run thence on the course called for in the grant the distance called for, the chain being used to measure the distance. The northwest or second corner called for in the grant was thus established by him, the distance giving out in the prairie. In running the west line I made an offset to avoid crossing the Leon River, which was about 50 or 60 vrs. wide. This offset was made soon after leaving the beginning corner, there being a peculiar bend in the river at that point. From the northwest corner thus established the second line was run the course and distance called for in the grant. Several streams were crossed on this line at distances not now recollected, and the northeast corner established on two small hackberries in Cow Creek bottom. From the northeast or third corner so established a line was run in the course called for in the grant to San Andres River. This last line was marked but not measured, because it was not usual or necessary to measure the closing line.

"It was admitted by the defendant that the distance as measured on the ground from the northeast corner to a creek called for in the grant was some four thousand varas more than the distance called for; that is, the distance is 7,500 instead of 8,500 vrs; and on cross-examination, being asked to account for the dis-

crepancy, said the distances called on that line were not measured but guessed at. No part of the east line was measured. The exterior lines were marked with blazes. The corner trees and bearing trees, where there were such, were marked with blazes, with two hacks above and two below. In answer to question, on cross-examination, he said that he did not begin the survey at the southeast corner, but he began at the southwest corner, at the three forks at the mouth of the Lampasas, and actually traced the lines in the order set forth in the field notes. The field book containing the same, which I kept, I examined, which I don't remember to examine until a month ago, and as hereinbefore stated.

"The plaintiff in rebuttal to Johnson's testimony, as above set forth, it appearing that said Johnson died in 1884, offered to read in evidence a deposition of said Johnson, taken in 1860, in a certain suit then pending in Bell County, Texas, wherein David Ayers was plaintiff and Lancaster was defendant, in which he stated in answer to question therein propounded that he began the Moreno survey at the southeast corner and ran thence northerly. The north line was then run westwardly, and the third, if run at all, was run southwardly to the river. I am of the opinion that no western line was run, but was left open; but the eastern and northern lines were run and measured; it was not usual to measure the closing line. To the reading of which last-mentioned deposition, proven to be in the handwriting of Johnson, taken in 1860, the defendants objected upon the ground that the deposition had been taken in another and different cause, between other parties, before the institution of this suit; and the same witness having testified in answer to interrogatories and cross-interrogatories propounded herein in 1877 and 1880, respectively, it was not competent as original evidence nor admissible to contradict or impeach the testimony of the witness Johnson, as given in his deposition read by the defendants, notwithstanding the death of Johnson; which objection the court overruled and admitted the testimony so objected to; to which ruling of the court the defendants then and there excepted and still except, and the same is allowed as exception No. 1."

A very earnest and able argument is presented to us to sustain this ruling, upon the general ground of the liberality of courts in admitting what would be otherwise called hearsay evidence in regard to boundaries, such as tradition, general understanding in the neighborhood, declarations of persons familiar with the boundaries and with the objects on the lines of the survey, and others of similar character. An opinion of *Mr. Justice Field*, delivered in the Supreme Court of California in 1860, in the case of *Morton v. Folger*, 15 Cal. 277, is much relied on in this case, and it is also said that the courts of the State of Texas have established the same principle, which has thus become a rule of property in that State, which should be followed in this case. If the principle stated in the decision of the California court, and in the decisions of the Supreme Court of the State of Texas, were indeed applicable to the case before us, we would hesitate very

much in reversing the judgment on this ground, and, indeed, should be inclined, on the weight of those authorities, and in the belief that in the main they are sound, to overrule the exception. But the objection in the present case to the deposition of Johnson, taken in 1860, does not rest upon the ground that it is hearsay testimony, or that it does not come within the general principle which admits declarations of persons made during their lifetime of matters important to the location of surveys and objects showing the line of those surveys. Johnson's deposition of 1860, if it stood alone and was introduced upon the trial of this case for the first time as independent testimony in favor of plaintiffs, might be admissible. It is not necessary to decide that question, because such is not the character of the circumstances under which the testimony was admitted. As we have already said, there had been three trials of this action, during which Johnson was alive and was a competent witness for either party. All his testimony was given by way of deposition. This only renders the manner of taking it more deliberate, and if it was to be contradicted by anything he had said on former occasions, made it the more easy and reasonable that plaintiff should have called his attention to the former statements which they proposed to use. It will be observed that the plaintiffs did not introduce, or offer to introduce, this deposition of Johnson of 1860 as a part of their case, when it was their duty to introduce their testimony. They, therefore, did not rely on it as independent testimony in their favor. But after Johnson's deposition had been given in the case itself, and he had been cross-examined by the plaintiffs in that deposition in regard to his testimony, and after he was dead and could give no explanation of his previous testimony of 1860, which might show a mistake in that deposition, or give some satisfactory account of it consistent with his testimony in the principal case, this old deposition is for the first time brought forward to contradict the most important part of his testimony given on the present trial. The importance of this matter as it was presented to the jury will be readily understood when we revert to the fact that the two southern corners of the survey are established without question and are found on the San Andres River, and the controversy concerns the question whether the east line and the west line of that survey, which are straight lines almost due north, extend so far north that the northern line between these lines is so far north as to include the survey of Daws under which plaintiff claims. In the principal deposition of Johnson, as we have seen by the bill of exceptions, he states that this survey commenced at the southwestern corner on the San Andres River and was run northward the distance called for in the grant, and actually measured by the chain. The northwest or second corner called for in the grant was established by him, the distance giving out in the prairie. From the northwest corner thus established, the second, the line was run for the course and distance called for in the grant, and the northeast corner established on two small hackberries on Cow Creek bottom. From the northeast or third corner thus es-

tablished, the course was run to the San Andres River. This last line was marked but not measured, because it was not necessary to measure the closing line. In answer to questions on cross-examination, he said he did not begin at the southeast corner but he began at the southwest corner, and actually traced the lines in the order set forth in the field notes. He said the field book containing these notes "I kept and examined, which I do not remember to have examined till a month ago, as hereinbefore stated." The deposition offered by plaintiff states distinctly that he began the Moreno survey at the southeast corner, and ran thence northerly. The north line was then run westwardly, and the third, if run at all, was run southward to the river. And he further says: "I am of the opinion that no western line was run but was left open, but the eastern and northern lines were run and measured. It was not usual to measure the closing line." It was admitted that the distance as measured on the ground from the northeast corner to a creek called for in the grant was some four thousand varas more than the distance called for, and the witness on cross-examinations in the principal depositions read by the defendant in this case, being asked to account for this discrepancy, said: "The distances called on that line were not measured but guessed at. No part of the east line was measured." The discrepancy between these two depositions is manifest, and that discrepancy is in a matter which relates directly to the question whether the Moreno grant as it was surveyed included the land embraced within the Daws grant, under which plaintiff asserts claim. If the jury believed in the truth of the depositions of Johnson taken by the defendant in this case, at which he was cross-examined by the plaintiff, it affords the strongest evidence that the Daws claim was included in the lines of the Moreno survey. This deposition is supported by the field notes and by the reference of Johnson himself to those field notes a very little while before he gave his deposition. If, on the contrary, the eastern line was the one which was actually run and measured, beginning at the southeast corner of the survey on the San Andres River, then the fact that that line was actually run and measured would probably have a very great influence in the mind of the jury on the question in issue. And whether this was so or not, the contradictory statements of Johnson under oath might destroy the value of his testimony before the jury.

The circumstances under which the former statements of a witness in regard to the subject matter of his testimony when examined in the principal case can be introduced to contradict or impeach his testimony, are well settled, and are the same whether his testimony in the principal case is given orally in court before the jury or is taken by deposition afterwards read to them. In all such cases, even where the matter occurs on the spur of the moment in a trial before a jury, and where the objectionable testimony may then come for the first time to the knowledge of the opposite party, it is the

rule that before those former declarations can be used to impeach or contradict the witness, his attention must be called to what may be brought forward for that purpose, and this must be done with great particularity as to time and place and circumstances, so that he can deny it, or make any explanation intending to reconcile what he formerly said with what he is now testifying. While the courts have been somewhat liberal in giving the opposing party an opportunity to present to the witness the matter in which they propose to contradict him, even going so far as to permit him to be recalled and cross-examined on that subject after he has left the stand, it is believed that in no case has any court deliberately held that after the witness's testimony has been taken, committed to writing and used in the court, and by his death he is placed beyond the reach of any power of explanation, then in another trial such contradictory declarations, whether by deposition or otherwise, can be used to impeach his testimony. Least of all would this seem to be admissible in the present case, where three trials had been had before a jury, in each of which the same testimony of the witness Johnson had been introduced and relied on, and in each of which he had been cross-examined, and no reference made to his former deposition nor any attempt to call his attention to it. This principle of the rule of evidence is so well understood that authorities are not necessary to be cited. It is so well stated, with its qualifications and the reasons for it, by Mr. Greenleaf in his work on Evidence, vol. I, in §§ 462 and 464 inclusive, that nothing need be added to it here except a reference to the decisions cited in his notes to those sections. See also *Weir v. McGee*, 25 Tex. Supp. 82.

It will thus be seen that the principle on which counsel for plaintiff in error objected to this deposition of Johnson is not in conflict with the case of *Morton v. Folger*, 15 Cal. 277, nor with any case to which we are cited, decided by the Supreme Court of Texas. That ground, as stated in the bill of exceptions, is "that the deposition had been taken in another and different cause, between other parties, before the institution of this suit; and the same witness having testified in answer to interrogatories and cross-interrogatories propounded herein in 1877 and 1880, respectively, it was not competent as original evidence, nor admissible to contradict or impeach the testimony of the witness Johnson as given in his deposition read by the defendant, notwithstanding the death of Johnson."

We are very clear that the deposition of 1880 was improperly admitted, and its important relation to the issue tried by the jury was such that *the judgment rendered on it must be reversed, and the verdict set aside and a new trial granted.*

There are other assignments of error, the consideration of which is not necessary in the decision of the case before us, which, with due attention to what we decided when the case was here before, to which we still adhere, may not arise in another trial.

WILLIAM ROEMER, *Appt.*,
v.
THOMAS B. PEDDIE ET AL.

SAME, *Appt.*,

ALBERT O. HEADLEY.

SAME, *Appt.*,

CHARLES KUPPER.

SAME, *Appt.*,

RICHARD C. JENKINSON.

(See S. C. Reporter's ed. 318-317.)

Construction of letters-patent—limitations and restrictions in patent.

1. When a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it.
2. Where the patentee, after the rejection of his application, inserted in his specification a statement that his invention related to a new construction of lock-case, whereby it was made "to dispense with an extended bottom plate," he cannot contend that his specification and claims are to be interpreted so as to cover a construction which has an extended bottom plate.

[Nos. 120, 121, 132, 133.]

Argued Nov. 18, 19, 1889. Decided Dec. 9, 1889.

APPEALS from decrees in the two first above-named cases of the Circuit Court of the United States for the Southern District of New York, and appeals from decrees in the two last above-named cases of the Circuit Court of the United States for the District of New Jersey, dismissing suits in equity for the infringement of letters-patent No. 195,233, granted to William Roemer Sept. 18, 1887, for an improvement in a combined lock and handle for traveling bags. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 27 Fed. Rep. 702.

Mr. Arthur V. Briesen for appellant.

Messrs. Frederic H. Betts and J. E. Hindon Hyde, for appellees:

There is no invention in what Roemer has shown in his patent in suit, in view of what he himself had shown in his prior patent, and in consideration of other prior structures of this class.

Winans v. Denmead, 56 U. S. 15 How. 330 (14:717); *Evans v. Eaton*, 16 U. S. 8 Wheat. 454 (4:433); *Smith v. Nichols*, 2 Pat. Off. Gaz. 649; *Tucker v. Spalding*, 80 U. S. 18 Wall. 453 (20:515); *Phillips v. Page*, 65 U. S. 24 How. 164 (16:639); *Hicks v. Kelsey*, 85 U. S. 18 Wall. 670 (21:852); *Rubber-Coated Harness Trimming Co. v. Welling*, 97 U. S. 7 (24:942); *Terhune v. Phillips*, 99 U. S. 592 (25:298); *Orouch v. Roemer*, 103 U. S. 797 (26:426); *Atlantic Works v. Brady*, 107 U. S. 192 (27:438); *Yale Lock Mfg. Co. v. Greenleaf*, 117 U. S. 554 (29:952).

He has simply taken the Havell lock-box or

his own lock-box of his patent of May, 1887, and substituted for the forms of notch or ring-loop in those structures the old and well-known form of ring-loop. This does not amount to invention.

Stimpson v. Woodman, 77 U. S. 10 Wall. 117 (19:866); *Dunbar v. Meyers*, 94 U. S. 187 (24:34); *Hall v. Macneale*, 107 U. S. 90 (27:867); *Slawson v. Grand Street, P. P. & F. R. Co.*, 107 U. S. 649 (27:576); *Double Pointed Tack Co. v. Two Rivers Mfg. Co.* 109 U. S. 117 (27:877); *Bussey v. Excelsior Mfg. Co.* 110 U. S. 181 (28:95); *Stephenson v. Brooklyn Cross-Town R. Co.* 81 Pat. Off. Gaz. 263, 114 U. S. 149 (29:58).

Mr. Justice Blatchford delivered the opinion of the court:

These are two suits in equity, brought by William Roemer in the Circuit Court of the United States for the Southern District of New York, one against Thomas B. Peddie and George B. Jenkinson, and the other against Albert O. Headley; and two suits in equity brought by the same plaintiff in the Circuit Court of the United States for the District of New Jersey, one against Charles Kupper, and the other against Richard C. Jenkinson. All four of the suits are brought for the infringement of letters-patent No. 195,233, granted to the plaintiff September 18, 1877, for an improvement in a combined lock and handle for traveling bags.

The specification says: "Be it known that I, William Roemer, of Newark, in the County of Essex and State of New Jersey, have invented a combined lock and handle-holder for traveling bags, etc., of which the following is a specification: Figure 1 is a top view of my improved combined lock and handle-holder, figure 2 is a vertical longitudinal section of the same; figure 3 is a cross-section on the line *c c*, figure 2. Similar letters of reference indicate corresponding parts, in all the figures. This invention relates to a new construction of lock-case for traveling bags, satchels, and the like, whereby the same is made to retain the rings which connect with the handle [to dispense with an extended bottom plate], and yet to leave said rings movable in their bearings. The invention consists in forming notches in the sides, near the ends of the lock-case, which notches engage over the lower parts of the handle-rings, all as hereinafter more fully described. In the accompanying drawing, the letter A represents the lock-case, the same being of suitable construction, shape and size, and adapted to be fastened to the frame of the satchel or bag by rivets or other suitable means. The ends of the lock-case are, by notches *a*, which are cut into or formed in its sides, made hook-shaped, as clearly shown in figure 2, and these hooks *b*, thus produced, serve to retain the handle-rings B B in place. These handle-rings are, as indicated in figure 3, preferably flattened at their lower parts, and are, with these flattened portions, placed under the hooks *b* of the lock-case, and thereby secured to the satchel-frame, to which the lock-case is riveted, as already described. In these hooks, however, the rings are free to vibrate, and free, therefore, to move with the handles, and the rings constitute, in consequence, a flexible connection between the handle and

the bag or satchel. [By making the notches in the sides, the top of the lock-case remains smooth and offers no obstruction to the free movement of handle and rings.] The claim of the patent is as follows: "The lock-case made with the notched sides *a a* near its ends to receive and hold the handle-rings B, substantially as herein shown and described."

In the application for the patent as filed, the parts above put in brackets were not contained in the specification, and the proposed claim was as follows: "The combination of the lock-case, A, having the hooks, *b*, at its ends, with the rings, B B, which are held in place by said hooks, substantially as herein shown and described." The application as thus made was rejected, by a reference to patent No. 177,020, granted May 2, 1876, to William Simon, for improvements in a traveling bag. The proposed claim was then stricken out, and the following claim was substituted: "The lock-case, A, having the notches, *a a*, at its under side, and combined with the rings, B B, which are held in said notches, substantially as and for the purpose specified." The application was again rejected, by a reference to the patent to Simon, the Patent Office saying: "The difference between the two devices appears to be, that in applicant's device the notches are cut in the vertical sides of the lock-case, and in the reference they are struck up from the bottom plate." The application was then amended by inserting in the specification the words above put in brackets, and by altering the claim so as to read as it does in the patent as issued.

After an answer and a replication in the suit against Peddie and Jenkinson, proofs were taken on both sides, and the court, held by Judge Wheeler, made a decree dismissing the bill, with costs. In the opinion of the court (27 Fed. Rep. 702) it was said: "The improvement patented consists essentially in extending the sides of the lock-case to hold the handle-rings of traveling bags. The bottom plate of the lock had before been extended for that purpose. By the improvement the bottom plate could be dispensed with, and the side walls of the lock-case made both to inclose the lock and hold the handle-rings. The defendants use the same thing to hold the handle-rings, but place the lock above it, and do not use it for the side walls of the lock-case. It becomes, by the use which they make of it, an extended bottom plate to the lock, of an improved form. If this piece was patented and the patent is valid to cover it, the defendants do infringe. The file-wrapper and contents are made a part of the case. From them it appears that the orator, in his application for this patent, at first applied for a patent covering the combination of the lock-case with the handle-rings. His claim was rejected on a reference to patent No. 177,020, granted to William Simon, which covered an extended bottom plate to the lock to hold the handles. The claim was amended and again rejected on the same reference, and was not granted until the specification was amended to dispense with an extended bottom plate to the lock, and the claim was confined to a lock-case with notched sides near its ends, to receive and hold the handle-rings. This piece, which the defendants use, was the same before as after these amendments. The Patent 182 U. S.

Office would not grant a patent for it generally in combination with the handle-rings, but only specifically when used for the sides of the lock-case and for the handle-rings. The orator accepted the patent narrowed in that manner, and cannot now be heard to claim that it is any more broad than that in its scope. He invented this particular form of lock-case, and his patent is for that only, and it cannot be construed to cover anything else. *Chicago & N. W. R. Co. v. Sayles*, 97 U. S. 554 [24: 1058]. The defendants do not use his lock-case, but use an extended bottom plate like his lock-case. It has been argued ingeniously and with plausibility that the same thing is used under a merely different name; but this argument is not in reality well founded. The patent was for a lock-case not only in name but in substance. The defendants do not use this lock-case. They evade the patent not by a mere colorable, but by a substantial, evasion."

As the patentee, after the rejection of his application, inserted in his specification a statement that his invention related to a new construction of lock-case, whereby it was made "to dispense with an extended bottom plate," he cannot now contend that his specification and claims are to be interpreted so as to cover a construction which has an extended bottom plate. By his patent, as issued, he dispenses with the extended bottom plate, and confines his claim to a lock-case with sides notched near its ends to receive and hold the handle-rings—an arrangement not found in the defendants' structure. In that, the lock and the handle fastenings are combined with the extended bottom plate, as in the Simon patent of May 2, 1876. The lock-case of the defendants does not have notches in its sides, but the notches are in the sides of an extended, struck-up bottom plate, such extended bottom plate being expressly excluded from the construction by the specification of the plaintiff's patent.

This court has often held that when a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it. *Leggett v. Avery*, 101 U. S. 256 [25: 865]; *Good-year Dental Vulcanite Co. v. Davis*, 102 U. S. 222, 228 [26: 149, 151]; *Fay v. Cordesman*, 109 U. S. 408 [27: 979]; *Mahn v. Harwood*, 112 U. S. 354, 359 [28: 665, 667]; *Union Met. Cartridge Co. v. U. S. Cartridge Co.* 112 U. S. 624, 644 [28: 828, 834]; *Sargent v. Hall Safe & Lock Co.* 114 U. S. 63 [29: 67]; *Shepard v. Carrigan*, 116 U. S. 598, 597 [29: 723, 724]; *White v. Dunbar*, 119 U. S. 47 [30: 303]; *Sutter v. Robinson*, 119 U. S. 530 [30: 492]; *Bragg v. Fitch*, 121 U. S. 478 [30: 1008]; *Snow v. Lake Shore & M. S. R. Co.* 121 U. S. 617 [30: 1004]; *Crawford v. Heysinger*, 123 U. S. 589, 606, 607 [31: 269, 274].

It is contended by the defendants that, in view of the prior state of the art, the patent is invalid. We do not consider it necessary to examine that question, because, for the reasons before assigned, we are of opinion that the decree must be affirmed; and as, in each of the other three cases, there is a stipulation that the

suit may be argued here, on appeal, on the record in the Peddie suit, and abide the result of that suit, and as the decree in each of those other three cases was a decree dismissing the bill with costs, *each of such decrees is affirmed.*

JAMES O. CLEVELAND ET AL., *Plffs.*
in Err.,

CHARLES S. SMITH ET AL., *Survivors of*
THEMSELVES AND GEO. C. RICHARDSON.

(See S. C. as *Cleveland v. Richardson*, Reporter's ed.
818-838.)

Fraudulent misrepresentations, what are—duty to disclose facts—ignorance of fact, effect of omission to disclose financial ability, on compromise—voluntary payment—coercion or duress, what is.

1. A party can commit a legal fraud, in a business transaction with another, only by fraudulent misrepresentations of fact, or by such conduct or artifice, for a fraudulent purpose, as will mislead the other party, or throw him off his guard, and cause him to omit inquiry or examination which he would otherwise make.
2. Where there is no such relation of trust or confidence between the parties as imposes upon one an obligation to give full information to the other, the latter cannot proceed blindly, omitting all inquiry and examination, and then complain that the other did not volunteer to give the information he had.
3. Ignorance of a fact extrinsic and not essential to a contract, but which, if known, might have influenced the action of a party to the contract, is

NOTE.—*Fraud—suppression veri—duty to disclose.*
Silence is by no means necessarily equivalent to direct affirmation; for in very many cases no duty of disclosure exists. Ordinarily, indeed, it is only where, from what has passed in the transaction or from some relationship between the parties, disclosure becomes a duty, that silence is a fraud. *People's Bank's Appeal*, 98 Pa. 107.

Fraud may consist in silence as well as in actual, outspoken misrepresentation; but a vendor is not obliged at law or in equity, no matter what the rule of morality may be, to disclose latent defects in the subject matter of the sale; nor is the purchaser bound to inform the seller of advantages known only to himself. *Laidlaw v. Organ*, 15 U. S. 2 Wheat. 178 (4: 214); *Kintzing v. McElrath*, 5 Pa. 467; *Hanson v. Edgerly*, 20 N. H. 348; *Smith v. Countryman*, 30 N. Y. 655; *Fisher v. Budlong*, 10 R. I. 525; *Hadley v. Clinton County Importing Co.* 18 Ohio St. 502; *Williams v. Spurr*, 24 Mich. 335; *Law v. Grant*, 37 Wis. 548; *Mitchell v. McDougall*, 62 Ill. 498; *Frenzel v. Miller*, 37 Ind. 1. But see *Cedil v. Spurger*, 32 Mo. 462; *McAdams v. Cates*, 24 Mo. 223; *Barron v. Alexander*, 27 Mo. 530; *Patterson v. Kirkland*, 34 Miss. 423, 431.

Lord Thurlow, as an illustration of this doctrine, put the case of a man buying land under which there was a mine, known only to the purchaser, and said that the latter was not bound to disclose his knowledge. *Turner v. Harvey*, Jac. 169, 178.

Such cases have arisen in this country, and the dictum of *Lord Thurlow* has been followed. *Harris v. Tyson*, 24 Pa. 847; *Williams v. Spurr*, 24 Mich. 335. But see *Williams v. Beasley*, 8 J. J. Marsh. 578; *Law v. Grant*, 37 Wis. 548; *Elgelow on Fraud*, 33.

If, however, a man professes to describe the article which he is selling, he must describe everything that is material. If he undertakes to tell the truth,

not such a mistake as will authorize equitable relief.

4. A compromise made by a debtor with a firm, his creditor, cannot be assailed on the ground that the agent of the firm in the compromise omitted to disclose the financial ability of a partner of the firm to pay the debts of the firm.
5. Where an insolvent firm, in consideration of a compromise with some of their creditors at sixty cents on a dollar, executed to them an agreement not to pay voluntarily to any creditor to exceed sixty cents on a dollar in settlement, a payment of more than sixty per cent, to wit, eighty per cent, to a creditor to settle a suit brought by him on a debt against the firm in which there was no defense, which was about to be tried, and in which a judgment for the full amount would be recovered, and where the debt was secured by attachment, was not a voluntary payment.
6. Where there is actual or threatened exercise of power possessed over the property of another by the party exacting or receiving payment, there is coercion or duress which will render a payment involuntary.

[No. 125.]

Argued Nov. 21, 1889. Decided Dec. 9, 1889.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment for the plaintiffs in an action to recover for breach of an agreement made upon a compromise of debts not to pay voluntarily to any creditor more than sixty per cent on the dollar in settlement. *Reversed.*

The facts are stated in the opinion.

Mr. Jas. S. Harlan, for plaintiffs in error:
The acceptance of a smaller sum in payment of a larger, when evidenced by an instrument

it will not do for him to tell only part of the truth. *Kerr on Fr. and Mis.* 61, 62.

Nor can a man remain silent if it is his duty to speak. Suppression of the truth in such a case is a fraud. *Young v. Bumpass*, 1 Freem. Ch. (Mis.) 241; *Paddock v. Strobbridge*, 20 Vt. 470, 477; *Kerr on Fr. and Mis.* 95; *Leake on Contracts*, 134.

As in contracts of insurance and suretyship, where from the situation of the parties the duty of disclosure is greater than in ordinary cases. *Carter v. Boehm*, 3 Burr. 1006; 1 Smith, Lead. Cas. pt. 2 (7th Am. ed.) 834, notes; notes to *Locke v. North American Ins. Co.* 2 Am. Lead. Cas. 523, 13 Mass. 61; *Leake on Contracts*, 139; *Perry on Trusts*, § 179.

It is, in law, a willful falsehood for a man to assert of his own knowledge a matter of which he has no knowledge. *Hazard v. Irwin*, 18 Pick. 95; *Stone v. Denny*, 4 Met. 151; *Kerr on Fr. and Mis.* 54; *Jolliffe v. Baker*, L. R. 11 Q. B. Div. 271.

No man can be held responsible for a misrepresentation made through an honest mistake. No fraudulent intention can be imputed in such a case. *Fisher v. Mellen*, 103 Mass. 603; *Cabot v. Christie*, 42 Vt. 126; *Kerr on Fr. and Mis.* 57; *Leake on Contracts*, 137. See, however, *Bankhead v. Alloway*, 5 Coldw. 75.

If, however, he afterwards discovers the untruth, he must not allow the other party to act on the belief that no mistake has been made. To do so would be fraud. *Reynell v. Sprye*, 1 De Gex, M. & G. 660; *Kerr on Fr. and Mis.* 57.

But a party may be held responsible, even for an honest mistake, if the duty of knowing the truth is for any reason cast upon him. In such a case, mistake, ignorance or forgetfulness is no excuse. *Burrowes v. Lock*, 10 Ves. Jr. 470; *Babcock v. Case*, 61 Pa. 430; *Kerr on Fr. and Mis.* 60.

It is not every concealment, even of facts ma-

under seal, may always be pleaded in bar of a suit to recover the balance.

Kingsley v. Kingsley, 20 Ill. 205; Co. Litt. 212 b; *Potter v. Green*, 6 Allen, 442.

The payment of a lesssum and its acceptance in full discharge, when it is not yet due, is a good discharge of the whole.

2 Parsons on Contracts, 619; *Brooks v. White*, 2 Met. 288; *Goodnow v. Smith*, 18 Pick. 414; *Sibres v. Tripp*, 15 Mees. & W. 28.

If Libbey, by signing the paper, had expressly agreed that he would individually become liable for the debts of the old firm, such an agreement would not avail creditors. It could only be enforced by the old firm. As to creditors, it would be *res inter alios acta*.

Serviss v. McDonnell, 9 Cent. Rep. 841, 107 N. Y. 260.

A compromise made by a debtor may not be assailed on the ground that he failed to make disclosures as to his financial condition, when he is not questioned in regard thereto, and does nothing to mislead.

Graham v. Meyer, 99 N. Y. 611.

The ruling that any payment over sixty per cent to any creditor was voluntarily made unless the claim had gone to judgment was erroneous.

Carey v. Barrett, L. R. 4 C. P. Div. 379; *Chicago & A. R. Co. v. Chicago, V. & W. Coal Co.* 79 Ill. 121; *Radich v. Hutchins*, 95 U. S. 218 (24: 410).

A payment in excess made afterwards will not avoid the composition unless made in pursuance of a previous understanding.

Re Sturges, 8 Biss. 79.

When an instrument under seal is set up, the defendants in error cannot set up any excep-

tion to it by parol. The remedy, if any, can only be by suit upon the agreement.

Kingsley v. Kingsley, 20 Ill. 205.

Mr. James R. Doolittle, for defendants in error:

The assignment to Knickerbocker was not binding upon the defendants in error, because the plaintiffs in error did not disclose the financial standing of Libbey, and the express liability which he assumed in the agreement with Cleaveland, and that all the debts of the firm should be paid.

Nothing less than an act of God making it impossible would be a good defense to an action upon the agreement for its breach.

2 Parsons on Contracts, 6th ed. 671, 672.

In effecting a composition agreement the policy of the law demands the utmost good faith on the part of the debtor.

Hester v. Cahn, 78 Ill. 206; *Sewing v. Gale*, 28 Ind. 486; Bump on Composition, 23; *Elfelt v. Snow*, 2 Sawy. 94.

Dormant partners are liable when disclosed.

Hoare v. Dawes, 1 Doug. 371; *Robinson v. Wilkinson*, 3 Price, 583; Bump on Composition, 20.

Where parties reduce their agreement to writing they cannot be allowed to vary its terms by parol; but where it is evident that the agreement is not reduced to writing, but only a part of it, the whole agreement may be proven.

Greenleaf on Ev. 12th ed. 321, chap. 15, § 284 a; *Bradshaw v. Combs*, 102 Ill. 428; *Morgan v. Griffith*, L. R. 6 Exch. 70; *Lewis v. Seabury*, 74 N. Y. 409; *Chapin v. Dobson*, 78 N. Y. 74.

terial to the interest of a party, which will entitle him to the interposition of a court of equity. The case must amount to the suppression of facts which one party, under the circumstances, is bound in conscience and duty to disclose to the other party, and in respect to which he cannot innocently be silent. 1 Story, Eq. Jur. § 204.

It is essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but also that there should be some obligation on the party to make the discovery. Fox v. Mackreth, 2 Bro. Ch. 420; Turner v. Harvey, 1 Jac. Rep. 178; Pothier, De Vente, n. 234-242; Id. n. 295-299.

A fraud in the sense of a court of equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances, which one party is under some legal or equitable obligation to communicate to the other; and which the latter has a right, not merely *in foro conscientia*, but *juris et de jure*, to know. 1 Story, Eq. Jur. § 207; 2 Kent, Com. 490, 491; Parker v. Grant, 1 Johns. Ch. 630; Ellard v. Llandaff, 1 Ball & B. 260, 261; 1 Fonbl. Eq. Bk. 1 chap. 3, § 4, note n.

Many most material facts may be unknown to one party, and known to the other, and not equally accessible, or at the moment within the reach of both; and yet contracts, founded upon such ignorance on one side, and knowledge on the other, may be completely obligatory. Turner v. Harvey, Jac. 178; 1 Story, Eq. Jur. § 207.

If a vendor should sell an estate, knowing that he had no title to it, or knowing that there were incumbrances on it, of which the vendee was ignorant, the suppression of such a material fact, in respect to which the vendor must know that the very

purchase implied a trust and confidence on the part of the vendee that no such defect existed, would clearly avoid the sale on the ground of fraud. Arnot v. Biscoe, 1 Ves. Sr. 95, 96; Pothier, De Vente, n. 240; Pilling v. Armitage, 12 Ves. Jr. 78; Story, Eq. Jur. §§ 142, 143.

There is often a material distinction between circumstances which are intrinsic, and form the very ingredients of the contract, and circumstances, which are extrinsic, and form no part of it, although they may create inducements to enter into it, or affect the value or price of the thing sold. 2 Kent, Com. 482 (4th ed.); Pothier de Vente, n. 236, n. 242, 243; Id. n. 208-210; 1 Domat, Bk. 1, tit. 2, § 3, art. 11; Id. § 11, arts. 2, 3, 5, 15.

The case of Martin v. Morgan, 1 Brod. & Bing. 289, is a strong application of the doctrine of concealment avoiding a payment. In that case there was no special confidence between the parties; but a post-dated check being paid to the holder by a banker, at a time when the latter had no funds of the drawer, and the holder knew that the drawer had become insolvent, of which the banker was ignorant, the amount was allowed to be recovered back on account of the concealment. But there are cases of intrinsic circumstances in which courts of law and equity treat the concealment of them as a breach of trust and confidence justly reposed. In cases of this sort, silence of the party must import as much as a direct affirmation, and be deemed equivalent to it. Martin v. Morgan, 1 Brod. & Bing. 289; Piddock v. Bishop, 3 Barn. & C. 805; 2 Kent, Com. 488, 489, note (4th ed.); Smith v. Bank of Scotland, 1 Dow, Parl. Cas. 292, 294; Etting v. Bank of U. S. 24 U. S. 11 Wheat. 59, 68 (6: 419); Fishmongers Co. v. Maltby, cited in 1 Dow, Parl. Cas. 294.

Mr. Justice Blatchford delivered the opinion of the court:

This is an action of assumpsit, brought in the Circuit Court of the United States for the Northern District of Illinois, in September, 1884, by George C. Richardson, Charles S. Smith, George K. Guild, Ralph L. Cutter and Harrison Gardner, partners composing the firm of George C. Richardson & Co., against James O. Cleaveland, Cornelius B. Cummings, Charles W. Woodruff and Washington Libbey, partners composing the firm of Cleaveland, Cummings & Woodruff.

The declaration contains the money counts, and annexed to it is a copy of an account showing various items of merchandise sold by the plaintiffs to the defendants, in August, September and October, 1883, amounting in debit items to \$12,125.25, with a credit item of cash, December 31, 1883, amounting to \$7,275.15, leaving a balance due to the plaintiffs, on the last-named day, of \$4,850.10.

The defendants were served with process and put in various pleas, and there were replications and rejoinders, raising issues covered by the findings of the court on the trial. The defendant Woodruff having died, it was ordered that the suit proceed against the surviving defendants. A trial before a jury was commenced, but a juror was withdrawn, and the parties duly waived a trial by jury and consented that the case be tried by the court.

The court filed special findings, as follows:

"1. James O. Cleaveland, Cornelius B. Cummings and Washington Libbey, three of the defendants, with one William F. Shelley, on the 31st of December, 1881, formed a limited co-partnership under the Statute of the State of Illinois in that behalf, under the name of 'Cleaveland, Cummings & Shelley,' to do a wholesale business in merchandise in Chicago, in which the said Washington Libbey was a limited partner, having put in \$50,000 of capital.

"2. About the 1st of May, 1883, the said Shelley went out of the firm, and Charles W. Woodruff, the other defendant in this cause, came into the firm, which assumed the name of 'Cleaveland, Cummings & Woodruff,' and continued to do business until as hereinafter stated.

"3. Said firm of 'Cleaveland, Cummings & Woodruff' intended, as between themselves, to do business as a limited partnership, but they did not take the steps required by law to make said firm a limited partnership under the Statute of Illinois in that behalf.

"4. The plaintiffs sold to the firm of Cleaveland, Cummings & Woodruff, upon the 28th, 29th and 30th of August, 1883, and upon the 14th and 15th of September, 1883, merchandise to the amount of \$8,064.08, payable by the said firm in sixty days from Sept. 15th; and on the 24th of October sold to Cleaveland, Cummings & Woodruff merchandise to the amount of \$1,291.83, payable in sixty days from November 1st; and the plaintiffs were also the holders of two notes of said Cleaveland, Cummings & Woodruff, dated Chicago, September 15, 1883, due in four months from the date thereof, payable to the order of the defendants and indorsed by them, one for \$1,847.99 and one for

\$1,421.40, which two notes matured January 18, 1884; said several amounts aggregating \$12,125.25.

"5. On the 30th of October, 1883, Washington Libbey paid to James O. Cleaveland \$1,000 for his interest in the firm of Cleaveland, Cummings & Woodruff, and said James O. Cleaveland, Cornelius B. Cummings, Charles W. Woodruff and Washington Libbey signed and delivered to James O. Cleaveland an instrument in writing as follows, viz:

" 'The co-partnership heretofore existing between James O. Cleaveland, Cornelius B. Cummings, Charles W. Woodruff and Washington Libbey, under the firm name of Cleaveland, Cummings & Woodruff, has this day been dissolved by mutual consent, and such dissolution to take effect Nov. 1, 1883. All accounts and indebtedness due the late firm of Cleaveland, Cummings & Woodruff must be paid to Cummings, Woodruff & Brown, successors to Cleaveland, Cummings & Woodruff, by whom all liabilities of the late firm must be paid and said Cleaveland held harmless therefrom.

" 'Dated Chicago, Illinois, Oct. 30, A. D. 1883.

" 'James O. Cleaveland,
" 'C. B. Cummings,
" 'Charles W. Woodruff,
" 'Washington Libbey.'

"6. It was contemplated, October 30, 1883, that a new firm would be formed, composed of Cornelius B. Cummings, Charles W. Woodruff and Swan Brown, as general partners, and Washington Libbey, as special partner, but said firm was never formed, but the said Cleaveland supposed it was so formed when he sold out his interest to the said Libbey.

"7. The firm of Cleaveland, Cummings & Woodruff stopped business on or before November 14, 1883. Said firm owed for borrowed money about \$179,000, which was unsecured, and for merchandise about \$461,000; and the assets of said firm were sufficient to pay the borrowed money in full and not quite sixty per cent on the dollar upon the mercantile debts. The said Washington Libbey was reputed to be a man of large wealth.

"8. On the 14th of November, 1883, all the bills receivable, notes and accounts of Cleaveland, Cummings & Woodruff were sold to Columbus R. Cummings for his two notes for \$201,110.43; one for \$110,000, which was delivered to the Union National Bank in full payment of borrowed money due by said firm to said bank. The other, for \$91,110.43, was delivered to a member of said firm of Cleaveland, Cummings & Woodruff. Columbus R. Cummings was a brother of Cornelius B. Cummings, and a director in the Union National Bank, to which he had introduced said firm, and felt in honor bound to see that the bank suffered no loss.

"9. Immediately thereafter, Cleaveland, Cummings & Woodruff sent J. J. Knickerbocker, as their attorney, to New York, and proposed to the mercantile creditors of that firm to pay them sixty cents on the dollar of their respective claims. When application to the plaintiffs was made to accept sixty cents on the dollar of their claims, some had settled at that rate and some had not. The attorney of Cleaveland,

Cummings & Woodruff explained the situation of the assets of Cleaveland, Cummings & Woodruff, saying that the borrowed money was to be paid in full, which would not leave enough to pay quite sixty per cent of the remaining indebtedness. Libbey's liability as a member of the firm was spoken of, when said attorney stated to the plaintiffs that he had not had opportunity to examine into the question and was not in possession of information to know whether Libbey could make a successful defense or not, but that it was a question they could investigate for themselves. One of said plaintiffs said to said attorney they had sold no goods to the defendants on the strength that Libbey was more than a special partner; that no credit had been given to the firm on the faith that Libbey sustained any other relation to it; that Libbey had lost his special capital; and that they had no desire to make him pay more. It does not appear, however, from the evidence, that the defendants, or their attorney, communicated to the plaintiffs the fact that Libbey had signed the instrument in writing referred to in the fifth finding, or that he made any statement as to Libbey's financial ability to pay the debts of said firm. The plaintiffs at first refused, but about the 29th of December, 1888, upon the receipt of the sum of \$7,275.15, which was sixty per cent of their entire claim, they, by their agent, Walter M. Smith, executed and delivered to the said John J. Knickerbocker, the attorney for the defendants, at Chicago, an instrument in writing, as follows:

"For and in consideration of the sum of seven thousand two hundred and seventy-five and $\frac{15}{100}$ (\$7,275.15) dollars, to us in hand paid by John J. Knickerbocker, of Chicago, Ill., the receipt whereof is hereby acknowledged and confessed, we have sold, assigned, transferred and delivered, and do hereby sell, assign, transfer, set over and deliver, to said Knickerbocker, his heirs, executors, administrators and assigns, the above and foregoing claim in our favor and against the late firm of Cleaveland, Cummings & Woodruff, and all other claims and demands which we now have or might or could have against the said Cleaveland, Cummings & Woodruff, by reason of the happening of any matter or thing from the beginning of the world to the day of the date hereof, without recourse to us, and authorize and empower said Knickerbocker to sue for, collect, settle, compound and give acquittance therefor as fully as we could do in person.

"In witness whereof we have hereunto set our hand and seal this 29th day of December, 1888.

"George C. Richardson & Co., [Seal.]

"Per Walter M. Smith. [Seal.]

"Attached to said instrument are the following:

"Chicago, Sept. 15, 1888.

"Four months after date we promise to pay to the order of ourselves one thousand three hundred and forty-seven $\frac{15}{100}$ dollars at the Mechanics' National Bank, N. Y., value received.

"Due Jan'y 18, 1884.

"\$1,347.99.

"Cleaveland, Cummings & Woodruff."

"(Indorsed:)

"Cleaveland, Cummings & Woodruff."

182 U. S.

"Chicago, Sept. 15, 1888.

"Four months after date we promise to pay to the order of ourselves one thousand four hundred and twenty-one dollars and $\frac{15}{100}$ at the Mechanics' National Bank, N. Y., value received.

"Due Jan'y 18, 1884.

"\$1,421.41.

"Cleaveland, Cummings & Woodruff."

"(Indorsed:)

"Cleaveland, Cummings & Woodruff."

"Messrs. Cleaveland, Cummings and Woodruff to George C. Richardson & Co., debtors:

"1888.

	To mdse., 60 days, Sept. 15....	
"Aug. 28.	8338 94	
" 29.	863 79	
" 30.	156 06	
" 31.	859 35	
" Sept. 1.	4,733 66	
" 2.	1824 74	
" 3.	237 17	
" 4.	525 33	
" Oct. 24.	Nov. 1....	1,291 83

\$9,355 86"

"And Charles W. Woodruff, one of the said defendants, at the same time, and as part of the same arrangement, delivered to the said agent of the plaintiffs an instrument in writing as follows, viz:

"John J. Knickerbocker. Jesse Holdom.

"Knickerbocker & Holdom,

"Attorneys at Law,

"164 La Salle St.

"Chicago. — —, 188—.

"In consideration of a compromise this day made by Messrs. Geo. O. Richardson & Co. and Messrs. Jay, Langdon & Co., of New York City, of their respective claims against the late firm of Cleaveland, Cummings & Woodruff, of Chicago, Ill., the said Cleaveland, Cummings & Woodruff stipulate and agree not to pay voluntarily to any of their creditors holding claims in excess of one thousand dollars, to exceed sixty per cent on the dollar in settlement: Providing, however, that the payment of attorneys' fees and court costs in all cases where suits have been heretofore or may hereafter be commenced shall not be considered as an evasion or violation of this agreement.

"Cleaveland, Cummings & Woodruff.

"Dec. 29th, 1888."

"10. In April, 1884, all the mercantile debts of Cleaveland, Cummings & Woodruff had been settled at sixty cents and released except about \$88,000. The firm of Vitor & Achelis had not released their claim, but had brought a suit by attachment thereon against James O. Cleaveland, Cornelius B. Cummings, Charles W. Woodruff and Washington Libbey, which was about to be tried. The attorney of Cleaveland, Cummings & Woodruff paid to Vitor & Achelis sixty cents on the dollar of their claim, who thereupon released their said claim; but at the same time said attorney of Cleaveland, Cummings & Woodruff gave his check (which was afterwards paid) to the attorneys of Vitor & Achelis, for twenty-five per cent on the dollar of said claim, and said attorneys remitted twenty of said twenty-five per cent to Vitor & Achelis. This payment to the attorneys of Vitor & Achelis was a cover under which Vitor & Achelis were to and did receive on their claim more than sixty per cent, and such

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payment was made, after Viotor & Achelis had refused to take sixty per cent, by agreement between the attorneys of Cleaveland, Cummings & Woodruff and Viotor & Achelis that Viotor & Achelis should receive eighty per cent.

"11. The amount due on the original claim is \$4,850.10, and the interest thereon from December 29th, 1883, to April 14th, 1886, is \$679.85, making \$5,529.45 in all."

Thereupon a judgment was entered, which states that the court finds the issues for the plaintiffs, and assesses their damages at \$5,529.45, and overrules a motion by the defendants for a new trial, and orders that the plaintiffs recover from the defendants Cleaveland, Cummings and Libbey, survivors of Woodruff, \$5,529.45 damages and \$147.80 costs. To review this judgment the defendants have brought a writ of error.

There is a bill of exceptions, which states that both parties adduced evidence tending to prove the issues on their respective sides; that, when the written paper dated October 30, 1883, set forth in the fifth special finding, was offered in evidence, the defendants objected to its introduction, on the ground that it was incompetent and irrelevant, but the court overruled the objection and admitted the paper in evidence, and the defendants excepted; that the plaintiffs also offered in evidence the paper dated December 29, 1883, signed "Cleaveland, Cummings & Woodruff," set forth at the close of the ninth special finding; that the defendants objected to its introduction, on the grounds of variance and incompetency, but the court overruled the objection and admitted the paper in evidence, and the defendants excepted; that evidence was introduced touching the matters named in the tenth special finding, and the defendants adduced evidence tending to show that no payment was made to either of the mercantile creditors by preference, or with a view to discriminate between one of the said creditors and another; that the defendants objected to the evidence tending to show that Viotor & Achelis were paid more than 60 per cent on the ground that such payment, if made as claimed by the plaintiffs, was not made voluntarily; that the court overruled the objection, and held that, under the contract of December 29, 1883, signed "Cleaveland, Cummings & Woodruff," any payment over 60 per cent was made voluntarily, unless such claim had gone to judgment; that the defendants excepted to such ruling; and that it appeared from the evidence that the borrowed money was paid in full during November, 1883, and each of the mercantile creditors received 60 per cent on their claims from Cleaveland, Cummings & Woodruff.

It is contended for the plaintiffs that their assignment to Knickerbocker was not binding upon them, because the defendants did not disclose to them the financial standing of Libbey, nor the fact of his liability as a general partner in the firm of Cleaveland, Cummings & Woodruff, nor the liability in regard to the debts of that firm assumed by him by the paper set forth in the fifth finding.

But the ninth finding sets forth fully what took place between Knickerbocker and the plaintiffs, on the visit of the former to the latter, at New York, to propose to them to accept

from the defendants sixty cents on the dollar. That finding states that Knickerbocker explained the situation of the assets of Cleaveland, Cummings & Woodruff, saying that the borrowed money was to be paid in full, which would not leave enough to pay quite 60 per cent of the remaining indebtedness (a fact which was true, according to the seventh finding); that Libbey's liability as a member of the firm was spoken of, when Knickerbocker stated to the plaintiffs that he had not had opportunity to examine into the question and was not in possession of information to know whether Libbey could make a successful defense or not, but that it was a question they could investigate for themselves; and that one of the plaintiffs said to Knickerbocker that they had sold no goods to the defendants "on the strength that Libbey was more than a special partner;" that no credit had been given to the firm on the faith that Libbey sustained any other relation to it; that Libbey had lost his special capital, and that they had no desire to make him pay more. The ninth finding does not state that Knickerbocker was in possession of any information such as that which he stated to the plaintiffs he was not in possession of.

The ninth finding further says that it does not appear from the evidence that the defendants or Knickerbocker communicated to the plaintiffs the fact that Libbey had signed the paper set forth in the fifth finding, or that Knickerbocker made any statement as to Libbey's financial ability to pay the debts of the defendants' firm. It is not shown that Knickerbocker made a false answer to any inquiry put to him by the plaintiffs.

It thus appears that Libbey's liability as a member of the defendants' firm was spoken of between Knickerbocker and the plaintiffs; that Knickerbocker made to them no representation that Libbey was not liable, but substantially stated to them that the question of Libbey's liability was a matter to be examined into, and one which they could investigate for themselves; that the plaintiffs communicated to Knickerbocker at the time the idea that, in their dealings with the defendants, they had always acted on the view that Libbey was only a special partner; and that Knickerbocker did not state to the plaintiffs that Libbey was not financially able to pay the debts of the defendants' firm.

The exact date of this interview in New York, between Knickerbocker and the plaintiffs, does not appear, but it would seem, from the eighth and ninth findings, that an interval of between five and six weeks must have elapsed between the time of that interview and the 29th of December, 1883, when the assignment to Knickerbocker was executed.

It is not found by the court that it was known to the defendants' firm or to Libbey that the latter was not merely a special partner; nor is it found that the defendants were guilty of any fraudulent concealment. The suggestion by Knickerbocker to the plaintiffs, that there was a question as to the liability of Libbey as a general partner, was full enough to put them on inquiry, and to call upon them to investigate the question for themselves, during the five or six weeks that elapsed before they made the assignment to Knickerbocker.

As to the statement in the ninth finding, that it does not appear that the defendants or Knickerbocker communicated to the plaintiffs the fact that Libbey had signed the paper set forth in the fifth finding, it is to be remarked that that paper sets forth that the liabilities of the defendants' firm were to be paid by the proposed new firm of Cummings, Woodruff & Brown; and that the sixth finding states that it was contemplated, on the day that paper bears date, that a new firm would be formed, composed of Cornelius B. Cummings, Charles W. Woodruff and Swan Brown, as general partners, and Washington Libbey as special partner, but that such new firm was never formed, although Cleaveland supposed it was so formed when he sold out to Libbey his interest in the firm of Cleaveland, Cummings & Woodruff, on the day that paper was signed. As the new firm was never formed, that paper had no effective force at the time of the interview between Knickerbocker and the plaintiffs, or at the time the assignment to Knickerbocker was made. Besides, Libbey was to be only a special partner in the new firm.

We are unable to see, in this case, any breach of good faith on the part of the defendants, or any misrepresentation as to the assets of their firm, or any false answer by Knickerbocker to any question put to him by the plaintiffs.

It is found as a fact, by the court below, that Cleaveland, Cummings and Libbey, with one Shelley, in December, 1881, formed a limited co-partnership under the Statute of Illinois, under the name of "Cleaveland, Cummings & Shelley," in which Libbey was a limited partner, having put in \$50,000 of capital; that, about the 1st of May, 1883, Shelley went out of the firm, and Woodruff came into it, the firm being then called "Cleaveland, Cummings & Woodruff;" and that that firm intended, as between its members, to do business as a limited partnership, but did not take the steps required by law to make itself a limited partnership under the Statute of Illinois. It is not found that either Cleaveland, or Cummings, or Woodruff, or Libbey, supposed at any time that the co-partnership was other than a limited one; and it distinctly appears, by the ninth finding, that the plaintiffs, in selling their goods to the defendants, all the time regarded Libbey as only a special partner.

In a case very like the one before us, *Dambmann v. Schulting*, 75 N. Y. 55, it was held that a party can commit a legal fraud, in a business transaction with another, only by fraudulent misrepresentations of fact, or by such conduct or artifice, for a fraudulent purpose, as will mislead the other party, or throw him off his guard, and cause him to omit inquiry or examination which he would otherwise make; that where there is no such relation of trust or confidence between the parties as imposes upon one an obligation to give full information to the other, the latter cannot proceed blindly, omitting all inquiry and examination, and then complain that the other did not volunteer to give the information he had; that ignorance of a fact extrinsic and not essential to a contract, but which, if known, might have influenced the action of a party to the contract, is not such a mistake as will authorize equitable relief; and that, as to such facts, the party

must rely upon his own vigilance, and, if not imposed upon or defrauded, will be held to his contract. That was an action brought to set aside a release under seal, on the ground that it was inoperative because obtained by misrepresentation and a concealment of material facts. It was not found that there was any fraudulent misrepresentation, and there was none in fact, and there was no misrepresentation of any kind, nor was there any fraudulent concealment of any facts; nor was any statement or artifice used to throw off from his guard or to entrap or mislead the party executing the release. The court says in its opinion: "A party buying or selling property, or executing instruments, must, by inquiry or examination, gain all the knowledge he desires. He cannot proceed blindly, omitting all inquiry and examination, and then complain that the other party did not volunteer all the information he had." These views were reaffirmed when the case was again before the court, in 85 N. Y. 622.

In *Graham v. Meyer*, 99 N. Y. 611, it was held that a compromise made by a debtor with his creditor cannot be assailed on the ground that the debtor omitted to disclose his financial condition; and that where he is not questioned in regard thereto, and does nothing to mislead, he is not bound to make any such disclosure. It was claimed in that case that, although there was a failure to show that any fraudulent representations were made on the part of the debtor to induce the compromise, yet it ought to be set aside on the ground of the undue concealment by the debtor and his attorney of the true condition of the estate of the debtor, which he had assigned under a general assignment for the benefit of his creditors. The court said: "But the defendant was not bound to make any disclosure of his financial condition. He was not asked to make any. He made no misrepresentations, and did nothing to mislead Graham, or prevent him from inquiring, or to throw him off from his guard. They negotiated at arms' length. The defendant was in no trust or confidential relation with him. It is true that he had made an assignment, and had thereby created a trust for Graham's benefit. But he was not the trustee. He bore the simple relation to him of debtor, and he had the right to make the best compromise with him he could, using no fraud or culpable artifice to accomplish the result. Each party to such a compromise has the right to the advantage which his superior skill, foresight and knowledge may give him. The business of the world can be conducted upon no other basis. If either party desires information from the other, he must ask for it; and then he must not be misled or deceived by answers given. These views are fully sustained by the case of *Dambmann v. Schulting*, 75 N. Y. 62, and the court below was not mistaken in holding that that case was a controlling authority for the decision it made. The principles of law laid down in that case were in no way impugned or questioned when the case again came before this court, in 85 N. Y. 622, but they were reaffirmed."

As to Libbey's financial ability, the seventh finding states that he "was reputed to be a man of large wealth," not that he was a man of large wealth. The failure of Knickerbocker to make any statement as to Libbey's financial

ability to pay the debts of the defendants' firm cannot give rise to any inference of concealment or fraud, because the importance of Libbey's financial ability depended entirely upon whether he was a special or a general partner; and the statement made by one of the plaintiffs to Knickerbocker, that they had acted, in their dealings with the defendants' firm, on the view that Libbey was only a special partner, joined with the fact that Knickerbocker distinctly suggested to them an investigation of the question as to the character of Libbey's liability as a member of the firm, shows that there was no duty on the part of Knickerbocker, as representing the defendants, to make any statement as to Libbey's actual or reputed financial ability.

The only remaining question is as to whether the defendants violated the agreement made by them in the paper signed in their firm name, dated December 29, 1883, set forth in the ninth finding, "not to pay voluntarily, to any of their creditors holding claims in excess of one thousand dollars, to exceed sixty per cent on the dollar in settlement."

It appears by the tenth finding that, in April, 1884, all the mercantile debts of the defendants' firm had been settled at 60 cents and released, except about \$88,000; that the firm of Viotor & Achelis had not released their claim, but had brought a suit by attachment thereon, against Cleaveland, Cummings, Woodruff and Libbey, which was about to be tried; that the attorney of the defendants' firm paid to Viotor & Achelis 60 cents on the dollar of their claim, which they thereupon released, and that at the same time said attorney gave his check, which was afterwards paid, to the attorneys of Viotor & Achelis, for 25 per cent on the dollar of said claim, and the latter attorneys remitted 20 of said 25 per cent to Viotor & Achelis; that this payment was a cover under which Viotor & Achelis were to and did receive on their claim more than 60 per cent, and such payment was made, after Viotor & Achelis had refused to take 60 per cent, by agreement between the attorneys of Cleaveland, Cummings & Woodruff, and of Viotor & Achelis, that the latter should receive 80 per cent.

We are of opinion that the facts set forth in the tenth finding fail to show that the payment of the 20 per cent to Viotor & Achelis was a voluntary payment. They had brought a suit by attachment on their claim, against their debtors, and the suit was about to be tried. There was evidently no defense to it, and a judgment for the full amount of it would be recovered, and it was secured by attachment. A settlement of the entire claim for 80 per cent would be a saving of 20 per cent and would, to that extent, increase the assets of the firm, which were not quite sufficient to pay the 60 cents on the dollar which the firm proposed to pay on the mercantile debts, and which they had paid, by April, 1884, and prior to the transaction with Viotor & Achelis, on debts amounting to \$378,000. Under these circumstances, the payment of the 20 per cent to Viotor & Achelis was not voluntary.

It appears by the bill of exceptions that the defendants objected to the evidence tending to show that Viotor & Achelis were paid more than 60 per cent on the ground that such payment was not made voluntarily, but that the

court held that, under the paper of December 29, 1883, signed by Cleaveland, Cummings & Woodruff, any payment over 60 per cent was made voluntarily, unless the claim had gone to judgment. If the claim had gone to judgment, the payment over 60 per cent would have been 40 per cent; and we do not see that the payment of the 20 per cent, at the time it was made, was any the less involuntary than would have been the payment of the 40 per cent after judgment had been obtained.

In *Carey v. Barrett*, L.R. 4 C. P. Div. 379, certain creditors of the defendant signed an agreement, to which the plaintiff assented, setting forth that they, in consideration of ten shillings in the pound on their respective debts, agreed to accept the same in discharge of those debts, "the whole of the creditors receiving not exceeding a like sum in discharge of their debts." At the time the agreement was entered into, it was known that the debtor was being sued by a creditor for a sum of money which was afterwards paid in full the day before the cause was ripe for trial. In consequence of this, the plaintiff sued the defendant to recover a part of his unpaid debt. The court (*Lord Coleridge, Ch. J., and Lindley, J.*) held that the agreement of compromise was limited to the creditors who signed it, and that, even if that were not so, the payment to the creditor who was paid in full, being made under pressure, and not in pursuance of a prior arrangement to give him a preference, did not render the transaction void. *Lord Coleridge* said that the payment in full "was not the less a payment under process of law because the debtor did not wait to incur the expense of a judgment and execution."

In *Radich v. Hutchins*, 95 U. S. 210, 218 [24: 409, 410], it is laid down that where there is an actual or threatened exercise of power possessed over the property of another by the party exacting or receiving a payment, there is coercion or duress which will render a payment involuntary; and the case of *Baltimore v. Lefferman*, 4 Gill, 425, is cited, which holds, that when a payment is made to emancipate property from an actual and existing duress imposed upon it by the party to whom the money is paid, the payment is to be regarded as compulsory.

The judgment is reversed, and the case is remanded to the Circuit Court, with a direction to enter judgment for the defendants on the findings of fact.

Mr. Justice Miller dissents.

Mr. Chief Justice Fuller, having been of counsel in this case, did not sit in it or take any part in its decision.

UNITED STATES, *Appt.*,

v.

TYLER DAVIS.

(See S. C. Reporter's ed. 334-337.)

Fees of deputy marshal—regulations by the President.

1. Although the President has authority to regulate the length of service and compensation of a special deputy marshal or a supervisor of elec-

tion, yet, where the services for which compensation is demanded were performed before the President made such regulations and were performed in pursuance of the Statute, compensation must be made therefor accordingly.

2. The regulations cannot have a retroactive effect so as to invalidate a claim for services performed before they were in existence.

[No. 1033.]

Submitted Nov. 4, 1889. Decided Dec. 9, 1889.

APPPEAL from a judgment of the District Court of the United States for the District of Maryland in favor of plaintiff for a balance due him for services as a special deputy marshal at the congressional election of 1886 in the City of Baltimore. *Affirmed.*

The facts are stated in the opinion.

Mr. John B. Cotton, Assistant Attorney-General, for appellant.

Mr. Charles C. Lancaster, for appellee:

This same question was fully reviewed by Judge Hughes of the United States District Court for the Eastern District of Virginia, and decided in favor of the claimant.

Berry v. U. S. 35 Fed. Rep. 269; *Stocksdale v. U. S.* 39 Fed. Rep. 62.

Mr. Justice Lamar delivered the opinion of the court:

On the 2d day of December, 1887, the appellee, Tyler Davis, brought suit against the United States in the District Court of the United States for the District of Maryland, under the Act of March 3, 1887, giving to the District Courts of the United States concurrent jurisdiction with the Court of Claims in suits against the United States where the amount in dispute does not exceed \$1,000, with a few exceptions not necessary to be considered in this case (24 Stat. 505), to recover the sum of \$25, alleged to be a balance due him for services performed as a special deputy marshal at the congressional election of 1886, in the City of Baltimore, in that State.

Issue having been joined upon a demurrer filed by the plaintiff to the answer of the United States, the court found the facts and the law in favor of the plaintiff, and rendered judgment in his favor for the amount demanded. The United States appealed.

At the last term of this court the case was before us on a motion to dismiss the appeal upon the ground that the United States were not entitled to appeal from a judgment of the district court against them where the amount in dispute was less than \$5,000. The motion was denied, the court holding that, under the Act of March 3, 1887, *supra*, appeals from the district court were governed by the same law as applied in the case of appeals from the Court of Claims in like cases. 181 U. S. 87 [83: 98]. The case is now here on its merits.

There is no dispute as to the facts. As found by the court below they are as follows:

"(1.) The plaintiff was duly appointed and commissioned special deputy marshal of election for the Eighteenth Ward of Baltimore City, in the State of Maryland, by George H. Cairnes, Esq., United States marshal for the District of Maryland, on the 8d day of September, A. D. 1886, in pursuance of section 2021 of the United States Revised Statutes, and the 132 U. S.

supplements and amendments thereto, and he duly qualified and entered upon his duties.

"(2.) The laws of Maryland governing registration for congressional and other elections in the City of Baltimore require that the officers of registration, for the purpose of correcting the lists of qualified voters, shall sit with open doors in the several wards of the city from 9 a. m. to 9 p. m., for fifteen successive days, commencing on the first Monday of September; and afterwards, for the purpose of revising the lists, for three (3) successive days, commencing on the — Monday of October.

"(3.) The plaintiff, in pursuance of his said appointment, and of the provisions of section 2016 of the Revised Statutes, which authorized and required the supervisors of elections to attend at all times and places fixed for the registration of voters, who, being registered, would be entitled to vote for a representative or delegate in Congress, and to personally inspect and scrutinize such registration, and in pursuance of section 2021, which made it his duty, when required thereto, to aid and assist the supervisors of election in the verification of any lists of persons who may have registered, did attend to said registration in the said ward for which he was appointed for the purpose of aiding and assisting the supervisors of election, for fifteen days in September, A. D. 1886, and for three days in October, 1886, being October 4th, 5th and 6th in said year.

"(4.) The United States marshal for this district, on the 10th of October, 1886, received from the Attorney-General of the United States a circular letter, in which he notified the marshal that 'it is not expected that supervisors and deputy marshals will receive compensation for more than five days' services, and they should be so informed. Within this time all can be done, it is thought, that ought to be done.'

"(5.) The plaintiff was on duty and had performed eighteen days of proper and necessary service as special marshal before the circular letter of the Attorney-General, relied upon in the answer of the United States, had been received."

Section 2081 of the Revised Statutes provides, among other things, that "there shall be allowed and paid to . . . each special deputy marshal, who is appointed and performs his duty under the preceding provisions, compensation at the rate of five dollars per day for each day he is actually on duty, not exceeding ten days."

The defense relied upon by the United States is, that the President had authority to regulate the length of service and compensation of a special deputy marshal or a supervisor of election; and that, having such authority, and having undertaken, through the Attorney-General, to make such regulations, by the circular letter aforesaid, those regulations are binding upon inferior officers. Upon the facts in this case it is to be observed, that the question of the authority of the President to make the regulations mentioned does not arise here; for, as shown by the findings of fact, the services for which compensation is demanded were performed prior to the date when the circular letter was issued from the Attorney-General's of-

fice. They were performed under the Statutes mentioned, and compensation must be made accordingly. Whether the President had the power to make the regulations prescribed by the above-mentioned circular or not, they manifestly cannot have a retroactive effect, so as to invalidate a claim for services performed before they were in existence.

The judgment of the court below is affirmed.

UNITED STATES, *Appt.*,

v.

HENRY SCHOFIELD.

(See S. C. Reporter's ed. 887, *note*.)

United States v. Davis, *ante*, p. 890, followed.

[No. 1084.]

Submitted Nov. 4, 1889. Decided Dec. 9, 1889.

APPEAL from a judgment of the District Court of the United States for the District of Maryland in favor of plaintiff for wages as supervisor of registration during a congressional election. *Affirmed.*

Reported below, 82 Fed. Rep. 576.

Mr. John B. Cotton, Assistant Attorney-General, for appellant.

Mr. Charles C. Lancaster for appellee.

Mr. Justice Lamar delivered the opinion of the court:

This case is similar in all its essential features to the preceding one of *United States v. Davis*, *ante*, p. 890, and the decision in it should be the same. For the reasons given in the opinion in that case the judgment of the court below in this case is affirmed.

WILLIAM H. ROBERTSON, Collector of the PORT OF NEW YORK, *Piff. in Err.*,

v.

JESSE ROSENTHAL ET AL.

(See S. C. Reporter's ed. 460-464.)

Duty on hairpins—Act of 1870—construction of.

1. Iron and steel-wire hairpins are liable to a duty of 45 per cent *ad valorem*, under that part of Schedule C, section 2502, of the Revised Statutes, as enacted by the Act of March 8, 1883 (22 Stat. 501).
2. As Congress, for the thirteen years prior to 1883, treated hairpins for revenue purposes as a distinct article from "pins, solid-head or other," it would be unreasonable to hold that the legislation of 1883 was intended to do away with such distinction.
3. As by the Act of July 14, 1870, Congress assigned hairpins to a class by themselves, therefore their not being specifically enumerated in 1883 did not relegate them to the category of "pins, solid-head or other."

[No. 57.]

Argued Nov. 4, 1889. Decided Dec. 16, 1889.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of the plaintiffs in an action to recover duties illegally exacted by defendant as Collector of the Port

of New York upon goods imported by plaintiffs. *Reversed.*

Statement by *Mr. Chief Justice Fuller*:

This was an action brought to recover duty alleged to have been illegally exacted by the defendant, as Collector of the Port of New York, upon certain merchandise imported by the plaintiffs. It was stipulated on the trial that if the plaintiffs should be entitled to recover on the main question raised by their protest, a verdict should be entered generally in plaintiffs' favor, subject to adjustment as to formal requisites and to amount, at the custom-house, under the direction of the court.

Evidence was given tending to show that on or about July 5th and 7th, 1884, the plaintiffs imported certain iron-wire and steel-wire hairpins, upon which the Collector assessed a duty of 45 per cent *ad valorem*, under that part of Schedule C, section 2502, of the Revised Statutes, as enacted by the Act of March 8, 1883 (22 Stat. 501), which reads:

"Manufactures, articles or wares, not specially enumerated or provided for in this Act, composed wholly or in part of iron, steel, copper, . . . and whether partly or wholly manufactured, forty-five (45) per centum *ad valorem*."

The plaintiffs paid the amount of duty assessed, and protested as follows:

"We protest against your decision as to the rate and amount of duties to be paid on the hairpins entered by us for consumption July 5, 1884, per Donau 86888, from Bremen, because they are dutiable at 80 per cent *ad val.* under tariff Schedule C, pins, solid-head or other.

"If not so dutiable they are dutiable under said schedule at the rates per pound prescribed for the iron or steel wire of which they are made.

"We pay the excess exacted under compulsion, solely to get the goods."

To sustain the issues upon their part, the plaintiffs introduced Leopold Kramer, who testified that he was an importer of fancy goods in the house of plaintiffs, and that their business was the general importation of notions, etc., and who identified the invoices and entries involved in this action, and also showed that the rate of duty upon said hairpins, if classified as "pins, solid-head or other," would not be less than the rate of duty chargeable upon the iron or steel wire from which they were made.

Witness testified further as follows:

"These samples are samples of the articles imported, and are known ordinarily as hairpins. There are also samples of various other kinds of pins: one is a crimping pin, one a solid-head pin, one a pin with a black head, called a bonnet pin, used to fasten shawls; also diaper pins. They are made of iron wire and steel wire, and have no heads at all. Diaper pins and crimping pins have not solid heads. They have no heads."

And on cross-examination:

"Some pins have heads, but are not solid-headed pins. Bonnet pins and shawl pins are pins with heads, but are not solid-headed pins. Those pins [referring to card] are pins with heads, but are not solid-headed pins.

"Q. Are solid-headed pins the ordinary pins that everybody has?

"Ans. Yes; not everybody. I am familiar with dress pins. I don't know anything about clothespins, except that there are such things. I know there are linchpins and kingpins for locomotives, but they are not used for the same purpose as the articles in suit."

Plaintiffs having rested, defendant's counsel moved the court to direct a verdict for the defendant upon the following grounds, to wit:

"1st. That in prior laws pins, solid-head or other, and hairpins were both provided for, which shows that, as Congress uses the phrase 'pins, solid-head or other,' it does not include hairpins.

"2d. That the phrase 'pins, solid-head or other,' applies only to pins with heads of some kind.

"3d. Generally; that the evidence does not make out a case for recovery by the plaintiffs."

Which motion the court denied; to which ruling defendant's counsel then and there excepted.

The court thereupon charged the jury as follows:

"Gentlemen, if you think these articles are pins, according to the common understanding of the class of pins that are known as solid-head pins or other pins, return a verdict for the plaintiffs; if not return a verdict for the defendant. You may take the case."

The jury having returned a verdict for the plaintiffs, and the amount having been subsequently ascertained as agreed, judgment was entered against the Collector accordingly, and the cause brought here on writ of error.

Mr. O. W. Chapman, Solicitor-General, for plaintiff in error.

Messrs. Edward Hartley and Walter H. Coleman for defendants in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

The articles in question were ordinary headless hairpins, made of steel wire and iron wire, and the question is whether they were dutiable as "pins, solid-head or other."

By section 18 of the Act of July 14, 1862 (12 Stat. 555-57), a duty of five per centum *ad valorem*, in addition to then existing duties, was levied on many articles, including "pins, solid-head or other," and "manufactures, articles, vessels and wares, not otherwise provided for, of gold, silver, copper, brass, iron, steel, lead, pewter, tin or other metal, or of which either of these metals or any other metal shall be the component material of chief value."

By section 21 of the Act of July 14, 1870 (16 Stat. 264), a duty of fifty per centum *ad valorem* was levied "on hairpins made of iron wire."

Under section 2504, title XXXIII, Revised Statutes of 1874, "Schedule M—Sundries," we find: "Hairpins, made of iron wire: fifty per centum *ad valorem*;" "Pins, solid-head or other: thirty-five per centum *ad valorem*." (Ed. 1878, 476, 480.) And in "Schedule E—Metals" (465): "All manufactures of steel, or of which steel shall be a component part, not otherwise provided for: forty-five per centum *ad valorem*. But all articles of steel partially manufactured, or of which steel shall be a component part, not otherwise provided for, shall 182 U. S.

pay the same rate of duty as if wholly manufactured." And also (467): "Manufactures, articles, vessels and wares not otherwise provided for, of . . . iron, . . . or other metal (except . . . steel), or of which either of these metals shall be the component material of chief value: thirty-five per centum *ad valorem*."

In March, 1875, certain imported steel hairpins having been held at the Port of New York dutiable at fifty per cent *ad valorem*, because of their similarity to iron-wire hairpins, the Treasury Department decided that this was erroneous, and that they were properly chargeable with the rate of duty applicable to manufactures of steel not otherwise provided for. Synopsis T, Dec. 1875, p. 56, No. 2140.

By section 2502 of title XXXIII of the Revised Statutes as enacted by the Act of March 8, 1888 (22 Stat. 501), "Schedule C—Metals," a duty of thirty per centum *ad valorem* was levied on "pins, solid-head or other;" and by the last paragraph in the same schedule, on "manufactures, articles or wares, not specially enumerated or provided for in this Act, composed wholly or in part of iron, steel, . . . or any other metal, and whether partly or wholly manufactured: forty-five per centum *ad valorem*."

It will be perceived, that although hairpins are not mentioned *eo nomine*, this last paragraph covers iron and steel hairpins, as was ruled as to the latter by the Department in 1875, in the construction and application of similar language.

Inasmuch as Congress, for the thirteen years prior to 1888, treated hairpins for revenue purposes as a distinct article from "pins, solid-head or other," we consider it unreasonable to conclude that the legislation of 1888 was intended to do away with a distinction manifestly regarded as inherent in the thing itself.

In short, it is doubtful if it could ever have been properly held that hairpins were *ejusdem generis* with the pins referred to in the Tariff Acts; but if this could have been so prior to 1870, we are of opinion that at that time Congress assigned them to a class by themselves, because essentially *sui generis*, and therefore that their not being specifically enumerated in 1888 did not relegate them to the category of "pins, solid-head or other," as ingeniously argued by counsel.

From these views the conclusion follows that the court below should have instructed the jury to find for the defendant.

The judgment is reversed, and the cause remanded, with a direction to award a new trial.

FRANK HUME, *Appx.*

v.

UNITED STATES.

UNITED STATES, *Appt.*

v.

FRANK HUME.

(See S. C. Reporter's ed. 406-415.)

Government contract—unconscionable contract—damages upon—defense at law—dealing with government officers—clerical error—admission—reasonable profit.

1. Where claimant made a written contract with the United States to furnish to a government hospital a quantity of shucks at the rate of sixty cents per pound, based on proposals made by the Secretary of the Interior, when shucks were only of the market value of from six mills to one and three fourths cents per pound, and those furnished by claimant were only of the latter value, in an action for the price of the shucks delivered, the market value can only be recovered.
2. If a contract be unreasonable and unconscionable; but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to.
3. Where a contract is so extortionate and unconscionable on its face as to raise the presumption of fraud in its inception, or to require but slight evidence to justify such presumption, inference of fraud is as efficacious to maintain a defense at law as to sustain affirmative relief in equity; and if performance has been accepted in ignorance and under circumstances excusing the non-return of articles furnished, and these have some value, the amount sued for may be reduced to that value.
4. It is the duty of persons dealing with public officers to inquire as to their power and authority to bind the government; and persons so dealing are held to a recognition of the fact that government agents are bound to fairness and good faith as between themselves and their principal.
5. If claimant knew that a clerical error had been made in the contract, of which the agents of the government were ignorant, or if, under the facts, he must have known that their action in making the contract was in violation of their duty, the character of the fraud is not changed by the fact that such action was the result of a mistake or negligence of such agents.
6. Where claimant alleges that sixty cents per pound for shucks was the price at which he intended to bid, and that there was no mistake on his part in making the bid, this is an admission, when taken with the findings of fact, that he designed to commit the agents of the government to an unconscionable contract.
7. The effect of the contract is not weakened by the fact that, under his bids on the shucks and on other items separately, the claimant lost money on some of the articles and he will receive on the whole only a reasonable profit, if paid for at the contract price.

[Nos. 102, 103.]

Submitted Nov. 13, 1889. Decided Dec. 16, 1889.

A PPEALS from a judgment of the Court of Claims in favor of claimant in an action for the price of goods sold and delivered to the United States. *Affirmed.*

Opinion below, 21 Ct. Cl. 328.

Statement by Mr. Chief Justice Fuller:

Claimant filed his petition against the United States in the Court of Claims, averring that on the 9th day of August, 1888, he entered into a contract in writing with the acting Secretary of the Interior Department for the furnishing of certain articles, constituting items in his proposal numbered 2, 9, 19, 32, 42, 56, 71, 77, 78, 79, 89, 90, 91, 97, 102 and 103, to the Government Hospital for the Insane near Washington, at rates specified therein; that he had furnished merchandise amounting to the sum of \$5,635.89, according to the prices established by the terms of the contract, and had been paid only the sum of \$1,663.89, and that there

was still due and owing to him the sum of \$4,032, which he was entitled to recover with interest from the first day of July, 1884; and that the accounting officers of the Interior Department had refused and neglected to pay such balance of \$4,032, because, as they alleged, the price charged for item 97 in claimant's proposal was excessive, "notwithstanding the charge therefor was based upon the amount stated in said proposal, and accepted by said defendant's officers and agents, and by them incorporated in said contract as aforesaid."

To this petition a special plea was filed February 12, 1886, on behalf of the United States, to the effect that claimant had agreed to furnish shucks to the government hospital at the rate of sixty cents per hundred weight, and entered into a written contract, to recover damages for the breach of which this suit was instituted, whereby he agreed to furnish (*inter alia*) shucks at the rate of sixty cents per pound; that this was a clerical error, the real contract being that shucks were to be furnished by claimant to said hospital at sixty cents per hundred weight; that notwithstanding this "claimant attempts to practice a fraud against the United States in attempting to establish an allowance of the claim as made by him, and by his effort to obtain a judgment in this court upon such written contract, as if such mistake and clerical error had not been made, and for the amount due for the shucks furnished, as expressed by mistake in said written contract."

To this special plea claimant replied, by his attorney, denying that he agreed to furnish shucks at the rate of sixty cents per hundred weight, and averring that he bid for shucks "at the rate of sixty cents per pound, in accordance with the printed schedule furnished him by the United States upon which to make out his bid; that the said price was the price at which he intended to bid, and that there was no mistake on his part in making out the bid;

that the said contract contained fifteen other items of goods, which were furnished as ordered, and some items furnished in much larger quantities than the estimated quantity contained on the printed schedule; that upon some of the items the claimant lost money; upon others there was a very small profit; and that upon the whole contract, adjusted at contract rates, the claimant will not receive more than a fair and reasonable profit. Claimant denies emphatically any attempt to practice a fraud on the United States, and avers that the whole transaction was in absolute good faith in the ordinary course of business; that there was no inducement or promise made in regard to the matter, except the written proposal of the claimant and the written contract."

Evidence was adduced on behalf of the United States, tending to show that shucks at the time of the contract were worth from three fifths of a cent to one cent and three quarters per pound; that it was the custom of the government to buy shucks by the hundred weight; and that the mistake in question had occurred by reason of the word "pounds" in the printed form not having been struck out and "hundred weight" inserted; all of which evidence was objected to on behalf of the claimant.

The Court of Claims filed its findings of fact and conclusion of law on the 3d of May, 1886.

The first finding sets forth the advertisement of the Secretary of the Interior for proposals for furnishing supplies to the Government Hospital for the Insane for the fiscal year ending June 30, 1884, stating, among other things, "Proposals must be made in duplicate on the forms furnished by the Department." "Bids will be considered on each item separately. Schedules containing blank forms for bidding, items and approximate estimates of amounts will be furnished on application." A description of what the quality of many of the articles, not including shucks, must be, is given at length in the advertisement.

The second finding contains the bids of the claimant on forms furnished by the Department, the schedule attached to his proposal enumerating some one hundred and seven articles, on all but twelve of which claimant made bids. This schedule, under the head of estimated quantity, enumerates the articles by pound, dozen, gross, bushel, box, ton, barrel, bale, gallon, case, quart and sack, and the bids are carried out per pound, per dozen, per gallon, etc.

The third finding gives the contract, by the terms of which the claimant agrees to furnish the items in the proposal, numbered as in the petition, and the acting Secretary of the Interior agrees to pay or cause to be paid on behalf of the United States the prices specified in the proposal and contract, "for all the articles delivered and accepted," the right being reserved to order a greater or less quantity of each.

The fourth and fifth findings and conclusion of law are as follows:

"IV. He (claimant) furnished under said contract all the articles included under items Nos. 2, 9, 19, 32, 42, 56, 71, 78, 79, 89, 90, 91, 102, 108, and has been paid therefor according to the contract. He also furnished in two or three lots, in the latter part of the year 1888, 6,720 pounds shucks under item No. 97, with memorandum bills accompanying the delivery thereof, with the price carried out, at 60 cents per pound, the whole aggregating \$4,032. For the shucks he has not been paid.

"V. At the time said contract was made shucks were of the market value of from \$12 to \$35 a ton, according to quality, and whether they were hackled or unhackled; and those furnished by the claimant were of the market value of \$35 a ton, or 14 cents per pound, aggregating, for all that were delivered, \$117.60.

"Conclusion of law: Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to recover \$117.60, and no more."

The opinion of the court was delivered by Richardson, *Ch. J.* (21 Ct. Cl. 328), who, after stating the facts and pointing out that the claimant was the only bidder for shucks, says:

"At the time the contract was made shucks were worth from \$12 to \$35 a ton, or from 6 mills to 14 cents a pound, while the claimant was to receive nearly forty times as much as the highest value.

"That an agreement to pay \$1,200 a ton for shucks, actually worth not more than \$35 a ton, is a grossly unconscionable bargain, defined in Bouvier's Law Dictionary to be 'a contract which no man in his senses, not under delusion,

would make, on the one hand, and which no fair and honest man would accept, on the other, nobody can doubt. Such a contract, whether founded on fraud, accident, mistake, folly or ignorance, is void at common law. It is not necessary to invoke the aid of a court of equity to reform it. Courts of law will always refuse to enforce such a bargain, as against the public policy of honesty, fair dealing and good morals."

After citing Story's Equity Jurisprudence, § 188; *James v. Morgan*, 1 Levinz, 111; *Baxter v. Wales*, 12 Mass. 365, and *Leland v. Stone*, 110 Mass. 459, the opinion thus concludes:

"These citations are sufficient to show that in suits upon unconscionable agreements the courts of law will take the matter in their own control, and will, without the intervention of courts of equity, protect the parties against their enforcement.

"If it be so in suits on contracts between private parties who act by and for themselves, how much more is it so in suits on agreements by the United States, acting always through public officers, who are mere agents, required to act in good faith towards their principal according to the laws of the land, as everybody dealing with them are bound to know.

"There is no finding by the court of actual fraud by any of the persons engaged in making the contract now under consideration. The unconscionable price inserted for shucks was no doubt a mere accident, perhaps from an idea that it was the price per hundred pounds instead of per pound, as printed in the proposals and contract, and from neglect to change the printed words accordingly, which, if it had been done, would have fixed the price at \$12 a ton, the very price which the findings show to have been the lowest value of shucks of any kind at that time. But, however it may have happened, we hold, as was held in the case of *Leland v. Stone*, from which we have quoted the words of the court, that a contract may be held unconscionable without proof of actual fraud at its inception if its enforcement would be unconscionable.

"It would be a fraud upon the United States to enforce such a contract as the one now in suit, and it never can be done through the Court of Claims."

Judgment was accordingly rendered in favor of the claimant for \$117.60, and both parties appealed.

Messrs. Robert Christy and John C. Fay, for Hume, appellant:

Parol evidence is inadmissible to contradict or vary the terms of a valid written instrument. 1 Greenl. Ev. 277.

If parties choose to enter into unwise and improvident bargains they must abide by the consequences of their own rashness and folly; they have contracted for themselves and the court cannot contract for them.

Addison on Contracts, 12; Pomeroy, *Eq. Jur.* § 925; *Erwin v. Parham*, 53 U. S. 12 How. 200 (18: 952).

Mr. Wm. A. Maury, Assistant Attorney-General, for the United States:

If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its

breach damages, not according to its letter, but only such as he is equitably entitled to.

Scott v. U. S. 79 U. S. 12 Wall. 443, 445 (20: 488, 489).

Mr. Chief Justice Fuller delivered the opinion of the court:

In his celebrated judgment in *Earl of Chesterfield v. Janssen*, 2 Ves. Sr. 125, 155; Lord Hardwicke arranged all the forms of fraud recognized by equity in four classes, the first two of which he gives in these words:

"1. Then fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition; which is the plainest case. 2. It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscionable bargains; and of such even the common law has taken notice; for which, if it would not look a little ludicrous, might be cited *James v. Morgan*, 1 Lev. 111."

The case referred to by the Lord Chancellor was ruled by Sir Robert Hyde, then at the head of the King's Bench, and is reported in 1 Levinz, 111, in these words:

"Assumpsit to pay for a horse a barley-corn a nail, doubling it every nail; and avers that there were thirty-two nails in the shoes of the horse, which, being doubled every nail, came to five hundred quarters of barley. And on non-assumpsit pleaded, the cause being tried before Hyde at Hereford, he directed the jury to give the value of the horse in damages, being £8, and so they did. And it was afterwards moved in arrest of judgment for a small fault in the declaration, which was overruled, and judgment given for the plaintiff."

James v. Morgan is cited by Lord Chief Justice Hale, 1 Ventris, 267, to the point that "upon certain contracts the jury may give less damages than the debt amounts to," and also in Bacon's Abridgment, *Damages*, D, 1, together with *Thornborough v. Whitacre*, 6 Mod. 805, 8. C., 2 Id. Raym. 1164, to the same point, stated thus: "Though in contracts the very sum specified and agreed on is usually given, yet if there are circumstances of hardship, fraud or deceit, though not sufficient to invalidate the contract, the jury may consider of them and proportionate and mitigate the damages accordingly."

In *Thornborough v. Whitacre*, the plaintiff declared that the defendant, in consideration of 2s. 6d. paid down, and £4 17s. 6d. to be paid on the performance of the agreement, promised to give the plaintiff two grains of rye corn on a certain Monday, and to double it successively on every Monday for a year; and the defendant demurred to the declaration. Upon calculation, it was found that, supposing the contract to have been performed, the whole quantity of rye to be delivered would be 524,288,000 quarters. The court recognized the case of *James v. Morgan* as good law, and said that though the contract was a foolish one, the defendant ought to pay something for his folly. "The counsel for the defendant, perceiving the opinion of the court to be against his client, offered

the plaintiff his half crown and his cost, which was accepted of, and so no judgment was given in the case."

In *Leland v. Stone*, 10 Mass. 459, *James v. Morgan* and *Thornborough v. Whitacre* are referred to with approbation, and the principle of mitigating the damages applied, as also in *Cutler v. How*, 8 Mass. 257; *Cutler v. Johnson*, Id. 268, and *Baxter v. Wales*, 12 Mass. 865. And see *Greer v. Tweed*, 18 Abb. Pr. N. S. 427, and *Russell v. Roberts*, 8 E. D. Smith, 818.

Mr. Justice Swayne remarks, in *Scott v. United States*, 79 U. S. 12 Wall. 443-445 [20: 488, 489]:

"Where parties intend to contract by parol, and there is a misunderstanding as to the terms, neither is bound, because their minds have not met. Where there is a written contract and a like misunderstanding is developed, a court of equity will refuse to execute it. If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to. *James v. Morgan*, 1 Lev. 111; *Thornborough v. Whitacre*, 2 Id. Raym. 1164; *Baxter v. Wales*, 12 Mass. 865."

But *James v. Morgan* and *Thornborough v. Whitacre* were plainly cases in which one party took advantage of the other's ignorance of arithmetic to impose upon him, and the fraud was apparent upon the face of the contracts. In the latter case the defendant, by demurring, admitted that there was no fraud, and consequently the only question was on the validity of the contract in the absence of fraud, and it was sustained, but the plaintiff was allowed to take nominal damages only. And as to many of the cases it may be objected that they are at variance with the rule that a party must recover according to his contract if he sue upon it, or not at all, although, if the express contract were void, the defendant might nevertheless be held in general assumpsit, upon the implied contract to pay for property received from the plaintiff and retained.

The true principle deducible from the authorities, and most consistent with the reason of the thing, seems to be this: In the instance of a special contract which has been wholly executed and the time of payment passed, if the plaintiff proceeds in general assumpsit, the express contract is only evidence of the value of the consideration, which is open to attack by the defendant in reduction of damages. But, where the action is in special assumpsit, the express promise of the defendant fixes the measure of damages to which the plaintiff is entitled. And while the general rule is that the performance of every contract may be resisted on the ground of fraud, at law as well as in equity, yet upon a contract of sale, the defendant, having accepted performance, cannot interpose this defense to defeat the contract, unless he returns the article or proves it to have been entirely worthless, though he may ordinarily recoup the damages which he can show he has sustained through the fraud. And there may be contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception, or at least to require but slight additional evidence to

justify such presumption. In such cases the natural and irresistible inference of fraud is as efficacious to maintain the defense at law as to sustain an application for affirmative relief in equity. When this is so, if performance has been accepted in ignorance and under circumstances excusing the non-return of articles furnished, and these have some value, the amount sued for may be reduced to that value.

In the case at bar the shucks had been appropriated by the government before the discovery of the error in the schedule and the position of the claimant in regard to it, and if the defendant successfully impeached the contract on the ground of fraud, the judgment for the actual market value of the shucks was correct, and sustainable under the pleadings.

In order to guard the public against losses and injuries arising from the fraud or mistake or rashness or indiscretion of their agents, the rule requires of all persons dealing with public officers the duty of inquiry as to their power and authority to bind the government; and persons so dealing must necessarily be held to a recognition of the fact that government agents are bound to fairness and good faith as between themselves and their principal. *Whiteside v. United States*, 98 U. S. 247, 257 [23: 882, 885]; *United States v. Barlow*, 132 U. S. 271, ante, p. 346.

If the claimant intended to induce the agents of the government to contract to pay for these shucks thirty-five times their highest market value, and the agents of the government knowingly entered into such a contract, it will not be denied that such conduct would be fraudulent and the agreement vitiated accordingly. If the claimant knew that a clerical error had been committed, of which the agents of the government were ignorant, and deliberately intended to take advantage of the error to obtain the execution of a contract for the payment of so grossly unconscionable a price, or if the facts were such that he must be held to have known that their action, if understandingly taken, would be in palpable dereliction of their duty to their principal, and, notwithstanding, sought to profit by it, the character of the fraud, so far as the claimant is concerned, is not changed by the fact that such action was the result of the negligence or mistake of the government's agents, untainted by moral turpitude on their part.

The claimant by his replication insists that the price of sixty cents per pound for shucks "was the price at which he intended to bid, and that there was no mistake on his part in making out the bid." This is an admission, when taken with the findings of fact, that he designed to commit the agents of the government to a contract "such as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept, on the other," and is fatal to his recovery according to the letter of the contract. Nor is its effect in that regard weakened in any degree by the suggestion that, under bids on each item separately, the claimant made but little profit, or none at all on some of the articles.

The Court of Claims did not err in the admission of the evidence upon which the fifth finding of fact is based, nor in its refusal to permit the claimant to recover more than the

market value of the shucks, its allowance of which we will not disturb.

The judgment is affirmed.

FREDERICK MULLER ET AL., *Plffs.*
in Err.,

vs.
ANTHONY B. NORTON ET AL.

(See S. C. Reporter's ed. 501-506.)

Assignment for benefit of creditors—sale on credit—law of Texas—two assignees.

1. A clause in an assignment by an insolvent debtor of his property for the benefit of his creditors, that the assignee shall "convert" the property assigned "into cash as soon and upon the best terms possible for the best interest of the creditors," does not give him authority to sell on credit.
2. But if such clause does permit a sale by the assignee on credit, yet, under the Texas decisions, that does not render the assignment void upon its face.
3. Under the Statute of Texas such an assignment is not void because it is made to two assignees, instead of to one, although the Statute speaks only of an assignee.

[No. 91.]

Argued Nov. 8, 11, 1889. Decided Dec. 9, 1889.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas to review a judgment in favor of defendants in an action brought by assignees of a debtor against the marshal of the Northern District of Texas and his sureties for seizing under attachments the goods of the debtor which had been assigned to the plaintiffs. *Reversed.*

The facts are stated in the opinion.

Reported below, 19 Fed. Rep. 719.

Mr. W. Hallett Phillips for plaintiffs in error.

Messrs. John Johns and D. A. McKnight, for defendants in error:

The deed of assignment is void, as against non-consenting creditors, for the reason that it authorizes the assignees to sell upon credit.

In the following cases, wherein the assignee had authority to fix the "terms" of sale, it was held that a sale on credit was implied:

Sumner v. Hicks, 67 U. S. 2 Black, 582 (17: 355); *Hutchinson v. Lord*, 1 Wis. 286; *Keop v. Sanderson*, 12 Wis. 352; *Beus v. Shaughnessy*, 2 Utah, 492; *Moir v. Brown*, 14 Barb. 89; *Schufeldt v. Abernethy*, 2 Duer, 583.

Authority to the assignor to sell upon credit renders the deed of assignment void on its face.

McCleery v. Allen, 7 Neb. 21; *Collier v. Davis*, 47 Ark. 867; *Bagley v. Bove*, 7 Cent. Rep. 258, 105 N. Y. 171, 177; *Robbins v. Butcher*, 6 Cent. Rep. 803, 104 N. Y. 575; *Jaffray v. McGhee*, 107 U. S. 385 (27: 496); *Robinson v. Elliott*, 89 U. S. 22 Wall. 513 (22: 758); *Means v. Dowd*, 128 U. S. 273 (32: 429); *Nicholson v. Leavitt*, 6 N. Y. 510.

Under the statutes of the State of Texas, and the decisions of her courts, a deed of assignment authorizing a sale upon credit is voidable by non-consenting creditors.

Tex. Rev. Stat. 1879, art. 2465, p. 863, Act March 24, 1879; *Woodward v. Marshall*, 22

Pick. 474; *Bagley v. Bowe*, 7 Cent. Rep. 258, 105 N. Y. 177; *Cunningham v. Norton*, 125 U. S. 77, 81 (81: 624, 625).

Where the Statute is silent the assignee must be governed by the deed of assignment.

Burrill on Assignments, § 868; *Ogden v. Peters*, 21 N. Y. 28; *Re Lewis*, 81 N. Y. 424; *Adler v. Ecker*, 1 McCrary, 257; *Hopkins v. Ray*, 1 Met. 79; *Collier v. Davis*, 47 Ark. 367; *Blum v. Welborne*, 58 Tex. 157; *Keller v. Smalley*, 63 Tex. 512, 516; *Bagley v. Bowe*, 7 Cent. Rep. 258, 105 N. Y. 171.

In Texas it has always been held that an authority to sell on credit voids the assignment.

Eckes v. Copeland, 53 Tex. 590; *Baldwin v. Peet*, 22 Tex. 714; *Carlton v. Baldwin*, 23 Tex. 731; *Nave v. Britton*, 61 Tex. 572; *La Belle Wagon Works v. Tidball*, 59 Tex. 291.

An assignment for the benefit of creditors, which in terms directs or authorizes the assignee to execute the trust or dispose of the property in a mode not authorized by the Statute, or contrary to its requirements, is void on its face.

Schoolfield v. Johnson, 11 Fed. Rep. 297; *Heeland v. Hoagland*, 10 Neb. 511; *Bonns v. Carter*, 20 Neb. 566; *Edwards v. Mitchell*, 1 Gray, 239; *Pike v. Bacon*, 21 Me. 280; *Raleigh v. Griffith*, 37 Ark. 158; *Churchill v. Whipple*, 41 Wis. 611.

The deed of assignment is void as against non-consenting creditors, for the reason that it is not made to one assignee as required by the Statute.

Sedgwick on Stat. Law, 91; Burrill on Assignments, § 819; *Wakeman v. Grover*, 4 Paige, 28; *Grover v. Wakeman*, 11 Wend. 187; *Jaffray v. McGhee*, 107 U. S. 365 (27: 490); *McKee v. Coffin*, 66 Tex. 804, 809.

Mr. Justice Lamar delivered the opinion of the court:

This is an action of trespass brought in the court below by Frederick Muller and Adolph Jacobs, assignees of the firm of Louis Goldsal & Company, of Denison, Texas, against Anthony B. Norton, the United States Marshal for the Northern District of Texas, and the sureties on his official bond, for levying upon and seizing, under certain attachment suits in that court, the goods, wares and merchandise of said firm which had been assigned to the plaintiffs.

The plaintiffs in their petition set up the fact of the assignment by virtue of which they assert title to the property, reciting the main portions of the deed at length; set out the details of the various levies under the attachment suits, and prayed judgment for the amount and value of the goods levied on, which was alleged to be something over \$34,000. Upon demurrer to the petition, the court below held the deed of assignment null and void, and accordingly rendered a judgment in favor of the defendants. (19 Fed. Rep. 719.) To reverse that judgment this writ of error is prosecuted.

The deed of assignment was as follows:

"Know all men by these presents that we Louis Goldsal and Benjamin Hassberg, doing business as merchants in Denison, Grayson County, Texas, under the firm name and style of 'Louis Goldsal & Co.,' for and in consideration of the sum of one dollar, to us in hand

paid by Fred. Muller and A. Jacobs, of same place, the receipt of which is hereby acknowledged, and for the further purposes and considerations hereinafter stated, have this day assigned, bargained, sold and conveyed, and by these presents do assign, bargain, sell and convey, unto the said Fred. Muller and A. Jacobs, all the property of every kind owned by us, or either of us, individually or as a firm, either real, personal or mixed, said property consisting of our stock of merchandise situated in our place of business known as Nos. 204 and 206, south side Main Street, in Denison, Texas, being composed of dry goods, clothing, boots, shoes, hats, caps, trunks, valises, gents' furnishing goods, show-cases, book accounts, etc., worth about twenty-seven thousand dollars, and all other property owned by us or either of us not herein mentioned, except such of our or either of our property as is exempt from execution by the laws of the State of Texas and no other; to have and to hold unto them, the said Fred. Muller and A. Jacobs, their assigns and successors, forever. This conveyance is made, however, for the following purposes, to wit: We, the said Louis Goldsal and Benjamin Hassberg, doing business as aforesaid under the firm name of 'Louis Goldsal & Co.,' are insolvent, being indebted beyond what we or either of us are able to pay, and desire to secure a just and proper distribution of our and each of our property among our creditors, and this assignment is made in trust to the said Fred. Muller and A. Jacobs for the benefit of such of our creditors only as will consent to accept their proportional share of our estate and discharge us from their respective claims; and for said purpose the said Fred. Muller and A. Jacobs are hereby authorized and directed to take possession at once of all the property above conveyed and convert the same into cash as soon and upon the best terms possible for the best interest of our creditors, and execute and deliver all necessary conveyances therefor to the purchasers, and to collect such of the claims due us or either of us as are collectible, and to bring and prosecute such suits therefor as may be necessary, and to execute and deliver all proper receipts, releases and discharges to our said debtors on the payment of said claims, and to do and perform each and every act and thing whatsoever requisite, necessary and proper for them to do in and about the premises for the proper and lawful administration of this trust in accordance with the law; and the said Fred. Muller and A. Jacobs shall pay the proceeds of our said property, according to law, to such of our creditors as shall legally consent to accept their proportional share of our estates, property and effects as aforesaid, and discharge us from their respective claims, and no others, he first paying the expenses of administering this trust, and a reasonable compensation to himself for his services."

The validity of the above deed in view of matters apparent on its face constitutes the only question for consideration. We think that question is determined by the principle laid down in *Cunningham v. Norton*, 125 U. S. 77 [81:624], which reversed the judgment on the authority of which the one now under re-

view was rendered by the court below. That case involved, as does this, the validity of an assignment under the Texas Statute just referred to, which was sought to be set aside on account of a provision in the deed alleged to be not in conformity with that Statute. The assignments in the two cases are very similar, the main difference being that the one in the *Ounningham Case* contains two provisions neither of which occurs in the instrument under consideration. The first of these provisions reserves to the assignor the surplus of the property assigned after the payment of all the debts of the consenting creditors. The second expressly authorizes the assignee to sell such property on credit, according to his discretion. This last provision, however, was not called to the attention of the court in that case. The main contention was, that the deed in controversy was rendered void by the clause directing the assignee to pay over to the assignor the surplus after paying in full all the creditors who should accede to the deed. This court decided that the said clause did not affect the validity of the assignment, but was itself alone invalidated by reason of its being in violation of the Statute. The decision was based upon the general construction of the whole Act taken together, in view of the main object designed to be subserved by it, and of the decisions of the Supreme Court of Texas upon many of its express provisions, in which line of decisions the court indicated its full concurrence. That policy the court declares to have been the appropriation of the entire estate of an insolvent debtor to the payment of his debts, and as a means thereto to favor assignments, and to give them such construction that they may stand rather than fall; that its manifest purpose was to provide a mode by which an insolvent debtor, desiring to do so, may make an assignment simple and yet effective to pass all his property to an assignee for the benefit of such of his creditors as will accept a proportionate share of the said property and discharge him from their claims; that it further manifests the intention to transfer to the assignee all the property of the debtor for distribution among all the creditors; that no act of the assignee or of the assignor after the assignment is made, or preceding it, but in contemplation of it, however fraudulent that act may be, shall divest the right of the creditors to have the trust administered for their benefit in accordance with the spirit of the Statute; and that, therefore, the provision reserving the surplus to the debtor after payment of the debts to the consenting creditors, even though conceded to be not in conformity with the requirements of the Statute, and therefore itself void, does not vitiate the assignment or prevent its execution for the benefit of the creditors, as provided in the Statute.

These principles apply with controlling force to the assignment in the case at bar. The ingenious argument of the counsel has failed to point out any distinguishing features in the two cases.

The first ground upon which this deed is assailed is the following clause therein: "The said Fred Muller and A. Jacobs are hereby authorized and directed to take possession at

once of all the property above conveyed, and convert the same into cash as soon and upon the best terms possible for the best interest of our creditors;" which language the court below, and the counsel for the defendants claim is an authority to the assignee to sell upon credit. We do not think that such is a correct or fair interpretation of the clause, taking the whole instrument together and construing it with reference to the purpose manifest in all its other provisions. A positive direction to "convert" the property assigned "into cash as soon and upon the best terms possible for the best interest of our creditors," can hardly be construed into a discretionary authority to sell on credit, without doing violence to the well-established rule that the power to sell on credit will not be inferred from language susceptible of a different construction. *Burrill on Assignments*, § 224.

But even if we concede that the construction contended for be correct, and that the clause thus construed is in contravention of the Statute, it will not, as this court has decided, operate to annul the assignment, in which all the creditors may have an interest. In *Kellogg v. Muller*, 68 Tex. 182, 184, this very point we are now considering was presented and decided by the court in the following language: "The first exception to the deed is that it authorized the assignee to sell the property assigned on a credit, and is therefore void. The provision to which we are cited in support of the exception is as follows: 'That so soon as said inventory is complete, the said Frederick Muller, as such trustee aforesaid, shall thereafter, with all reasonable dispatch, proceed to sell and dispose of said goods, wares and merchandise and furniture, and collect said book accounts and bills receivable, converting the same into cash or its equivalent.' It may be doubted if this can be construed to empower the assignee to sell for anything but money. . . . But, however this may be, even if a badge of fraud, it is not sufficient to authorize the court to hold the deed void upon its face," citing *Baldwin v. Post*, 22 Tex. 708.

In the assignment before us all the property conveyed by it is in terms devoted to the payment of the creditors of the insolvent debtors. The judgment of the court below adjudging it to be void upon its face, because it permitted a sale on credit, was erroneous.

The second objection, that the deed was not made to one assignee, does not require any extended comment. Under the common law an insolvent debtor was permitted to make an assignment to a single individual or to several. *Burrill on Assignments*, § 91. It is true the Act of March 24, 1879, speaks only of an assignee; but the statutory rule of construction in force in Texas is: "The singular and plural number shall each include the other, unless otherwise expressly provided." *Rev. Stat. of Texas* (1879), art. §188, § 4. Under this rule, and keeping in mind the policy of the Statute of 1879 regulating assignments, we do not think the deed of assignment in this case void for the second reason assigned.

For the reasons given the decrees of the court below is reversed and the case remanded, with directions to take such further proceedings as shall not be inconsistent with this opinion.

THE RIO GRANDE RAILROAD COMPANY, *Pf. in Err.*,

JOHN B. VINET, Dative Testamentary Executor of A. J. GOMILA.

(See S. C. *Rio Grande R. Co. v. Gomila's Executor*, Reporter's ed. 478-486.)

Property seized on execution on U. S. judgment does not revert to state probate court, on death of debtor—jurisdiction of U. S. court not impaired by state legislation—court cannot surrender its jurisdiction.

1. Property of a debtor, brought within the custody of the circuit court of the United States by seizure under process issued upon its judgment, remains in its custody to be applied in satisfaction of the judgment notwithstanding the subsequent death of the debtor; by such death it does not pass under the control of the probate court of the State, to be disposed of in the administration of the assets of the deceased.
2. The jurisdiction of a court of the United States once obtained over property by being brought within its custody continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the State or by any proceedings subsequently commenced in a state court.
3. When property is seized to satisfy a money judgment of the United States court, it is appropriated to pay that judgment, and the court cannot surrender its jurisdiction over the property until it is applied to that judgment, or that judgment is otherwise satisfied. Only the part remaining after such appropriation goes, upon the death of the debtor, into the probate court as his assets.

[No. 113.]

Argued Nov. 15, 1889. Decided Dec. 9, 1889.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana to review a judgment that certain property, seized by the United States marshal to satisfy an execution upon a judgment rendered by said United States circuit court, and then in the possession of said marshal, be delivered to the executor of the judgment debtor, as the officer of the Probate Court for the Parish of Orleans, for the purpose of administration under the orders of the Probate Court. *Reversed.*

Reported below, 28 Fed. Rep. 837.

Statement by *Mr. Justice Field*:

This case comes from the Circuit Court of the United States for the Eastern District of Louisiana. It arises out of the following facts: On the 5th of June, 1885, The Rio Grande Railroad Company, a corporation, recovered a judgment in that court against a co-partnership firm known as Gomila & Co., and against its members, Anthony J. Gomila and Larned Torrey, *in solido*, for \$26,781.99, with interest from January 1, 1884. Upon this judgment execution was issued under which certain interests were attached, or seized, as it is termed in the laws of Louisiana, namely, a claim upon which, in February, 1885, judgment was recovered in that court in favor of Gomila & Co. against Culliford & Clark, for \$28,999.76, with interest at the rate of five per cent per annum from June 30, 1883, from which judgment an appeal was, at the time, pending in the Supreme Court of the United States; also a claim and

judgment thereon in favor of Gomila & Co., against John T. Milliken, rendered in a state court of Louisiana, on the 27th of June, 1883, for \$6,200, with interest at the rate of eight per cent per annum from February 27, 1883; and also a claim made by Gomila & Co. against Kehlor Brothers, garnishees in the suit of Gomila & Co. against Milliken. Under this execution a parcel of real estate in the City of New Orleans was also seized. The property, except the real estate, was advertised by the marshal of the district for sale. Whilst thus advertised, and before the day of sale designated, Gomila, of the firm of Gomila & Co., died. The sale did not, therefore, take place, and the representatives of Gomila were made parties to the proceedings under the execution. Subsequently a new sale was advertised. Before the day of sale arrived, the public administrator, and, as such, dative testamentary executor of Gomila, upon an affidavit that three fourths of these assets belonged to and were inventoried as of the succession of the deceased, and should be administered with his other assets in the Probate Court of the Parish of Orleans, moved the circuit court of the United States for an order directing the marshal of the district to discontinue and withdraw the advertisement of sale, and desist from making the sale as advertised, or offering for sale the property seized. To this motion the Railroad Company appeared, and, by way of exception and demurrer, pleaded, first, that the executor could not proceed by motion if he had any cause of complaint, but must proceed by an original bill in equity; and, second, that the motion presented issues of law and fact, which, if within the jurisdiction of the law side of the court, should be tried in the ordinary way by a jury. The Company further stated that, if the demurrer and exception were overruled, it desired to set up in answer to the motion the fact that the claims were seized and advertised for sale before the death of Gomila, and were in the custody and jurisdiction of the court at the time of his death, and should not, therefore, be transferred to the probate court of the parish. Upon the hearing, which took place on the 5th of November, 1885, the court overruled the exception and demurrer, and ordered that the marshal discontinue and withdraw the advertisement of sale, which had been fixed for that day, and desist from making the sale until further order of the court, reserving to the parties all the rights not therein passed upon. This order merely operated to postpone the sale. Subsequently another rule was taken out by the executor upon the Railroad Company to show cause why the effects and property should not be delivered to him, burdened with any liens in its favor which might have resulted from their seizure, and be received and held by him as executor for the purpose of administration, under the orders of the probate court. Upon the hearing which followed, the circuit court, in December, 1885, adjudged and decreed that the rule be made absolute, and that the property described in the motion, then in the possession and under the control of the marshal, be delivered to the executor as the officer of the Probate Court for the Parish of Orleans, the said property to pass into his possession burdened with any liens in favor of the

plaintiff which might have resulted from its seizure, and that it be received and held by the executor for the purposes of administration under the orders of the probate court, and that the cost of the proceeding be paid by The Rio Grande Railroad Company. *Rio Grande R. Co. v. Gomila*, 28 Fed. Rep. 387.

To reverse this judgment the case is brought to this court on writ of error.

Mr. George L. Bright, for plaintiff in error:

Whenever property has been seized under judicial process, the property is to be considered as in the custody of the court, within its jurisdiction; and no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises.

1 Abb. U. S. Pr. § 46; *Wallace v. McConnell*, 88 U. S. 13 Pet. 151 (10: 95); *Biggs v. Johnson County*, 78 U. S. 6 Wall. 166 (18: 768); *Bell v. Ohio Life and Trust Co.* 1 Biss. 260; *De Visser v. Blackstone*, 6 Blatchf. 235; *Fox v. Hempfield R. Co.* 2 Abb. U. S. 151; *U. S. v. The Reindeer*, 2 Cliff. 57; *The Skylark*, 2 Biss. 251; *Buck v. Colbath*, 70 U. S. 8 Wall. 384 (18: 257); *Collier v. Stanbrough*, 47 U. S. 6 How. 14 (12: 324); *Dupuy v. Bemiss*, 2 La. Ann. 510.

The jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the State.

Erwin v. Lowry, 48 U. S. 7 How. 181 (12: 655); *Hyde v. Stone*, 61 U. S. 20 How. 175 (15: 875); *Suydam v. Broadnax*, 89 U. S. 14 Pet. 67 (10: 357); *Union Bank v. Vaiden*, 59 U. S. 18 How. 508 (15: 473); *Freeman v. Howe*, 65 U. S. 24 How. 454 (16: 750).

Mr. Gus. A. Breaux, for defendant in error:

The administration laws of a State will be observed by the federal courts in the enforcement of individual rights.

Yonley v. Lavender, 88 U. S. 21 Wall. 279, 280 (22: 537, 538); *Williams v. Benedict*, 49 U. S. 8 How. 111 (12: 1007); *Hess v. Reynolds*, 118 U. S. 77 (28: 928); *Peale v. Phipps*, 55 U. S. 14 How. 375 (14: 459); *Serra & Hijo v. Hoffman*, 29 La. Ann. 19.

Mr. Justice Field delivered the opinion of the court:

The question presented for our consideration is whether property of a debtor, brought within the custody of the circuit court of the United States by seizure under process issued upon its judgment, remains in its custody to be applied in satisfaction of the judgment notwithstanding the subsequent death of the debtor, or is removed by such death from the jurisdiction of the circuit court and passes under the control of the probate court of the State, to be disposed of in the administration of the assets of the deceased. To this question we have no doubt the answer must be that the property remains in the custody of the circuit court of the United States, to be applied to the satisfaction of the judgment under which it was seized. The jurisdiction of a court of the United States once obtained over property by being brought within 182 U. S.

its custody continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the State or by any proceedings subsequently commenced in a state court. This exemption of the authority of the courts of the United States from interference by legislative or judicial action of the States is essential to their independence and efficiency. If their jurisdiction could in any particular be invaded and impaired by such state action, it would be difficult to perceive any limit to which the invasion and impairment might not be extended. To sanction the doctrine for which the executor appointed by the Probate Court of the Parish of Orleans contends, would be to subordinate the authority of the federal courts in essential attributes to the regulation of the State, a position which is wholly inadmissible.

The principle declared in *Freeman v. Howe*, 65 U. S. 24 How. 450 [18: 749], and in *Buck v. Colbath*, 70 U. S. 8 Wall. 384 [18: 257], both of which have, from their importance, attracted special attention from the profession, in effect determines the question presented here.

In the first of these cases the marshal had levied a writ of attachment, issued from the Circuit Court of the United States for the District of Massachusetts, upon certain property which was subsequently taken from his possession by the sheriff of the County of Middlesex, in that State, under a writ of replevin issued from a state court, and the question presented was whether the sheriff was justified in thus taking the property from the marshal's possession, or whether the marshal had the right to retain it. The court held that the property was, by its attachment under process of the federal court, brought within the custody of that court and under its jurisdiction; that it could not be taken from that custody by any tribunal of the State; and that if a conflict in the assertion of jurisdiction in such case arose, the determination of the question rested with the federal court, observing that "no government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another."

In the second of the above cases—*Buck v. Colbath*, 70 U. S. 8 Wall. 384 [18: 257]—this court referred to the decision in *Freeman v. Howe*, and, after stating that, when first announced, it had taken the profession generally by surprise, said that the court was clearly satisfied with the principle upon which the decision was founded; "a principle," it added, "which is essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction. That principle is that, whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." The doctrine of *Freeman v. Howe* was thus reaffirmed, with a statement of the limitation to which, in its application, it

was subject, by allowing suits against officers and others for seizing the property of strangers, which did not invade the custody of the court over the property. With the property in custody, so long as it continues, no other tribunal can interfere, though, but for such custody, possession of it might be taken under process from state courts. *Covell v. Heyman*, 111 U. S. 176 [28: 390].

In *Riggs v. Johnson County*, 73 U. S. 6 Wall. 166 [18: 768], which came from the Circuit Court for the District of Iowa, and was before us at December Term, 1867, this doctrine finds illustration. There the plaintiff had obtained judgment in the circuit court against the county upon certain of its bonds. Execution issued upon the judgment was returned unsatisfied. Thereupon he applied to the circuit court for a mandamus upon the supervisors of the county to compel the levy of a tax for the payment of the judgment. An alternative writ was issued commanding the supervisors to assess the tax or show cause to the contrary on a day designated. The supervisors appeared on the return day and alleged that they had been enjoined by proceedings in a state court from assessing a tax for that purpose, and that they could not do so without being guilty of contempt and becoming liable to punishment. To this return the plaintiff demurred on several grounds; and, among others, that the state court had no jurisdiction, power or authority to prevent him from using the process of the circuit court to collect its judgment; and that the decree for an injunction rendered in the state court was no bar to his application for relief. The court overruled the demurrer, and decided that the return was sufficient. Judgment was thereupon rendered for the supervisors, and the plaintiff brought the case to this court by writ of error. Here the judgment was reversed and the cause remanded, with directions to sustain the demurrer and take further proceedings in accordance with the opinion of the court. In considering the grounds of the demurrer, this court held that the jurisdiction of a court is not exhausted by the rendition of judgment, but continues until that judgment is satisfied; that process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment; observing that the judicial power would otherwise be incomplete and entirely inadequate to the purposes for which it is conferred by the Constitution; that mandamus is an appropriate remedy to compel the levy of a tax to pay a debt contracted by a municipal corporation, where judgment has been recovered for the debt, and execution thereon has been returned unsatisfied; and that state laws cannot control its process. "Repeated decisions of this court," was its language, "have also determined that state laws, whether general or enacted for the particular case, cannot in any manner limit or affect the operation of the process or proceedings in the federal courts." And it concluded its consideration of the subject by holding that the injunction of the state court was "inoperative to control or in any manner to affect the process or proceedings of a circuit court, not on account of any paramount jurisdiction in the latter courts, but because, in

their sphere of action, circuit courts are wholly independent of the state tribunals."

It is earnestly contended that this doctrine cannot apply where the property brought under the control of the federal court has by the subsequent death of the debtor become, under the Statute of Louisiana, the subject of administration in the probate courts of the State. The doctrine as declared in the cases cited does not admit of any exception to the jurisdiction of the circuit court of the United States in such cases. Indeed, if an exception could be made in cases in the probate court, it might be made in other cases. Special jurisdiction in particular classes of cases might be authorized, so as to take a large portion of subjects from the jurisdiction of the federal courts. When property is seized to satisfy a money judgment of the United States court, and thus brought within its custody, it is appropriated to pay that judgment, and the court cannot surrender its jurisdiction over the property until it is applied to that judgment, or that judgment is otherwise satisfied. Only the part remaining after such appropriation goes, upon the death of the debtor, into the probate court as his assets. All proceedings under a levy of execution have relation back to the time of the seizure of the property. *Freeman v. Dawson*, 110 U. S. 264, 270 [28: 141, 143].

We do not question the general doctrine laid down in *Yonley v. Lavender*, 88 U. S. 21 Wall. 276, 279, 280 [22: 536-538], to the effect that the administration laws of a State are not merely rules of practice for the courts, but laws limiting the rights of the parties, and will be observed by the federal courts in the enforcement of individual rights, and that those laws upon the death of a party withdraw the estate of the deceased from the operation of the execution laws of the State, and place them in the hands of his executor or administrator for the benefit of his creditors and distributees. But that doctrine only applies where the property has not been, previous to the death of the debtor, taken into custody by the federal court upon its process, and thus specifically appropriated to the satisfaction of such judgment. In this case, had Gomila died before the property in question had been seized upon process issued upon a judgment against him, the doctrine of the case cited might have been applicable. We do not recall any case now where the federal courts have not paid respect to the principle that all debts to be paid out of the decedent's estate are to be established in the court to which the law of his domicile has confided the general administration of estates, and that judgments against the deceased, unaccompanied by a seizure of property for their satisfaction, stand in the same position as other claims against his estate, and are to be paid in like manner. The jurisdiction of chancery to enforce the equitable rights of a nonresident creditor in the case of maladministration or non-administration of the estate of a decedent, stands upon a different principle (*Payne v. Hook*, 74 U. S. 7 Wall. 425 [19: 280]); the rule prevailing, as stated in *Hyde v. State*, 61 U. S. 20 How. 170, 175 [15: 874, 875], that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired

by the laws of the State which prescribe the modes of redress in their courts or which regulate the distribution of their judicial power.

Nor is there anything in the doctrine of the exclusive jurisdiction of the federal court to dispose of the property in its custody without any intervention of the probate court, until its judgment is satisfied, that in any way trenches upon that doctrine, equally well established, that where a state and a federal court have concurrent jurisdiction over the same subject matter, that court which first obtains jurisdiction will retain it to the end of the controversy, either to the exclusion of the other, or to its exclusion so far as to render the latter's decision subordinate to the other, a doctrine which, with some exceptions, is recognized both in federal and state courts. *Wallace v. McConnell*, 88 U. S. 18 Pet. 186, 143 [10: 95]; *Taylor v. Taintor*, 88 U. S. 16 Wall. 366, 870 [21: 287, 290].

Wallace v. McConnell, 88 U. S. 18 Pet. 186, 143 [10: 95], was a case brought in the District Court of the United States for the District of Alabama, exercising the power of a circuit court, upon the promissory note of the defendant for \$4,880. The defendant appeared and pleaded payment and satisfaction, and, issue being joined, the case was continued until the succeeding term. The defendant then interposed a plea of *pais darrien continuance*, alleging, that as to \$4,204 of the sum, the plaintiff ought not to maintain his action, because that sum had been attached in proceedings commenced against him under the Attachment Law of the State in which he was summoned as garnishee. In those proceedings he had admitted his indebtedness beyond a certain payment made, and the state court gave judgment against him for the balance. To this plea the plaintiff demurred, and the demurrer was sustained. The case being taken to this court, it was contended that the proceedings under the Attachment Law of Alabama were sufficient to bar the action as to the amount attached, and that, therefore, the demurrer ought to have been overruled. But the court said: "The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the district court of the United States, and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts that would extremely embarrass the administration of justice."

From the views expressed it follows that the court below erred in ordering the marshal to discontinue the advertisement for the sale of the property seized, and from proceeding with its sale, and directing its delivery over to the executor of the deceased Gomila, for purposes of administration under the orders of the Probate Court of the Parish of Orleans. Only so much of the property, or of its proceeds, as may remain after the satisfaction of the judgment under which the property was seized, can be transferred to such executor.

The judgment of the court below must therefore be reversed, and the cause remanded, with directions to discharge the rule; and it is so ordered.

182 U. S.

WILLIAM H. ROBERTSON, Collector of the Port of New York, *Piff, in Err.*,

v.

OTTO GERDAN.

(See S. C. Reporter's ed. 454-459.)

Duty on ivory keys for pianos—not musical instruments.

1. Ivory pieces for the keys of pianos or organs are manufactures of ivory and are not dutiable as musical instruments.
2. The fact that such articles were to be used exclusively for a musical instrument, and were made on purpose for such an instrument, does not make them dutiable as musical instruments.

[No. 56.]

Argued Dec. 4, 1889. Decided Dec. 16, 1889.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of plaintiff to recover duties paid under protest on certain ivory pieces for the keys of pianos or organs. *Reversed.*

The facts are stated in the opinion.

Mr. Wm. A. Maury, Assistant Attorney-General, for plaintiff in error.

Messrs. Stephen G. Clarke and Edwin B. Smith for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court:

This is an action brought in the Superior Court of the City of New York, and removed by certiorari by the defendant into the Circuit Court of the United States for the Southern District of New York, by Otto Gerdan against William H. Robertson, Collector of Customs of the Port of New York, to recover duties paid under protest on certain ivory pieces for the keys of pianos or organs, imported into the Port of New York, and entered there, some of them in September and October, 1882, and the rest of them in January, October and November, 1884. Upon those imported in 1882, the Collector assessed a duty of 35 per cent *ad valorem*, under the provision of Schedule M of section 2504 of the Revised Statutes (2d ed. p. 474), enacted June 22, 1874, which imposes that rate of duty on "manufactures of bones, horn, ivory or vegetable ivory." On the articles imported in 1884, the Collector assessed a duty of 80 per cent *ad valorem*, under that provision of Schedule N of section 2502 of the Revised Statutes, as enacted by the Act of March 3, 1883 (22 Stat. 511), which imposes that rate of duty on "bone, horn, ivory or vegetable ivory, all manufactures of, not specially enumerated or provided for in this Act."

The importer claimed in his protest that the goods imported in 1882 were subject to a duty of 30 per cent *ad valorem*, under that provision of Schedule M of section 2504 of the Revised Statutes of 1874 (2d ed. p. 478), which imposes that rate of duty on "musical instruments of all kinds;" and that the goods imported in 1884 were liable to a duty of 25 per cent *ad valorem*, under that provision of Schedule N of section 2502 of the Revised Statutes, as enacted by the said Act of March 3, 1883 (22 Stat. 513), which imposes that rate of duty on "musical instruments of all kinds."

On appeal, the decision of the Collector was affirmed by the Secretary of the Treasury, and suit was brought in due time. The plaintiff had a verdict at the trial, and judgment was entered for him, for \$345.50, to review which the defendant has brought a writ of error.

The bill of exceptions states as follows: "Plaintiff called as his only witness George W. Clark, who, being duly sworn, testified that he was in the employ of plaintiff; that he identified the samples produced as similar to the articles which were imported; that they are pieces for the keys of pianos or organs; that they come in packages and are matched to certain octaves for certain instruments, to wit, organs and pianos, five octaves for organs and seven octaves for pianos, and are glued on the keys; that they are sawed and cut in a particular shape for that purpose, and are tapered in thickness, so that the end meets and the shaft comes in between. Q. They are used for no other purpose than for piano and organ keys? A. That is it, sir. On cross-examination this witness testified that he had never put them on pianos or organs; that there are different grades and two sizes of the articles in question. Q. Do you know how they are put on the piano? A. We don't do that; we sell to the piano makers and key-board makers. I have seen it done. They scrape them to make them hold to the wood; then they are put on the key-board, and then sawed out and stuck on in that way on a large board, and then sawed out, and this, the ivory piece, is then glued on top of it, and then it is polished. Q. Are the corners rounded off? A. We don't do that; we sell to the makers. Q. As a matter of fact, don't you know that the outside corners are rounded off? A. I have seen it so, yes, sir; on the pianos. We are not piano makers; we sell to the piano and key-board makers." No other evidence was offered on either side.

The defendant asked the court to direct a verdict in his favor, because (1) the imported article was not a musical instrument, and (2) it was not a completed, indispensable part of a musical instrument. This motion was denied, and the defendant excepted. The defendant then asked the court to charge the jury that, in order to find for the plaintiff, they must find that the imported articles were completed, indispensable parts of a musical instrument. But the court charged that if the articles were used exclusively for pianos and organs, the jury should return a verdict for the plaintiff, if not, for the defendant; to which instruction the defendant excepted. The court also charged that if the articles were made on purpose for pianos and organs, as musical instruments, and no other purpose, the jury might return a verdict for the plaintiff. To this instruction the defendant excepted.

We think there was error in the charge of the court. The substance of the charge was that, if the articles were made on purpose to be used in pianos and organs, and were used exclusively in pianos and organs, they were dutiable as musical instruments, and not as manufactures of ivory. That the articles were in themselves musical instruments, cannot be gravely contended. They were ivory pieces for the keys of pianos or organs. As imported, they were simply pieces of ivory which had

undergone a process of manufacture; were of a shape and size to be used for certain octaves of pianos and organs; and were sold to piano makers and key-board makers. Those persons scraped the lower surface of the ivory, to make it adhere to a piece of wood to which it was afterwards glued. In the shape in which the articles were imported, they were clearly manufactures of ivory.

Neither of the Statutes in question imposes on parts of musical instruments the same rate of duty which it imposes on musical instruments.

By Schedule E of section 11 of the Act of July 30, 1846 (9 Stat. 47), a duty of 20 per cent *ad valorem* was imposed on "musical instruments of all kinds, and strings for musical instruments of whip-gut or catgut, and all other strings of the same material;" and, by the same Act (p. 45), a duty of 80 per cent *ad valorem* was imposed on "manufactures of bone, shell, horn, pearl, ivory or vegetable ivory."

By section 20 of the Act of March 2, 1861 (12 Stat. 190), a duty of 20 per cent *ad valorem* was imposed on "musical instruments of all kinds, and strings for musical instruments of whip gut or catgut, and all other strings of the same material;" and by section 23 of the same Act (p. 192), a duty of 80 per cent *ad valorem* was imposed on "manufactures of bone, shell, horn, ivory or vegetable ivory."

By section 6 of the Act of July 14, 1862 (12 Stat. 550), a duty of 10 per cent *ad valorem*, in addition to then existing duties, was imposed on "musical instruments of all kinds, and strings for musical instruments of whip-gut or catgut, and all other strings of the same material;" and by section 13 of the same Act (p. 557), a duty of 5 per cent *ad valorem*, in addition to then existing duties, was imposed on "manufactures of bone, shell, horn, ivory or vegetable ivory."

By Schedule M of section 2504 of the Revised Statutes of 1874 (2d ed. p. 481), a duty of 80 per cent *ad valorem* was imposed on "strings: all strings of whip-gut or catgut, other than strings for musical instruments;" and by section 2505 of said Revised Statutes (2d ed. p. 484), "catgut strings, or gut-cord, for musical instruments," were made free of duty.

By section 2502 of the Revised Statutes, as enacted by the Act of March 3, 1883 (22 Stat. 514), a duty of 25 per cent *ad valorem* was imposed on "strings: all strings of catgut, or any other like material, other than strings for musical instruments;" and, by section 2508 of the same enactment (22 Stat. 518), "catgut strings, or gut-cord, for musical instruments," were made free of duty.

It is thus seen that, by the Act of 1846, by the Act of 1861, and by the Act of 1862, provision was made for imposing a duty on parts of stringed musical instruments, by laying a duty on "strings for musical instruments of whip-gut or catgut," leaving other parts of musical instruments, imported in parts, to be dutiable under other provisions of law. So, in the Revised Statutes of 1874, and as enacted in 1883, while there is no specific duty on parts of musical instruments, as such parts, "catgut strings or gut-cord, for musical instruments," are made free of duty, leaving other parts of

musical instruments to be dutiable under other provisions than that applicable to "musical instruments of all kinds."

This view of the legislation of Congress is fortified by the fact that in the Revised Statutes of 1874, and in the same as enacted in 1883, a duty is imposed on carriages and parts of carriages; on chronometers and parts of chronometers; on clocks and parts of clocks, and on watches and parts of watches. If Congress had intended, in either enactment of the Revised Statutes, to impose the same duty on parts of musical instruments which is imposed on musical instruments, it would have been easy to impose that duty on "musical instruments of all kinds, and parts of the same."

It is very clear to us that the fact that the articles in question were to be used exclusively for a musical instrument, and were made on purpose for such an instrument, does not make them dutiable as musical instruments.

The contention of the plaintiff is thought to be supported by the fact that, in the case of *Foot v. Arthur*, tried in the Circuit Court for the Southern District of New York early in the year 1880, and unreported, it was held that a completed violin-bow was a musical instrument, and subject to duty as such under the Statute, and by the fact that the Treasury Department acquiesced in that decision, under the advice of the Attorney-General of the United States. It is sufficient to say that the pieces of ivory in question were not violin-bows; and that, whatever the true view may be as to violin-bows, the same considerations applicable to them do not apply to the articles in question here.

Attention is called by the plaintiff to the fact that the provision in the Revised Statutes, as enacted in 1883, in regard to manufactures of ivory, imposes the duty of 80 per cent *ad valorem* on all manufactures of ivory "not specially enumerated or provided for in this Act." But those words have no bearing on the present case, because the pieces of ivory in question are not specially enumerated or provided for in the Act of 1883.

The judgment is reversed, and the case remanded to the Circuit Court, with a direction to grant a new trial.

WILLIAM H. ROBERTSON, Collector of the PORT OF NEW YORK, *Plff. in Err.*,

HENRY R. BRADBURY.

(See S. C. Reporter's ed. 491-501.)

Act of March 3, 1883—duty on valuation, including transportation charges—appraisement—damaged goods—deduction for lost goods—voluntary payment.

1. The 7th section of the Act of March 3d, 1883, entitled "An Act to Reduce Internal Revenue Taxation, and for Other Purposes," went into effect at the time of the passage of the Act.
2. The levy of duties on a valuation which includes charges of transportation from the place of production to the place of shipment, and charges of shipment, since the passage of the Act of 1883, is contrary to law.

3. If the value of the goods expressed in the invoice included the charges of transportation and shipment, and the importer desired to have the invoice corrected, and he was told by the officers that he must enter the goods at the value expressed in the invoice and was compelled to do that in order to proceed at all, then he was not bound to ask for an appraisement under section 2926, Rev. Stat., in order to recover for the excess of duties paid.

4. If goods are damaged that is matter for appraisement under section 2927, Rev. Stat., but if any portion of them has been actually lost an allowance for the same must be made to the importer in estimating the duties.

5. Where the jury finds that the plaintiff was compelled to pay the illegal duties in order to get possession of his goods, the payment was not voluntary.

[No. 58.]

Argued Nov. 22, 1889. Decided Dec. 16, 1889.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of plaintiff in an action to recover an excess of duties paid. *Affirmed.*

The facts are stated in the opinion.

Mr. Wm. A. Maury, Assistant Attorney-General, for plaintiff in error.

Messrs. Edward Hartley and Walter H. Coleman, for defendant in error:

The importer made his entry under duress as the only means of getting his goods.

Maxwell v. Griswold, 51 U. S. 10 How. 242 (18: 405); *Hutton v. Schell*, 6 Blatchf. 49, 50, 59; *U. S. v. Lawson*, 101 U. S. 169 (25: 862); *Corkle v. Maxwell*, 8 Blatchf. 418; *U. S. v. Ellsworth*, 101 U. S. 173 (25: 864).

Refusal to receive any other proof in aid of the original invoice relieved the importer from any obligation to produce it.

U. S. v. Lee, 106 U. S. 196, 200, 202 (27: 172, 174); *Atwood v. Weems*, 99 U. S. 186, 187 (25: 472); *Tracey v. Irwin*, 85 U. S. 18 Wall. 549 (21: 786); *Bennett v. Hunter*, 76 U. S. 9 Wall. 326 (19: 672); *Craig v. Maxwell*, 2 Blatchf. 548; *Reynolds v. Maxwell*, 2 Blatchf. 556, 557.

Duty is due only on the quantity landed.

Marriott v. Brune, 50 U. S. 9 How. 619 (18: 282); *U. S. v. Southmayd*, 50 U. S. 9 How. 637 (18: 290); *Lawrence v. Canwell*, 54 U. S. 18 How. 488 (14: 235); *Balfour v. Sullivan*, 17 Fed. Rep. 281, 8 Sawy. 648; *Weaver v. Saltonstall*, 38 Fed. Rep. 493.

Mr. Justice Bradley delivered the opinion of the court:

This is a suit to recover alleged excess of duties exacted on certain cargoes of asphaltum in cakes, imported by Bradbury, the plaintiff below, from Antwerp, in May, 1883. Two questions are presented in the case for our determination: *First*, whether the 7th section of the Act of March 3d, 1883, entitled "An Act to Reduce Internal Revenue Taxation, and for Other Purposes," went into effect at the time of the passage of the Act, or not until the fourth of July following; *secondly*, if it did go into effect at the time of the passage of the Act, whether, under the circumstances of this case, the plaintiff below was entitled to the benefit of that section.

Prior to the passage of the Act referred to,

under the 2907th and the 2908th sections of the Revised Statutes (which were taken from the 9th section of the Act of July 28th, 1866, 14 Stat. 830), the collector, in determining the "dutiable value" of merchandise, was required to add to the cost, or actual wholesale price or general market value, at the time of exportation, in the principal markets of the country whence the goods were imported, the cost of transportation, shipment and transshipment, with all the expenses included, from the place of growth, production or manufacture to the vessel in which shipment was made to the United States; also the value of the sack, box or covering, and commissions and brokerage; which additions were to be regarded as part of the actual value, and a penalty was imposed for not including them. These sections were repealed by the 7th section of the Act of March 3d, 1883. They are repealed by words in the present tense, thus: "That sections 2907 and 2908 . . . be, and the same are hereby, repealed, and hereafter none of the charges imposed by said sections, or any other provisions of existing law, shall be estimated in ascertaining the value of goods to be imported." We do not see how there can be any doubt that this repealing section went into immediate effect. The law itself went into immediate effect, although, it is true, various provisions of it contained in other sections were postponed, to take effect, some on the first of July and some on the first of May. But where such postponement was intended it was expressed, and only referred to the parts that were so postponed. It did not affect the section in question. And such was the understanding of the Treasury Department itself at the time. In a treasury circular of March 12th, 1883, addressed to the collectors of customs, the Secretary, referring to the Act in question, then just passed, said: "Various sections recite the date when each shall go into effect, and, so far as concerns these sections, those dates control. Section 7, however, names specifically no date when it is to go into operation, and the Department holds that it takes effect from and after the date of the passage of the Act." This contemporaneous construction is entitled to some weight in favor of importers. *United States v. Johnston*, 124 U. S. 236, 253 [81: 389, 396]. At all events it was undoubtedly the correct construction.

The question then arises whether the plaintiff below, by anything that took place in the entry of the goods at the custom-house, or by any omission to do what the law required, precluded himself from being entitled to the benefit of this Statute.

Under the old law, the cost or value of the goods at the place of production was often merged for convenience with the costs of transportation to the place of shipment and the other charges, and the aggregate was called the price or value "*free on board*" of the vessel in which the goods were shipped to the United States. This price or value, *free on board* or *f. o. b.*, in the absence of fraud, represented the "dutiable value," subject, of course, to correction by appraisement. When the vessel arrived, and the consignee presented the entry at the custom-house, it was accompanied with the invoice, showing this price or value. In the present case, although the goods were shipped

in April, the consignors in Europe, not being aware of the passage of the Act of March 3d, 1883, repealing sections 2907 and 2908, made out the invoices in the usual way, stating the price of the goods as free on board at Antwerp, including therein the original cost of the goods at the mines, near Neufchatel, Switzerland, their cost of transportation from Neufchatel to Antwerp, and the other charges required by the repealed sections. This invoice was duly certified by the consul at Mannheim, Germany. Before the entry of the goods, a corrected supplementary invoice had arrived, in answer to a telegram, and was presented at the time of the entry; but it had no consular certificate—that being supplied afterwards. On the trial of the cause, the plaintiff introduced evidence tending to show these facts. He produced the entry, which described the importation as "12,000 cakes, 300,000 kilograms asphaltum, marks 15,750, \$8,749," with the usual consignee's oath that the invoice and bill of lading produced with the entry were the true and only ones received, and that the invoice exhibited the actual cost or fair market value at Neufchatel of the goods and all charges thereon. The invoice, certified by the consul, on which the entry was based, was also produced in evidence, representing the goods as "a quantity of asphaltum, 300,000 kilograms, at 52.50 marks per 1000 kilograms, 15,750 marks, free on board—Antwerp." There was attached to this invoice on making the entry, and when produced in evidence, the uncertified supplementary invoice before referred to, which represented the goods as "a quantity of asphaltum, 300,000 kilograms; value at the mines, 84.50 marks per 1000 kilos. *M* 10,350. Freight and charge from the mines to Antwerp, free on board, at 18 marks per 1000 kilos, 5,400. Free on board, Antwerp, marks 15,750."

Attached to the consular invoice was the oath of the owner of the goods, which stated, among other things, that said invoice contained the actual cost and quantity thereof and of all charges thereon. The certificate of the consul attached to said invoice was dated 20th of April, 1883, and certified, among other things, that the invoice, "in which are mentioned and described certain asphaltum, amounting with the charges thereon to the gross sum of marks 15,750, was produced to him by the owner," and that the actual market value of the goods (except as corrected by him) was correct and true.

The plaintiff further offered evidence to show that, being charged with duties on the entire amount of 15,750 marks, he protested against the assessment on the ground that the defendant "assessed duty upon the cost of transportation, shipment and transshipment, with all expenses included, from the place of production and manufacture to the vessel in which the shipment was made to the United States, contrary to section 7 of the Act of March 3, 1883," claiming "that said charges were not subject of appraisement or duty;" and on a second ground that the weigher's return showed a less quantity than that on which duty was charged; and that he paid the excess of duties exacted under compulsion, solely for the purpose of obtaining the goods.

An appeal was taken to the Secretary of the

Treasury, who affirmed the decision of the Collector, on the ground that the deduction for charges had not been made in the entry, and the action was brought within proper time thereafter.

A. W. Patterson, the plaintiff's custom-house broker, testified that he presented the two invoices above named at the custom-house on the entry of the goods; that he made the entry for the plaintiff; that he asked to make the entry on both the consular and supplemental invoices, the latter as explanatory of the former; that the custom-house officers refused to allow this to be done; that he asked permission to use the supplemental invoice in connection with the other invoice as explanatory, and enter in the net value, charges off, which was refused; that he then entered the goods according to the consular invoice; that the supplemental invoice had come in answer to a telegram to the Neufchatel Asphaltum Company, to furnish a corrected invoice showing what the charges were; that subsequently to the entry of the goods a copy of the supplemental invoice was received, properly certified by the consul. (This copy was admitted in evidence.) The weigher's certificate was also produced, showing a deficiency of 2,740 pounds of asphaltum in the cargo of the Marshall, and over 9,000 pounds in that of the Edith, for which no refund of duty had been made. The witness Patterson further testified as to the meaning of the expression "free on board," as before stated.

Potter, an examiner in the appraisers' department, testified that he passed the entry in question, and indorsed it "correct," which merely meant that the entry was sufficient to cover the market value of the goods. He further testified that he found from memory, and by comparison with other goods in the same markets, that the market value of these goods was 84 marks 50 pfennigs, or 85 marks at the mines, at the place of production. Being asked if he had passed, as a rule, invoices of asphaltum from Mannheim, Germany, for a considerable period before and after that time at the same rate of 84.50, he said that would be impossible to say without the papers, but he presumed that that was about the market value. On cross-examination he stated that he had no recollection as to what he found the market value of this importation to be independent of what was written upon the entry and invoice. To the question "Have you any recollection at all of what you did, in fact, find the market value in the principal foreign ports to be?" his answer was "Yes; I have that recollection, because it is so stated on the invoice (supplemental), that 84 marks 50 pfennigs per thousand kilograms was about the usual price, and it seems to have been stated there on the invoice." To the further question, "Then, as I understand, the effect of your testimony is that from looking at the supplemental invoice you form the impression that the value at that time at the mines was 84 marks and 50 pfennigs per thousand kilograms?" his answer was "Yes, sir."

Esterbrook, chief liquidating clerk of the custom-house, testified that, according to the course of business in the custom-house, under the law, the entered value is the value declared upon the entry under oath, and that the prac-

tice is, that the Collector shall not levy duty on less than the entered value, though the amount in the invoice is less. Another clerk testified to the same effect.

Thereupon, the evidence being closed, the counsel for the government moved that the jury be directed to find for the defendant upon the following grounds: 1, that the evidence does not show the duty exacted on any amount in excess of the invoice value; 2, nor in excess of the entered value; 3, nor does it make out a case of recovery for the plaintiff. The court having denied this motion, the counsel then made a request to charge fourteen separate propositions, the substance of which was that under section 2900 of the Revised Statutes, which declares that "the duty shall not, however, be assessed upon an amount less than the invoice or entered value," the Collector was bound to assess the duty on the amount stated in the entry and in the invoice certified by the consul, and could not take notice of the uncertified invoice; and that if the plaintiff desired to have the invoice corrected, his remedy was to demand an appraisement under section 2926 of the Revised Statutes, which provides that merchandise of which incomplete entry has been made, or an entry without specification of particulars, either for want of the original invoice or for any other cause, or which has received damage during the voyage, shall be conveyed to a warehouse and there remain until the particulars, cost or value, as the case may require, shall have been ascertained, either by the exhibition of the original invoice, or by appraisement, at the option of the owner, importer or consignee, and until the duties shall have been paid or secured to be paid.

The court declined to adopt the propositions of the counsel, but charged the jury that as the invoice certified by the consul purported to show the value of the goods "free on board at Antwerp," if the jury were satisfied by the evidence that this meant that the value so expressed included charges, the charges of transportation and placing on board ship,—charges from the markets of the country to the ship,—then it was not an invoice of the "dutiable value," but was an incomplete invoice; that if this was its character, the importer or consignee had a right to claim that it was incomplete, and to ask that the goods be appraised, or that he might amend his invoice. The charge then proceeded as follows: "You have heard Mr. Patterson testify as to what occurred when he presented this invoice to the entry clerk. . . . Now, if he was given to understand when he presented that invoice there and stated that he wanted to get the charges out in some way, and presented this additional paper—you heard his testimony about what he did—if he was given to understand that he must enter those goods at the value expressed,—that is, the value including the charges, the value expressed in the invoices, and in no other way, and that they could not get along in any other way than that,—then he was not bound to ask for an appraisement. If they gave him to understand that that was the only thing he could do, if they met him right there when he wanted to put in this additional invoice, and said the only thing you can do is to enter these goods at this value, and the importer was compelled to do it in order to pro-

ceed at all, and he yielded to that, then he was not bound to say anything about an appraisal. But if they did not do that, if they merely refused that and gave him a chance to ask for an appraisal if he wanted to, and he did not ask for it, he mistook his remedy, and the plaintiff cannot recover, and it was his fault that he did not enter them right. But if they cut him right off on that subject and said he must enter at this larger value, then it was their fault, and the plaintiff can recover if duties on charges were collected."

The court further charged that, if the examiner who appraised the goods appraised their value in the principal markets of the country whence they came, in the shape they were (that is, in cakes), at 34 marks 50 pfennigs, that was their dutiable value, and the Collector exacted a duty in excess for charges, whether he called them charges or not, and the plaintiff should recover what he paid for this duty on charges, because the Law of 1888 took out charges as a part of the dutiable value; but that, if this was not the value that the appraiser took, when he says he did appraise the goods, and the jury cannot tell what it was, then they cannot tell what duty was paid on charges, and the plaintiff has not made out his case.

As to the deficiency in weight, the counsel for the government contended, and asked the court to charge, that the plaintiff was not entitled to recover anything in respect to the difference between the weights stated in the invoices and entries and the weights stated in the official weigher's returns. The court declined so to charge, and instructed the jury that if the deficiency arose from the loss of goods on the passage, a proportionate reduction should be made; but not if it arose from mere shrinkage, and if all the goods that were sent arrived.

The counsel for the government excepted to each part of the charge as given, and to each refusal to charge as requested.

We do not think that the court below committed any error in its instructions or in its refusals.

First. In regard to the construction and effect of the consular invoice which expressed the value of the goods "free on board," it was perfectly proper and right to instruct the jury that if they were satisfied from the evidence that this form of valuation was understood to include charges of transportation from the place of production to the place of shipment, and other charges of shipment and transshipment, then the levy of duties on such valuation, since the passage of the Act of 1888, was contrary to law; and that the plaintiff could recover back the duties levied on the amount of such charges, provided he took the proper course to avail himself of the error. This is so evident that it needs no discussion to make it plainer.

Secondly. As to the course which the plaintiff did pursue, we see no error in the position taken by the court, that, although the Statute prescribed a particular method to be followed under section 2026 of the Revised Statutes, in case of an incomplete entry of goods, or an entry without the specification of particulars (namely, to convey the goods to a warehouse,

there to remain until the particulars, cost or value should be ascertained either by the exhibition of the original invoice, or by appraisal), yet if, when the importer or consignee pointed out the imperfection, and desired to correct it, or have it corrected, he was met by a declaration of the officers that he must enter the goods at the value expressed in the invoice and in no other way, and was given to understand that that was the only thing he could do, and he was compelled to do that in order to proceed at all, then he was not bound to ask for an appraisal under the Statute. The case was prejudged against him. The theory of the custom-house officers evidently was that the valuation of the goods in the entry and invoice was binding on the importer, although in that valuation he had inadvertently included charges for transportation and other charges exempted from duty by the Act of 1888; and that it was his own fault for having so included such charges, and that he was estopped from disputing the valuation thus made and sworn to, even though qualified by the words "free on board," which could have no effect to alter the valuation. It is not stated in these words, but that was the tendency of the evidence; and we think that the jury were properly instructed on the subject.

Thirdly. As to the deficiency in the weight of the goods, as the value was measured by the weight, both in the invoice and by the appraiser—namely, so much per 1,000 kilograms,—we think the court was right in telling the jury that any deficiency arising from loss of goods, and not from mere shrinkage, was a proper subject of recovery. If goods are damaged or affected intrinsically, that is a matter for examination and appraisal under section 2027, Revised Statutes; but if any portion of them has never come to hand but has been actually lost, the case would seem to come within the spirit of section 2021, which says that "if, in the opening of any package, a deficiency of any article shall be found on examination by the appraisers, the same shall be certified to the collector in the invoice, and an allowance for the same be made in estimating the duties." The appraiser's certificate in the present case related merely to *pro rata* value, and not to quantity—that was ascertained and certified by the weigher. If only half of the cargo was found on board the ship, it could hardly be contended that the importer would be bound by his entry and invoice to pay duty on the entire cargo shipped at Antwerp.

As to the point that the payment of the duties was voluntary on the part of the plaintiff, it is obvious to remark, that the case as already considered involved this very question. The verdict of the jury in favor of the plaintiff, under the instructions given, was virtually a finding of the fact that the plaintiff was compelled to pay the illegal duties in order to get possession of his goods. The counsel for the government says that he ought to have asked for a reappraisal. The question whether he was bound to take that course or not was involved in the inquiry submitted to the jury under the second head of instructions.

We see no error in the record and the judgment is affirmed.

THE WESTERN UNION TELEGRAPH
COMPANY, *Pff. in Err.*,

v.

THOMAS SEAY, Governor, ET AL.

(See S. C. The W. U. Tel. Co. v. Alabama Board of
Assessment, Reporter's ed. 472-478.)

*Telegraph companies—exemption from taxation
on interstate messages—interstate commerce—
jurisdiction.*

1. Telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866, sections 5263 to 5268, Rev. Stat. U. S., cannot be taxed by a State for any messages, or receipts arising from messages, from points within the State to points without, or from points without the State to points within, but such taxes may be levied upon all messages carried and delivered exclusively within the State.
2. Messages of the former class are elements of commerce between the States and not subject to legislative control of the States, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the State, and therefore subject to its taxing power.
3. Where a state court decided that a state law taxing telegraph companies authorized and imposed a tax upon receipts derived by them from messages from or to other States, and sustained a state tax thereon under such law, this court has jurisdiction to review such decision.

[No. 115.]

Submitted Nov. 15, 1889. Decided Dec. 16, 1889.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment affirming a judgment of a court of that State quashing a writ of certiorari to correct an assessment for taxes on the gross receipts of a Telegraph Company. *Reversed.*

The facts are stated in the opinion.

Reported below, 80 Ala. 278.

Messrs. Gaylord B. Clark and Thos. B. Jones for plaintiff in error.

Mr. John T. Morgan for defendants in error.

Mr. Justice Miller delivered the opinion of the court:

This case comes before us on a writ of error to the Supreme Court of the State of Alabama.

The question on which the jurisdiction of this court depends has been decided in this court so frequently of late years, several of the decisions having been made since the judgment of the Supreme Court of Alabama was delivered, that but little remains to be said in the present case except to show that it comes within the principles of the cases referred to.

That principle is, in regard to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866, sections 5263 to 5268 of the Revised Statutes of the United States, that they shall not be taxed by the authorities of a State for any messages, or receipts arising from messages, from points within the State to points without or from points without the State to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the State. The foundation of this principle is that messages of the former class are elements of commerce between the States and not subject

to legislative control of the States, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the State, and therefore subject to its taxing power. The following cases in this court have fully developed and established this proposition: *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 1 [24: 708]; *Western Union Tel. Co. v. Texas*, 105 U. S. 460 [26: 1067]; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530 [31: 790]; *Ratterman v. Western Union Tel. Co.* 127 U. S. 411 [32: 229]; *Leloup v. Port of Mobile*, 127 U. S. 640 [32: 811]; *Fargo v. Michigan*, 121 U. S. 290 [30: 888]; *Philadelphia and Southern Steamship Co. v. Pennsylvania*, 122 U. S. 826 [30: 1200].

The plaintiff in error instituted its proceeding in the state court by a writ of certiorari, directed to E. A. O'Neal, Governor; C. C. Langdon, Secretary of State; M. C. Burke, Auditor, and Frederick H. Smith, Treasurer, composing the State Board of Assessment, for the purpose of correcting the error which they had made in an assessment for taxation of the gross receipts of the Company. This Board was invested by the law of Alabama with authority to assess for taxation the items of property of railroad companies returned to the auditor of the State (section 13 of the Act approved February 17, 1885), and by section 15 of the same Act a similar authority is conferred upon it in reference to telegraph companies whose lines, or any part thereof, are within the State. By an Act to levy taxes for the use of the State and the counties thereof, approved December 12, 1884, it is declared by subdivision 6, section 1, that a tax shall be levied "on the gross amount of the receipts by any and every telegraph, telephone, electric light and express company, derived from the business done by it in this State, at the rate of two dollars on the hundred dollars." The Telegraph Company, in making its report of gross receipts to this Board of Assessment, included only those received from business transacted wholly within the State of Alabama. The Board were not willing to accept this report, and required the Company to make report of its receipts from all messages, whether carried wholly within or partly without the State, and, against the remonstrances of the Company, decided that this sum should be the amount on which the tax of two per cent should be paid. It was to correct the supposed error of this assessment that the writ of certiorari was issued by the Circuit Court of Montgomery County to the Governor and others constituting that Board of Assessment. That court held the assessment valid, and made an order quashing the writ of certiorari and dismissing the proceeding. On appeal to the Supreme Court of the State this decision was affirmed, and the case is now before us, on a writ of error, to review that judgment of affirmance. In the opinion of the Supreme Court of Alabama, which is found in the record, the point mainly discussed is the construction of the Tax Law, in regard to the meaning of the words "gross receipts derived from business done in this State," and also whether, "if that means all the receipts of the Company for business having connection with lines within the State, it is consistent with the Constitution of Alabama." Of these questions

this court has no jurisdiction; but, having decided that the Statute, by fair interpretation, included all receipts derived from business done in the State, and actually received there, though the message may have been delivered at, or may have been sent for delivery from, some office out of the jurisdiction of the State, the court proceeds: "Though thus construed, the Statute is not an unauthorized interference with interstate commerce. The question is fully and ably considered and discussed in the following cases: *Western Union Tel. Co. v. Richmond*, 26 Gratt. 1; *Western Union Tel. Co. v. State*, 55 Tex. 814; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 531, and *Port of Mobile v. Leloup*, 76 Ala. 401; and is expressly decided in respect to a tax on the gross receipts of railroad companies, they consisting in part of freights received for transportation of merchandise from the State to another State, or into the State from another, in *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284 [21: 164], and in *Osborne v. Mobile*, 88 U. S. 16 Wall. 479 [21: 470]."

It will be observed that the authorities relied on by the Supreme Court of Alabama to sustain its judgment in this case are mostly decisions of state courts. The case of the *Western Union Tel. Co. v. State*, 55 Tex. 814, and the case of *Port of Mobile v. Leloup*, 76 Alabama, 401, have been reversed by the decisions of this court in the same cases on writ of error to the state courts. Of the cases already referred to as establishing the proposition which we have stated in the early part of this opinion, those of the *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 1 [24: 708]; *Western Union Tel. Co. v. Texas*, 105 U. S. 460 [26: 1067]; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 580 [31: 790]; *Ratterman v. Western Union Tel. Co.* 127 U. S. 411 [32: 229], and *Leloup v. Port of Mobile*, 127 U. S. 640 [32: 811], are all cases in regard to taxes upon telegraph companies by state authorities, and all of them hold that no tax can be imposed upon messages, or upon the receipts derived from messages, where the communication is carried either into the State from without, or from within the State to another State.

In the earliest of these cases, *Pensacola Tel. Co. v. Western Union Tel. Co.*, the Statute of Florida had attempted to confer upon a corporation of its own State, the Pensacola Telegraph Company, an exclusive right of doing the telegraph business within that State. This court held, affirming the judgment of the Circuit Court of the United States for that District, that this Statute was a regulation of commerce among the States forbidden by the Constitution of the United States to the State of Florida. In the next case, that of the *Telegraph Co. v. Texas*, in which that State had imposed a tax of one cent for every full-rate message sent, and one half cent for every message less than full rate, on the business of the Western Union Telegraph Company, many of the messages were by the officers of the government on public business, and a large portion of them were to places outside of the State. The company contested the constitutionality of this law, and the case came to this court, where it was said that a telegraph company occupies the same relation to commerce,

as a carrier of messages, that a railroad does as a carrier of goods. Both companies are carriers, and their business is commerce itself. The court then went on to consider the authorities, and said further that it followed that the judgment under review, so far as it included the messages sent out of the State or for the government on public business, was erroneous. The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of the State, and does not affect other nations or States,—that is to say, the purely internal commerce of the State, belongs exclusively to the State,—was said to be as well settled as that the regulation of commerce which does affect other nations or States or Indian tribes belongs to Congress. The judgment of the Supreme Court of Texas was therefore reversed.

The case of *Western Union Tel. Co. v. Massachusetts* was a question growing out of the taxation of the telegraph company by the State of Massachusetts, and the same principle we have already considered was asserted in that case, after a general review of the authorities upon the subject.

In *Ratterman v. Western Union Tel. Co.* the same question arose on a writ of error to the Circuit Court of the United States for the Southern District of Ohio, where, after a full review of the whole subject, this court said that there was really no question, under the decisions of this court in regard to the proposition, that so far as a tax was levied upon receipts properly appurtenant to interstate commerce, it was void; and that so far as it was only upon commerce wholly within the State, it was valid. The commerce here mentioned was telegraph business, and the receipts were receipts for telegraph messages. This case arose upon a certificate of division of the judges who presided at the trial, and in remanding the case the court said: "We answer the question in regard to which the judges of the circuit court divided in opinion, by saying that a single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross, and without separation or apportionment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce;" and, concurring with the circuit judge in his action enjoining the collection of the taxes on that portion of the receipts derived from interstate commerce, and permitting the treasurer to collect the other tax upon property of the company and upon receipts derived from commerce entirely within the limits of the State, the decree was affirmed.

In the subsequent case, *Leloup v. Port of Mobile*, found in the same volume, the question arose upon a conviction under the Statute of Alabama on an indictment for failing to take out a license tax by the telegraph company, imposed by the City of Mobile on all telegraph companies. Edward Leloup, the agent of the company, was convicted under this proceeding, his conviction affirmed by the Supreme Court of Alabama, and its judgment brought to this court on writ of error. This court held,

that, his company having complied with the Act of Congress of July 24, 1866, the State could not require it to take out a license for the transaction of business in the city, and that a general license tax on the telegraph company affected its entire business, interstate as well as domestic and internal, and was unconstitutional.

We think these cases are so directly in point on the questions arising in the present case that they must control; and as the record of the case presents the means by which the receipts arising from commerce wholly within the State, and from that which, under these definitions, may be called interstate commerce, can be separated, *the judgment of the Supreme Court of Alabama is reversed, and the case remanded to it, with directions for further proceedings in conformity with this opinion.*

MEHITABLE B. GREENE ET AL., Appts.,
v.

JAMES TAYLOR ET AL.

(See S. C. Reporter's ed. 415-444.)

Statute of Limitations—the two years' Statute which applies to assignee in bankruptcy, applies to his grantee—beginning to run against assignee, continues to run against grantee—new period of limitation—redemption from foreclosure sale—waiver of right.

1. A conveyance by the assignee in bankruptcy cannot prevent the operation of the bar of the Statute against the grantee, when it has already run against the assignee, or bring into action a new period of limitation dating from the time of the conveyance.
2. Nor can it interrupt the running of the Statute against the claim or right, when it has once commenced to run against the assignee.
3. The purchaser takes the right *cum onere*, subject to the continuance of the running of the Statute, and subject to the fact that a part of the two years has already run as against the claim or right, while it was in the hands of the assignee, and to the consequence that when sufficient additional time shall have run against it in the hands of the purchaser to make up the entire two years, the claim or right will be wholly barred.
4. No initiation of a new period of limitation, under any statute, begins to run in favor of the purchaser at the time of his purchase, whether the two years wholly elapsed, or only a part thereof elapsed, while the claim was owned by the assignee.
5. Where the Statute of Limitations has begun to run against the right of an assignee in bankruptcy to redeem from a foreclosure sale and conveyance of real property of the bankrupt, the Statute continues to run against a subsequent grantee of the same property by conveyance from the assignee.
6. The right of a creditor to redeem such property by virtue of a judgment is waived by his procuring the property to be sold by the assignee in bankruptcy and its proceeds to be applied on the judgment.

[No. 128.]

Argued Nov. 20, 21, 1889. Decided Dec. 16, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois to review a decree that plaintiffs may redeem lands from a foreclosure sale and conveyance on payment of the amount found due the defendants on their lien on the land, and that, on such payment being made, defendants convey the land to plaintiffs by quitclaim deed. *Reversed and remanded, with directions to dismiss the suit.*

The facts are stated in the opinion. Opinions below, 21 Fed. Rep. 209, 27 Fed. Rep. 537.

Messrs. George L. Paddock and John Lowell, for appellants:

The two years' limitation set up in the answers, and insisted upon in the assignments of error, applies in favor of appellants,—and the bill should be dismissed.

Rev. Stat. U. S. § 5057; Bankrupt Act of March 2, 1867, § 2; *Gifford v. Helms*, 98 U. S. 248 (25: 57); *Jenkins v. Bank*, 106 U. S. 571 (27: 304); *Wiener v. Brown*, 122 U. S. 219 (30: 1207); *Traer v. Clews*, 115 U. S. 528 (29: 467).

The ignorance of the assignee is immaterial as a reply to the bar.

Norton v. De la Villebeauve, 1 Woods, 163; *McIver v. Ragan*, 15 U. S. 2 Wheat. 25 (4: 175); *Phelps v. Elliott*, 29 Fed. Rep. 53.

Messrs. Charles E. Pope and Charles B. McCoy, for appellees:

This case is not within the terms of the Statute of Limitations. The limitation clause of the Bankrupt Act, by its terms, only applies to contests between an assignee in bankruptcy and a person claiming an interest adverse to such assignee.

Bailey v. Glover, 88 U. S. 21 Wall. 846 (22: 638); *Sargent v. Helton*, 115 U. S. 352 (29: 414); *Bariles v. Gibson*, 17 Fed. Rep. 298.

Where the interest adverse to that of the assignee has been acquired through fraud and the fraud has been concealed, the two years' Statute of Limitations does not commence to run until the discovery of the fraud.

Upton v. McLaughlin, 105 U. S. 640 (26: 1197); *Rosenthal v. Walker*, 111 U. S. 190 (28: 397); *Traer v. Clews*, 115 U. S. 528 (29: 467); *Retzer v. Wood*, 109 U. S. 187 (27: 901); *Kilbourn v. Sunderland*, 130 U. S. 505 (32: 1005).

Appellees have a right to redeem from this trustee's sale by reason of their title acquired through sale of this property, under their judgment recovered against Robertson before the bankruptcy and before the trustee's sale.

Shirley v. Watts, 3 Atk. 200; *King v. Marissal*, 3 Atk. 192; 2 Story, Eq. Jur. § 1023; *Dunlap v. Wilson*, 83 Ill. 517; *Sumner v. Waugh*, 56 Ill. 539; *Beach v. Shaw*, 57 Ill. 19; *Freedman's Saving & Trust Co. v. Earle*, 110 U. S. 710 (28: 301).

Mr. Justice Blatchford delivered the opinion of the court:

On the 1st of April, 1871, Nathan S. Grow, of Chicago, Illinois, executed a trust deed to Benjamin E. Gallup, of the same place, to secure the payment of a promissory note for \$35,000, payable in five years from that date, with interest at the rate of 9 per cent per annum, payable half-yearly on October 1 and April 1, as evidenced by 10 interest coupons, bearing the same date, for \$1,575 each. The note was payable to the order of Grow, and was indorsed by him payable to David R. Greene or order. The trust deed stated that

the \$35,000 was a loan to Grow made by the legal holder of the note. Greene was the person who loaned the money. He resided in New Bedford, Massachusetts. The real estate covered by that trust deed was at the northeast corner of West Madison and Sheldon Streets, in Chicago, being 73 feet on West Madison Street, in front, 116 feet deep, on Sheldon Street, 73 feet in the rear, on a line parallel with West Madison Street and on a sixteen-foot alley, running east and west, and 116 feet on the east line, parallel with Sheldon Street. It was described as having on it three four-story brick stores with stone fronts, fronting on West Madison Street; and it was stated that a block of two-story-and-basement brick dwelling-houses was about to be erected on the property. The front piece was 60 feet deep; then came a twelve-foot court; and the rear part was 44 feet deep. The entire property came afterwards to be known as "the Jefferson-Park Hotel property." This trust deed was recorded April 1, 1871.

Grow, on the 9th of February, 1876, conveyed the entire property to William Scott Robertson, subject to an incumbrance of \$35,000, by a warranty deed, which was recorded February 18, 1876. The loan to Grow matured on the 1st of April, 1876, and in the spring of 1877 negotiations were had between Robertson and Greene for a renewal of the loan. These negotiations were successful, and Robertson executed a trust deed dated April 2, 1877 (the 1st of April, 1877, being Sunday), covering the same property, to Francis B. Peabody, of Chicago, to secure the payment of a promissory note for \$35,000, which, the trust deed stated, was for a loan of that sum, made on the day of the date of the trust deed, by the legal holder of the note to Robertson, the note being payable three years after date, with interest at the rate of 7½ per cent per annum, payable half-yearly on the 2d of October and 2d of April, with six interest coupons for \$1,812.50 each. The name of David R. Greene was not mentioned in the trust deed or in the promissory note. The six interest coupons were each of them signed by Robertson and made payable to his order; and each was indorsed by him payable to the order of David R. Greene. The note was payable to the order of Robertson and was indorsed by him payable to David R. Greene or order. It stated that it was expressly agreed that if default should be made in the payment of any installment of interest when it should become due, and such default should continue for 30 days thereafter, the principal sum should, at the election of the legal holder of the note, at once become due and payable, such election to be made at any time after the expiration of said 30 days, without notice; and this provision of the note was recited in the trust deed. It was provided in the trust deed that, if default should be made in the payment of the principal sum secured by the note, whether it should have become due by election or by the regular maturity of the note, or if Robertson should fail to perform its agreements, it should be lawful for the trustee, on application of the legal holder of the note, with or without a previous entry on the premises, to sell and dispose of them and all right, title, benefit and equity of redemption of Robertson, his heirs and assigns,

therein, at public auction, to the highest bidder, for cash, having first given notice of the time and place of such sale (such sale to be made at some place in Cook County, Illinois), by publication once in each week for four successive weeks, the first publication to be at least 30 days before the day of sale, in some newspaper published in Cook County authorized by law to publish legal notices, personal notice to Robertson, his heirs or assigns, or any person claiming by, through or under him, of such sale, being expressly waived, and in the name of the trustee to execute and deliver to the purchaser at the sale a deed of conveyance of the premises in fee simple; and that all the recitals that might be contained in such deed, setting forth the fact of such default, due notice, advertisement and sale, and any and all such other facts and statements as might be proper to evidence the legality of such sale and conveyance, should be considered and taken, on all occasions, and as between all persons, to be prima facie evidence of the truth of all the facts and matters set forth in such recitals, and such deed should be effectual to pass the title, and all the right and equity of redemption of Robertson, his heirs and assigns, in and to the premises sold. This trust deed was acknowledged by Robertson on the 28d of July, 1877, and was recorded on the same day.

On the 30th of July, 1877, James Taylor and John Bruce recovered a judgment against Robertson in the Circuit Court of the United States for the Northern District of Illinois, for \$21,666.66 damages and \$120.05 costs. Robertson took steps toward bringing a writ of error to review that judgment, and for that purpose procured one Hugh Templeton to sign a bond as surety, and, to indemnify Templeton therefor, executed to him a bond and a mortgage covering the real estate aforesaid, subject to the incumbrance of the trust deed to Peabody. This mortgage was acknowledged August 17, 1877, and recorded August 22, 1877. As the writ of error was never perfected, Templeton did not become liable, and the mortgage to him was no incumbrance on the premises.

Robertson, on the 1st of September, 1877, leased to John McAllister the second, third and fourth stories of the three stores fronting on West Madison Street, and known as the Jefferson-Park Hotel, for two years, at a rent of \$300 a month. This rent was afterwards reduced to \$30 a month from January 1, 1878.

On the 15th of October, 1877, Taylor and Bruce issued to the marshal an execution on their judgment. This was returned wholly unsatisfied on the 12th of January, 1878; and, on the 24th of January, 1878, they, being aliens, filed a bill in equity, in the form of a creditor's bill, in the Circuit Court of the United States for the Northern District of Illinois, against Robertson, Templeton, McAllister, Gallup and Peabody. The bill was founded on their judgment and the issuing of their execution and its return unsatisfied. It set forth that Robertson was interested in a large quantity of real estate, including the before-mentioned property, 73 feet by 116 feet, at the corner of West Madison Street and Sheldon Street, which, it stated, brought in a large rental monthly. It contained the allegations usual in creditors' bills, and alleged that Robertson had

property which ought to be applied to the payment of the plaintiffs' judgment, and prayed that he might discover on oath what assignments or transfers he had made of his property. It averred that the defendants other than Robertson held the title to real estate belonging to Robertson, for the purpose of defrauding the plaintiffs, and prayed for a discovery on oath by such defendants of all such real estate. It did not mention the trust deed to Gallup, or the trust deed to Peabody, or the mortgage to Templeton, or the lease to McAllister.

The plaintiffs, on the 29th of January, 1878, issued to the marshal a second execution on their judgment, which, on the 15th of February, 1878, was levied on real estate of Robertson, not including the premises at the corner of West Madison and Sheldon Streets.

On the 2d of March, 1878, the five defendants to the bill filed a general demurrer to it, for want of equity. On the 25th of March, 1878, the court entered an order sustaining the demurrer.

Robertson failed to pay to Greene any of his interest due October 2, 1877, and April 2, 1878, being two installments amounting to \$2,625, and was pressed for payment by Greene, through Peabody, in April and May, 1878. This pressure continued through the summer of 1878, and Greene complained directly to Robertson that the latter was receiving the rents of the property and paying him no interest. This pressure took the shape of a request by Greene to Robertson that the latter should turn over to the former the rents of the property, and a statement that otherwise the trust deed would be foreclosed.

Greene, on the 27th of August, 1878, notified Peabody in writing that, by reason of the default, continued for more than 80 days, in the payment of the installments of interest due October 2, 1877, and April 2, 1878, on the note secured by the trust deed of April 2, 1877, Greene had elected to make the principal note at once due and payable; and that, default having been made in its payment, he requested Peabody to proceed at once, under the powers contained in the trust deed, to advertise and sell the premises.

Robertson, on the 29th of August, 1878, notified Peabody and Greene that he intended to file a petition in bankruptcy, and that he proposed to go to Scotland (which was his native country) to see what arrangement could be made of his affairs, and to turn over to Greene, from the 1st of September, 1878, the rents of the property monthly.

On the 30th of August, 1878, Robertson signed a paper, addressed and delivered to Peabody as trustee, which stated that the note secured by the deed of trust was held by Greene; that Peabody had that day demanded of Robertson the possession of the premises covered by the deed of trust, on account of a breach of the covenants contained therein; that Robertson consented to Peabody's taking possession of the premises; that he thereby delivered such possession to Peabody, and requested the tenants of the premises severally to attorn to Peabody; and that it was understood that Peabody should respect the leases granted by Robertson and his reservation of certain rooms mentioned in the lease to McAllister. On this paper Pea-

body, as trustee, wrote an order addressed to Edmund A. Cummings, directing him, for Peabody and as his agent, to receive from Robertson possession of the premises and the attornment of the tenants. Six of the tenants, including McAllister, on the same day signed a paper by which they recognized the transfer of the possession of the premises from Robertson to Peabody as trustee, and respectively attorned to Peabody as to the premises occupied by them.

Robertson, on the 31st of August, 1878, filed in the District Court of the United States for the Northern District of Illinois his voluntary petition in bankruptcy, with schedules. In the schedule of "Bankrupt creditors holding securities," there appeared, under the heading "Names of Creditors," "David R. Greene;" under the heading "Residence and Occupation," "New Bedford, Mass.;" under the heading "When and Where Contracted," "April 2, 1877, at Chicago, Ill.;" under the heading, "Value of Securities," "Unknown;" under the heading, "Amount of Debt," "\$35,000 and interest at 7½ per cent, since April 2, 1877;" and under the heading, "Particulars," "Note for money borrowed to take up old mortgage upon property when bought, and secured by trust deed to F. B. Peabody upon lot 26 (except the east 2 feet thereof) and lots 27 and 28, all in block 6, in McNeill's subdivision, in Wright's Addition to Chicago, with improvements and appurtenances; property known as 487 and 489 and 491 West Madison Street, Chicago, and 53 and 54 Sheldon Street;" being the premises in question.

Peabody, on the 2d of September, 1878, notified Greene that he would forthwith proceed to advertise the foreclosure sale. On the same day, Peabody, as successor in trust to Gallup under the trust deed of April 1, 1871, made to Gallup by Grow, executed and acknowledged a paper releasing to Grow all the interest acquired under the trust deed, the paper stating that the indebtedness secured by that deed had been canceled.

On the 8d of September, 1878, Peabody, as trustee, prepared a notice of sale, dated that day, setting forth the facts of the date and record of the trust deed of April 2, 1877; the contents of the note secured by it; the fact that its legal holder, as thereby authorized, had elected to make the principal sum therein mentioned, and the same had thereby become, at once due and payable, by reason of the default, continued for more than 80 days, in the payment of the installments of interest due thereon October 2, 1877, and April 2, 1878, respectively; that there was due on the note the principal sum of \$35,000, with interest thereon at the rate of 7½ per cent per annum from April 2, 1878, and the two defaulted installments of interest, of \$1,312.50 each, with interest on each at the rate of 10 per cent per annum, from the dates when they respectively became due; that default had been made in the payment thereof; that, on the demand of the legal holder of the note, the trustee, on October 7, 1878, at 11 o'clock in the forenoon, at the southwest corner of Dearborn and Monroe Streets, in Chicago, at the door of No. 174 Dearborn Street, would sell at public auction to the highest bidder for cash, for the uses and purposes specified in the trust deed,

the premises described therein (repeating the description contained in the trust deed), together with all the right, title, benefit and equity of redemption of Robertson, his heirs and assigns, therein; and that the records of the recorder's office showed that Templeton had acquired some title or interest in the premises, as assignee of Robertson, subject to the trust deed. This notice was published in the "Chicago Journal," a newspaper of general circulation, printed and published in Chicago, four times, being one time a week for four successive weeks, the date of the first paper containing the same being September 4, 1878, having been published and issued on that day, and the date of the last paper containing the same being September 28, 1878, having been published and issued on that day.

Robertson, on the 7th of September, 1878, left Chicago for Scotland; and on the same day he was adjudicated a bankrupt. He has never since been in Chicago.

On the 5th of October, 1878, Taylor and Bruce, as creditors of Robertson, filed a petition in the district court, in bankruptcy, sworn to by Charles B. McCoy, their agent at Chicago, setting forth their judgment, and stating that no assignee of the estate of Robertson had yet been chosen; that Robertson, in his inventory of assets, had scheduled a large amount of property which required the immediate personal attention of some person properly authorized to care therefor and preserve the same for the benefit of the estate, and prevent waste, injury and loss thereof; that among the assets so scheduled, with other real estate, was "the property known as the Jefferson-Park Hotel, on West Madison Street, Chicago." The petition prayed that a provisional assignee be appointed for the estate of Robertson, with the usual powers in such cases, to act in the premises until the regular assignee should be chosen. On the same day, Bradford Hancock was appointed by the district court provisional assignee of the estate of Robertson, "with full power and authority to take possession of, manage and control the same, and to collect the rents due said estate."

The sale under the trust deed took place on the 7th of October, 1878, at the hour and place named in the published notice. Greene became the purchaser, and Peabody, as trustee, on the same day executed and acknowledged a deed to him, which was recorded October 10, 1878. That deed recited the making of the note and its contents, including the provision for election by the legal holder of the note as to the becoming due of the entire principal; the making and recording of the trust deed; the power of sale given by it to the trustee, and the provisions in it for notice and for giving a deed to the purchaser. It also recited the default in the payment of the two installments of interest; the election by the legal holder of the note that the principal sum should at once become due and payable; the amount that was due for principal and interest; that the legal holder had applied to the trustee to advertise and sell the premises; that he had advertised them, and all right, title, benefit and equity of redemption of Robertson, his heirs and assigns, therein, for sale at public auction to the highest bidder for cash, on the day and at the place before men-

tioned; the notice he had given; that the contents of the notice were in conformity with the provisions of the trust deed and of the statute; that, in pursuance of said notice, and at the time and place of sale therein mentioned, he had offered the premises described in the trust deed, and all right, title and equity of redemption of Robertson, his heirs and assigns, therein, for sale at public auction to the highest bidder for cash; that Greene was such highest bidder, and bid therefor \$30,000, which was the highest bid; and that the same were accordingly struck off and sold to Greene at that price. The deed then conveyed to Greene, his heirs and assigns, forever, the premises described in the trust deed, by the description therein contained, together with all the right, title, benefit and equity of redemption of Robertson, his heirs and assigns, therein, to have and to hold the same, with the appurtenances, to Greene, his heirs and assigns, forever. It further stated that Peabody covenanted to the extent, and no more, that he had fulfilled all the powers and trusts in said deed contained, in respect to the sale, in accordance with the terms of the trust deed.

The \$30,000 for which Greene purchased the property was applied to pay the first and second interest coupons, with interest thereon to October 17, 1878, and interest on the note to that date from April 2, 1878, the expense of advertising, the fees of the trustee, and sundry back taxes; and the balance of the amount, \$24,107.48, was indorsed by the trustee as paid on the principal of the note for \$35,000, on the 17th of October, 1878.

On the 23d of October, 1878, the release by Peabody, as successor in trust, of the trust deed from Grow to Gallup, was recorded.

Greene died at New Bedford on the 19th of May, 1879.

On the 7th of July, 1879, a warrant in bankruptcy was issued against the estate of Robertson.

Bradford Hancock was, on the 24th of July, 1879, appointed assignee, in bankruptcy of Robertson, and on the same day the register assigned to him all the estate, real and personal, of Robertson, including all the property, of whatever kind, of which he was possessed, or in which he was interested, or entitled to have, on the 31st of August, 1878, except property exempt by section 5045 of the Revised Statutes.

Taylor and Bruce, on the 23d of March, 1880, filed in the bankruptcy court a proof of debt against Robertson, founded on their judgment and on the levy made February 15, 1878, under the execution issued January 29, 1878. They claimed therein a lien, by virtue of the judgment, on all the real estate of Robertson, and by virtue of such levy, on the portion thereof on which it was levied, and a first preference on all the proceeds of the property covered by the lien of the judgment and the levy.

On the 25th of March, 1880, Taylor and Bruce filed a petition in the bankruptcy court, setting forth the recovery of their judgment; the issuing and return unsatisfied of their execution of October 15, 1877; the filing of their creditor's bill in the circuit court on the 24th of January, 1878; the fact that they had proved their debt in the bankruptcy court; that on the 30th of July, 1877, the date of the recovery of

their judgment, Robertson owned real estate, all of which was incumbered with sales for taxes, and the greater part with mortgages or deeds of trust to about or near the full value thereof, so that of the latter class he was, at the time of the filing of the petition in bankruptcy, at best only invested with an equity of redemption; that at the time their judgment was rendered, and at the time of the filing of the petition in bankruptcy, he owned sundry real estate which was unincumbered except by tax sales and judgments (describing it); that, at those times, he owned or had interest in real estate incumbered by mortgages and trust deeds, and also by tax liens, describing it, and as part of it describing the property 73 feet by 116 feet, on the corner of West Madison Street and Sheldon Street, "incumbrance, \$35,000, besides interest and taxes;" that on the 29th of January, 1878, they issued a second execution on their judgment; that on the 15th of February, 1878, it was levied on all the real estate described in the petition, except a small portion in Cook County, Illinois, which was heavily incumbered; that before any sale was made by the marshal Robertson went into bankruptcy, and no sale had ever been made under the execution, but the levy was in force as a first lien of any judgment; that they were entitled to have the amount of their judgment paid out of the proceeds of the sale of the property, to the exclusion of all the other creditors of Robertson, except those who held mortgages or liens prior to their judgment; and that they were willing and desirous to have the administration and enforcement of the lien of their judgment transferred to the bankruptcy court, and established by that court, and enforced against the property of the bankrupt estate. They prayed that their lien might be established against the described real estate; that Hancock, the assignee, might be ordered to sell said real estate and apply the proceeds to pay their judgment; and that they might be permitted to purchase at the sale and credit their bids on the judgment.

Hancock, the assignee, on the 2d of April, 1880, presented a petition to the bankruptcy court, in answer to a rule for him to show cause, issued on the filing of the petition of Taylor and Bruce of March 25, 1880, setting forth that he believed the allegations of that petition to be substantially correct, and that he believed it was for the best interest of the bankrupt's estate that said real estate should be sold without further delay. He prayed for an order directing him to sell it; that it be sold subject to all taxes, liens and incumbrances thereon, except the judgment of Taylor and Bruce and judgments rendered subsequently thereto; and that he be ordered to bring the proceeds of sale into court or make such other disposition of them as the court should direct. On this petition, and on the same day, an order was made by the bankruptcy court, on the consent of the assignee, of Taylor and Bruce, of the bankrupt, and of two creditors by a judgment subsequent to that of Taylor and Bruce, directing the assignee to sell all the real estate of the bankrupt, free and clear of the lien of the judgments mentioned, "but subject to all other liens and incumbrances thereon, and all taxes and assessments thereon," and to bring

the proceeds of the sale into court, to be paid to such judgment creditors according to the priority of their liens on the property sold, to the amount of their respective judgments.

On the 26th of April, 1880, the assignee made a report to the bankruptcy court, setting forth that, on the 24th of April, 1880, he had sold to the highest bidder for cash all the right, title and interest of the bankrupt, and of himself as assignee, to real estate which he described, free and clear of the lien of the judgment and execution levy of the creditors mentioned in the order of sale, "but subject to all other liens and incumbrances thereon, and taxes and assessments thereon." The description included the premises at the corner of West Madison Street and Sheldon Street, with the buildings thereon, at the sum of \$250, to L. G. Pratt, trustee. The gross proceeds of sale were \$6,122, and the net proceeds \$5,107.42, which the assignee reported to the register on the 27th of May, 1880.

The register, on the 14th of June, 1880, made an order directing the assignee to pay to Taylor and Bruce \$5,053 out of the proceeds of the sale.

On the 17th of June, 1880, the assignee, by a deed recorded on the 30th of August, 1880, conveyed to Lorin G. Pratt, trustee, certain real estate purchased by him at said sale, including the premises at the corner of West Madison and Sheldon Streets. The deed recited the prior proceedings in bankruptcy, the order of sale and its confirmation, and the order for a deed, and conveyed all the right, title and interest of the bankrupt, which he had on the 31st of August, 1878, and of the assignee, subject to all unpaid taxes and to all liens and incumbrances, unless by the terms of sale expressly excepted, to the real estate described in the deed.

Robertson, on the 4th of December, 1880, filed his petition for a discharge in bankruptcy.

Taylor and Bruce, on the 22d of December, 1880, directed the marshal to release the levy made February 15, 1878, and to return the execution of January 29, 1878, unsatisfied. This was done.

On the 5th of January, 1881, under an execution issued to the marshal on the previous day, on the judgment of Taylor and Bruce, he levied on certain real estate of Robertson, including the premises at the corner of West Madison and Sheldon Streets, with all the buildings and improvements thereon, and on the 27th of January, 1881, sold the premises at the corner of West Madison and Sheldon Streets to Lorin G. Pratt, trustee, for the sum of \$5,000. No deed appears to have been made under this sale.

No proceedings having been taken in this suit since the demurrer to the original bill was sustained, an order was made on the 6th of July, 1881, after an interval of more than three years and three months, giving leave to the plaintiffs to amend their bill and also to file a supplemental bill.

On the 17th of September, 1881, they filed an amended and supplemental bill, dismissing the original bill as to all the real estate except that situated at the corner of West Madison and Sheldon Streets, 73 feet by 116 feet, with the buildings thereon erected. This new bill

recites the contents of the original bill, and states that, on a demurrer thereto, the court held that all the property and estate of Robertson, so far as it could be discovered, must first be exhausted, before the court could interfere in equity to compel the discovery and relief sought, and required the plaintiffs to wait until all such visible property and estate was so sold and exhausted. It sets forth the contents of the trust deed from Grow to Gallup; that Peabody was the successor in trust of Gallup; that the deed was made to secure the payment of an indebtedness of \$35,000 to Greene; that Peabody had been in possession of the premises, and receiving the rents and profits, amounting to more than sufficient to pay all the interest on the debt, and the taxes, insurance and expenses of carrying the property; that, in pursuance of a fraudulent scheme to place the property beyond the reach of the plaintiffs, Robertson, on the 28d of July, 1877, which was two days after the verdict was returned in their suit against Robertson and seven days prior to the rendering of their judgment, executed a second deed of trust to Peabody, to secure an alleged additional indebtedness of Robertson of \$35,000; that, for the purpose of making it appear that the trust deed had been made before the verdict was rendered, it and the note were dated back to April 2, 1877; that, for the purpose of preventing the plaintiffs from learning who was the real holder of the note and the interest coupons, or whether the deed was a bona fide lien in addition to the first lien, the note was made payable to the order of Robertson and indorsed by him in blank; that said trust deed was only a renewal of the former trust deed from Grow to Gallup, and was made to secure to Greene said debt to him, and was not an additional incumbrance on the property; that said first mortgage should have been released of record so that the plaintiffs might ascertain from the record the true amount of the incumbrance; but it was withheld, making it appear that the property was subject to \$70,000 incumbrance, instead of only \$35,000; and that Robertson prayed an appeal from said judgment to the Supreme Court of the United States, which appeal was not perfected, but on account of its pendency the plaintiffs were unable to issue an execution on their judgment until October 15, 1877. The new bill then recites the mortgage to Templeton, and avers that it ought to be canceled of record. It then sets forth the making of the lease to McAllister for two years from September 1, 1877, at a rent of \$800 a month, and the reduction of the rent to \$30 a month from January 1, 1878, and avers that this was done for the purpose of lessening the income from the property, so that it would be insufficient to pay the taxes, insurance and expenses, and the interest on the loan; and that the plaintiffs used due diligence to reach the estate of Robertson, but were unable to realize anything therefrom by execution. It then sets forth the turning over by Robertson to Peabody, as agent and trustee for Greene, of all the leases, rents and profits of the premises; and alleges that this was done in pursuance of the fraudulent scheme aforesaid, and under an arrangement substantially as follows: Robertson was to go through bankruptcy and obtain a discharge; Greene and Peabody were to carry

the property and collect the income from it, but by reason of such reduction of the rent the income would be insufficient to carry it; Peabody was thereupon to declare a forfeiture for nonpayment of interest, and sell the property under the deed of trust, and thus cut out the lien of the plaintiffs' judgment, and also prevent the property from coming to the hands of the assignee in bankruptcy; but Robertson, or his agent, said McAllister, was to be allowed to redeem from such sale, after Robertson had procured his discharge, upon paying the amount actually due according to the terms of the loan, and the expenses incurred in carrying the property, less the amount received from the rents and profits thereof, the same as if no sale had been made; the release of the trust deed to Gallup was to be withheld from record, so as to prevent any outside bidder and the plaintiffs from bidding at the sale; such arrangement was made with Robertson, and McAllister, his agent, and Peabody, as agent for Greene, began to collect the rents of the premises under the leases, and they were, if judiciously and honestly applied, more than sufficient to carry the property and pay the interest on the loan; but they were not applied to that purpose. The new bill further sets forth that, immediately on the making of such arrangement, Robertson filed his petition in bankruptcy, and very soon afterwards left the United States and had since remained continuously absent therefrom, so that he could not be examined; that Peabody proceeded to declare a forfeiture of the trust deed for nonpayment of interest on the loan, and, on October 7, 1878, pretended to sell the premises, and executed a deed thereof to Greene for a pretended bid at the sale of \$30,000; that after the sale an agreement was made by Robertson, either in person or by his agent McAllister, with Greene, and Peabody, as the agent of Greene, whereby Greene was to hold the property and collect the rents and apply them to carrying the property, and to allow Robertson or McAllister to redeem on payment of the amount of the incumbrance and interest, and the cost of carrying the property, less the amount of rents received, the same as if no sale had been made; that the notice of sale was insufficient and defective; that the release of the trust deed to Gallup was purposely withheld from record; that the plaintiffs had no actual notice of the sale, but it was concealed from them and they did not learn of it until long afterwards; and that the deed of June 17, 1880, by the assignee in bankruptcy, on his sale, was made to Lorin Grant Pratt as trustee for the plaintiffs. It then sets forth the purchase of the property by the plaintiffs for \$5,000, at the marshal's sale; that Greene died after the pretended purchase by him of the premises at the sale by Peabody; that on his death whatever right, title or interest he had in and to the premises passed to and became vested in Mehitable B. Greene, his widow; William W. Crapo and Charles W. Clifford, as trustees of Robert B. Greene, Susan G. Page, Horatio N. Greene and Francis B. Greene; and said Robert B. Greene, Susan G. Page, Horatio N. Greene and Francis B. Greene, as the heirs-at-law or devisees of said David R. Greene, and was still so held by and vested in them; that such heirs-at-law or

devises are citizens of Massachusetts and of full age; and that E. A. Cummings, a citizen of Illinois, is the agent for the property, and collecting the rents for the heirs or devisees of Greene.

The new bill makes as defendants the five persons who were defendants to the original bill, and also the widow and the heirs or devisees above named of Greene, and their trustees, and Cummings, their agent. Its prayer is that the mortgage to Templeton may be declared void; that the deed from Peabody to Greene may be set aside as against the rights of the plaintiffs; that Greene, during his lifetime, and his heirs or devisees, and Cummings as their agent, may be decreed to be mortgagees in possession; that they and Peabody make full answer in the premises; that an account be taken; and that the plaintiffs be allowed to redeem on paying the amount found to be due.

All of the defendants except Robertson and Templeton entered an appearance in the suit on the 21st of November, 1881.

The plaintiffs, on the 15th of December, 1881, consented to the discharge of Robertson in bankruptcy.

On the 31st of December, 1881, all of the defendants who so appeared, except McAllister, put in an answer to the original bill and the amended and supplemental bill, denying all the allegations imputing fraud to the said defendants or to Greene in his lifetime, and claiming that the foreclosure proceedings by Greene and Peabody were had in good faith.

On the 6th of February, 1882, a replication to this answer was filed, and on the 6th of June, 1882, the cause was referred to a master, to take proofs and report them.

After some proofs had been taken on the part of the plaintiffs, and on the 4th of January, 1883, the plaintiffs filed an amendment to their amended and supplemental bill, which avers that Peabody, in order to conceal the time of the sale from the plaintiffs, caused the notice of sale to be published in "The Chicago Weekly Journal," a newspaper which was not read in the City of Chicago and had no circulation in said city or in Cook County; that the premises sold were composed of three separate lots; that the north 44 feet of the property was separated from the south portion, fronting on West Madison Street, by an alley or court 12 feet wide; that such north 44 feet were divided into two lots of 22 feet each, on each of which stood a brick dwelling-house 22 feet wide and fronting on Sheldon Street, which were used for private dwelling-houses, and were entirely distinct from the hotel part of the premises; that Peabody sold the property in bulk to Greene, at half its value, when it was his duty to have sold it in separate lots; and that, if he had so offered it, the part of it used for a hotel, and fronting on Madison Street, south of the alley or court, would have brought more than sufficient to pay off the debt, interest and costs.

On the 6th of January, 1883, the defendants answered this amendment, denying its allegations, and, on the 29th of January, 1883, they amended their answer by averring that, as to so much of the bill, amended bill and supplement as alleged any agreement between Greene and Robertson for the redemption or

repurchase of the premises by Robertson, such supposed agreement was not in writing, signed by Greene or by any person by him authorized in writing, according to the Statute of Illinois in such case made and provided.

On the 27th of October, 1883, the master reported the proofs to the court, and the cause was heard before Judge Blodgett, in November, 1883; and, on the 14th of April, 1884, he filed an opinion, which is reported in 21 Fed. Rep. 209, deciding the case in favor of the plaintiffs.

A motion for a rehearing was made and overruled on the 7th of July, 1884, and on the 29th of July, 1884, an interlocutory decree was entered, finding that the equities of the cause were with the plaintiffs; that they were entitled to redeem the premises in question from the indebtedness secured thereon in favor of the heirs and representatives of the estate of David R. Greene, deceased, upon such terms as might be thereafter fixed by the court; and that a reference be had to a master, who was named, to take and report to the court an account of what was due to such heirs and representatives, for principal and interest, on the debt secured by the trust deed to Peabody, and of the amounts paid for taxes, assessments and charges provided for in such trust deed, and an account of what had been paid by said defendants for necessary repairs and improvements, and an account of the rents and profits of the premises, and to report such accounts with the evidence.

Those accounts were taken, and the master filed his report on the 15th of July, 1885, finding due to the defendants on the 12th of June, 1885, on the principles stated in the interlocutory decree, \$45,641.66. Both parties filed exceptions to this report. Before they came on for hearing, and on the 4th of January, 1886, the defendants moved for leave to amend their answer, so as to set up the limitation of actions provided by the Bankruptcy Statute. The consideration of the motion was postponed until the final hearing of the cause.

The case came on to be heard on the 1st of April, 1886, and on the 3d of April, 1886, the court made an order allowing the defendants so to amend their answer, and also granting leave to the plaintiffs to amend their bill, and ordering the replication to the original answer to stand as a replication to such amendment thereto, and giving leave to either party to put in before the master further evidence on the subject matter of such amendments, directing the master to continue the account from June 12, 1885, to April 1, 1886, and ordering that such additional evidence and statement of account be considered as if taken before the hearing, and that all exceptions to the former report of the master be considered as exceptions to such supplemental matters.

In pursuance of such leave, the plaintiffs amended their amended and supplemental bill, by averring that neither they nor the assignee in bankruptcy had any knowledge that the sale by Peabody had been made, until the 24th of April, 1880; that they did not have any knowledge of such collusive agreement between Robertson and his agents, and Peabody, as trustee for Greene, until on or about September 13, 1881; that the details of such agreement

did not come to their knowledge until the taking of the evidence in the cause; that such sale and agreement were purposely concealed by all parties thereto, notwithstanding all due diligence was used to discover the same; that Peabody having been, prior to the making of the sale, placed in possession of the property as agent and trustee, and there being no apparent change in the possession of the property thereafter, there was nothing to advise the plaintiffs of the sale, unless they had accidentally discovered the record of the deed from Peabody to Greene; and they made no examination for that for the reason that, by the conduct of Robertson and his agents and of Peabody, they had been lulled into the belief that no foreclosure or sale would be made, at least prior to April 2, 1880, when the debt secured by the trust deed to Peabody would mature; that the sale made by Peabody October 7, 1878, was made after the filing of the petition of Robertson in bankruptcy, August 31, 1878, and before the appointment of his assignee, July 24, 1879, and while there was no representative of the estate of Robertson and of his equity of redemption in the property, on whom the notice of sale could operate, or who could protect the estate and the creditors; that the sale was, therefore, void as against the rights of the plaintiffs, and as against the assignee in bankruptcy and the plaintiffs as purchasers of the title and right of such assignee, under the provisions of the Bankruptcy Statute; that such sale, made under such circumstances, should not in equity be allowed to cut off the plaintiffs from their right to redeem from the trust deed, notwithstanding the sale and the deed thereunder; and that the plaintiffs should be decreed to have taken the title of Robertson in and to the property in the same condition as it was on the 31st of August, 1878, unaffected by the sale by Peabody, and with full right to redeem from the trust deed as if no sale had been made.

The defendants filed the proposed amendment to their answer. As to the allegation that the sale by Peabody took place, and his deed to Greene was made, pending the proceedings in bankruptcy, and before the election of an assignee, or at a time when the power of sale under the trust deed was suspended, and as to any other irregularity in the notice of sale, or any right in the plaintiffs or in said Pratt, derived from the assignee in bankruptcy, to set aside the deed from Peabody to Greene for any matter alleged, it says that the right to do so, if it ever existed, belonged to the assignee and the provisional assignee, as representing the creditors in the bankruptcy proceeding; that the assignees and the plaintiffs waived such claims and equities and failed to assert them; that at the time Peabody made the deed to Greene, on October 7, 1878, Hancock was provisional assignee in the bankruptcy matter, and on the 24th of July, 1879, became assignee; that the supposed equities and claims under which the plaintiffs pretend to have derived a right, under such assignee, to vacate such foreclosure and redeem the premises, did not accrue within two years next before the bringing of the amended and supplemental bill of September 17, 1881, wherein the defendants, excepting Peabody, were for the first time impleaded in this suit, and wherein, as to all of the defend-

ants, said pretended rights were for the first time asserted; and that those claims and equities, if they ever existed, were barred by such laches and by the Statute at the time when the supplemental bill was filed. The amendment sets up such laches as an equitable bar and defense to so much of the bill as rests upon such pretended equities, and avers that, by the Bankruptcy Act, the plaintiffs, by reason of such lapse of time and of the said facts, were and are barred from claiming any relief by reason of such pretended equities, and sets up said bar and limitation of two years. The amendment to the answer also denies the allegations contained in the amendment so filed by the plaintiffs to the amended and supplemental bill.

The master, on the 12th of April, 1886, filed a supplemental report, bringing down the account to the 1st of April, 1886, and finding to be due to the defendants on that day \$45,842.86.

The case was brought to a hearing before Judge Blodgett, and he filed his opinion on the 24th of May, 1886 (27 Fed. Rep. 587.) He adhered to his former views.

On the 28th of May, 1886, Robertson, Templeton and McAllister filed an answer disclaiming all interest in the property in controversy, admitting that the plaintiffs were entitled to the relief prayed by them, and consenting to the entry of such decree as might seem proper to the court.

The court, on the 1st of July, 1886, made a final decree, adjudging that there was due to the defendants, the widow, heirs and representatives of the estate of David R. Greene, deceased, on their lien on the premises in question, \$45,842.86, with interest thereon from April 1, 1886, at 6 per cent per annum; that the plaintiffs pay to them that sum, with the interest, within 90 days, in redemption of all lien of the defendants on the premises; and that, on such payment being made, the defendants convey the premises to the plaintiffs by a quit-claim deed.

The widow, heirs and representatives of the estate of David R. Greene, deceased, with Peabody and Cummings, have appealed to this court from that decree.

The plaintiffs claim a right to redeem from the sale to Greene, made by Peabody as trustee, or from the trust deed under which that sale was made, on payment of the mortgage debt, (1) as owners of Robertson's equity of redemption by virtue of their purchase from the assignee in bankruptcy; and (2) as judgment creditors of Robertson, having a lien on the property by virtue of their judgment, prior in time to the sale by Peabody as trustee, and by their purchase of the property at the sale under the execution issued on their judgment.

They rest their claim under their purchase from the assignee in bankruptcy, first, on the ground that the sale by Peabody as trustee was made after the commencement of the proceedings in bankruptcy, and after the adjudication thereon, before an assignee was appointed, and without leave of the bankruptcy court, and was void as against such assignee and those claiming under him, that the property was still subject to the right of redemption by the assignee, and that such right has been conveyed by him to the plaintiffs; second, on the ground that there was a collusive agreement made with

Robertson, by Peabody as agent for Greene, giving to Robertson the right to redeem from the sale by Peabody, and that such right of redemption passed from Robertson to his assignee in bankruptcy, and from the latter to the plaintiffs.

The claim of the plaintiffs to redeem, as judgment creditors of Robertson, is based on the allegation that they were led by the wrongful conduct of the defendants to believe that the property was subject to the deed of trust to Gallup, as well as to that to Peabody; that they were not allowed an opportunity to pay off the incumbrance before the sale by Peabody, although they were ready and willing to do so; that, by reason of the collusive agreement referred to, the sale by Peabody was part of a scheme to hinder them in collecting their judgment, by cutting off their lien on Robertson's equity of redemption, and giving the property back to him, after he should have been discharged in bankruptcy from the judgment; that the sale by Peabody was not properly advertised; that the plaintiffs had no notice of such sale prior to its being made; that such notice was intentionally withheld from them; that the sale by Peabody, with the prior incumbrance of the trust deed to Gallup apparently standing against the property, when such incumbrance had been paid, was made with a view to prevent competition in bidding at the sale; that the property was sold in bulk, and not offered for sale in parcels; and that it was sold for an inadequate price.

But we do not find it necessary to consider any of these questions, because we are of opinion that the right of action of the plaintiffs, under their title derived from the assignee in bankruptcy, was barred by the two years' limitation enacted by the Bankruptcy Statute.

Section 5067 of the Revised Statutes provides as follows: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

It is contended for the plaintiffs that the limitation provided by section 5067 applies only to the case of a contest between an assignee in bankruptcy and a person claiming an interest adversely to such assignee, touching property of the bankrupt, in a suit to which the assignee is a party; that when the assignee transferred his rights to Pratt, who acted for the plaintiffs, on the 17th of June, 1880, under the sale to Pratt made on the 24th of April, 1880, the Statute ceased to run, and the interest which thus passed from the assignee then ceased to be within the terms of the Bankruptcy Statute of Limitation, and became subject to the ordinary Statute of Limitation, and that the two years' limitation had not run on the 24th of April, 1880, or on the 17th of June, 1880, the register's deed to the assignee in bankruptcy having been made on the 24th of July, 1879.

But we are of opinion that the right which passed to the assignee, to file a bill to redeem, began to exist on the 24th of July, 1879; that, as the Bankruptcy Statute of Limitation began then to run against such right in the hands of

the assignee, it continued to run after such right passed to the plaintiffs, by the assignee's deed to Pratt on their behalf, of June 17, 1880, made in pursuance of the sale of April 24, 1880; that the two years' Statute of Limitation bars the right asserted by the plaintiffs in their bill, in like manner as it would have barred the right of the assignee to redeem, if he had never made any sale or conveyance to Pratt, and if he were now the plaintiff in this suit; that the suit cannot be regarded as having been brought against the widow, heirs and representatives of David R. Greene until the supplemental bill was filed, on the 17th of September, 1881, when for the first time the sale by Peabody, as trustee, to Greene was drawn in question in this suit; and that, as more than two years elapsed between July 24, 1879, and September 17, 1881, the two years' bar of the Statute is complete.

That the two years' bar of the Statute applies in favor of a purchaser from an assignee in bankruptcy, has been decided by this court.

In *Gifford v. Helms*, 98 U. S. 248 [25:57], the assignee in bankruptcy was appointed in May, 1868, and sold all the assets of the bankrupt to the plaintiff in May, 1871. Afterwards the plaintiff brought suit to set aside an alleged fraudulent conveyance which had been made by the bankrupt in June, 1867. It was held that, as the right of action on the part of the assignee in bankruptcy was barred in May, 1871, it was barred as against the plaintiff. This could not have been held if the two years' Statute of Limitation had been regarded as one applying only in a suit brought by the assignee. It was said by the court that if the conveyance sought to be impeached was made in fraud of creditors, the equities in controversy were vested in the assignee in bankruptcy when he was appointed, and his right of action commenced at the time the assignment was made to him, and he might have pursued such right at any time thereafter; that, as the plaintiff claimed as purchaser from the assignee, he did not acquire, under the sale made to him by the assignee, any greater rights than those possessed by the latter; that those rights were acquired by the assignee in May, 1868; that throughout the period intervening between that date and May, 1871, the equities in controversy were held by the defendant adversely to the supposed right of the assignee; and that the right, if any, of the assignee, was barred by the two years' Statute of Limitation, before the purchase by the plaintiff.

In *Wisner v. Brown*, 123 U. S. 214 [30:1205], it was held that an assignee in bankruptcy cannot transfer to a purchaser the bankrupt's adverse interest in real estate in the possession of another claiming title to it, if two years have elapsed from the time when the cause of action therefor accrued to the assignee; and that the right of the purchaser in such case is as fully barred by the Bankruptcy Statute of Limitation as is that of the assignee. In that case, the suit was brought by a person who had purchased property of the estate from the assignee in bankruptcy, and received a conveyance thereof, more than seven years after the title of the assignee accrued. The defendants pleaded the two years' Bankruptcy Statute of Limitations. At the time of the appointment of the assignee the property sued for was held ad-

versely by the defendants. The court held that the assignee could not, after two years from the time of his appointment had expired, himself bring an action to recover the property, or, by selling the lands to a third person after such time had expired, enable the latter to maintain an action therefor; and it quotes with approval the remark made in *Gifford v. Helms, supra*, that the purchaser from the assignee did not acquire by his purchase any greater rights than those possessed by the latter.

These cases show that a conveyance by the assignee in bankruptcy cannot prevent the operation of the bar of the Statute against the grantee, when it has already run against the assignee, or bring into action a new period of limitation dating from the time of the conveyance. Nor can it interrupt the running of the Statute against the claim or right, when it has once commenced to run as against the assignee. The purchaser takes the right *cum onere*, subject to the continuance of the running of the Statute, and subject to the fact that a part of the two years has already run, as against the claim or right, while it was in the hands of the assignee, and to the consequence that when sufficient additional time shall have run against it, in the hands of the purchaser, to make up the entire two years, the claim or right will be wholly barred. No initiation of a new period of limitation, under any statute, begins to run in favor of the purchaser at the time of his purchase, whether the two years wholly elapsed, or only a part thereof elapsed, while the claim was owned by the assignee.

But the plaintiffs seek to take the case out of the bar of the Statute by alleging that they were ignorant of their rights, and did not discover the facts relating to the sale by Peabody as trustee, and the other matters set up in their supplemental bill, until the 24th of April, 1880, which was within two years of September 17, 1881; and that the sale by Peabody was kept secret by the defendants, as far as possible, although the plaintiffs used diligence to discover the facts.

Even if the allegations in the supplemental bill and in the amendments thereto be regarded as sufficiently charging a fraudulent concealment by the defendants of the facts of the case, from the assignee in bankruptcy, or from Pratt, or from the plaintiffs, we do not think the evidence establishes any such fraudulent concealment.

With the petition in bankruptcy, filed August 31, 1878, there was filed a schedule naming the creditors of Robertson holding securities, giving the name of David R. Greene as one of such creditors, his place of residence, the date of the contracting of his debt, its amount, a statement that the security was a

trust deed on property in Chicago, a description of such property, the street and number where it was situated, and the name of Peabody as trustee. It also disclosed the fact that the only incumbrance on the property was the trust deed to Peabody, thus excluding the idea that the trust deed to Gallup was in force.

Here was information, accessible to the assignee in bankruptcy when he was appointed, information which he was bound to take notice of, information equally accessible to the plaintiffs, being in a public record, which information referred the assignee and the plaintiffs to David R. Greene for full particulars as to the property in question, and the transactions in regard to the trust deed. The petition in bankruptcy was filed thirty-seven days before the sale of the property to Greene by Peabody as trustee. Moreover, in the petition of the plaintiffs, filed in the bankruptcy court October 5, 1878, two days before the sale by Peabody, and sworn to by the agents of the plaintiffs, the contents of the schedules in bankruptcy of Robertson are referred to, and it is stated that among the assets set forth in such schedules is the property in question, identifying it. This shows that information was actually had by such agent, at that time, of the facts before set forth as contained in one of such schedules, as to the particulars of the trust deed to Peabody, and as to who was the holder of the note secured by it and where he resided. That petition was filed more than nine months before the assignee in bankruptcy was appointed.

The rights of the plaintiffs must depend wholly upon such right of redemption as existed in Robertson, and passed to his assignee in bankruptcy, and from the latter to the plaintiffs. That being extinguished, no other right exists, and the plaintiffs have no right to redeem through any separate title acquired under their judgment against Robertson. They did not become, by the recovery of their judgment, or by anything done under it, the successors of Robertson in respect of any right of redemption, but they must follow and acquire their only title to such right through the assignee in bankruptcy. Moreover, whatever right to redeem they could have acquired by virtue of their judgment was waived by them by their petition of March 25, 1880, to the bankruptcy court, and by their procuring the property in question to be sold by the assignee in bankruptcy, and its proceeds to be applied on their judgment. At their own suggestion the equity of redemption, which was sold by the assignee, was thus put beyond their reach.

The result of these views is, that *the decree of the Circuit Court must be reversed, and the case be remanded to that court, with a direction to enter a decree dismissing the bill, with costs.*

JOHN F. DRAVO ET AL., Assignees, etc.,
App'ts.,
v.

PHILIP FABEL ET AL.

(See S. C. Reporter's ed. 487-490.)

Sworn answer, evidence—Pennsylvania Statute as to practice does not apply to suits in equity in U. S. courts—depositions of parties—finding of fact, not reviewed.

1. A sworn answer in an equity suit, which is responsive to the bill, is evidence for defendant, where plaintiff has not waived an answer under oath.
2. The Pennsylvania Statute that a party may examine the adverse party "as under cross-examination", does not apply to suits in equity in United States courts.
3. Where the plaintiff uses the depositions of defendant taken by plaintiff "as under cross-examination" under that Statute, he makes defendant his own witness, and, though not concluded by the evidence, he cannot contend that defendant is unworthy of belief.
4. Where the finding of the district court, upon a mere question of fact, was affirmed by the circuit court on appeal, this court will not reverse such finding unless the error is clear.

[No. 142.]

Argued Dec. 4, 1889. Decided Dec. 16, 1889.

APPPEAL from a decree of the Circuit Court of the United States for the Western District of Pennsylvania, affirming a decree of the District Court dismissing a suit to set aside deeds as fraudulent and void as to creditors and requiring defendants to release their apparent title to the assignees in bankruptcy. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 25 Fed. Rep. 116.

Messrs. D. T. Watson and William S. Pier for appellants.

Mr. G. A. Jenks for appellees.

Mr. Justice Harlan delivered the opinion of the court:

By two deeds, one dated January 22, 1876, reciting a consideration of \$10,000, and the other dated January 26, 1876, reciting a consideration of \$18,000, and both executed, acknowledged and delivered to the grantees on the last-named day, John Dippold and wife conveyed to Philip Fabel and Kate Fabel, his wife (the latter being a daughter of the grantors), two tracts of land in the County of Beaver, State of Pennsylvania. Both deeds were recorded in the proper office, but not until the 16th day of February, 1878.

On the 1st of March, 1878, John Dippold, John H. Dippold, Martin Dippold and Jacob H. Dippold, doing business under the name of John Dippold & Sons, were adjudged bankrupts by the District Court of the United States for the Western District of Pennsylvania. Their assignees in bankruptcy, duly appointed and qualified, were the present appellants, who, June 13, 1879, brought this suit in the same court against the appellees.

The bill alleged that neither of the grantees possessed means sufficient for the purchase of these lands, and that the deeds to them were executed with the intent and purpose of hin-

dering, delaying and defrauding the creditors of John Dippold, and to prevent the lands from going to, and being distributed by, his assignees in bankruptcy. It also alleged a conspiracy and combination between Dippold and the grantees, pursuant to which the former was to make said conveyances in order that the lands could be held by the grantees for the benefit of themselves and of John Dippold, discharged from the claims of his creditors; and that the deeds were a mere contrivance between him and them, whereby the lands "were to be in such condition as to the title thereof that if at any time the said John Dippold should become seriously and financially embarrassed it might be made to seem" that he "was not the owner of said properties."

It further alleged that, in January, 1876, John Dippold, as a member of his firm, was largely engaged in business, borrowing large sums of money down until the date of the petition in bankruptcy, and that during all that time he and the respondents conspired to have it believed by the public generally and by creditors dealing with him that he was the owner of these lands, and, by reason of such belief, creditors would be, and were, induced to trust and confide in his financial responsibility.

The relief sought was a decree declaring the deeds null and void, fraudulent as to creditors, and vesting no right in the grantees, as against Dippold's creditors and assignees in bankruptcy, and requiring Fabel and wife to release and convey their apparent title to the assignees in bankruptcy.

The bill was sworn to, and did not waive the oath of the defendants to their respective answers.

The answers, which were under oath, besides putting in issue all the material allegations of the bill, averred that the transactions evidenced by the deeds were bona fide; that the deeds were executed and delivered at their respective dates; and that the consideration named in each was paid by the grantees to Dippold in money.

The district court dismissed the bill with costs, and a similar decree was rendered upon appeal in the circuit court.

The only error assigned is the refusal of the circuit court to declare the deeds to Philip Fabel and his wife to be fraudulent and void as to the creditors and assignees in bankruptcy of John Dippold.

This case does not present any difficult question of law. Its determination depends entirely upon the special facts and circumstances disclosed by the evidence.

Conceding that the case was an uncommon one, and that some of its circumstances tended to excite suspicion as to the integrity of the transaction between Dippold and his grantees, the conclusion of the district court was that the clear weight of the evidence was on the side of the defendants, and that the bill should be dismissed. It was accordingly so decreed. *Dravo v. Fabel*, 25 Fed. Rep. 116. A similar decree was passed in the circuit court.

The answers of the defendants, being directly responsive to the bill, are evidence in their behalf, the plaintiffs not having waived, as they might have done, answers under oath.

Conley v. Nailor, 118 U. S. 127, 134 [30: 112, 115]; 41st Eq. Rule, as amended.

Besides, the depositions upon which the plaintiffs must rely to sustain the charge of fraud are those of the principal defendants, John Dippold and Philip Fabel. These depositions were taken and read by the plaintiffs. It is true they were taken "as under cross-examination," pursuant to a Statute of Pennsylvania which declares that "a party to the record of any civil proceeding in law or equity, or a person for whose immediate benefit such proceeding is prosecuted or defended, may be examined as if under cross-examination, at the instance of the adverse party, or any of them, and for that purpose may be compelled, in the same manner, and subject to the same rules for examination as any other witness, to testify; but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony." 1 Brightly's Purdon's Digest, 728. But that Statute has no application to suits in equity in the courts of the United States. The Act of Congress providing that the practice, pleadings, forms and modes of proceedings in civil causes in the courts of the United States shall conform, as near as may be, to the practice, pleadings, forms and modes of proceedings existing at the time in like causes in the courts of record of the State, expressly excepts equity and admiralty causes. 17 Stat. 197, chap. 255, § 5; R. S. § 914. So that, when the plaintiffs used the depositions of Dippold and Fabel, taken "as under cross-examination," they made those parties their own witnesses. While the plaintiffs were not concluded by their evidence, and might show they were mistaken, it could not be properly contended by the plaintiffs that they were unworthy of credit. The evidence must be given such weight as under all the circumstances it is fairly entitled to receive. The case comes within the ruling in *Lammers v. Nissen*, U. S. Sup. Ct. L. ed. Bk. 25, p. 562,* where the finding of the court of original jurisdiction, upon a mere question of fact, was affirmed by the Supreme Court of the State. Chief Justice Waite said: "Under such circumstances, we ought not to disturb the judgment of the state court unless the error is clear. No less stringent rule should be applied in cases of this kind than that which formerly governed in admiralty appeals, when two courts had found in the same way on a question of fact."

Without stating the evidence in detail, we content ourselves with saying that upon a careful review of all the circumstances disclosed by the record, we do not feel justified in disturbing the conclusion reached by the district and circuit courts upon mere questions of fact.

Decree affirmed.

*Not elsewhere reported.

EDWARD M. MCGILLIN, *Plff. in Err.*,

v.

MILTON H. BENNETT ET AL.

(See S. C. Reporter's ed. 445-454.)

Admission of evidence, when cannot be alleged as error—payment in land becomes, by omission

to deed, payable in money—application of payments—payments in land and notes.

1. Defendant cannot allege as error the admission of evidence introduced by himself.
2. Where a person is to pay an agreed sum of money by conveying a piece of land on a certain day, if he declines to make the conveyance or is unable to give a good title, such agreed sum, on that day, becomes payable in cash.
3. A credit or payment is to be applied to the one of two sums first due.
4. Where a payment of a sum of money is to be made in land and it becomes a cash payment by failure to deliver the deed, and at the same time another payment is to be made on the same matter in notes payable at a future day, and the notes are not given, which last payment is secured by a vendor's lien, a credit must be first applied on the payment to be made in land, and not on the deferred payments to be evidenced by notes.

[No. 146.]

Argued Dec. 5, 6, 1889. Decided Dec. 16, 1889.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment for the plaintiffs in an action to recover the unpaid purchase money of property sold. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 28 Fed. Rep. 411.

Messrs. Charles W. Gould and S. V. White for plaintiff in error.

Messrs. John L. Peak, A. McCoy, Charles B. McCoy, J. B. Johnson and C. E. Pope, for defendants in error:

Neither the evidence upon which the findings are based, nor the findings, will be examined by this court, except to determine whether the facts found by the court are sufficient to support the judgment.

U. S. Rev. Stat. §§ 700, 1011; *Mercantile Mut. Ins. Co. v. Folsom*, 85 U. S. 18 Wall. 237 (21:827); *Booth v. Tiernan*, 109 U. S. 205 (27:907); *Meath v. Miss. Levee Comrs.* 109 U. S. 268 (27:980); *Tyng v. Grinnell*, 92 U. S. 467 (23:783).

The finding of the court below on a mixed question of law and fact is final and conclusive.

Cooley v. O'Connor, 79 U. S. 12 Wall. 391 (20:446); *Wiggins v. Burkman*, 77 U. S. 10 Wall. 139 (19:884); *Coquillard v. Hovey*, 23 Neb. 622; *Etting v. Bank of U. S.* 24 U. S. 11 Wheat. 74 (6:420); *First Nat. Bank v. Dana*, 79 N. Y. 108; *Edelman v. Yeakel*, 27 Pa. 26; *Martinton v. Fairbanks*, 112 U. S. 674 (28:864); *Norris v. Jackson*, 76 U. S. 9 Wall. 125 (19:608).

The contract in question is a simple contract for the sale of the ranch, ranch outfit and cattle therein described, and not a cross-contract for the purchase of land.

Croome v. Lediard, 2 Myl. & K. 251; *Atkinson v. Smith*, 14 Mees. & W. 695; *McDaniels v. Whitney*, 38 Iowa, 60.

Where property is taken at a fixed money price, the transfer amounts to a sale, whether the property is to be paid for in money or goods.

Picard v. McCormick, 11 Mich. 68; *Herrick v. Carter*, 56 Barb. 41; *Butcher v. Carlisle*, 12 Gratt. 520; *Crockett v. Moore*, 3 Sneed (Tenn.) 145.

If from any cause defendant failed to tender a good and sufficient conveyance of the land upon the day named in the contract, then the whole sum of \$168,000 became due and payable in money.

Church v. Peterow, 2 Pen. & W. (Pa.) 801; *Sessions v. Ainsworth*, 1 Root (Conn.) 181; *Troubridge v. Holcomb*, 4 Ohio St. 88; *Brooks v. Hubbard*, 3 Conn. 58; *Jones v. Gilbert*, 13 Conn. 507; *Bush v. Canfield*, 2 Conn. 485; *McAlpin v. Lee*, 12 Conn. 129; *Gregory v. McDowell*, 8 Wend. 485; *Dey v. Dox*, 9 Wend. 129; *West v. Wentworth*, 3 Cow. 82; *Clark v. Pinney*, 7 Cow. 681; *Pinney v. Gleason*, 5 Wend. 898; *Berry v. Nall*, 54 Ala. 448; *Weiss v. Maunch*; *Chunck Iron Co.* 58 Pa. 295; *Stewart v. Donnelly*, 4 Yerg. 177; *Fleming v. Potter*, 7 Watts (Pa.) 880; *Townsend v. Wells*, 3 Day (Conn.) 327; *White v. Perley*, 15 Me. 470; *Powe's Admrs. v. Powe*, 42 Ala. 118.

Where an immediate credit is to be given, it must be given upon a debt due at the time.

Field v. Holland, 10 U. S. 6 Cranch, 8-28 (3:136-143); *McDowell v. Blackstone Canal Co.* 5 Mass. 11; *Gass v. Stimson*, 3 Sumn. 112; *Caldwell v. Wentworth*, 14 N. H. 431-439; *Bacon v. Brown*, 1 Bibb (Ky.) 384-386; *Seymour v. Seaton*, 10 Watts (Pa.) 255-257; *Effinger v. Henderson*, 38 Miss. 449; *Lau v. Sutherland*, 5 Gratt. 357; *Brown v. Shirk*, 75 Ind. 266-271; *Baker v. Stackpoole*, 9 Cow. 420; *Hunter v. Osterhoudt*, 11 Barb. 83; *Bobs v. Stickney*, 36 Ala. 482-495; *Richardson v. Coddington*, 49 Mich. 1.

Mr. Justice Blatchford delivered the opinion of the court:

This is an action at law, brought in the Superior Court of Cook County, Illinois, by Milton H. Bennett and Robert L. Dunman against Edward M. McGillin, and removed by the defendant into the Circuit Court of the United States for the Northern District of Illinois. The suit was brought to recover the sum of \$108,150, with interest at 6 per cent per annum from the 15th of July, 1885. The defendant pleaded the general issue and sundry special pleas. The plaintiffs demurred to the latter, the demurrer was sustained, and leave to amend the pleas was denied. There was also a plea of set-off, to which there was a replication, joining issue; and there was a *similiter* to the plea of the general issue. On the written waiver of a jury, the case was tried before the court, which found the issues for the plaintiffs, and also made special findings, and assessed the damages of the plaintiffs at \$115,580.55; for which amount, with costs, judgment was entered in their favor. To review that judgment, the defendant has brought a writ of error.

The suit was founded on a written instrument, dated April 16, 1885, a copy of which, as set out in the first count of the plaintiffs' declaration, is contained in the margin.*

There is a bill of exceptions, which contains all the evidence offered on the trial by either party, and the special findings made by the court. The material parts of those findings are as follows: The parties executed the contract sued on. At the date of its execution, the defendant paid to the plaintiffs \$25,000, and also delivered to them his promissory notes of that date for \$75,000, due and payable July 25, 1885, with interest at 8 per cent per annum. Those notes were thereafter, and before maturity, transferred for value, and were, after the commencement of this suit, paid in full by the defendant to the legal holders thereof. On and prior to July 14, 1885, the plaintiffs delivered to the defendant, and he accepted, the ranch and ranch outfit, as called for and described in the contract, and he took possession of the same; and at the same time they delivered to him 4,854 head of the cattle called for by the contract, which were accepted by him, and were the only cattle delivered by them to him on the contract. There was a deficiency of 7,646 cattle in the number called for by the contract. This deficiency, at the rate of \$25 per head, amounted to \$191,150, which the defendant was entitled to have credited upon the \$400,000 which he was, by the contract, to pay to the plaintiffs for the ranch, ranch outfit and cattle. The failure of the plaintiffs to deliver the full number of cattle called for by the contract was by reason of heavy losses of cattle sustained by them, from cold and starvation, during the winter of 1884 and the spring of 1885, whereby their herd was reduced from about the number called for by the contract to the number actually delivered. When they made the contract, they in good faith believed that they had, and should be able to deliver to the defendant, the full number of 12,500 head, and were not aware of the losses until they attempted to round up or collect their cattle, at about the time the delivery was to be made. Neither the defendant nor his agents or employes had any information that the plaintiffs would not be able to deliver the 12,500 head of cattle, until notified by the latter, on the 14th of July, 1885, that they had delivered all the cattle belonging to the ranch, and could not deliver any more. Before the 1st of July, 1885, the defendant had caused a deed to be made out, and signed and acknowledged by himself and his wife, conveying to the plaintiffs the 84 acres of land in Cook County, Illinois, mentioned in the contract; but there was an apparent incumbrance upon the land, as shown by the record of land titles in Cook County, by a trust deed dated June 28, 1878, to one Manning, as trustee, to secure the payment of \$40,000 from the defendant to one Sawyer, and that trust deed was not released and discharged until December 5, 1885; but, in fact, the indebtedness

* "Know all men by these presents that we, Milton H. Bennett and Robert L. Dunman, composing the firm of Bennett & Dunman, for and in consideration of the sum of four hundred thousand dollars, to be paid as hereinafter provided, have this day sold, and do by these presents sell, transfer, assign and convey, unto Edward M. McGillin, of Cleveland, State of Ohio, the following described personal property, to wit:

"All our ranch, cattle, horses, wagons, mules, hogs and ranch outfit, located in the Indian Territory, at or near the junction of the Arkansas and Cimarron Rivers, and more particularly described as follows, to wit, twelve thousand and five hundred head of cattle, to be counted, and averaging in age and sex about as follows: Three thousand head of three, four and five-year-old steers; three thousand head of two-year-olds, mixed; five thousand head of one-year-olds, mixed; and fifteen hundred head of cows and bulls, calves born in 1885 not to be counted; all of said cattle being branded in one or more of the following brands, to wit." [Here

secured thereby had been fully paid on or before July 1, 1885. On the 15th of July, 1885, the plaintiffs did not transfer, or offer to transfer, to the defendant the two leases mentioned in the contract; and the parties agreed to meet at Kansas City, Missouri, within a few days after the said 15th of July, and then endeavor to adjust and settle all differences between them in regard to the contract. They did so meet in Kansas City on the 17th of July, and the defendant then offered to convey to the plaintiffs the 94 acres of land in Cook County, on their paying to him \$59,150, which conveyance the plaintiffs refused to accept on those terms. Thereupon the defendant, to avoid litigation and as a compromise, as he said, offered to convey to the plaintiffs 54 acres of the Cook County land, in full payment of the balance due from him to them for the ranch and cattle. The plaintiffs refused to accept such offer; but the defendant did not tender any deed, either of the whole or of any part of the land. After such delivery of the ranch, ranch property and cattle to the defendant, the plaintiffs insisted that there was due to them from him \$108,850, which should be divided into two equal amounts and secured by the notes of the defendant, one payable on July 1, 1886, and the other on November 1, 1886, with

interest on each note at the rate of 8 per cent per annum. The plaintiffs also insisted that the sum of \$191,150, to be credited to the defendant on the \$400,000 purchase price to be paid for the ranch and cattle, should be applied as a credit to extinguish the payment to be made in the Cook County land. But the defendant refused to give the notes for \$108,850, as demanded by the plaintiffs, and insisted that there was no cash payment or money due from him to them. The defendant declined to settle unless the plaintiffs would take in settlement the Cook County land. Thereupon the defendant, by way of compromise, offered to the plaintiffs that if they would repay to him the \$25,000 cash paid by him, and would return to him his notes for \$75,000, given under the contract, he would surrender to them the possession of all property delivered, throw up the contract, and stand the loss of all moneys, amounting to about \$5,000, expended by him on the ranch. The plaintiffs declined this offer, stating that they had used the money and parted with the notes, and that the acceptance of the offer was entirely beyond their control. At the meeting in Kansas City, the plaintiffs advised the defendant of the amount which they had advanced for rent on the leases named in the contract, subsequently to July 15, 1885,

follow the brands.] "One hundred and twenty-five head of horses, branded in one or more of the above described brands, and all the mules, wagons, harness, hogs and ranch outfit located on their said ranch and used in connection therewith, and all their right, title and interest in and to the above-described brands; also all their right, title and interest in and to a certain lease for one hundred and twenty-eight thousand acres of land, known as the Cherokee Lease, dated October, 1883, and running five years from date thereof, at a yearly rental of two and one-half cents per acre; also all their right, title and interest in and to a certain lease for one hundred and twenty-seven thousand and two hundred and sixty-five acres of land, known as the Pawnee Lease, dated June 1, 1884, and running five years from date thereof, at a yearly rental of three cents per acre; and if the Cherokee Stock Association shall get their lease extended we guarantee an extension of said lease on same terms and at the same prices secured by other members of said association; also three good ranch houses, three good corrals, corn-cribs, stables, blacksmith shop, and everything used in operating said ranch; also twenty-two and one half miles of wire fence, Glidden wire, four strands, and nearly all black-walnut posts, and one horse pasture, two miles square, near ranch headquarters, to be fenced and completed; to have and to hold the said property above described, unto him, the said Edward M. McGillin, his heirs and assigns, forever.

"We agree to deliver possession of all the above-described property to the said Edward M. McGillin on the ranch on or before the 15th day of July, 1886, we to pay all ranch expenses, taxes and rental on lease up to date of delivery, the said Edward M. McGillin to refund to us all money paid by us on leases beyond date of delivery.

"Should the number of cattle delivered by us to the said Edward M. McGillin exceed twelve thousand and five hundred head, the said Edward M. McGillin is to pay us in cash the sum of twenty-five dollars per head for such excess, in addition to the other consideration herein provided for; and should said number fall short of twelve thousand five hundred head, we are to credit the said Edward M. McGillin on the amount herein provided to be paid, at the rate of twenty-five dollars per head for such deficit.

"The consideration of four hundred thousand dollars above specified is to be paid by the said Edward M. McGillin as follows, to wit: The sum of twenty-five thousand dollars paid cash in hand, the receipt whereof is hereby acknowledged; the sum of seventy-five thousand dollars to be paid July 25, 1886, for which the said Edward M. McGillin is to execute his negotiable promissory notes of even date here-

with, payable to us or our order at the Fourth National Bank of New York City on said 25th day of July, 1886, with eight per cent interest from date; sixty-six thousand dollars to be paid July 1, 1886; sixty-six thousand dollars to be paid November 1, 1886; for which said two last-named amounts the said Edward M. McGillin is to execute his several negotiable promissory notes bearing date on July 15, 1885, and payable to us or our order at the Fourth National Bank of New York City on said 1st day of July, 1886, and 1st day of November, 1886, with eight per cent interest per annum from date of said notes; the remaining one hundred and sixty-eight thousand dollars is to be paid by the said Edward M. McGillin on the 15th day of July, 1886, as follows, to wit: On said 15th day of July, 1886, the said Edward M. McGillin is to convey to us, the said Milton H. Bennett and Robert L. Dunman, by deed of general warranty, free and clear from all incumbrances, taxes and liens of every kind and character, eighty-four acres of land lying and situate in the County of Cook and State of Illinois, more particularly described as being in certain blocks of Crosby's and others' subdivision of the south half of section five, township thirty-seven, N. R. thirteen, lying west of the Chicago, Rock Island and Pacific Railway; we, the said Milton H. Bennett and Robert L. Dunman, hereby covenanting that the property herein sold and conveyed to the said Edward M. McGillin is free and clear from all incumbrance, and that we will warrant and defend the title to the said cattle, horses and stock unto the said Edward M. McGillin, his heirs and assigns, forever; we, the said Milton H. Bennett and Robert L. Dunman, hereby expressly reserving a vendor's lien on all the property herein sold and conveyed for the security and payment of the two amounts of sixty-six thousand dollars each herein provided to be paid, respectively, on the 1st day of July, 1886, and the 1st day of November, 1886; hereby expressly reserving the right, power and authority to advertise and sell any or all of said property by giving thirty days' notice of the time and place of such sale in some daily newspaper published in the City of Kansas, Jackson County, Missouri, if said sums, together with all the interest due thereon, are not paid when due, according to the terms and tenor of the notes to be executed by the said Edward M. McGillin therefor.

"In testimony whereof, witness our hands and seals, this 16th day of April, 1886.

"Milton H. Bennett, [Seal.]

"Robert L. Dunman, [Seal.]

"I accept the above conveyance, and am bound by the terms and conditions thereof. Witness my hand and seal.

"Edward M. McGillin, [Seal.]"

and which was to be refunded by the defendant; and thereafter the latter paid said rental, and the plaintiffs duly transferred the leases to him. In the preliminary negotiations between the parties, which resulted in the contract, the defendant insisted that he would not purchase the ranch and cattle at the price of \$400,000, unless the plaintiffs would take his Cook County land at the sum of \$168,000, and the plaintiffs insisted that they would not sell for \$400,000, unless they could receive about \$250,000 in money, being willing to take the balance of such purchase price in the 84 acres of Cook County land. Before the contract was entered into, and while the negotiations for it were going on, the plaintiff Bennett visited Chicago and examined the Cook County land.

On these findings of fact, the court found against the defendant, and he made a motion to set aside such finding, and for a new trial. The motion was denied, and the defendant excepted. He then moved in arrest of judgment; but the motion was denied, and he excepted. The court then rendered judgment upon the findings, in favor of the plaintiffs and against the defendant, and the latter excepted. There is no exception by the defendant to any ruling of the court in the course of the trial; and the only question open for consideration is whether the judgment is supported by the special findings.

The opinion of the circuit court, held by Judge Blodgett, accompanying its findings and forming part of the record, is reported as *Bennett v. McGillin*, 28 Fed. Rep. 411. The opinion states that the controversy in the case is as to whether the plaintiffs were bound to accept the Cook County land at the price of \$168,000, and make up in cash the deficiency in that price, or whether the plaintiffs could insist that the credit for the \$191,150 shortage on the cattle should be applied first to extinguish the payment of \$168,000 to be made in Cook County land, and then upon the amount to be secured by the \$182,000 of notes to fall due in July and November, 1886, thus leaving a balance of \$108,150 due to the plaintiffs; and that the suit to recover that balance was brought on the ground that, the defendant having refused to give his notes, such balance became at once a money demand.

The court took the view that when the actual count of the cattle showed a shortage of 7,646 head in the number necessary to make up the 12,500 the defendant might properly have refused to accept the property, and have put the plaintiffs in default on their part of the contract; but that he elected to accept what the plaintiffs had to deliver, and must be held to have assented thereby to such readjustment of the terms of the contract as was made necessary by the changed facts; that the contract gave to the defendant the option of paying \$168,000 of the purchase money by conveying the Cook County land; that if the defendant declined to make the conveyance, or was unable to give a good title, the \$168,000 would at once become a money payment, payable in cash on the 15th of July, 1885; and that, if the plaintiffs delivered the whole number of 12,500 cattle, they would be entitled to the two notes of \$66,000 each, and also to a deed of the Cook County land; or to the \$168,000 in cash in case the

defendant should refuse, or be unable, to make a deed.

The court was therefore of opinion that the \$168,000 was to be treated as a present or cash payment; that the deficiency in cattle, of \$191,150, being 7,646 head at \$25 per head, which was to be credited to the defendant, should be appropriated in liquidation of the cash payment of \$168,000, such credit being thus applied to the cash payment which the defendant would be called upon to make in case he should be unable to make the title at the time called for; that the \$168,000 to be liquidated by the land was a present payment, whether made in money or land; that if, by the terms of the contract, the defendant was entitled to a credit equal to or exceeding the \$168,000, that credit should be applied thereon, rather than upon the deferred payments to be evidenced by notes, because the \$168,000 was a payment down, to be made on the 15th of July, 1885; that, therefore, as \$100,000 had been paid in cash on the \$400,000 purchase price, leaving \$300,000 due, a credit thereon of the \$191,150 deficiency in cattle left due to the plaintiffs \$108,850, for which amount the court held that the defendant should have given his notes, payable in July and November, 1886, with interest at 8 per cent per annum; and that, as he declined to give such notes, or any notes, such balance became a present demand, for which the plaintiffs could sue. It therefore ordered judgment for the plaintiffs, for \$108,850, with interest at 6 per cent from July 15, 1885.

Although, as appears by the bill of exceptions, the defendant at the trial introduced evidence, under the objections and exceptions of the plaintiffs, of the circumstances attending the execution of the contract, of the relative situation of the parties, and of the negotiations, correspondence and interviews between them and their agents, leading up to its execution, to enable the court better to understand and construe the contract, the defendant now seriously alleges as error the admission of such parol evidence. The point is not tenable. It appears, from the findings of fact, that the court considered the evidence so introduced by the defendant; and he cannot now object to it.

We are of opinion that the conclusion of law of the circuit court, from the findings of fact, was correct. Of course, the credit of \$191,150 for the 7,646 head of cattle deficient, at \$25 per head, was not intended by the contract to be applied on the cash payment of \$25,000, made April 16, 1885, or on the payment of \$75,000 provided for by the promissory notes made April 16, 1885, and due July 25, 1885. The question of a shortage in the number of cattle was not to be determined, and was not determined, before the 15th of July, 1885, and the contract does not provide for repaying any part of the \$100,000. Therefore, the credit of \$191,150 could be applied only on the \$300,000 remaining unpaid on the 15th of July, 1885. On that day the payment of \$168,000 was to be made. By the contract, if there was an excess of cattle over 12,500 head, the payment to be made by the defendant on that day would be more than \$168,000 (exclusive of the \$182,000 payable in 1886), but that excess was to be paid in cash. If there was a shortage in

the number of cattle, and a credit to be made to the defendant therefor on the \$400,000 purchase price, the amount of that credit was to be made on the 15th of July, 1885, the same day the \$168,000 was to be paid. It is clear, therefore, that the amount of the excess was to be added to that payment, or the amount of the credit was to be deducted therefrom. The payment to be made on the 15th of July, 1885, would be greater or less than the \$168,000, as the number of cattle exceeded or fell short of 12,500 head. The \$108,850 became due July 15, 1885, and the defendant, according to the terms of the contract, ought then to have given his notes therefor, payable, one half July 1, 1886, and one half November 1, 1886. He refused to give such notes. As the payments to be made July 1, 1886, and November 1, 1886, were not due on July 15, 1885, and a vendor's lien was expressly reserved in respect of those payments, there is no solution of the problem except to deduct from the \$191,150 deficiency in cattle the \$168,000 payment to be made in land or money, July 15, 1885, leaving \$23,150, and to deduct that from the \$182,000 payable in 1886, leaving \$108,850 due to the plaintiffs, with interest from July 15, 1885, for which sum judgment was had. On the facts found, showing that the defendant was not prepared or able to deliver to the plaintiffs, on the 15th of July, 1885, a deed for the 84 acres of land in Cook County, Illinois, the \$168,000 became on that day a cash payment.

The judgment of the Circuit Court is affirmed.

JAMES C. PENNIE, Administrator, etc.,
Pff. in Err.,

C. REIS, Treasurer of the POLICE LIFE AND
HEALTH INSURANCE FUND of the City
and County of San Francisco.

(See S. C. Reporter's ed. 464-472.)

Admissions by demurrer—construction of statute not admitted by—fund created by law for police officers may, by law, be devoted to other purposes—vested right—repeal of law.

1. A demurrer admits only allegations of fact and not conclusions of law.
2. A demurrer does not admit that the construction of a statute set forth in the pleading demurred to is the correct one, nor that the statute imposes the obligations or confers the rights which the pleading alleges.
3. Where a statute for the pay of police officers provided that two dollars a month be retained from the pay of each officer, for a fund, a certain sum of which should, on the death of each officer, be paid to his representatives, such fund, until such death, can be applied to a different purpose by the Legislature.
4. There was no contract by the State that the disposition of the fund should always continue as originally provided; and until the event happens upon which the money was to be paid, there is no vested right in the representatives of such officer to such payment.
5. Such statute having been repealed before the death of the intestate, his expectancy in such fund was thereby revoked, and the sum claimed

therefrom by his representatives was no longer subject to the provisions of such statute, and cannot be recovered by them.

[No. 1260.]

Submitted Dec. 2, 1889. Decided Dec. 16, 1889.

IN ERROR to the Supreme Court of the State of California, to review a judgment denying a writ of mandate to compel the Treasurer of San Francisco, California, to pay to the administrator of a police officer a sum of money claimed to be due from a fund created under the California Act of April 1, 1878, for the benefit of police officers, and dismissing the petition for said writ. *Affirmed.*

Statement by Mr. Justice Field:

This case comes from the Supreme Court of the State of California. The petitioner is the administrator of one Edward A. Ward, deceased, who was a police officer of the City and County of San Francisco from the 24th of September, 1869, until his death, which occurred on the 13th of March, 1889.

On the 1st of April, 1878, an Act of the Legislature of California was approved, entitled "An Act to Enable the Board of Supervisors of the City and County of San Francisco to Increase the Police Force of said City and County, and Provide for the Appointment, Regulation and Payment thereof." (Statutes of California of 1877-78, p. 879.) The first section of this Act authorized the Board of Supervisors to increase the existing force of the police, which consisted of one hundred and fifty members, not exceeding two hundred and fifty more, the whole number not to make in all more than four hundred; and provided that they should be appointed and governed in the same manner as the then existing force. The second section declared that the compensation of the two hundred and fifty, or such part thereof as the board might allow, should not exceed \$102 a month for each one, and that the compensation of those then in office should continue at the rate prescribed by the Acts under which they were appointed until June 1, 1879, when their pay should be fixed by a board of commissioners created under the Act; that the police officers then in office should be known as the "old police," and those appointed under the Act as the "new police;" and that the officers subsequently appointed to fill vacancies on the old police should receive the same pay as the new police, subject to the condition that the treasurer of said city and county should "retain from the pay of each police officer the sum of two dollars per month, to be paid into a fund to be known as the 'Police Life and Health Insurance Fund,'" to be administered as provided in the Act. The mayor, auditor and treasurer of the City and County of San Francisco were constituted a board to be known as the "Police Life and Health Insurance Board," and required from time to time to invest, as it might deem best, the moneys of the Police Life and Health Insurance Fund in various designated securities, to be held by the treasurer, subject to the order of the board. The Act declared that upon the death of any member of the police force after the first day of June, 1878, there should be paid, by the treasurer, out of the said Life and Health Insurance Fund, to his legal represen-

tative, the sum of one thousand dollars; that in case any officer should resign from bad health or bodily infirmity, there should be paid to him, from that fund, the amount of the principal which he may have contributed thereto; and that, in case such fund should not be sufficient to pay the demand upon it, such demand should be registered and paid in the order of its registry, out of the funds as received. Ward having been a police officer whilst this Act was in force, the administrator of his estate demanded of the treasurer the one thousand dollars provided by it. There was in the treasury at the time the sum of forty thousand dollars. The treasurer having refused to pay the demand, the administrator applied to the supreme court for a writ of mandate upon him to compel its payment. To the petition for that writ the treasurer demurred on the ground that it did not state facts sufficient to constitute a cause of action, or entitle the petitioner to the writ of mandate, or to any relief whatever; and that the Act of the Legislature, passed March 4, 1889, entitled "An Act to Create a Police Relief, Health and Life Insurance and Pension Fund in the Several Counties, Cities and Towns, Cities and Towns of the State," was a valid and constitutional enactment. (Statutes of California, 1889, p. 56.) This Act creates a board of trustees of the police relief and pension fund of the police department in each county, city and county, city or town, to be known as the board of police pension-fund commissioners; and provides for its organization and the administration of the fund, and for pensions to officers over sixty years of age, who have been in the service over twenty years, to those who have become physically disabled in the performance of their duties, and to the widows and children of those who lose their lives in the discharge of their duties, and for the payment of certain sums of money to the widows or children of those who die from natural causes after ten and less than twenty years' service, and regulates the evidence of disability; and that retired officers shall report to the chief of police at certain stated periods, and perform duty under certain circumstances, and for the forfeiture of pensions by misconduct, and for the meetings of the board, and prescribes their duties as to the fund.

Sections 12 and 13 of the Act are as follows:

"Sec. 12. The board of supervisors, or other governing authority, of any county, city and county, city or town, shall, for the purposes of said 'police relief and pension fund' hereinbefore mentioned, direct the payment annually, and when the tax levy is made, into said fund of the following moneys:

"First. Not less than five nor more than ten per centum of all moneys collected and received from licenses for the keeping of places wherein spirituous, malt or other intoxicating liquors are sold.

"Second. One half of all moneys received from taxes or from licenses upon dogs.

"Third. All moneys received from fines imposed upon the members of the police force of said county, city and county, city or town, for violation of the rules and regulations of the police department.

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"Fourth. All proceeds of sales of unclaimed property.

"Fifth. Not less than one fourth nor more than one half of all moneys received from licenses from pawnbrokers, billiard-hall keepers, second-hand dealers and junk stores.

"Sixth. All moneys received from fines for carrying concealed weapons.

"Seventh. Twenty-five per centum of all fines collected in money for violation of county, city and county, city or town ordinances.

"Eighth. All rewards given or paid to members of such police force, except such as shall be excepted by the chief of police.

"Ninth. The treasurer of any county, city and county, city or town shall retain from the pay of each member of police department the sum of two dollars per month, to be forthwith paid into said police relief and pension fund, and no other or further retention or deduction shall be made from such pay for any other fund or purpose whatever.

"Sec. 13. Any police, life and health insurance fund, or any fund provided by law, heretofore existing in any county, city and county, city or town for the relief or pensioning of police officers, or their life or health insurance, or for the payment of a sum of money on their death, shall be merged with, paid into, and constitute a part of the fund created under the provisions of this Act; and no person who has resigned or been dismissed from said police department shall be entitled to any relief from such fund: *Provided*, That any person who, within one year prior to the passage of this Act, has been dismissed from the police department for incompetency or inefficiency, and which incompetency or inefficiency was caused solely by sickness or disability contracted or suffered while in service as a member thereof, and who has, prior to said dismissal, served for twelve or more years as such member, shall be entitled to all the benefits of this Act."

The Act also repealed all Acts or parts of Acts in conflict with its provisions. Under this Act the treasurer refused to pay the money demanded by the administrator of Ward. The Supreme Court of the State held that this latter Act was a valid law, and that it repealed the former Act, and denied the prayer of the petitioner and dismissed the writ.

From that judgment the administrator has brought the case to this court on a writ of error.

Messrs. Alfred Clarke and James A. Johnson, for plaintiff in error:

The validity of a contract cannot be impaired by state legislation.

Douglass v. Pike Co. 101 U. S. 677 (25: 988); *McCracken v. Hayward*, 48 U. S. 2 How. 606, 612 (11: 397, 399); *Ogden v. Saunders*, 25 U. S. 12 Wheat. 218 (6: 606); *People v. Ingersoll*, 58 N. Y. 1; *Goggins v. Turnispeed*, 1 S. C. 80, 7 Am. Rep. 23; *Stein v. Mobile*, 49 Ala. 362, 20 Am. Rep. 263; *Von Baumbach v. Bado*, 9 Wis. 559.

The Legislature cannot alter the legal effect of a contract or violate its obligation.

King v. Dedham Bank, 15 Mass. 447; *Ohio C. Ins. & T. Co. v. Debolt*, 57 U. S. 16 How. 416 (14: 997); *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 175 (17: 520); *Havemeyer v. Iowa County*,

70 U. S. 3 Wall. 294 (18: 88); *Thompson v. Lee County*, 70 U. S. 3 Wall. 327 (18: 177); *Mitchell v. Burlington*, 71 U. S. 4 Wall. 270 (18: 350); *Lee County v. Rogers*, 74 U. S. 7 Wall. 181 (19: 160); *Kenosha v. Lamson*, 76 U. S. 9 Wall. 477 (19: 725); *Chicago v. Sheldon*, 76 U. S. 9 Wall. 55 (19: 597); *White v. Hart*, 80 U. S. 13 Wall. 647 (20: 686); *Osborn v. Nicholson*, 80 U. S. 13 Wall. 655 (20: 693); *Olcott v. Suprs.* 83 U. S. 16 Wall. 678 (21: 382); *Boyes v. Tabb*, 85 U. S. 18 Wall. 646 (21: 757).

If the law is so changed that the means of enforcing it are materially impaired, the obligation of the contract no longer remains the same.

Bronson v. Kinsie, 42 U. S. 1 How. 311 (11: 143); *McCracken v. Haynard*, 43 U. S. 2 How. 612 (11: 399); *Gantly's Lessee v. Ewing*, 44 U. S. 3 How. 717 (11: 798); *Curran v. Arkansas*, 56 U. S. 15 How. 804 (14: 705); *Butz v. Muscatine*, 75 U. S. 8 Wall. 588 (19: 494); *Walker v. Whitehead*, 83 U. S. 16 Wall. 814 (21: 357); *Olcott v. Suprs.* 83 U. S. 16 Wall. 678 (21: 382); *Gunn v. Barry*, 82 U. S. 15 Wall. 628 (21: 215); *Jackson v. Lamphire*, 28 U. S. 3 Pet. 280 (7: 679); *Green v. Biddle*, 21 U. S. 8 Wheat. 1 (5: 547); *Edwards v. Kearney*, 96 U. S. 601 (24: 797); *Taylor v. Stearns*, 18 Gratt. 244; *Nevitt v. Bank*, 14 Miss. 513; *Von Baumbach v. Bade*, 9 Wis. 559.

These salary rights have been always enforced.

People v. Smyth, 28 Cal. 26; *People v. Outton*, Id. 51; *Dolan v. Mayor*, 68 N. Y. 274; *McVeany v. Mayor*, 80 N. Y. 185; *Fitzsimmons v. Brooklyn*, 102 N. Y. 536; *Andrews v. Portland*, 79 Me. 484; *Nichols v. MacLean*, 101 N. Y. 526; *Andrews v. King*, 77 Me. 281; *Rule v. Tavt*, 88 Kan. 765; *Shaw v. Pima County (Ariz.)* 18 Pac. 276; *People v. Potter*, 68 Cal. 127; *Carroll v. Siebenhaier*, 37 Cal. 195.

The Act of March 4th, 1889, deprives the plaintiff of property without due process of law.

This fund is a trust fund created by law for the uses and objects stated in the creative Act, and it ceases to be applicable to any other purpose.

People v. Brooks, 16 Cal. 85; *Babcock v. Middleton*, 20 Cal. 659; *Creighton v. Pragg*, 21 Cal. 119; *Nevada Bank v. Steinmiz*, 64 Cal. 816; *Meyer v. Porter*, 65 Cal. 69.

The Act of March 4, 1889, impairs the obligation of our contract with respondent, and thereby violates article 1, section 10, of the Federal Constitution.

Com. v. Wetherbee, 105 Mass. 149; *Brady v. King*, 58 Cal. 45; *People v. Lynch*, 51 Cal. 15; *Kelly v. Luning*, 76 Cal. 811; *Hutson v. Woodbridge Protection Dist.* 79 Cal. 90; *Floyd v. Blanding*, 54 Cal. 45; *Wolff v. New Orleans*, 108 U. S. 367 (26: 399); *Chas Chan Ping v. U. S.* 130 U. S. 581 (32: 1068); *Oakland Paving Co. v. Barstow*, 79 Cal. 45; *U. S. v. Reisinger*, 128 U. S. 898 (32: 480); *Jack v. Anderson*, 57 Cal. 251; *Boyd v. U. S.* 116 U. S. 635-88 (29: 753).

Messrs. Davis Louderback and W. W. Morrow, for defendant in error:

The provision in the former Act, the Act of April 1st, 1878, that upon the death of a police

officer the treasurer shall pay one thousand dollars to his legal representatives, does not create a vested right or property, and therefore does not fall within the protection of that provision of the National Constitution that a person shall not be deprived of his property without due process of law.

Randall v. Kreiger, 90 U. S. 23 Wall. 143 (23: 126); *Brenham v. Story*, 89 Cal. 185; *Re Lawrence*, 1 Redf. 310; *Merrill v. Sherburne*, 1 N. H. 214; *Guerin v. Moore*, 25 Minn. 464, 465; *Wallace v. Reddick*, 119 Ill. 151, 6 West. Rep. 769; *Morrison v. Rice*, 35 Minn. 486.

It is like the wife's right to dower, which does not vest till death of husband. Prior thereto it may be changed or destroyed by legislation.

Re Lawrence, 1 Redf. 310; *Merrill v. Sherburne*, 1 N. H. 214; *Barbour v. Barbour*, 48 Me. 13, 14; *Mages v. Young*, 40 Miss. 169, 170; *Guerin v. Moore*, 25 Minn. 464, 465; *Randall v. Kreiger*, 90 U. S. 23 Wall. 143 (23: 126); *Boyd v. Harrison*, 36 Ala. 588; *Ware v. Owens*, 42 Ala. N. S. 212; *Bennett v. Harms*, 51 Wis. 257; *Morrison v. Rice*, *supra*.

Till the payment of the price, Congress may withdraw the public lands from entry or sale.

Hale v. Gaines, 63 U. S. 22 How. 144 (16: 264); *People v. Shearer*, 30 Cal. 645; *Hutton v. Frisbie*, 37 Cal. 475; *Southern Pac. R. Co. v. Garcia*, 64 Cal. 515.

Officers' emoluments, salaries, pensions and incidents are not contracts within those provisions of the Constitution of the United States and of the State of California which prohibit legislation impairing the obligation of contracts.

State v. Deves, R. M. Charlton's Rep. (Ga.) 400, 401; *Miller v. Kister*, 68 Cal. 144; *Butler v. Pennsylvania*, 51 U. S. 10 How. 416 (13: 478); *Com. v. Mann*, 5 Watts & S. 418; *Com. v. Bacon*, 6 Serg. & R. 22; *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518, 629 (4: 629, 657); *Connor v. N. Y.* 2 Sandf. 870; *Coffin v. State*, 7 Ind. 157; *Connor v. Mayor*, 5 N. Y. 285; *Benford v. Gibson*, 15 Ala. 524; *Koontz v. Franklin County*, 76 Pa. 157; *County Comrs. v. Jones*, 18 Minn. 202; *Williams v. Newport*, 12 Bush (Ky.) 438; *State v. Douglas*, 26 Wis. 432; *Alexander v. McKenzie*, 2 S. C. 81, 93; *Newton v. Comrs.* 100 U. S. 557, 558 (25: 711); *Farrell v. Bridgeport*, 45 Conn. 195; *Smith v. Mayor*, 37 N. Y. 520; *Donahue v. Will County*, 100 Ill. 108, 104; *Standeford v. Wingate*, 2 Duvall (Ky.) 443; *Knoup v. Piqua Bank*, 1 Ohio St. 616; *Toledo Bank v. Bond*, 1 Ohio St. 653, 656; *Barker v. Pittsburg*, 4 Pa. 49; *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 548 (12: 552).

All affairs that concern state policy are under immediate control of the sovereignty of the State through the legislative department.

People v. Hurlbut, 24 Mich. 68-103; *People v. Mahaney*, 13 Mich. 490; *Park Comrs. v. Common Council*, 28 Mich. 285, 286; *Burch v. Hardwicke*, 30 Gratt. 24; *State v. Hunter*, 38 Kan. 578; *State v. Kansas City*, 38 Kan. 593; *Chicago v. Wright*, 69 Ill. 326; *People v. Draper*, 15 N. Y. 554; *Mayor v. State*, 15 Md. 455, 456; *Police Comrs. v. St. Louis*, 3 Bush (Ky.) 597; *Diamond v. Cain*, 21 La. Ann. 309; *State v. Leovy*, 21 La. Ann. 538; *People v. Draper*, 25 Barb. 344;

People v. Shepard, 86 N. Y. 285; *Farrell v. Bridgeport*, 45 Conn. 195; *Cobb v. Portland*, 55 Me. 883; *Andrews v. King*, 77 Ma. 280; *People v. Lynch*, 51 Cal. 85.

Public funds may be appropriated by the State to such public uses or purposes as it may determine.

Creighton v. San Francisco, 42 Cal. 450; *Ex parte Reis*, 64 Cal. 238; *Sangamon County v. Springfield*, 68 Ill. 70; *Aid Society v. Reis*, 71 Cal. 681; *Darlington v. Mayor*, 81 N. Y. 164; *Guilford v. Cornell*, 18 Barb. 615; *U. S. v. Baltimore & O. R. Co.* 84 U. S. 17 Wall. 332 (21: 601); *New Orleans v. Clark*, 95 U. S. 654 (24: 528); *Palmer v. Fitts*, 51 Ala. 492; *Matter of Buffalo*, 68 N. Y. 171; *State v. St. Louis County Court*, 84 Mo. 670; *St. Louis v. Shields*, 52 Mo. 354; *Sinton v. Ashbury*, 41 Cal. 530; *Hart v. Burnett*, 15 Cal. 612; *Payne v. Treadwell*, 16 Cal. 288; *People v. Burr*, 18 Cal. 351; *Beals v. Amador County*, 85 Cal. 632, 638; *San Francisco v. Canavan*, 42 Cal. 558; *People v. Kerr*, 27 N. Y. 189; *People v. Alameda County*, 26 Cal. 649; *Litchfield v. Vernon*, 41 N. Y. 128; *People v. Pucheco*, 27 Cal. 209.

Mr. Justice Field delivered the opinion of the court:

It was contended in the court below that this latter Act of March 4, 1889, violated that provision of the Constitution of the United States, and of the State, which declares that no person shall be deprived of his property without due process of law. The Supreme Court of the State held that this contention went on the theory that the deceased police officer had, at the time of his death, a vested property right in the one thousand dollars of public money which the former Statute had directed to be paid to his legal representative upon his death. The petitioner now insists that this statement of his contention below is erroneous; that he did not then contend and does not now contend that the fund in the hands of the treasurer was public money, but private money accumulated from the contributions of the members of the police force, and that by Ward's contribution the sum claimed became, on his death,—like money due on a life insurance policy,—property of his estate. Such, at least, is his position, if we rightly understand it. Some plausibility is given to it by the language of the petition to which the treasurer demurred. The petition alleges that Ward, the deceased, contributed, out of his salary as a police officer, to the Police Life and Health Insurance Fund, the sum of two dollars per month for each month from April 1, 1878, to and including the month of March, 1889, and that the whole amount of his contribution to that fund was \$264; that, upon his death, there was due to the petitioner, as the legal representative of Ward, the sum of one thousand dollars, payable out of that fund; that it was the duty of the treasurer of that fund to pay it; and that there was in his possession, at the time, forty thousand dollars applicable to its payment.

The petitioner now contends that these several allegations are to be taken as literally true, from the fact that the treasurer demurred to the petition. But a demurrer admits only allegations of fact and not conclusions of law. When, therefore, a plaintiff relies for recovery

upon compliance with the provisions of a statute, and attempts to set forth conformity with them, the court will look to that statute and take the allegations as intended to meet its provisions, notwithstanding the inaccuracy of any statement respecting them. If the pleading misstates the effect and purpose of the statute upon which the party relies, the adverse party, in demurring to such pleading, does not admit the correctness of the construction, or that the statute imposes the obligations or confers the rights which the party alleges. *Dillon v. Barnard*, 88 U. S. 21 Wall. 430, 437 [22: 673, 676]. Notwithstanding, therefore, in this case, the petitioner avers that the deceased police officer contributed out of his salary two dollars a month, pursuant to the law in question, and, in substance, that the fund which was to pay the one thousand dollars claimed was created out of like contributions of the members of the police, the court, looking to the Statute, sees that, in point of fact, no money was contributed by the police officer out of his salary, but that the money which went into that fund under the Act of April 1, 1878, was money from the State retained in its possession for the creation of this very fund, the balance—one hundred dollars—being the only compensation paid to the police officer. Though called part of the officer's compensation, he never received it or controlled it, nor could he prevent its appropriation to the fund in question. He had no such power of disposition over it as always accompanies ownership of property. The Statute, in legal effect, says that the police officer shall receive as compensation, each month, not exceeding one hundred dollars, or such sum as may be fixed after June 1, 1879, by a board of commissioners created under the Act, and that, in addition thereto, the State will create a fund by appropriating two dollars each month for that purpose, from which, upon his resignation for bad health or bodily infirmity, or dismissal for mere incompetency not coupled with any offense against the laws of the State, a certain sum shall be paid to him, and, upon his death, a certain sum shall go to his legal representative.

Being a fund raised in that way, it was entirely at the disposal of the government, until, by the happening of one of the events stated—the resignation, dismissal or death of the officer—the right to the specific sum promised became vested in the officer or his representative. It requires no argument or citation of authorities to show that, in making a disposition of a fund of that character, previous to the happening of one of the events mentioned, the State impaired no absolute right of property in the police officer. The direction of the State, that the fund should be one for the benefit of the police officer or his representative, under certain conditions, was subject to change or revocation at any time, at the will of the Legislature. There was no contract on the part of the State that its disposition should always continue as originally provided. Until the particular event should happen upon which the money or a part of it was to be paid, there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law, and li-

able to be revoked or destroyed by the same authority. The law of April 1, 1878, having been repealed before the death of the intestate, his expectancy became impossible of realization; the money which was to pay the amount claimed had been previously transferred and mingled with another fund, and was no longer subject to the provisions of that Act. Such being the nature of the intestate's interest in the fund provided by the Law of 1878, there was no right of property in him of which he or his representative has been deprived.

If the two dollars a month, retained out of the alleged compensation of the police officer, had been in fact paid to him, and thus become subject to his absolute control, and after such payment he had been induced to contribute it each month to a fund on condition that, upon his death, a thousand dollars should be paid out of it to his representative, a different question would have been raised with respect to the disposition of the fund, or at least of the amount of the decedent's contribution to it. Upon such a question we are not required to express any opinion. It is sufficient that the two dollars retained from the police officer each month, though called in the law a part of his compensation, were, in fact, an appropriation of that amount by the State each month to the creation of a fund for the benefit of the police officers named in that law, and, until used for the purposes designed, could be transferred to other parties and applied to different purposes by the Legislature.

Judgment affirmed.

R. H. PAUL, *Appt.*,

v.

HENRY B. CULLUM.

(See S. C. Reporter's ed. 559-553.)

Partnership—who is partner—profits and losses—power of partner to assign partnership assets for benefit of creditors—agency.

1. The contribution of money or property by an incoming partner is not essential to the creation of a partnership. It is competent for the prior partners, in consideration of the new partner undertaking the entire charge and control of the business of the company, to give him an interest as partner in the property which is to constitute, at the outset, the whole capital as a partnership.
2. One who is to receive a certain share of the profits and bear a like share of the losses in the business of selling goods of a firm is a partner.
3. A partner to whom is committed the entire direction and supervision of the partnership property can, in a general assignment of the partnership effects for the benefit of the firm creditors, represent another partner who has expressly authorized him to bargain, sell, hypothecate, and in every way deal with the partnership property. Such assignment executed by him binds the other partner.

[No. 107.]

Argued Nov. 13, 14, 1889. Decided Dec. 16, 1889.

A PPEAL from a judgment of the Supreme Court of the Territory of Arizona, affirm-

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ing a judgment of a District Court of that Territory in favor of plaintiff in an action of replevin. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. Hallett Phillips and Benj. Morgan, for appellant:

Harlow had no interest in the stock from the fact that he was to share profits and losses, as there were no profits to share and the business was terminated by the assignment.

Blanchard v. Coolidge, 23 Pick. 151; *Alfaro v. De La Torre*, 24 Week. Rep. 510.

Whether the agreement constituted a partnership in the stock is a question of construction, and therefore one of law.

Kingsbury v. Tharp, 61 Mich. 216.

Sharing profit and loss is not proof of partnership in stock.

Donnell v. Harsha, 67 Mo. 170; *Clifton v. Howard*, 89 Mo. 192.

The agreement looked merely to the future association, and until then no interest in the new associate accrued.

Drennan v. London Assurance Co. 113 U. S. 51 (28:919); *London Assurance Co. v. Drennan*, 116 U. S. 461 (29:688).

The power of attorney to C. E. Harlow does not purport to empower Harlow to perform any partnership act for Lord, much less such an act as the assignment in question. For this a special authorization was necessary.

Woodbridge v. Irving, 23 Fed. Rep. 676; *Hook v. Stone*, 84 Mo. 329; *Wells v. March*, 30 N. Y. 844; *Palmer v. Myers*, 48 Barb. 511.

While the partner who did not join in the assignment may ratify it, such ratification cannot relate back so as to invalidate intervening attachments.

Holland v. Drake, 29 Ohio St. 445; *Stein v. La Dow*, 18 Minn. 412.

Mr. Lucien Birdseye, for appellee:

An assignee for the benefit of creditors can maintain an action in his individual character to recover a claim due the assignor. He is not required to sue as trustee.

Ogden v. Prentiss, 33 Barb. 160; *Richardson v. Mead*, 27 Barb. 178; *Eastern Plank Road Co. v. Vaughan*, 14 N. Y. 546, 555; *Merritt v. Seaman*, 6 N. Y. 168; *Marie v. Garrison*, 83 N. Y. 14, 30; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Litchfield v. Flint*, 104 N. Y. 543; *Stillwell v. Carpenter*, 62 N. Y. 639; *Beers v. Shannon*, 73 N. Y. 292; *Thompson v. Whitmarsh*, 100 N. Y. 85; *Buckland v. Gallup*, 105 N. Y. 453; *Bingham v. Marine Bank*, 112 N. Y. 661.

Mr Justice Harlan delivered the opinion of the court:

In an action brought in a District Court of the Territory of Arizona, by G. H. Thompson against C. H. Lord and W. W. Williams, partners under the name of Lord & Williams, an attachment was sued out, October 28, 1881, and levied by the sheriff, the present appellant, upon "certain goods, wares and merchandise, being the entire stock of Lord & Williams." H. B. Cullum, claiming to be the owner of the property at the time the attachment was levied, brought this action against the sheriff to recover possession thereof, or its value, in case delivery could not be had. The answer put in issue the plaintiff's ownership of the goods, and

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averred that, when taken under the attachment, they were owned by and in possession of Lord & Williams. The pleadings, therefore, raised the question of the ownership of the goods attached.

The district court made the following finding of facts:

"1. That on the 25th day of October, A. D. 1881, at the City of Tucson, Charles H. Lord, W. W. Williams and C. E. Harlow, then, and for several months before that time, composing the mercantile firm of Lord & Williams Company, and exclusively engaged in general commercial business, viz., buying and selling goods, being insolvent, made and executed as such firm a general assignment of all their property, not exempt from execution, for the equal benefit of all their creditors, to Henry B. Cullum, the plaintiff, and that the plaintiff immediately accepted said assignment and took possession of the property conveyed by it, including the property mentioned in the complaint, which property was a portion of the property of the said Lord & Williams Company at the time of the assignment. The assignment was executed in the firm name by W. W. Williams, and also signed by said Williams and said Harlow individually, and by the said Lord by his attorney, the said C. E. Harlow, the said Harlow then holding a general power of attorney from him, and the said Lord being then absent from the Territory, and sick, and his whereabouts being entirely unknown at that time to his partners and family, though every reasonable effort had been made to discover it, and that said assignment was ratified and approved by said Lord at the earliest opportunity.

"2. That on the said 25th day of October, A. D. 1881, and for a long time previous thereto, at said city, the said Charles H. Lord and W. W. Williams were copartners in the banking business and in dealing in live stock under the firm name of Lord & Williams; that on said last mentioned day the said firm of Lord & Williams, being then insolvent, made and executed a general assignment of all its property, not exempt from execution, for the general benefit of all its creditors, to the said Henry B. Cullum, who thereupon immediately entered upon the possession of the same and accepted the trust. Said assignment was executed in the firm name by said Williams, and also signed by him, individually, and by said Harlow, as Lord's attorney in fact.

"3. That said assignments were made in good faith by the said firms respectively, and that at the time of making the same the assignors had full confidence in the ability and integrity of said Henry B. Cullum.

"4. That on the 28th day of October, A. D. 1881, one G. Howard Thompson commenced a suit in this court against the said Lord & Williams, and sued out an attachment therein against the property of the said Lord & Williams, and placed the same in the hands of the defendant, Robert H. Paul, who was then the sheriff of Pima County aforesaid; and the said Paul, claiming that the said goods and property in the complaint mentioned and described were then the property of the said Lord & Williams, and not the property of Cullum, the plaintiff,

seized and attached the same on October 28, 1881, and held the same until replevied in this suit.

"5. That at the time the property was so seized and attached it was the property of the plaintiff, and not subject to such seizure or attachment.

"6. That its value was \$35,000."

The plaintiff having taken the property into possession, the judgment was that he retain possession and recover his costs. That judgment was affirmed by the Supreme Court of the Territory, the record in that case containing an agreed "statement on appeal," upon which, in connection with the finding of facts, the case was heard and determined in that court.

The appellant contends that there was no evidence in the record of an assignment by Lord & Williams, and insists that the second paragraph of the finding of facts could only have reference to the assignment made, on the 25th of October, 1881, by the Lord & Williams Company. But the finding plainly imports that there were two assignments to Cullum on the same day, one by the Lord & Williams Company, and the other by Lord & Williams. The absence from the record, as prepared for the Supreme Court of the Territory, of the deed of assignment by Lord & Williams—if any such deed was executed—is explained by the fact that the real contest between the parties was in respect to the assignment in the name of the Lord & Williams Company for the benefit of its creditors. But it is not essential in this case to inquire whether an assignment was made by the firm of Lord & Williams as distinguished from the Lord & Williams Company; for it is not claimed that the goods seized under the attachment were embraced by any other assignment than the one made by the latter firm.

It appears that prior to March 1, 1881, C. H. Lord and W. W. Williams were engaged as partners, under the style of Lord & Williams, in the buying and selling of goods, as well as in the business of banking. The latter business was kept distinct from the former, although both were carried on in the same building.

On the day last named the following written agreement was entered into between the parties signing it:

"Tucson, A. T., March 1st, 1881.

"This agreement, entered into by and between Lord and Williams and C. E. Harlow, all of Tucson, Arizona Territory, witnesseth: That the said Lord and Williams have this day and date taken into partnership the said C. E. Harlow under the following conditions: They agree that an inventory of their stock of merchandise shall be taken under the supervision of said Harlow and after its value shall be agreed upon by the parties interested the same shall be turned over and delivered to the said Harlow as a capital stock, to be sold with his entire direction and supervision under the name and style of Lord & Williams Company for the term of one year from the date of this agreement. The said Harlow shall attend to all the business of the new concern, such as the payment of debts, employment of help, purchase of goods, payment of same, and all expenses attending

the proper and legitimate carrying on of the business; shall open a new set of books, in which a complete and true exhibit of the business shall be kept, and always open to the parties interested for inspection; shall, as far as possible, do a cash business; shall remit money to pay debts incurred as fast as the same may be realized from sales; shall not sign, indorse or negotiate any notes, bonds or agreements using the new firm name unless strictly in connection with the business of the house, and only then after consultation with one or both the other members of the firm; shall cause, at the end of each month, an exhibit to be made of the condition of the firm in the shape of a balance-sheet; and finally, every six months shall cause an inventory to be taken of all the property and the books balanced, after which any profit there may be shall be divided as follows: The said Lord and Williams shall have eight tenths of the same, and the said Harlow two tenths of the same. In case of loss, the same ratio shall prevail in sharing the same. In this contract it is distinctly understood by the parties interested that the partnership only pertains to that of merchandising, and has no connection in any shape or manner with any business the said Lord and Williams may have jointly or severally outside. Any trade or business they may be able to direct to the new concern they shall do so, any profits to be derived from same to be considered identical with those arising from business with other parties. They, however, shall have at cost price any merchandise they may need or require for their own individual account. In case said Harlow shall add any cash to the capital stock he shall receive for same ten per cent interest per year, which amount shall be charged to the general exchange and interest account.

"C. H. LORD,
"W. W. WILLIAMS,
"C. E. HARLOW."

The goods whose ownership is herein involved constituted a part of the stock of merchandise referred to in the above agreement. Nevertheless, appellant contends they were liable to be taken under the attachment sued out by Thompson against the property of Lord & Williams.

This contention rests, in part, upon the assumption that the agreement of March 1, 1881, did not work a change in the ownership of the goods, or establish a partnership between Lord and Williams and Harlow, or pass any interest whatever in the property to Harlow; but constituted the latter simply an agent for the other parties in respect to their mercantile business, thereafter to be carried on under the name of the Lord & Williams Company, as distinguished from their banking business, to be carried on, as before, under the name of Lord & Williams. It is, consequently, insisted that the goods levied upon belonged to the firm of Lord & Williams at the time the attachment was levied.

The words of the agreement forbid such an interpretation of its provisions. The only fact tending to support the position of appellant is, that Harlow did not put any goods into the new concern, nor pay any money for an interest in the property, or for the privilege of

becoming a partner with Lord & Williams in their mercantile business to be conducted under his direction and supervision. But that is not a controlling fact in view of all that is disclosed by the agreement. The contribution by Harlow of money or property was not essential to the creation of the partnership. It is competent for Lord & Williams, in consideration of his undertaking the entire charge and control of the business of the Lord & Williams Company, to give him an interest—though not necessarily an equal interest—in the property which was to constitute, at the outset, the whole capital of the partnership. And that is what they did. The agreement, it will be observed, prescribes the conditions upon which Harlow was "taken into partnership" by Lord & Williams in respect to the property placed in his hands "as a capital stock" for the Lord & Williams Company. He was to open "a new set of books," exhibiting therein the business of the "new concern" or the "new firm," the profits of such business to be divided, at stated periods, upon the basis of eight tenths to Lord and Williams and two tenths to Harlow, and the losses to be borne in the same ratio. That which Harlow was to receive when the books were balanced cannot be regarded merely as compensation for services rendered as agent or manager for Lord and Williams, but as the stipulated part of the profits, as profits, accruing to him as a partner in the new firm of the Lord & Williams Company, the owner of the partnership property. He became, by the agreement, one of the joint owners and possessors of that property. That instrument does not so declare, in terms, but such is the necessary implication of its words.

While, in the absence of written stipulations or other evidence showing a different intention, partners will be held to share equally both profits and losses, it is entirely competent for them to determine, as between themselves, the basis upon which profits shall be divided and losses borne, without regard to their respective contributions, whether of money, labor or experience, to the common stock. Story on Partnership, §§ 23, 24. Such matters are entirely within the discretion of parties about to assume the relation of partners. If anything further was needed to prove that Harlow became a partner with, and not a mere agent or employé for, Lord and Williams in their mercantile business, it is found in that clause of the agreement providing that "the partnership only pertains to that of merchandising, and has no connection in any shape or manner with any business the said Lord and Williams may have jointly or severally outside."

A different conclusion, it is contended, is required by the decisions of this court in *Drennan v. London Assurance Co.* 113 U. S. 51 [28:919], and *London Assurance Co. v. Drennan*, 116 U. S. 461, 472 [29:688]. The principal question in that case was whether one Arndt became, by virtue of a certain written agreement, a member of an existing partnership, so as to give him an interest in its property within the meaning of a contract of fire insurance, which provided that the policy should be void if the property insured "be sold or transferred, or any change takes place in title or possession (except by succession by

reason of the death of the insured), whether by legal process or judicial decree, or voluntary transfer or conveyance."

When the case was first before this court it was held that the agreement there in question did not make Arndt a member of the existing partnership, but only contemplated his becoming a member of the firm at a future time and after the performance of certain conditions, one of which was the creation of an incorporated company. It was observed in the same case that the parties *ex industria* excluded the possibility of Arndt's acquiring an interest in or control over the property insured in advance of the formation of such corporation.

When that case was brought here a second time, the court, after stating that mere participation in profits would not give an interest in the property contrary to the real intention of the parties, said: "Persons cannot be made to assume the relation of partners as between themselves, when their purpose is that no partnership shall exist. There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner with the others, or without his acquiring an interest in the property itself, so as to effect a change of title."

The case now before us is altogether different. It cannot be said that the parties excluded the possibility of Harlow's acquiring an interest in the property. They did not form a partnership in which, as between themselves, there was to be a community of interest only in profits and losses, leaving the property in the goods to remain in Lord and Williams. On the contrary, the written agreement shows a purpose to put the goods themselves into partnership, and to establish a community of property, as well as a community of profit and loss among its several members.

For the reasons stated we are of opinion that the agreement of March 1, 1881, created between the parties signing it a partnership by the name of the Lord & Williams Company, and that the stock of merchandise therein mentioned became the property of such partnership. It results that, if the deed of assignment of October 25, 1881, was not invalid upon the ground urged by the defendant and to be presently adverted to, the right of property passed by that instrument to the appellee, for the benefit of the creditors of the Lord & Williams Company, before the goods were seized under the attachment against the property of Lord & Williams.

Thus far we have assumed that the deed of assignment in question was executed by Lord. But the appellant contends that it was void, as against Thompson, the plaintiff in the attachment; because not so executed as to become a valid assignment of the property described in it. The deed was signed by Williams and Harlow, and by the Lord & Williams Company. It was executed for Lord by Harlow, as his attorney in fact. Harlow acted for him under a written authority, dated April 6, 1881, which, among other things, constituted Harlow attorney in fact for Lord, with power "to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares and merchandise, choses in

action, and other property in possession or in action, and to make, do and transact all and every kind of business of what nature and kind soever, and also for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter-parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfactions of mortgage, judgment and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises."

The argument of the appellant upon this branch of the case is, that the authority of one partner to make a general assignment of the partnership effects to a trustee for the benefit of creditors cannot be implied from the partnership relation merely; that Lord's general power of attorney did not authorize Harlow to act for him in a general assignment either of the property of the Lord & Williams Company or that of Lord & Williams; and that a special authorization was necessary to enable him to represent Lord in such a matter; further, that while Lord might subsequently ratify, as he did, the act of Harlow, such ratification occurred after the levy of Thompson's attachment, and could not relate back so as to invalidate that intervening attachment.

It is not necessary to consider all of these propositions; for we are of opinion that the above power of attorney, interpreted in the light of the relations in business of the parties to it, gave Harlow ample authority to represent Lord in any general assignment, made in good faith, of the property of the Lord & Williams Company for the benefit of its creditors. In respect to goods, wares, merchandise, choses in action and other property in possession or in action, and in respect to all business of whatever nature and kind, Harlow, for Lord, and in his name, was expressly authorized to bargain, agree for, buy, sell, mortgage and hypothecate the same, and in any and every way and manner to deal in and with such property and rights. And this authority was conferred while Harlow had, by another written agreement, to which Lord was a party, the entire direction and supervision of the property and business of the Lord & Williams Company. It would be extraordinary if a partner to whom was committed such direction and supervision of partnership property could not, in the matter of a general assignment of the partnership effects for the benefit of firm creditors, represent an absent partner who had given him the broad authority expressed in the above power of attorney.

Judgment affirmed.

THE IDAHO AND OREGON LAND IMPROVEMENT COMPANY, *Ptf. in Err.*
and *Appt.*,

v.

W. C. BRADBURY ET AL.

(See S. C. Reporter's ed. 509-518.)

Motion to dismiss—review of territorial judgment—writ of error, or appeal—appeals from

territorial courts—mechanics' lien—writ of error dismissed—findings of jury in equity suit—court may disregard findings—settlement—evidence.

1. Where a motion to dismiss for want of clerk's signature to authentication of record is made after it is too late to take a new appeal or writ of error, the court may allow the certificate of authentication to be perfected by adding the signature of the clerk.
2. A judgment or decree of the highest court of a Territory can be reviewed by this court, upon writ of error, only on the exceptions or questions of law presented by the record; and upon an appeal, on the rulings of the court below.
3. The Act of April 7, 1874, chapter 80, section 2 (18 Stat. 27, 28), permitting a writ of error to territorial courts, applies only to trial by jury in an action at common law, and does not apply to a trial of special issues by a jury in a suit in equity; suits in equity in the territorial courts, and actions in which the trial was not by jury, can be reviewed by this court only by appeal, and not by writ of error.
4. In appeals from a territorial court, the evidence taken at large cannot be brought up, but only a statement of facts and the rulings made at the trial and duly excepted to on the admission or rejection of evidence; and the authority of this court is limited to determining whether the court's findings of fact support its judgment or decree, and whether there is any error in such rulings, and does not extend to a consideration of the weight of evidence or its sufficiency to support the conclusions of the court.
5. A suit to enforce a mechanics' lien in Idaho Territory is a suit in equity, and therefore the writ of error in this case is dismissed, and the case considered as pending upon the appeal alone.
6. In an equity suit, the court may disregard the verdict and findings of a jury upon issues of fact submitted to them, either by setting them or any of them aside, or by letting them stand, and allowing them more or less weight in its final hearing and decree, according to its own view of the evidence in the cause. It is not necessary that a court of equity should formally set aside the verdict or finding of a jury, before proceeding to enter a decree which does not conform to it.
7. The action of the territorial district court in setting aside the general verdict in this case, and substituting its own findings of fact for the special findings of the jury, was a lawful exercise of its equitable jurisdiction, the propriety of which cannot be reviewed by this court; and it is immaterial whether the general verdict was consistent with the findings of the jury or with the evidence introduced at the trial.
8. The defendant in this case, having accepted the ditch made by plaintiff as completed, and used it, and made a settlement with the plaintiff therefor, cannot, in an action to enforce a lien thereon for the sum due on such settlement, object that the ditch was made wider and deeper than agreed in the original contract set out in the complaint.
9. It was not error on the trial to exclude testimony that the plaintiffs were told that defendant's vice-president and general manager had no authority to vary the dimensions of the ditch, where the offer of such testimony was not accompanied by an offer to show that such officer had, in fact, no such authority, and where the offer of the testimony was not renewed after the want of authority of the officer had been shown.
10. If the whole evidence is recited in the statement of the case, this court can consider it only

for the purpose of passing upon the exceptions taken to the admission or rejection of parts of it, and not for the purpose of deciding whether the whole evidence supports the findings of the court.
[No. 105.]

Argued Nov. 13, 1889. Decided Dec. 23, 1889.

IN ERROR AND APPEAL from a decree of the Supreme Court of the Territory of Idaho to review a decree for the foreclosure of a lien for the amount found due for its construction upon a ditch and the lands adjacent thereto, and for a sale of the premises and the payment out of the proceeds, to the plaintiffs, of such amount, and protest damages, and interest.

On motion to dismiss the writ of error, and on the merits. *Writ of error dismissed and case considered as pending upon the appeal alone; and ordered that the record may be withdrawn and amended by procuring the signature of the clerk of the Supreme Court of the Territory to the certificate of authentication, and that, upon the return of the record so amended, the decree be affirmed.*

The facts are stated in the opinion.

Messrs. C. W. Holcomb and J. H. McGowan for plaintiff in error and appellant.

Messrs. Samuel Shellabarger and Jeremiah M. Wilson, for defendants in error and appellees:

In a case not tried by a jury the appellate jurisdiction can only be exercised by appeal.

On appeal to the Supreme Court of the United States, the case, if otherwise properly here, will be determined upon the facts in the statement.

Neslin v. Wells, 104 U. S. 429 (26:808); *Davis v. Fredericks*, 104 U. S. 618 (26:849); *Gray v. Howe*, 108 U. S. 18 (27:684); *Eilers v. Boatman*, 111 U. S. 357 (28:455).

This court is required to accept the findings of fact by the Supreme Court of the Territory as true on appeal to this court.

Stringfellow v. Cain, 99 U. S. 610 (25:421); *Hecht v. Boughton*, 105 U. S. 235 (26:1018); *Cannon v. Pratt*, 99 U. S. 619 (25:446); *Story v. Black*, 119 U. S. 285 (30:341); *U. S. v. Hailley*, 118 U. S. 238 (30:178); *Murphy v. Ramsey*, 114 U. S. 35 (29:54).

There having been no exceptions taken to the verdict, findings of fact or conclusions of law, the assigned errors thereto will not be considered by this court.

Cogland v. Beard, 67 Cal. 308, *Ainslie v. Idaho World Pr. Co.* 1 Idaho, 641; *People, Huston, v. Hunt*, Id. 438; *Fox v. West*, Id. 782; *Guthrie v. Phelan* (Idaho) 6 Pac. 107; *Young v. Martin*, 75 U. S. 8 Wall. 354 (19:418); *Bacon v. Robson*, 58 Cal. 399; *Thatcher's Pr.* 308, §§ 75, 81.

There being no exceptions to the findings, this court will presume that they are supported by the evidence.

Moyes v. Griffith, 85 Cal. 556; *Hastings v. Cunningham*, 85 Cal. 549; *Wilson v. Dougherty*, 45 Cal. 84; *Putnam v. Sea*, 8 Colo. 298; *Merrill v. Chapman*, 84 Cal. 251.

To be of any avail, exceptions must be drawn up so as to present distinctly the ruling or point raised, and must be signed by the presiding judge.

Young v. Martin, 75 U. S. 8 Wall. 354 (19:

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418); Thatcher's Pr. p. 800, §§ 62, 63, p. 804, §§ 83, 85.

Where the statement or bill of exceptions does not purport to set out all the evidence given on the trial, an appellate court will not reverse the judgment for an instruction which depends upon the evidence for its correctness.

Thatcher's Pr. 800, §§ 63, 65; *Wiggins v. Burkham*, 77 U. S. 10 Wall. 129 (19:884).

In equity cases like this the verdict is merely advisory; the judge may qualify, alter or set aside the verdict and find the facts.

Sweetser v. Dobbins, 65 Cal. 529; *Bates v. Gage*, 49 Cal. 126.

When a jury renders a general verdict and a special verdict, the latter will control the former if there is any inconsistency between them.

Leese v. Clark, 20 Cal. 888; Code Civ. Proc. § 385.

A corporation that has received and retained the consideration of a contract for its benefit cannot deny its liability thereon on the ground that the contract was *ultra vires*.

Main v. Casserly, 67 Cal. 127; *Sedgwick on Stat. and Const. L.* 73; *Bradley v. Ballard*, 55 Ill. 418; *Pisley v. Western P. R. Co.* 38 Cal. 198; *Foulke v. San Diego & G. S. R. Co.* 15 Cal. 865.

Where the charge of the court, taken as a whole, fairly submitted the case to the jury, the judgment will not be disturbed because some instructions were refused which properly could have been given, or some of those given.

Boanston v. Gunn, 99 U. S. 660 (25:306); Thatcher's Pr. 153, § 19; *Brooks v. Crosby*, 23

Cal. 42; *Conroy v. Duane*, 45 Cal. 597; *Siemers v. Eisen*, 54 Cal. 418; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63.

Mr. Justice Gray delivered the opinion of the court:

This suit was commenced by Bradbury and Reinhart against the Idaho and Oregon Land Improvement Company by a complaint filed in a district court of the Territory of Idaho on September 24, 1888, alleging, in substance, that on April 13, 1883, the parties made an agreement in writing, by which the plaintiff agreed to construct, upon the defendant's land, and on a line designated by the defendant's engineer in charge of the work, a ditch four miles long, eight feet wide and two feet deep, and of a certain grade and slope, at certain prices by the cubic yard for the material moved, and on other terms expressed in the agreement (a copy of which was annexed); that on May 17, 1883, the parties made a supplemental agreement (a copy of which was also annexed) increasing the rate of compensation in some respects; that on June 1, 1883, after the ditch had been completed by the plaintiffs and accepted by the defendant, the parties came to a settlement, upon which it was ascertained and agreed that there was due from the defendant to the plaintiffs the sum of \$16,774.49, of which \$10,000 was paid, and for the rest of which the defendant gave its acceptance for the sum of \$6,774.49, payable in fifteen days, which was duly presented at maturity, but in no part paid, and on June 27, 1883, was protested for nonpayment, and that sum, with interest at the rate of one and a half per cent a month, was now due from

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the defendant to the plaintiffs; and that the plaintiffs, in order to perfect a lien on the ditch and adjoining land as security for the payment of that sum, on July 13, 1883, filed with the recorder of the county, as required by chapter 48 of the Code of Civil Procedure of Idaho Territory, a claim (a copy of which was annexed to the complaint) stating the substance of the original and supplemental contracts, and the balance due as aforesaid.

The complaint prayed for judgment directing a sale of the premises, and the application of the proceeds to the payment of the plaintiffs' claim, with interest as aforesaid, and costs, and twenty per cent damages, as provided by the statutes of the Territory, and also to the payment of the holders of any other liens who might come in; and that the plaintiffs might have judgment against the defendant for any deficiency in the proceeds of such sale to satisfy the amount due them, and for further relief.

The answer denied the completion of the ditch by the plaintiffs and its acceptance by the defendant, or that there was due from the defendant to the plaintiffs more than the sum of \$500; and alleged that, if any settlement was made between the parties, it was under a misapprehension of facts caused by false and fraudulent statements of the plaintiffs that the ditch had been completed according to the contracts.

The court submitted several special issues to a jury, who found some of them in favor of the plaintiffs and failed to agree upon others, and returned a general verdict for the plaintiffs in the sum of \$4,274.49 and interest.

The court set aside the general verdict, and made and filed findings of fact, adopting as part thereof the findings of the jury as far as they went, and substantially supporting all the allegations of the complaint; and from the facts so found made the following conclusions of law:

"1st. That the plaintiffs are entitled to a judgment for the sum of \$10,107.52, and for costs, which includes the sum found due, interest and protest damages.

"2d. That the plaintiffs are entitled to a decree of foreclosure of the lien set forth in their complaint, and it is so ordered."

By the final decree, rendered at a hearing upon the pleadings "and upon the proofs, records and evidence produced by the respective parties, and the court having heard the proofs necessary to enable it to render judgment herein, and it appearing to the court from the proofs herein that there is now due to the plaintiffs from the defendant the sum of \$10,107.52, for principal, damages and interest upon the debt set forth in the complaint, and that all the allegations in the complaint are true," the court ordered a sale of the premises by public auction; the payment, out of the proceeds, to the plaintiffs, of the sum of \$10,107.52, with costs, and interest at the rate of ten per cent from the date of the decree; and the amount of any deficiency to be paid by the defendant to the plaintiffs.

The defendant moved for a new trial for "insufficiency of the evidence to justify the verdict and findings," as well as for "errors in law, occurring at the trial, and excepted to."

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Upon this motion, the defendant filed a statement, which was certified by the judge as "the statement of the case," and contained parts of the testimony given and offered at the trial, and exceptions of the defendant to its admission or exclusion; instructions given to the jury and excepted to by the defendant; and a specification of twenty-one errors, touching the rulings upon evidence and the instructions to the jury, and the sufficiency of the evidence in the case and the findings of the jury to support the court's findings of fact and conclusions of law.

The defendant's motion for a new trial was overruled; and the defendant excepted to the ruling, and appealed "from the judgment and decree of foreclosure and sale" to the Supreme Court of the Territory, which adjudged "that the judgment of the court below be affirmed, and that the decree for foreclosure of mechanics' lien be modified so as that the lien shall hold only for the judgment, less the protest damages." (10 Pacific Reporter, 620). The defendant claimed an appeal, and sued out a writ of error.

In order to give this court jurisdiction of an appeal or writ of error, "an authenticated transcript of the record" of the court below must doubtless be filed in this court at the return term. Rev. Stat. § 997; *Edmonson v. Bloomshire*, 74 U. S. 7 Wall. 806 [19: 91].

In the case before us, a motion to dismiss is now made, on the ground that the record is not authenticated, because neither the clerk nor the deputy clerk made the return "under his hand," as well as under the seal of the court, as required by Rule 8 of this court.

In support of this motion, reliance is placed on *Blitz v. Brown*, 74 U. S. 7 Wall. 698 [19: 280], in which the only certificate of authentication was a blank form, wanting both the seal of the court below and the signature of the clerk, so that there was really no authentication whatever; and this court therefore dismissed the writ of error, but permitted the plaintiff in error to withdraw the record for the purpose of suing out a new writ.

But in the case at bar the certificate not only begins with setting out the name and office of the clerk as the maker of the certificate, but has appended to it the seal of the court, and lacks only the clerk's signature to make it conform to the best precedents. The question presented is not one of no authentication, but of irregular or imperfect authentication; not of jurisdiction, but of practice. It is therefore within the discretion of this court to allow the defect to be supplied. Considering that the motion to dismiss was not made until it was too late to take a new appeal or writ of error, justice requires that the record should be permitted to be withdrawn for the purpose of having the certificate of authentication perfected by adding the signature of the clerk.

In Idaho, as in other Territories, there is but one form of civil action, in which either legal or equitable remedies, or both, may be administered, through the intervention of a jury, or by the court itself, according to the nature of the relief sought, provided, however, that no party can be "deprived of the right of trial by jury in cases cognizable at common law." Rev. Stat. § 1868; Act of Congress of April 7, 1874, chap. 80, § 1 (18 Stat. 27); Idaho Code of Civil Procedure of 1881, §§ 138, 139, 280, 309, 358;

Ely v. New Mexico & A. Railroad, 129 U. S. 291 [82: 688].

Congress has prescribed that the appellate jurisdiction of this court over "judgments and decrees" of the territorial courts, "in cases of trial by jury, shall be exercised by writ of error, and in all other cases by appeal;" and "on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below," and transmitted to this court with the transcript of the record. Act of April 7, 1874, chap. 80, § 2 (18 Stat. 27, 28).

The necessary effect of this enactment is that no judgment or decree of the highest court of a Territory can be reviewed by this court in matter of fact, but only in matter of law. As observed by Chief Justice Waite, "We are not to consider the testimony in any case. Upon a writ of error, we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us." *Hecht v. Boughton*, 105 U. S. 285, 286 [26: 1018].

The provision of this Act, permitting a writ of error "in cases of trial by jury" only, evidently has regard to a trial by jury, as in an action at common law, in which there is and must be a trial by jury, and the court is not authorized to try and determine the facts for itself, unless a jury is waived by the parties according to statute, and has no application to a trial of special issues submitted to a jury in a proceeding in the nature of a suit in equity, not as a matter of right, or to settle the issues of fact, but at the discretion of the court, and simply to inform its conscience, and to aid it in making up its own judgment upon the facts; and the real trial of the facts is by the court and not by a jury. In all proceedings in the territorial courts in the nature of suits in equity, therefore, as well as in those proceedings in the nature of actions at common law in which no trial by jury is had (either because the jury has been duly waived, or because the issues tried are issues of law only), the appellate jurisdiction of this court must be invoked by appeal, and not by writ of error. *Davis v. Atwood*, 94 U. S. 545 [24: 283]; *Davis v. Fredericks*, 104 U. S. 618 [26: 849]; *Story v. Black*, 119 U. S. 285 [30: 341].

It must also be borne in mind that (as already seen) in either class of cases, whether equitable or legal, coming up by appeal from a territorial court after a hearing or trial on the facts, the evidence at large cannot be brought up (as it is in cases in equity from the circuit courts of the United States), but only "a statement of facts in the nature of a special verdict," and rulings made at the trial, and duly excepted to, on the admission or rejection of evidence. Consequently the authority of this court, on appeal from a territorial court, is limited to determining whether the court's findings of fact support its judgment or decree, and whether there is any error in rulings, duly excepted to, on the admission or rejection of evidence; and does not extend to a consideration

of the weight of evidence, or its sufficiency to support the conclusions of the court. *Stringfellow v. Cain*, 99 U. S. 610 [25:421]; *Cannon v. Pratt*, 99 U. S. 619 [25:446]; *Neslin v. Wells*, 104 U. S. 428 [26:802]; *Hecht v. Boughton*, 105 U. S. 285, 286 [26:1018]; *Gray v. Howe*, 108 U. S. 12 [27:634]; *Eilers v. Boatman*, 111 U. S. 856 [28:454]; *Zeckendorf v. Johnson*, 128 U. S. 617 [31:277].

The present suit was brought to enforce a mechanics' lien created by the statutes of the Territory, which authorize the court in such a suit to order both a sale of the real estate that is subject to the lien, and judgment against the owner thereof for any deficiency in the proceeds of the sale, "in like manner and with like effect as in actions for the foreclosure of mortgages." Idaho Code of Civil Procedure, §§ 815, 826. The relief provided for in those statutes, sought by the complaint, and granted by the court, was purely equitable, and the proceeding was in the nature of a suit in equity. *South Fork Canal Co. v. Gordon*, 78 U. S. 6 Wall. 561 [18:894]; *Davis v. Alvord*, 94 U. S. 545 [24:283]; *Brewster v. Wakefield*, 63 U. S. 22 How. 118, 128 [16:301,304]; *Walker v. Dreville*, 79 U. S. 12 Wall. 440 [20:429]; *Marin v. Lalley*, 84 U. S. 17 Wall. 14 [21:591]; Rule 92 in Equity.

The district court so treated the case, as is evident from its having made its own findings of fact on some of the questions at issue, and having based its decree, not upon the findings of the jury, but upon the proofs produced at the final hearing—neither of which would it have been authorized to do, had the suit been in the nature of an action at common law, the parties not having waived a trial by jury. *Morgan v. Gay*, 86 U. S. 19 Wall. 81 [22:100]; *Hodges v. Easton*, 106 U. S. 408 [27:169]; *Baylis v. Travelers' Ins. Co.* 113 U. S. 316 [28:989]; Act of Congress of April 7, 1874, chap. 80, § 1 (18 Stat. 27); Idaho Code of Civil Procedure, §§ 861, 889.

The writ of error must therefore be dismissed, and the case considered as pending upon the appeal alone. *Stringfellow v. Cain*, 99 U. S. 610, 612 [25:421].

The case being one of equitable jurisdiction only, the court was not bound to submit any issue of fact to the jury, and, having done so, was at liberty to disregard the verdict and findings of the jury, either by setting them or any of them aside, or by letting them stand, and allowing them more or less weight in its final hearing and decree, according to its own view of the evidence in the cause. By the settled course of decision in this court, it is not necessary that a court of equity should formally set aside the verdict or finding of a jury, before proceeding to enter a decree which does not conform to it. *Prout v. Roby*, 82 U. S. 15 Wall. 471, 475 [21:58]; *Bacey v. Gallagher*, 87 U. S. 20 Wall. 670 [22:452]; *Garsed v. Beall*, 92 U. S. 684, 695 [23:686,690]; *Johnson v. Harmon*, 94 U. S. 871, 872 [24:271]; *Watt v. Starke*, 101 U. S. 247, 252 [25:826]; *Quinby v. Conlan*, 104 U. S. 420, 424 [26:800]; *Wilson v. Riddle*, 128 U. S. 608, 615 [31:280,288].

The case of *Bacey v. Gallagher*, just cited, is quite analogous to the case at bar. In a suit brought in a district court of the Territory of Montana for an injunction against the diversion of a running stream in which the plaintiff as-

serted a right by prior appropriation for the purpose of irrigation, the court submitted specific issues to a jury, and afterwards heard the case upon the pleadings and proofs and the findings of the jury, and rendered a decree for the plaintiffs, in which it disregarded some of those findings and adopted others; and that decree was affirmed by the Supreme Court of the Territory, and by this court on appeal, notwithstanding a provision in the statutes of that Territory (similar to § 861 of the Idaho Code of Civil Procedure), that in civil actions "an issue of fact must be tried by a jury, unless a jury trial is waived."

The action of the District Court of the Territory of Idaho, therefore, in setting aside the general verdict, and substituting its own findings of fact for the special findings of the jury, was a lawful exercise of its equitable jurisdiction, the propriety of which cannot be reviewed by this court; and it is quite immaterial whether the general verdict was consistent with the findings of the jury, or with the evidence introduced at the trial.

The only other matters specified or argued in the brief of the appellant are two exceptions to the admission or rejection of evidence.

The first exception was to the admission of evidence, offered by the plaintiffs, tending to show that by the direction and with the consent of one Case, the defendant's vice-president and general manager, and under the supervision of the defendant's engineer, the ditch was made ten feet wide and three feet deep, whereas the original contract annexed to the complaint was for a ditch eight feet wide and two feet deep. But the supposed variance between the complaint and the proof did not exist. The complaint did not proceed upon the written contracts alone, but upon the defendant's acceptance of the ditch and the subsequent settlement between the parties. And the court found, as facts, that the changes in the dimensions of the ditch were made with the knowledge and consent of Case, and before the execution of the supplemental agreement; that the ditch, when completed, was accepted by the defendant through its general manager, and had ever since been appropriated and used by the defendant; that the settlement between the parties was based upon estimates and measurements made by the defendant's engineer in charge of the construction of the ditch; and that there was no fraud or misrepresentation on the part of the plaintiffs in or concerning that settlement.

The other exception was to the exclusion of testimony, offered by the defendant, of one Strahorn, its general manager at the time of the completion and acceptance of the ditch, and who had previously been its treasurer, tending to show that, at the time of the execution of the original contract, the plaintiffs were informed by him that Case had no authority from the defendant to contract for a ditch of larger dimensions than those specified in that contract. But it was a sufficient reason for excluding that testimony that the offer was only to show that the plaintiffs were told that Case had no authority to vary the dimensions of the ditch, and was unaccompanied by any offer of evidence that Case had in fact no such authority, and at the time of the offer no evidence as to

the actual authority of Case appears to have been introduced; and the offer to prove the information given to the plaintiffs was not renewed after the court had allowed Strahorn, against objection and exception by the plaintiffs, to testify that neither he nor Case had any authority from the defendant's board of directors to enlarge the dimensions of the ditch, and that the board had never ratified the enlargement of the ditch.

It does not appear that the whole evidence at the trial is recited in the statement of the case; and if it had been, this court, as already shown, could have considered it for the single purpose of passing upon the exceptions taken to the admission or rejection of parts of it, and not for the purpose of deciding whether the whole evidence supported the findings of the court.

The result is that the appellant has not been prejudiced by the rulings and decree below in any particular within the appellate jurisdiction of this court.

Ordered, that the record may be withdrawn and amended by procuring the signature of the clerk of the Supreme Court of the Territory to the certificate of authentication, and that, upon the return of the record so amended, the decree of that court be affirmed.

THE RIO GRANDE RAILROAD COMPANY, Appt.,

JOHN B. VINET, Executor, ET AL.

(See S. C. Reporter's ed. 565-571.)

Fraudulent mortgage.

A mortgage made by a partner on his homestead, which was used to raise money by the firm of which he was a member, to pay its debts and save its credit, is not fraudulent as to creditors of the firm.

[No. 114.]

Argued Nov. 16, 1889. Decided Dec. 23, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana dismissing a suit in chancery brought to remove an incumbrance on real property and to procure the cancellation of notes. *Affirmed.*

The facts are stated in the opinion.

Mr. George L. Bright, for appellant:

An assignee, before the maturity of a negotiable note secured by mortgage, takes the mortgage as he takes the note, free from objections to which it was liable in the hands of the mortgagee.

Carpenter v. Logan, 88 U. S. 16 Wall. 271 (21:314); *Sawyer v. Prickett*, 86 U. S. 19 Wall. 165 (22:109); *Succession of Dolhonde*, 21 La. Ann. 8.

But the holder must be an innocent holder, without knowledge of the objections to the mortgage.

2 Pomeroy, Eq. Jur. § 608.

Barker is not an innocent holder.

Garner v. Gay, 26 La. Ann. 876; *Butler v. Slocomb*, 33 La. Ann. 175; *Schepp v. Smith*, 35 438

La. Ann. 4; *Carpenter v. Logan*, 88 U. S. 16 Wall. 271 (21:314); *Sawyer v. Prickett*, 86 U. S. 19 Wall. 147 (22:105).

If anything appears to a party, calculated to attract attention or stimulate inquiry, the person is affected with the knowledge of all that the inquiry would have disclosed.

Carpenter v. Logan, 88 U. S. 16 Wall. 271 (21:314); *Sawyer v. Prickett*, 86 U. S. 19 Wall. 165 (22:109); *Succession of Dolhonde*, 21 La. Ann. 8; 2 Pom. Eq. Jur. § 608.

Messrs. J. D. Rouse and Wm. Grant, for appellees:

The mere fact that the mortgagees were nominal parties and not creditors did not destroy the validity of the mortgage.

Roberts v. Daur, 35 La. Ann. 453; *Billgery v. Ferguson*, 30 La. Ann. 89; *Richardson v. Cramer*, 28 La. Ann. 558; *Brewer v. Gay*, 24 La. Ann. 86; *D'Meza v. Generes*, 22 La. Ann. 285.

An individual member of a firm may grant a mortgage to the firm, and the notes and mortgage will be valid in the hands of a bona fide holder.

Pike v. Hart, 30 La. Ann. 868; *Billgery v. Ferguson*, 30 La. Ann. 84, 89.

The appellees, therefore, who loaned their money in good faith on the security of the notes, are entitled to the same rights they would have had if the mortgage had been executed to them. They are bona fide holders of the notes and mortgage.

Carpenter v. Logan, 88 U. S. 16 Wall. 271 (21:314); *Swift v. Tysen*, 41 U. S. 16 Pet. 1 (10:865); *Brooklyn C. & N. R. Co. v. Nat. Bk.* 102 U. S. 14 (26:61).

A debtor may borrow money and give security therefor, even when insolvent.

Tiffany v. Lucas, 82 U. S. 15 Wall. 410 (21:198); *Cook v. Tullis*, 85 U. S. 18 Wall. 333 (21:933).

Mr. Justice Miller delivered the opinion of the court:

The appellant, which was plaintiff below, obtained in the Circuit Court for the Eastern District of Louisiana on January 5, 1885, a judgment against the partnership firm of Gomila & Co., and against Anthony J. Gomila and Larned Torrey, who constituted the partnership, for the sum of \$26,731.97. It caused an execution to be issued upon the judgment, and had it levied upon a house, and the grounds belonging to it, in the City of New Orleans, a description of which is set forth in the bill filed in this case. It was discovered that there existed a mortgage upon this property for the sum of \$18,000, made by A. J. Gomila, and the Railroad Company brought the present suit by way of a bill in chancery to remove this incumbrance, as an obstruction to the successful exercise of its right to sell the property for the payment of its debt. The action commenced in the Civil District Court for the Parish of Orleans, was afterwards removed by Gomila into the circuit court of the United States, and the plaintiff there filed a new bill in equity substantially the same as the petition filed in the state court.

This bill, after reciting the judgment in favor of the Railroad Company, already mentioned, and the levy of the execution under it on the property described, proceeds to state: "That

there is inscribed on the books of the recorder of mortgages for the Parish of Orleans, against the name of Anthony J. Gomila, and against said property, an inscription of a mortgage made by said Anthony J. Gomila in favor of the commercial firm of Gomila & Co., by act before Samuel Flower, a notary public, dated the 8th of February, 1884, to secure the sum of \$18,000." According to the bill, this act recited an indebtedness by A. J. Gomila to the firm of Gomila & Co. for that much money loaned and advanced to him on that day, and that for said \$18,000 he had made his four promissory notes to the order of, and indorsed by, himself. Three of these notes were for \$5,000 each, and one for \$3,000. The \$5,000 notes were payable in one, two and three years after date respectively, and the \$3,000 note was payable three years after date.

The bill then alleges that "said mortgage is fictitious, and is a fraud committed by said A. J. Gomila to cover his property and to prevent the seizure and sale thereof; that it is not true, as stated in said act of mortgage, that on the 8th of February, 1884, the said firm of Gomila & Co. loaned and advanced to A. J. Gomila the sum of \$18,000, or any other sum of money; and your petitioner alleges that by reason of said fraud the aforesaid notes, amounting in all to \$18,000, are null and void; that after they were made and received by Larned Torrey, who accepted the act of mortgage, they were surrendered to A. J. Gomila, and thereby were canceled, and they have been ever since in his custody or under his control, or in the custody and control of some confederate, whom, when discovered, your petitioner prays leave to make a party hereto;" and the prayer of the bill is that these notes be canceled and annulled, and that Gomila be required to surrender them up, and for such further relief as the nature of the case may require.

Supplemental and amended bills were filed making defendants to the suit J. Ward Gurley, Jr., and C. D. Barker, upon the allegation that they claim to be the owners of the notes, and assert the sufficiency and validity of the mortgage by which they are pretended to be secured, and they are required to answer the allegations of the original bill and to set forth the nature of their claim. A. J. Gomila answered the bill, and to special interrogatories propounded to him in it he answered under oath as follows:

"To the first of said interrogatories, which reads as follows, viz.:

"To whom did you deliver the notes described in the original bill on file, and when did you do so? Give his full name and address.

"He answers, viz.:

"Ans. The notes were all delivered to Larned Torrey, the other member of the firm of Gomila & Co., when they were made or executed, Feb'y 8th, 1884.

"To the second of said interrogatories, which reads as follows, viz.:

"In whose possession have said notes been at all and any time up to the present time?

"He answers, viz.:

"Ans. The said notes were immediately thereafter delivered to J. Ward Gurley, Jr., of this city, from whom Gomila & Co. received

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the following sums of cash, viz., on 6th Feb'y, 1884 (\$3,496.50), three thousand four hundred and ninety-six and 50-100 dollars; on Feb'y 11th, 1884 (\$1,496.50), one thousand four hundred and ninety-eight and 50-100 dollars; on 20th Feb'y, 1884 (\$1,000), one thousand dollars, besides some city bonds at various dates just before and subsequently, other small sums of money for costs in different suits, etc., all of which is still due said Gurley, with interest thereon; that \$5,000 of said sums of money was obtained from said Gurley for the purpose and used to pay the balance of the purchase price of the property in question to the Hibernia Ins. Co.

"That some months after the said notes were so delivered to said Gurley two of them—viz., the note for \$5,000, due in two years after its date, and the note for \$5,000, due in three years after date—were withdrawn from the said Gurley by Gomila & Co., through the said Torrey, and pledged on the 21st Aug., 1884, with and to the Teutonia Ins. Co. of this city, to secure a loan then made by said Ins. Co. to Gomila & Co. of \$5,000 in cash; that on the 3d Sept., 1884, the said loan was renewed with said Ins. Co., and on the 10th Oct., 1884, the said loan of \$5,000 was renewed in the State Nat'l Bank of this city, and said two mortgage notes were withdrawn by Gomila & Co., through the said Torrey, from said Ins. Co. and pledged with and to the State Nat'l Bank to secure said loan.

"Subsequently Gomila & Co., through said Torrey, withdrew said two notes from the State Nat'l Bank and placed them with C. D. Barker of this city, on or about 3d November, 1884, from whom said firm of Gomila & Co. received, through said Torrey, the sum of two thousand dollars in cash November 3d, 1884, and the additional sum of one thousand dollars in cash Nov. 5th, 1884, and the additional sum of one thousand dollars in cash Nov. 7th, 1884.

"And, so far as deponent knows, the said last two mentioned notes are still held by said Barker, and the other two notes, one for \$5,000, due in one year after its date, and one for \$3,000, due in three years after its date, are now, and have always been, held by said Gurley since they were first delivered to him as aforesaid.

"To the third of said interrogatories, which reads as follows, viz.:

"Who is now the holder of said notes? Give his name and address.

"He answered, viz.:

"Ans. This interrogatory is answered by the answer just given above.

"A. J. GOMILA."

Gurley answered the bill under oath, setting forth the matter pretty much as Gomila's answer does, and averring that the notes and mortgage were true, real and bona fide, and that those which he owned are not now and have not at any time since the issue thereof been under the control or in the possession of A. J. Gomila, and that he took them for money advanced to the firm of Gomila & Co. before they were due; and he sets forth the amount of his advance with precision and particularity, showing that \$5,000 of the money which he advanced went to pay the purchase price of the

house and lot mentioned in the mortgage; and he says that said notes were acquired by him for a full and valuable consideration in due course of business, and that they were issued in the interest and for the benefit of Gomila & Co. and their creditors, to enable them to continue business, and that the said notes and the full amount of them are still justly and fully due to the defendant.

Caleb D. Barker, the other defendant, in whose possession some of the notes were, files an answer also under oath, in which he shows that Torrey, as a member of the firm of Gomila & Co., sold him two of the notes for \$5,000 before they were due, pledging them to secure a loan, in November, 1884, and they have been in his actual possession ever since, except for a short time when Torrey received possession of them to see if he could not raise the money on them to pay the existing loan of Barker. Failing in this, Torrey returned the notes to Barker, with an agreement that if the money was not paid on the 8th of January, 1885, they should become the property of Barker; that the loan was not repaid and never has been, and the said notes are now the property of Barker; and he avers that the notes were negotiable paper taken by him before maturity in good faith, for valuable consideration, in due course of business, without any intention to defraud the creditors of Gomila or Gomila & Co.

Replications were filed which made issue on these averments, and testimony was taken. Gomila died, and the suit was revived against his wife and one Wiltz, who had been made dative testamentary executor of Gomila, after which it was heard and decided by the court below rendering the decree from which this appeal is taken. That court finds that the transaction by which these notes and the mortgage were made and issued and came to the hands of Gurley and of Barker was in every respect an honest transaction; that the mortgage is a valid mortgage; and that the sums secured by it to the defendants Gurley and Barker are valid liens upon the property prior to that of the complainant; and on these grounds it dismissed the bill. Wiltz having died, the present appellee, as his successor, has been substituted in this court.

We concur entirely with the view of the evidence taken by the circuit court. There is nothing but the barest suspicion of fraud or unfairness in the making of these notes and mortgage and in the use afterwards made of the notes. Mr. Gomila, in his efforts to save the credit of his firm, consented that the house and grounds in which he lived might be mortgaged to raise money for that purpose. He accordingly made the four notes and the mortgage to secure them, covering that property. Five thousand dollars of the money first raised on these notes went immediately to pay a prior incumbrance in the nature of a vendor's lien on the property mortgaged. The remaining notes were handed to Mr. Torrey, the partner of Gomila in the firm of Gomila & Co., and he raised the sums due to Gurley by delivering to him part of the notes. He also raised money from certain banks by delivering some of the notes as security for the indebtedness of Gomila & Co. These notes he redeemed, and ultimately turned them over to Barker as security

for the loans advanced by him for the benefit of the firm of Gomila & Co. It is distinctly denied by A. J. Gomila that, after he delivered these notes to Torrey to be used for the benefit of Gomila & Co., they ever came back to his possession or under his personal control, and no evidence of that fact is produced, nor are we aware that, if such had been the case, it would impair the rights of their present holders, who received them in the regular course of business, paying a valuable consideration for them before their maturity. It is idle to pursue the subject further. A recital in this opinion of the testimony of each witness examined could lead to no useful results. That Mr. Gomila covered his homestead with a mortgage, which was used to raise money by the firm of which he was a member to pay its debts, is surely not a transaction that should be branded as a fraud.

The decree of the Circuit Court is affirmed.

THE SINGER MANUFACTURING COMPANY, *Plff. in Err.*,

KATIE RAHN.

(See S. C. Reporter's ed. 518-524.)

Imputed negligence—master's liability for servant's negligence—relation of master and servant—servant, who is—restriction.

1. A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, or even if he disapproved of or forbade it.
2. The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done.
3. Where a person, for certain commissions to be paid him, agrees to give his whole time and services to the business of a company in selling its machines, and the company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it, such person is the company's servant for whose negligence, in the course of his employment, the company is responsible.
4. A provision of the contract, that such servant shall not use the name of the company in any manner whereby the public or any individual may be led to believe that it is responsible for his actions, does not and cannot affect its responsibility to third persons injured by his negligence in the course of his employment.

[No. 122.]

Submitted Nov. 20, 1889. Decided Dec. 23, 1889.

IN ERROR to the Circuit Court of the United States for the District of Minnesota to review a judgment for the plaintiff in an action to recover for personal injuries caused by defendant's servant carelessly driving a horse and wagon against her. *Affirmed.*

Opinion below, 26 Fed. Rep. 912.

Statement by *Mr. Justice Gray*:

The original action was brought by Katie Rahn, a citizen of Minnesota, against the Singer

Manufacturing Company, a corporation of New Jersey, for personal injuries done to the plaintiff by carelessly driving a horse and wagon against her, when crossing a street in Minneapolis. The complaint alleged that the driver of the wagon was the defendant's servant and engaged in its business. The answer denied this, and alleged that the driver, one Corbett, was engaged in selling sewing-machines on commission, and not otherwise, for the defendant. The replication denied the allegations of the answer.

At the trial before a jury, after the plaintiff had introduced evidence to maintain the issues on her part, the defendant put in evidence the contract between itself and Corbett, headed "Canvasser's Salary and Commission Contract," the material provisions of which were as follows:

"1st. The party of the first part agrees to pay unto the party of the second part, for his services in selling and leasing the Singer sewing-machines, five dollars for each and every acceptable sale of a new machine sold by him; and in addition to said five dollars a further sum of ten per cent of the gross price realized for said sales so made shall be paid to said second party, which, in addition to the five dollars on each acceptable sale, shall be deemed a selling commission.

"2d. The party of the first part shall pay unto the second party, for his further services, a collecting commission of ten per cent on the amounts or balances due from customers having purchased machines from him, payable as the cash shall be collected and paid over to the said first party or its authorized representatives at Minneapolis; and the said per centum so paid shall be in full for the services of said second party in collecting or other service rendered to date thereof."

"7th. The said first party agrees to furnish a wagon, and any damage to said wagon through negligence shall be at the cost and expense of said second party; and the said second party agrees to furnish a horse and harness, to be used exclusively in canvassing for the sale of said machines and the general prosecution of said business; and said second party agrees to give his exclusive time and best energies to said business, and pay all expenses attending same.

"8th. The said second party agrees to employ himself under the direction of the said Singer Manufacturing Company, and under such rules and instructions as it or its manager at Minneapolis shall prescribe, and in all respects to comport himself to the best interests of the business of the said first party, and to neither sign nor to make use of the name of the said Company in any manner whereby the public or any individual may be led to believe that the said Company is responsible for his actions, said party's power being simply to make sales and turn over the proceeds to the said first party. If any special acts are required of said second party, the power to perform the same will be specially delegated."

"10th. It is further agreed that if said second party sells any other than the machines furnished to him by said first party, it shall work a forfeiture of any commissions that accrue

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under this agreement, if violated prior to the termination of the same."

"12th. This agreement may be terminated by the first party at any time, and by said second party by giving first party ten days' notice in writing."

The defendant requested the court to instruct the jury "that the contract under which Corbett, the driver of the horse causing the accident, was operating made him an independent contractor, and the defendant could not be liable for any damage done through his negligence, if he was negligent." The court declined to give the instruction requested, and instructed the jury that the contract established the relation of servant and master between Corbett and the defendant, and that the defendant was answerable for Corbett's negligence while engaged in its service.

The jury returned a verdict for the plaintiff in the sum of \$10,000, upon which judgment was rendered; and the defendant tendered a bill of exceptions, and sued out this writ of error.

Messrs. Joseph S. Auerbach and Grosvenor Lowry, for plaintiff in error:

A partial reservation of authority or control in certain respects does not transform the contractor into a mere servant.

Wood's Master and Servant, 618; Cooley on Torts, 548; Whart. on Agency, §§ 19, 20.

He is principal and not a master who retains the right to direct what ends shall be attempted, leaving the means to the management of the agent.

Blake v. Ferris, 5 N. Y. 48; *Pack v. Mayor*, 8 N. Y. 222; *Kelly v. Mayor*, 11 N. Y. 482.

Reservation of control is not sufficient to create the master's liability.

Allen v. Willard, 57 Pa. 882; *Painter v. Mayor*, 46 Pa. 218; *Hunt v. Pa. R. Co.* 51 Pa. 475; *Reed v. Alleghany City*, 79 Pa. 300; *Erie v. Caulkins*, 85 Pa. 247; *Edmondson v. Pittsburgh, McK. & Y. R. Co.* 111 Pa. 816; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 17; *Connors v. Hennessy*, 112 Mass. 96; *Wood v. Cobb*, 95 Mass. 58; *Samuelson v. Cleveland Iron Min. Co.* 49 Mich. 184; *Reedie v. London & N. W. R. Co.* 4 Exch. 243; *Steel v. Southeastern R. Co.* 13 C. B. 550.

The stipulation to supply to the canvasser a wagon was one way of making compensation to the canvasser.

Murray v. Currie, L. R. 6 C. P. Div. 24; *Stevens v. Armstrong*, 6 N. Y. 435; *Jones v. Mayor*, L. R. 14 Q. B. Div. 890.

Messrs. John W. Willis, Charles A. Ebert and W. P. Clough, for defendant in error:

The power to discharge the servant is said to be the test by which to determine whether the relation of master and servant exists.

Pawlet v. Rutland & W. R. Co. 28 Vt. 297; *Michael v. Stanton*, 8 Hun, 462, S. C. 5 Thomp. & C. 634; *Fenton v. Dublin Steam Packet Co.* 8 Ad. & El. 835; *Dalyell v. Tyrer*, El. Bl. & El. 900; *Blake v. Ferris*, 5 N. Y. 48.

The contract was one for services and not for the performance of a particular piece of work. It was not a contract for "results."

Regina v. Turner, 11 Cox, Cr. Cas. 551; *Fink v. Mo. Furnace Co.* 10 Mo. App. 61, S. C. 82 Mo. 276.

The plaintiff in error did not, by the contract, part with the right to control the mode and manner of the work.

Speed v. At. & P. R. Co. 71 Mo. 308; *Huff v. Ford*, 126 Mass. 24; *Carter v. Berlin Mills Co.* 58 N. H. 52; *Forsyth v. Hooper*, 98 Mass. 419; *St. Paul v. Seitz*, 8 Minn. 297.

A master is responsible for the wrongful acts of his servants which were done in his service.

McGuire v. Grant, 25 N. J. L. 356; *Quarman v. Burnett*, 6 Mees. & W. 499; *Brackett v. Lubke*, 86 Mass. 138; *Campbell v. Lunsford*, 83 Ala. 512.

The employer retained the power to control the work.

Sadler v. Henlock, 4 El. & Bl. 570; *Dalyell v. Tyrer*, El. Bl. & El. 899; *Blake v. Thirst*, 2 Hurl. & C. 20; *New Orleans, M. & C. R. Co. v. Hanning*, 82 U. S. 15 Wall. 649, 657 (21:220, 228); *Linnehan v. Rollins*, 137 Mass. 123; *Cincinnati v. Stone*, 5 Ohio St. 38; *Eriss v. Caulkins*, 85 Pa. 247; *Edmundson v. Pittsburgh, McK. & Y. R. Co.* 111 Pa. 316; *Hunt v. Pa. R. Co.* 51 Pa. 475; *Allen v. Willard*, 57 Pa. 374.

The fact that Corbett was paid by a commission on machines sold has no controlling force.

Regina v. Turner, 11 Cox, Cr. Cas. 551; *Patten v. Rea*, 2 C. B. N. S. 605; *Venables v. Smith*, L. R. 2 Q. B. Div. 279; *Joslin v. Grand Rapids Ice Co.* 50 Mich. 516; *Mulochill v. Bates*, 31 Minn. 364.

Mr. Justice Gray delivered the opinion of the court:

The general rules that must govern this case are undisputed, and the only controversy is as to their application to the contract between the defendant Company and Corbett, the driver, by whose negligence the plaintiff was injured.

A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, or even if he disapproved or forbade it. *Philadelphia & Reading Railroad v. Derby*, 56 U. S. 14 How. 468, 486 [14:502, 509]. And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, "not only what shall be done, but how it shall be done." *Railroad Co. v. Hanning*, 82 U. S. 15 Wall. 649, 656 [21:220, 223].

The contract between the defendant and Corbett, upon the construction and effect of which this case turns, is entitled "Canvasser's Salary and Commission Contract." The compensation to be paid by the Company to Corbett, for selling its machines, consisting of "a selling commission" on the price of machines sold by him, and "a collecting commission" on the sums collected of the purchasers, is uniformly and repeatedly spoken of as made for his "services." The Company may discharge him by terminating the contract at any time, whereas he can terminate it only upon ten days' notice. The Company is to furnish him with a wagon; and the horse and harness to be furnished by him are "to be used exclusively in canvassing for the sale of said machines and the general prosecution of said business."

But, what is more significant, Corbett "agrees

to give his exclusive time and best energies to said business," and is to forfeit all his commissions under the contract, if while it is in force he sells any machines other than those furnished to him by the Company; and he further "agrees to employ himself under the direction of the said Singer Manufacturing Company, and under such rules and instructions as it or its manager at Minneapolis shall prescribe."

In short, Corbett, for the commissions to be paid him, agrees to give his whole time and services to the business of the Company; and the Company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it; and might, if it saw fit, instruct him what route to take, or even at what speed to drive.

The provision of the contract, that Corbett shall not use the name of the Company in any manner whereby the public or any individual may be led to believe that it is responsible for his actions, does not and cannot affect its responsibility to third persons injured by his negligence in the course of his employment.

The circuit court therefore rightly held that Corbett was the defendant's servant, for whose negligence in the course of his employment the defendant was responsible to the plaintiff. *Railroad Co. v. Hanning*, above cited; *Linnehan v. Rollins*, 137 Mass. 123; *Regina v. Turner*, 11 Cox, Crim. Cas. 551.

Judgment affirmed.

HENRY M. HALE ET AL., Executors, *Piffs.*
in Err.,
v.

STEPHEN AKERS ET AL.

(See S. C. Reporter's ed. 554-555.)

Review of state judgment—federal question.

Where two defenses were made in the state court, either of which, if sustained, barred the action, and one involved a federal question, and the other did not, and the state court sustained them both, and gave its judgment for defendant, this court will affirm the state judgment without considering the federal question, although it may have been erroneously decided.

[No. 270.]

Submitted Dec. 6, 1889. Decided Dec. 23, 1889.

IN ERROR to the Supreme Court of the State of California to review a judgment of that court, affirming a judgment of the Superior Court of the County of Sonoma, California, in favor of defendant in an action to recover possession of a piece of land in Sonoma County. *Dismissed.*

The facts are stated in the opinion.

Reported below, 69 Cal. 160.

Mr. W. W. Cope, for plaintiffs in error:

The grant of Huichica to Jacob P. Leese was such as to divest the pueblo of all title in that portion thereof in suit.

U. S. v. Hare, 4 Sawy. 653, 655; *Grisar v. McDowell*, 73 U. S. 6 Wall. 363 (18: 868); *Townsend v. Greeley*, 72 U. S. 5 Wall. 326, 336, 337 (18: 547, 549); *Hart v. Burnett*, 15 Cal. 530.

The approval of the Departmental Assembly was not an essential requisite to the vesting of an interest in the grantee.

U. S. v. Reading, 59 U. S. 18 How. 1 (15: 291);
U. S. v. Cervantes, 59 U. S. 18 How. 553 (15:
 484); *U. S. v. Johnson*, 68 U. S. 1 Wall. 326
 (17: 597); *U. S. v. White*, 64 U. S. 23 How.
 249, 258 (16: 560, 561).

In a controversy between the parties claiming under two patents, each of which reserves the rights of other parties, the inquiry must extend to the character of the original concessions.

Henshaw v. Bissell, 85 U. S. 18 Wall. 266 (21: 889).

Mr. Frank W. Hackett, for defendants in error:

This court has no jurisdiction.

McManus v. O'Sullivan, 91 U. S. 578 (24: 390);
De Saussure v. Gaillard, 127 U. S. 232 (32: 723); *Murdock v. Memphis*, 87 U. S. 20 Wall. 636 (22: 444); *Jenkins v. Loewenthal*, 110 U. S. 222 (28: 129); *Brown v. Atwell*, 92 U. S. 327 (28: 511); *Citizens Bk. v. Bd. of Liquidation*, 98 U. S. 140 (25: 114); *Chouteau v. Gibson*, 111 U. S. 200 (28: 400); *Adams Co. v. Burlington & M. R. Co.* 112 U. S. 123 (28: 678); *Detroit City Ry. v. Guthard*, 114 U. S. 133 (29: 118); *New Orleans Water Works Co. v. La. Sugar Ref.* Co. 125 U. S. 18 (31: 607).

Mr. Justice Blatchford delivered the opinion of the court:

This is an action brought, August 22, 1879, in the Superior Court in and for the County of Sonoma, in the State of California, by Henry M. Hale and Georgiana L. Schell, executors of the will of Theodore L. Schell, deceased, against Stephen Akers and Montgomery Akers, to recover the possession of a piece of land in Sonoma County, being a portion of the Huichica rancho, and described as follows: "Beginning at a point on the northerly line of the lane which runs from the dwelling-house of said Schell, westerly to the road leading from the Sonoma Plaza to the Embarcadero called 'Montgomery Street,' or 'Broadway,' which place of beginning is distant 23.24 chains from the point of intersection of said lane and said road; thence north, 50 deg. and 45 min. west, along a fence 18.98 chains; thence south, 87 deg. 15 min. west, about 25 chains to a point on the northerly line of said lane, distant 3.68 chains easterly from the point of intersection aforesaid; thence north, 78 deg. 30 min. east, along said northerly line 19.61 chains to the place of beginning, containing eighteen and a half acres."

The answer of the defendants set up, among other defenses, that Stephen Akers entered into possession of the premises more than twenty-five years before the suit was brought, under a claim of title by a written conveyance made in 1858 by the City of Sonoma, in Sonoma County, which city was then in the possession of, and claimed title to, the premises, under a decree of confirmation by the Board of Land Commissioners, dated January 22, 1856, and by the judgment and decree of the Circuit Court of the United States for the Northern District of California, made November 16, 1864; that he was the owner in fee of the premises; that on the 11th of October, 1860, he entered into a written agreement with Schell, the testator of the plaintiffs, whereby he released to Schell one half of a piece of land then in the possession of Akers, and containing 111 182 U. S.

acres and 2 rods of land, and Schell agreed thereby that, in the event the City of Sonoma should establish its claim to any part of such released tract of land, he would deliver the possession of the same, or such portions thereof as might be so established, together with a yearly rent of \$5 per acre for the land so to be delivered, and that Akers thereby agreed that, in the event of the City of Sonoma not being able to establish its claim beyond the present line of the Huichica Patent, he would deliver possession to Schell of all or such portion of the remainder of such tract of land as might be within the line of the Huichica Patent, and would pay a yearly rent for the same, at the rate of \$5 per acre, to Schell; that by that agreement Schell relinquished all claim to the premises in question, and acquiesced in Akers' title and right of possession; that previous to October 11, 1860, and then and ever since, the City of Sonoma claimed the said lands as its pueblo lands, adversely to Schell, and was then, and ever since had been, prosecuting its claim before the Land Department of the government; that, before that time, the said city conveyed by deed to Akers the premises for which the suit was brought, and by virtue thereof he was, on the 11th of October, 1860, in possession of the premises and claiming the same adversely to Schell; that at that time Akers claimed that the premises were within the pueblo lands of the City of Sonoma, and that that city would establish before the Land Department of the United States and the commissioner of the General Land Office its claim thereto; that the defendants and the said city then and ever since claimed that the pueblo extended on the southeast to the Arroyo Seco, and that the Arroyo Seco formed the boundary line between the pueblo lands of the city and the lands of Schell, whilst Schell then claimed that the Arroyo Seco did not form such boundary line, but extended beyond it on the north and included the lands of Akers; that to settle the difficulties and avoid litigation, Akers and Schell made said agreement to await and abide the decision of the Land Department of the United States on the application of the city to have its title to its lands confirmed; that Schell then agreed with Akers that Schell should never claim any title to the lands described in the complaint, until it was determined by a decree of the Land Department of the United States that the city could not establish its title thereto; that Akers, for the purpose of avoiding litigation and to await and abide the decision of said Land Department, delivered over to Schell other land within the pueblo, to await such decision, and Schell then agreed that, in the event the city established its claim to any of the land, he would forever release all claim of title or possession thereto, deliver up to Akers all the lands claimed by Akers within the pueblo, and pay to Akers \$5 per acre per year for the use thereof; that Akers was to hold the land until the city should so fail to establish its title thereto; that the city had not failed to do so, but had established its claim; that on the 31st of March, 1880, and since the suit was commenced, the United States issued and delivered to the city and the trustees thereof a patent for the land described in the complaint; that the plaintiffs claimed the land

by virtue of a patent issued by the United States to one Leese, and known as the Huichica Patent; that said patent does not include the premises; that if it does, the same was made without authority of law; that the only authority on which the Huichica Patent issued was a decree of the said circuit court of the United States, made December 24, 1856; and that said decree did not authorize the issuing of a patent by the United States for the land described in the complaint, or for any land on the west side of the Arroyo Seco, but made the Arroyo Seco the boundary between the pueblo and the Huichica rancho.

The cause was tried by the court without a jury, and it made a finding of facts comprising the facts set forth in the answer, with additional matters, the only material ones being as follows: A grant to one Leese of the place called Huichica was made by the Mexican governor of California, in 1841; and embraced all the land between the Arroyo Seco, the Arroyo de los Carneros, and the swamp land, containing two square leagues, the western boundary being the Arroyo Seco. Subsequently the governor adjudged this grant to be void, because the land of which judicial possession was attempted to be given under it was much more than the quantity granted. Under a subsequent petition by Leese, and on July 6th, 1844, the then governor of California made to Leese a second grant of 8½ leagues of the land called Huichica, bounded on the north by the crossing of the upper road to Napa, on the east by the Arroyo de los Carneros, on the south by the swampy lands on the bay, on the west by Estero de Sonoma as far as the Trancas, taking the direction of the Arroyo Seco as far as the Little Hills of Huichica. This grant was made subject to approval by the Departmental Assembly, but was never placed before it for approval, although the first grant was approved by it after the second grant had been made. A claim of Leese to the whole Huichica tract of 5½ leagues was confirmed by the Board of Land Commissioners April 18th, 1853, and by the district court of the United States April 22d, 1856. An appeal to the Supreme Court of the United States was dismissed in December, 1856, no decree respecting the claim having ever been made by the circuit court of the United States. The decree of confirmation contained this clause: "The land of which confirmation is hereby made is known by the name of 'Huichica,' containing five and one half square leagues, and no more, and is bounded and described as follows, to wit: Bounded on the north by the upper road which goes to Napa, on the east by the Arroyo de Los Carneros, on the south by the marshy land adjoining the Bay of San Francisco, and on the west by the Estero of Sonoma, as far as the Trancas, taking the direction (*el rumbo*—direction or course) of the Arroyo Seco." A survey of the Huichica grant was made in December, 1858, and approved by the surveyor-general in June, 1859, and, in accordance therewith, a patent for the Huichica rancho, containing 18,704 acres, was issued by the United States to Leese August 3d, 1859, reciting the second grant, the confirmation and the survey. The westerly boundary, as shown on the plat in that patent, is "the Sonoma Creek, from a post marked L at

the lower landing as far as a post marked L at the Trancas; thence a straight line running north, 87 degrees east, 156 chains to a post marked L on the Arroyo Seco, at the Huichica Hills. This last line is known as the 'Trancas line.'" By quit-claim deeds under Leese, Schell claimed title to 470 acres of the Huichica rancho.

The title of Akers was derived as follows: In 1835 General Vallejo, (director of colonization, under previous instructions from the Mexican governor of California, established the pueblo of Sonoma, and made a survey thereof, with the following boundaries: "On the east the Arroyo Seco, from the vineyard of Salvador Vallejo to the salt marsh on the bay; thence along the salt marsh westerly to Sonoma Creek; thence up said creek to the Agua Caliente Creek; thence easterly by the hills north of the city to place of beginning." He laid out the tract into lots and blocks, and established families on it, occupying the tract along the Arroyo Seco, in 1835, down to the point where it entered the said salt marsh. On a report of his acts, made by him to the governor, they were approved by the latter. In May, 1853, the authorities of the City of Sonoma presented to the Board of Land Commissioners their claim, as successors of the pueblo, for all of its land, as established by Vallejo. The claim was confirmed by the board, and afterwards, on appeal, by the Circuit Court of the United States for the Northern District of California, November 2d, 1864. These decrees fixed the Arroyo Seco, from the vineyard aforesaid to the salt marsh, as the eastern boundary of the pueblo. A survey of the land was made in September, 1868, and reported to the Land Department of the United States for approval, in August, 1872. In March, 1876, the commissioner of the General Land Office, on a conflict before him on the approval of the survey as to the location of the southeasterly line, being the boundary common to the land confirmed to the City of Sonoma and the land known as the Huichica Grant, adjudged and determined that such boundary should be established as follows: "A direct line running from the point marked 'Trancas,' on Sonoma Creek, to the point where the Arroyo Seco enters the salt marsh (Station No. 43 in the amended survey of Rancho Huichica), and thence following the direction of the Arroyo Seco to the Little Huichica Hills, should constitute the southeasterly boundary of the pueblo of Sonoma;" and directed the surveyor-general to make survey of the confirmed claim of the City of Sonoma in accordance with such decision. A resurvey was made, and the commissioner approved it and his former decision of March, 1876, fixing the Arroyo Seco as the boundary between the pueblo of Sonoma and the Huichica grant. No appeal having been taken from that decision, the same became final, and a patent for the pueblo lands was issued by the United States, March 31, 1880, to the mayor and common council of the City of Sonoma, in accordance with the decrees of confirmation and the survey, containing 6063.95 acres. The plat in the patent showed that it covered 423 acres of land embraced in the Huichica Patent, being the tract bounded by the "Trancas line," so called, running from post L at the Trancas north, 87

deg. east, 156 chains to post L, on the Arroyo Seco, by the Arroyo Seco from said post to where it enters the marsh at station 48 aforesaid, and by a line from said station south, 70 deg. 45 min. west, 81.50 chains to post L at the Trancas. Akers entered into possession of the land described in the complaint, under a contract with the City of Sonoma to purchase it, in 1851, and had occupied it ever since. On the 18th of May, 1858, the city conveyed to him by deed 111 acres of land within the limits of the city as so confirmed and patented, the land sued for being part of such 111 acres. He continued to reside upon, cultivate and improve the whole of the same up to October 11, 1860, and resided upon, cultivated and improved the west part of the tract so conveyed to him, including the portion sued for by the plaintiffs, ever since 1851. In September, 1860, Schell sued Akers in the Seventh District Court of the State of California, for the County of Sonoma, to recover all of the said tract of land, claiming title thereto under the Huichica patent; and Akers, by his answer in that action, claimed title to the whole thereof under his deed from the City of Sonoma. Whilst the action was pending, and on the 11th of October, 1860, the agreement in writing, before mentioned, was made. On the execution of that agreement, Schell dismissed his action, and a fence was built by the parties, from the lane mentioned in the complaint, extending northerly across the said 111-acre tract and dividing it into two fields of nearly equal size, and Akers surrendered to Schell the possession of all that portion of the 111-acre tract lying east of said fence and embracing about fifty acres, and retained the possession of all the land on the west side of said fence. The Trancas line, being the western boundary of the line patented to Leese, divides the 111-acre tract into two three-cornered pieces, the line running from the southwest to the northeast and crossing the said fence, leaving a portion within the Huichica Patent on the west side of the fence in the possession of Akers, and also leaving a portion on the east side of the fence, not embraced within the patent of the Huichica, in the possession of Schell, held by him under the said contract.

Finding 25 was as follows: A piece of land described as follows: Beginning at a point on the northerly line of the lane leading from the house of Theodore L. Schell, deceased, westerly to the road commonly called "Broadway," 7.53 chains easterly from the intersection of said lane and road, the point where the Trancas line crosses said lane; thence north, 37 deg. east, along the Trancas line to a point where the said Trancas line crosses the fence heretofore constituting the division fence between Akers and Schell; thence south, 5 deg. 45 min. east, along said fence to the said lane; thence westerly along the northerly side of said lane 15.61 chains to the place of beginning,—is included within the land described in the complaint. Said piece of land is situated between Arroyo Seco and the Trancas line, and is within the boundaries described in the grant of the Huichica rancho of July, 1844; the decrees of confirmation, the surveys and the patent thereof of August 8d, 1859; also the three deeds under which Schell claimed title to the 470 acres; and

is not within the exceptions mentioned in the first of said deeds. Said piece of land is also within the boundaries of the pueblo of Sonoma, established by Vallejo; the decrees of confirmation, the final survey, and the patent of said pueblo, issued March 31, 1880; also the 111-acre tract; and is on the west side of the fence built by the parties.

The court found as follows, as matter of law: That the City of Sonoma has established its claim to the land in controversy, within the meaning of the said contract between Schell and Akers. That, by the terms of said contract, each agreed with the other to abide by the decision of the United States on the said claim of the City of Sonoma for said lands, as then pending before the United States courts, and to abide by the boundary line between them as established on the final confirmation of pueblo lands to the City of Sonoma. That the defendant Stephen Akers is entitled to the possession of all the lands and premises described in the complaint. That all the right, title and interest of Leese in and to all the piece of land described in finding 25, derived to him under the patent of the Huichica rancho, passed to and became vested in Schell on the 18th of January, 1859. That all the title of the City of Sonoma passed to and became vested in Stephen Akers, by deed dated May 18th, 1858, in and to the said tract described in said finding 25. That defendants are entitled to judgment for the possession of all the land described in the plaintiffs' complaint, with costs of suit.

The judge of the Superior Court of Sonoma County, in a short opinion given in the case, said: "The court is of the opinion that the contract of the 11th of October, 1860, is conclusive of this controversy. The Huichica Patent had issued when that agreement was made, and covered the land in dispute. Plaintiffs' testator had then all the title which he ever could acquire. The parties must have referred to the final location of the patent of the pueblo of Sonoma, when they, in their agreement, used the phrase 'in the event the City of Sonoma establishes her claim to any portion' of said land. That patent has been finally located, and embraces the land which is the subject of this suit. It follows that the defendants should prevail."

The judgment of the superior court was that the defendants recover costs from the plaintiffs. The latter took an appeal to the Supreme Court of the State, which affirmed the judgment of the superior court, by a judgment to review which the plaintiffs have brought a writ of error.

The opinion of the supreme court, found in the record, and also reported as *Hale v. Akers*, 69 Cal. 160, recites the facts as found by the superior court, and then states that there are two sufficient answers to the claims made by the plaintiffs. In its first answer, the court considered the meaning of the words, "taking the direction of the Arroyo Seco," found in the second grant of July 6, 1844, and in the decree of confirmation, and stated that it seemed to it, as it did to the commissioner of the General Land Office, that the line was to run from the Trancas to the nearest point on the Arroyo Seco, and thence up that creek or gulch; that, if that were so, then it is clear that the line as

run by the surveyor did not conform to the decree, but took in lands not covered by the decree; and that it must follow that, to the lands so taken in, the original concession to the pueblo, and the patent issued upon confirmation thereof, carried the better right.

The second answer which the supreme court made to the claims of the plaintiffs was that the written agreement, before mentioned, was intended to be, and was, binding upon the parties, and was decisive of their rights, when it was executed. The view taken by the court was that when Schell and Akers executed the agreement, in October, 1860, the Huichica Patent had been issued to Leese, in August, 1859, and Schell has his deed of January, 1859; that the Sonoma claim had been confirmed by the Board of Land Commissioners, in January, 1866, and took in the land lying between the Trancas line and the Arroyo Seco; that the city was asserting a right to that land, and the case was pending before the courts; that Akers had a deed, given by the city in May, 1858, of 111 acres of the land, and was in possession of them; that under these circumstances the parties compromised the pending suit, by dividing the 111 acres about equally between them, Akers releasing to Schell the eastern half and retaining the western half; that under the terms of the agreement, the only establishment of the Sonoma claim which the parties contemplated was such as would result from the action of the courts upon it, and the issuing of a patent by the government in pursuance of their decrees; that the parties evidently thought that if the city should finally succeed in establishing its claim, and receive a patent for any of the land within the lines of the Huichica Patent, it would have the better title to the land, and that they could, therefore, avoid litigation and expense, and safely await the issue of the city's contest; that they rightly interpreted the law; and that Schell, so long as he lived, acquiesced in the arrangement.

It is contended for the defendants that this court has no jurisdiction of this case. For the plaintiffs it is contended that not only was a federal question raised in the Supreme Court of the State, but it was decided adversely to the plaintiffs; and that both parties claimed under titles acquired from the Mexican government prior to the cession of California to the United States.

The errors assigned by the plaintiffs are that the Supreme Court of the State erred in adjudging that the Trancas line did not conform to the decree of confirmation of the claim of Leese to the Huichica rancho, made April 22, 1856, by the district court of the United States; in adjudging that the patent of March 31, 1880, to the mayor and common council of the City of Sonoma, established that the title to the land in controversy was in the defendants, and gave to them a title superior to the title of the plaintiffs under the patent of August 3, 1859, issued to Leese; and in adjudging that Schell and Akers, by their written agreement of October 11, 1860, intended that any patent which should be thereafter issued to the City of Sonoma, conveying any portion of the land to which Schell then had title under the Huichica Patent of August 3, 1859, would or could divest Schell of his title to the land under the Huichica

patent, or establish a superior title thereto in the City of Sonoma.

After contending that court below erred in its decision of the federal question; that such decision was based upon the facts (1) that the land in dispute was a portion of the pueblo land, and (2) that the lines of the survey of the Huichica Grant did not conform to the decree of confirmation; and that, in so doing, the court ignored (1) the power of the Mexican government to divest the pueblo title, and (2) the findings of the lower court that the survey did conform to the decree, the plaintiffs urged that the interpretation by that court of the agreement between Schell and Akers was incorrect, and that it would not have so interpreted the agreement had it not been for its erroneous deductions of law regarding the federal question, and, therefore, that the decision of the federal question was the controlling decision of the case.

But we cannot take this view. Both of the courts below decided that, irrespective of the federal question, the agreement of October 11, 1860, was decisive of the case. The construction of that agreement involved no federal question, and controlled the whole case.

In *Murdock v. City of Memphis*, 87 U. S. 20 Wall. 590, 636, [22:444], this court announced, as one of the propositions which flowed from the provisions of the second section of the Act of February 5, 1867 (14 Stat. 886), embodied in section 709 of the Revised Statutes of 1874, and still in force, that even assuming that a federal question was erroneously decided against the plaintiff in error, the court must further inquire whether there was any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question; and that, if that is found to be the case, the judgment must be affirmed, without inquiring into the soundness of the decision on such other matter or issue.

This principle has since been repeatedly applied. In *Jenkins v. Loewenthal*, 110 U. S. 222, [28:129], where two defenses were made in the state court, either of which, if sustained, barred the action, and one involved a federal question and the other did not, and the state court in its decree sustained them both, this court said that as the finding by the state court of the fact which sustained the defense which did not involve a federal question was broad enough to maintain the decree, even though the federal question was wrongly decided, it would affirm the decree, without considering the federal question or expressing any opinion upon it, and that such practice was sustained by the case of *Murdock v. City of Memphis*, *supra*. See also *McManus v. O'Sullivan*, 91 U. S. 578 [24:390]; *Brown v. Atwell*, 92 U. S. 827 [28:511]; *Citizens Bank v. Board of Liquidation*, 98 U. S. 140 [25:114]; *Chouteau v. Gibson*, 111 U. S. 200 [28:400]; *Adams County v. Burlington & Mo. R. Co.* 112 U. S. 128 [28:678]; *Detroit City Railway v. Guthard*, 114 U. S. 133 [29:118]; *New Orleans Water Works Co. v. La. Sugar Ref. Co.* 125 U. S. 18 [31:607]; *De Saussure v. Gaillard*, 127 U. S. 216, 234 [32:127, 135].

It appears clearly from the opinion of the supreme court that it was not necessary to the

judgment it gave that the words "taking the direction of the Arroyo Seco" should be construed at all. It is, therefore, of no consequence whether or not that court was wrong in its conclusions as to the meaning of the Hui-chica Grant.

The writ of error is dismissed.

JOEL D. SUGG ET AL., *Plffs. in Err.*,

JAMES T. THORNTON.

(See S. C. Reporter's ed. 524-531.)

Texas judgment—against nonresident—against partners—due process of law.

1. Under the statutes of Texas, in a suit against partners, where one of them was a nonresident and notice was addressed to him under article 1230, Rev. Stat. of Texas, and the other partner was served personally, the judgment is not a personal judgment against the nonresident partner, but a judgment against the partner individually who was personally served, and against the firm as a distinct legal entity.
2. So far as the nonresident partner is concerned, such judgment binds the firm assets only, and cannot be enforced by execution against his individual property.
3. The notice addressed to the nonresident partner, under article 1230, was not repugnant to the Constitution of the United States as not being due process of law; it does not have any binding effect personally on the party served therewith.

[No. 1141.]

Submitted Dec. 9, 1889. Decided Dec. 23, 1889.

ERROR to the Supreme Court of Texas to review a judgment of that court affirming a judgment of the District Court of Cooke County, Texas, in favor of plaintiffs, on a promissory note.

On motion to dismiss or affirm. *Affirmed.*

The facts are stated in the opinion.

Messrs. William Warner, O. H. Dean and James Hagerman, for defendant in error, for motion:

Where a party defendant in a suit appears at the term when judgment by default has been rendered against him, and moves to set aside or vacate the judgment on both jurisdictional and non-jurisdictional grounds, he thereby appears to the action and is effectually bound by the decision upon his motion.

Burdette v. Corgan, 26 Kan. 104; *Cohen v. Troubridge*, 6 Kan. 385; *Ee v. Big Sand Iron Co.* 18 Ohio St. 563; *Grantier v. Rosencrance*, 27 Wis. 491; *Alderson v. White*, 32 Wis. 309; *Meizell v. Kirkpatrick*, 29 Kan. 679; *Kaw Valley Life Assn. v. Lemke*, 40 Kan. 142, 661.

The record in the court below must show that there was drawn in question the validity

of the statutes of Texas, on the grounds that they were repugnant to the Constitution of the United States, and that such question was decided in favor of the validity of the state statutes.

Crowell v. Randell, 35 U. S. 10 Pet. 368 (9: 458); *Armstrong v. Treasurer*, 41 U. S. 16 Pet. 281 (10: 965); *Lawler v. Walker*, 55 U. S. 14 How. 149 (14: 364); *Maxwell v. Neubold*, 59 U. S. 18 How. 511 (15: 506); *Messenger v. Mason*, 77 U. S. 10 Wall. 507 (19: 1038); *Hoyt v. Sheldon*, 66 U. S. 1 Black. 518 (17: 65); *Spies v. Illinois*, 128 U. S. 131, 181 (31: 80, 91); *Baldwin v. Kansas*, 129 U. S. 52-57 (32: 640-642).

Messrs. Sawmle Robertson and W. O. Davis, for plaintiffs in error, in opposition: The court was without jurisdiction to render the judgment.

D'Arcy v. Ketchum, 52 U. S. 11 How. 165 (13: 643); *Public Works v. Columbia College*, 84 U. S. 17 Wall. 521 (31: 687); *Mason v. Eldred*, 6 Wall. 239 (18: 785); *Hull v. Lanning*, 91 U. S. 160 (23: 271); *Wood v. Watkinson*, 17 Conn. 500, 44 Am. Dec. 562; *Freeman on Judgments*, § 574; *Tay v. Hawley*, 39 Cal. 95.

It was not due process of law to adjudge a claim a joint demand against two when only one had been cited.

Harper v. Brink, 24 N. J. L. 383; *Oakley v. Aspinwall*, 4 N. Y. 525; *Pennoyer v. Neff*, 95 U. S. 732 (24: 572).

If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim but avoids all reference to it is as much against the right within the meaning of section 709 of the Revised Statutes as if it had been specifically referred to and the right directly refused.

Chapman v. Goodnow, 123 U. S. 540 (31: 235); *Murray v. Charleston*, 96 U. S. 432 (24: 760); *Murdock v. Memphis*, 87 U. S. 20 Wall. 590 (22: 429); *Crowell v. Randell*, 35 U. S. 10 Pet. 368 (9: 458); *Klinger v. Missouri*, 80 U. S. 13 Wall. 257 (20: 636).

Mr. Chief Justice Fuller delivered the opinion of the court:

James T. Thornton filed his petition in the District Court of Cooke County, Texas, against J. W. Sacra, J. W. Wilson, Isaac Cloud and E. C. Sugg & Bro., averring the latter to be a copartnership composed of E. C. Sugg and Iker Sugg, and that E. C. Sugg resided in Tarrant County, Texas, and Iker Sugg in Johnson County, Wyoming Territory, to recover on a promissory note for \$26,964.05, purporting to have been signed by Sacra, Wilson, Cloud and E. C. Sugg & Bro. The petition prayed for a citation to the defendants and a notice to the defendant Iker Sugg, as provided by section 1230 of the Revised Statutes of Texas, and for judgment for the amount of the note, and for costs, and for general and special relief. All of the defendants were served in Texas except Iker Sugg, to whom notice and a certified copy of the petition were delivered under the statute in Wyoming Territory.

Sections 1224, 1230 and 1346 of the Revised Statutes of Texas are as follows:

"Art. 1224. In suits against partners the citation may be served upon one of the firm,

NOTE.—As to what is due process of law, see note to *Pearson v. Yewdall*, 24: 433.

As to conclusiveness of judgments, see note to *Bank of U. S. v. Beverly*, 11: 75.

Service of notice to appear and defend, when necessary to validity of judgment, see note to *Hollingsworth v. Barbour*, 7: 622.

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and such service shall be sufficient to authorize a judgment against the firm and against the partner actually served."

"Art. 1230. Where the defendant is absent from the State, or is a nonresident of the State, the clerk shall, upon the application of any party to the suit, his agent or attorney, address a notice to the defendant requiring him to appear and answer the plaintiff's petition at the time and place of the holding of the court, naming such time and place. Its style shall be 'The State of Texas,' and it shall give the date of the filing of the petition, the file number of the suit, the names of all the parties and the nature of the plaintiff's demand, and shall state that a copy of the plaintiff's petition accompanies the notice. It shall be dated and signed and attested by the clerk, with the seal of the court impressed thereon, and the date of its issuance shall be noted thereon; a certified copy of the plaintiff's petition shall accompany the notice."

"Art. 1348. Where the suit is against several partners jointly indebted upon contract, and the citation has been served upon some of such partners, but not upon all, judgment may be rendered therein against such partnership and against the partners actually served, but no personal judgment or execution shall be awarded against those not served." 1 Sayles' Texas Civil Statutes, 417, 418, 448.

Judgment was rendered by the district court in these words:

"This day came the plaintiff by his attorney, and the defendants having failed to appear and answer in this behalf, but wholly made default, wherefore, the said James T. Thornton, plaintiff, ought to recover against the said J. W. Sacra, J. W. Wilson, Isaac Cloud and E. C. Sugg & Bro., a copartnership composed of E. C. Sugg and 'Iker' or I. D. Sugg, the said 'Iker' Sugg and I. D. Sugg being one and the same person, and E. C. Sugg the partner served, defendants, his damages by occasion of the premises, and it appearing to the court that the cause of action is liquidated and proved by an instrument of writing, it is ordered that the clerk do assess the damages sustained by said plaintiff; and the said clerk now here having assessed the damages aforesaid at the sum of twenty-eight thousand one hundred and thirty-four dollars and ninety-nine cents, it is adjudged by the court, that the said plaintiff do have and recover of the said defendants the sum of twenty-eight thousand one hundred and thirty-four dollars and ninety-nine cents, with interest thereon at the rate of ten per cent per annum, together with his costs in this behalf expended, and that he have his execution.

"It is further ordered by the court that execution issue for the use of the officers of court, against each party respectively for the costs by him in this behalf incurred."

On December 5, 1885, J. D. Sugg filed a petition to vacate the judgment so far as it affected him, and his individual property, and so far as it affected the property of the partnership of E. C. Sugg & Bro., upon the grounds: That the note was not given for a partnership liability of his firm, but that the firm name was signed thereto as surety for Sacra, and without authority, it being outside the scope of the part-

nership; that the judgment did not dispose of the case as to him; that his name was not "Iker" or I. D. Sugg, but J. D. Sugg, sometimes called "Ikerd Sugg;" that the partnership of E. C. Sugg & Bro. owned property in the State of Texas, and was largely indebted; and that the assets of the firm would be required to pay its debts. The petition was sworn to, and sustained by the affidavits of E. C. Sugg and others.

In reply, Thornton filed an answer asking that the judgment be corrected as to the name of J. D. Sugg, and alleging that J. D. Sugg and Iker Sugg were one and the same person, who, with E. C. Sugg, composed the partnership of E. C. Sugg & Bro.; that E. C. Sugg & Bro. owned property in Texas, Wyoming and the Indian Territory, of the value of about a million dollars, and were attempting to dispose of their property with intent to defraud their creditors; that plaintiff had obtained a judgment lien against their property in Texas; and various facts tending to show that the note was properly signed "E. C. Sugg & Bro.;" and affidavits were filed in support of this answer.

The district court proceeded to determine the issues thus raised, upon the affidavits, without objection, and overruled the motion to vacate and set aside the judgment, and entered an order directing the clerk to correct the judgment as asked by Thornton, so as to give J. D. Sugg's name correctly. To this action J. D. Sugg and E. C. Sugg & Bro. excepted, and gave notice of an appeal to the supreme court.

Article 1037 of the Revised Statutes of Texas provides:

"The appellant or plaintiff in error shall in all cases file with the clerk of the court below an assignment of errors, distinctly specifying the grounds on which he relies, before he takes the transcript of the record from the clerk's office, and a copy of such assignment of errors shall be attached to and form a part of the record; and all errors not so distinctly specified shall be considered by the supreme court or court of appeals as waived." 1 Sayles' Texas Civil Statutes, 339.

The defendants J. D. Sugg and E. C. Sugg & Bro. filed such assignment of errors in these words:

"Now come the defendants J. D. Sugg and E. C. Sugg & Bro., and assign errors as follows: 1. The court erred in overruling the motion of defendant J. D. Sugg to vacate the judgment herein. 2. The judgment is erroneous in not showing any disposition of the case as to defendant J. D. Sugg, otherwise called 'Iker Sugg.' 3. Though defendant J. D. Sugg was a party to this suit there was no discontinuance as to him, or any disposition of the case as to him in said judgment. 4. The record shows that the court had no jurisdiction of defendant J. D. Sugg. 5. The pretended notice served upon defendant J. D. Sugg was without authority and a nullity. 6. The court erred in permitting the judgment herein to be corrected."

The case was then taken by appeal to the Supreme Court of Texas, and on the eighth day of May, 1888, that court adopted the opinion of the commission of appeals, which is

certified as part of the record, and affirmed the judgment of the district court.

The opinion, after stating the facts, points out that J. D. Sugg, having submitted to a trial of the issues raised upon his petition and upon affidavits, could not then be heard to complain of the result; and as the affidavits were conflicting in regard to the want of authority to sign the firm name to the note, holds that the judgment should not be disturbed; and thus concludes:

"It is contended that the judgment is erroneous, because it makes no disposition of the case as to appellant. The judgment is not against him, does not discontinue the case as to him, nor does it contain any allusion to him, except in the use of his name as descriptive of the partnership of E. C. Sugg & Bro. If the judgment does not in terms or legal effect dispose of the case as to all defendants, it is not a final judgment, and this appeal could not be entertained. Appellant was a nonresident of this State, and the court could acquire no jurisdiction of his person, except by his appearance and voluntary submission to the jurisdiction. This he might have done and made any defense to the suit that any citizen of this State would have been entitled to make. The judgment rendered was the only judgment that could have been rendered, and we think it a final judgment. The court retained complete control of the judgment during the term at which it was rendered, and did not err in permitting it to be amended as to the name of appellant, so as to correctly describe the partnership against which the judgment was rendered.

"We find no error in the record requiring reversal, and are of the opinion that the judgment of the court below should be affirmed."

The cause was thereupon brought to this court by writ of error, allowed by the chief justice of the Supreme Court of Texas, by indorsement upon the application therefor, in which it is stated that the allowance is made without assent being given to all the statements contained in the application. The case now comes before us on a motion to dismiss or affirm.

Plaintiffs in error contend that the judgment against the firm of E. C. Sugg & Bro., under which the property of the partnership might be seized and sold, was not due process of law under the Fourteenth Amendment to the Constitution of the United States, and that articles 1224 and 1280 of the Revised Statutes of Texas, under which the judgment was sought to be sustained, were repugnant to that Amendment. It does not appear that any such question was raised in the state courts.

It is stated in the assignment of errors in the supreme court that "the record shows that the court had no jurisdiction of the defendant J. D. Sugg," and that "the pretended notice served upon defendant J. D. Sugg was without authority and a nullity," but there was no error assigned that the district court had no jurisdiction of the copartnership of E. C. Sugg & Bro.

As the Supreme Court of the State was only authorized to review the decision of the trial court, for errors committed there, and as J. D. Sugg challenged the judgment on the merits,

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and the decision was against him, it is clear that there is color for the motion to dismiss predicated upon a denial of the existence of a federal question so presented as to be available.

The rule applied by the supreme court in respect to the action of the district court on the motion to vacate is thus expressed by Judge Brewer in *Burdette v. Corgan*, 26 Kan. 102, 104:

"The motion challenged the judgment, not merely on jurisdictional, but also on non-jurisdictional grounds; and whenever such a motion is made the appearance is general, no matter what the parties may call it in their motion. (*Cohen v. Trowbridge*, 6 Kan. 885; *Fee v. B. S. Iron Co.* 18 Ohio St. 568; *Grantier v. Rosecrance*, 27 Wis. 491; *Alderson v. White*, 82 Wis. 809.) Such a general appearance to contest a judgment on account of irregularities will, if the grounds therefor are not sustained, conclude the parties as to any further questioning of the judgment. A party cannot come into court, challenge its proceedings on account of irregularities, and after being overruled be heard to say that he never was a party in court, or bound by those proceedings. If he was not in fact a party, and had not been properly served, he can have the proceedings set aside on the ground of want of jurisdiction, but he must challenge the proceedings on that single ground."

The record shows that there was a conflict of testimony in the district court upon the question whether the signature of E. C. Sugg & Bro. to the note sued upon, was an authorized partnership act. This was a question of fact simply, determined against the plaintiffs in error in the district court, and that determination affirmed by the Supreme Court of the State. And with its judgment in that regard we have nothing to do.

If, however, the validity of the Texas Statute and the judgment rendered thereunder was necessarily drawn in question, and must have been passed on in order to a decision, we find no ground to question the conclusion reached because of repugnancy to the Constitution. The notice authorized by article 1280 cannot, of course, have any binding effect personally on the party served therewith; but if the suit or proceeding is intended to affect property in Texas belonging to him, or in which he is interested, the notice may be very proper to apprise him of it and give him an opportunity to look after his interests if he chooses. For this purpose it might be to his advantage to receive it. It cannot legitimately serve any other purpose; and it does not appear to have been used for any other purpose in this case.

The judgment was not a personal judgment against J. D. Sugg, but a judgment against E. C. Sugg individually, and against E. C. Sugg & Bro., treating the partnership as a distinct legal entity. So far as J. D. Sugg was concerned, it bound the firm assets only, and could not be proceeded on by execution against his individual property. *Burnett v. Sullivan*, 68 Tex. 585; *Texas & St. L. R. Co. v. McCaughey*, 62 Tex. 271; *Alexander v. Stern*, 41 Tex. 193; *Sanger v. Overmier*, 64 Tex. 57.

The position taken by plaintiffs in error is not tenable (*Pennoyer v. Neff*, 95 U. S. 714 [24: 566]), and the judgment is affirmed.

THE PACIFIC EXPRESS COMPANY,
Plff. in Err.,
 v.
 MALIN & COLVIN.

(See S. C. Reporter's ed. 531-538.)

Remitter of part of judgment—counter-claim, overruling of—exception to—exceptions, when taken—motion to dismiss or affirm.

1. Under the statutes of Texas, a party recovering a judgment may remit any part of it; and where the remitter does not appear to have been made in open court, the court may, at the same term and before any writ of error is sued out, correct the record in that particular according to the fact.
2. Reconvention, as the term is used in practice in Texas, means a cross-demand, and the title of *Counter-Claim*, in the Revised Statutes of that State, is descriptive of such cross-action, which is more extensive than set-off, or recoupment.
3. In a suit to recover for goods destroyed by fire through defendant's negligence, where defendant pleaded, as a counter-claim or cross-demand, that the fire was set by plaintiff's negligence and the suit was without cause, and that other suits were brought against defendant, and in defending this and the other suits defendant had been obliged to pay out \$3,000 in attorneys' fees and expenses and thereby defendant had also been damaged by loss of business and reputation \$5,000, amounting in all to a damage of \$8,000, a verdict and judgment for plaintiff determined defendant's negligence and plaintiff's want of it, and against defendant's right to recover on the counter-claim; therefore defendant suffered no injury by the court's sustaining an exception to such counter-claim or cross-demand.
4. The exception to the counter-claim or cross-demand was also properly sustained because a recovery on it would be confined to the natural and proximate consequences of the act complained of and would not include such damages as are claimed in the counter-claim or cross-demand.
5. While exceptions may be reduced to form and signed after the trial, they must appear affirmatively to have been taken before the jury withdrew from the bar.
6. As the cross-demand was not set up until after the plaintiffs had reduced the amount claimed below the jurisdiction of this court, there is color for the contention on the part of the defendants in error that it was put forward for the purpose of giving this court jurisdiction. But assuming this not to have been so, the motion to affirm must be sustained under the circumstances.

[No. 1801.]

Submitted Dec. 2, 1889. Decided Dec. 23, 1889.

IN ERROR to the Circuit Court of the United States for the Western District of Texas to review a judgment in favor of plaintiffs in an action to recover the value of goods destroyed by fire occasioned by the negligence of the defendant.

On motion to dismiss or affirm. *Affirmed.*

The facts are stated in the opinion.

Mr. W. Hallett Phillips, for defendants in error, for motion:

NOTE.—For jurisdiction of United States Supreme Court, dependent on amount, see note to *Gordon v. Ogden*, 7: 502.

Exception, when must be taken to be available on review, see note to *Phelps v. Mayer*, 14: 643.

A case will be dismissed where it is apparent that the amount inserted was for the sole purpose of giving this court jurisdiction.

Lee v. Watson, 68 U. S. 1 Wall. 387 (17: 557); *Bowman v. Chicago & N. R. Co.* 115 U. S. 611 (29: 502).

To make them available, it should have appeared that the exceptions were made to the charge while the jury was at the bar.

Phelps v. Mayer, 56 U. S. 15 How. 160 (14: 643); *U. S. v. Carey*, 110 U. S. 51 (28: 67).

When error is assigned upon instructions given, the bill must set forth so much of the evidence as tends to prove the facts out of which the question is raised and to which the instructions apply, otherwise the bill will not be considered.

U. S. v. Hough, 103 U. S. 73 (26: 806); *Worthington v. Mason*, 101 U. S. 149 (25: 848).

Messrs. John Johns and D. A. McKnight, for plaintiff in error, in opposition: A remittitur entered after judgment will not divest this court of jurisdiction.

Thompson v. Butler, 95 U. S. 694 (24: 540).

The reformed judgment in the court below, after deduction of the sum remitted, was \$4,656.65. The counter-claim set out in the plea was for \$8,000. It was demurred to, the demurrer was sustained, and it is now before this court upon the exception to said ruling. The sum of said two amounts is \$12,656.65, and this is the matter in dispute on the writ of error.

Hilton v. Dickinson, 106 U. S. 165, 175 (27: 688, 691); *Bradstreet Co. v. Higgins*, 112 U. S. 227 (28: 715); *New York El. R. Co. v. Fifth Nat. Bank*, 118 U. S. 608 (30: 259).

The language of the court in the charge to the jury, which is excepted to, presented distinct propositions of law and had reference to facts set out in the pleadings. It is therefore unnecessary that any of the evidence should appear in the record.

Pennock v. Dialogue, 27 U. S. 2 Pet. 1, 15 (7: 327, 332); *Jones v. Buckell*, 104 U. S. 554, 556 (26: 841).

Mr. Chief Justice Fuller delivered the opinion of the court:

This action was commenced by Sam. Malin and George Colvin, partners doing business under the firm name and style of Malin & Colvin, in the District Court of Mitchell County, Texas, to recover of the defendant the sum of five thousand nine hundred and seventy dollars, the alleged value of certain goods and chattels destroyed by a fire, occasioned, as averred, by the negligence of the defendant. The defendant filed various pleas and exceptions to the plaintiffs' petition, including the general issue. The cause was then removed from the state court to the United States Circuit Court for the Western District of Texas, and the defendant filed an amended original answer, and as special exceptions stated various grounds upon which it alleged the plaintiffs' original petition was insufficient, and, among other things, that all the items of the property charged to have been destroyed were not sufficiently described, and again pleaded the general issue; and also set up, with particularity, contributory negligence on the part of the plaintiffs.

Plaintiffs thereupon filed an amended petition, recapitulating with greater precision the items of the property alleged to have been consumed, which reduced the aggregate of the claim from \$5,970 to \$4,656.71, and prayed judgment for the latter amount and costs, "and for all such other and further relief as the said plaintiffs may be entitled to in the premises in law or equity."

To this amended petition the defendant interposed, on the 5th day of October, 1888, a second amended original answer and exceptions, reiterating the exceptions formerly taken, and further answering, "by way of counter-claim and reconvention," charged that the plaintiffs were themselves guilty of negligence in keeping a dangerous lamp in a careless manner, by reason of which the fire was occasioned; and that thereupon the plaintiffs, "without probable or adequate cause," instituted this suit, and divers other parties have instituted and maintain suit against the defendant, by reason whereof the defendant has been compelled to pay out a large sum of money, to wit, three thousand dollars, for attorneys' fees and expenses in defending this and said other suits; and further, that by reason of said fire and the institution of said suits, the reputation of the defendant had become "damaged and bad, and defendant has thereby lost custom and business upon which it would have realized a net revenue of, to wit, five thousand dollars. Wherefore defendant says that it has been damaged by reason of the premises in the sum of eight thousand dollars, actual damages, and defendant pleads said damages herein by way of set-off, counter-claim and reconvention, and asks for judgment," etc.

On the same day, October 5th, plaintiffs filed an exception to the cross-demand. The case came on for trial on the 8th day of October, when the defendant's exceptions to the plaintiffs' petition were overruled, except the fourth special exception objecting that the bill of particulars was too vague, in respect to which the plaintiffs were allowed to amend at once, so as to meet such exception. The plaintiffs' exception to defendant's plea in reconvention and counter-claim was also sustained by the court, and the defendant excepted. A jury was called and trial had, resulting in the return of a verdict on said 6th of October in favor of the plaintiffs for the sum of \$4,300, "with interest from the 17th day of June, A. D. 1886," and judgment was thereupon rendered for the sum of \$4,800, and the further sum of \$792.15, interest since the 17th day of June, 1886, making in all the sum of \$5,092.15 with costs; and the judgment record then proceeds thus: "And then came the plaintiffs and remit of and from the foregoing judgment the sum of four hundred and thirty-five dollars and fifty cents, leaving said judgment, as above rendered, to stand for the sum of four thousand six hundred and fifty-six dollars and sixty-five cents in favor of the said plaintiffs and against the said defendant; for which execution may issue." The charge of the court at length was filed the same day.

On the 8th day of October, 1888, a paper entitled "Defendant's Bill of Exceptions to the Charge of the Court" was filed, which commenced: "Now comes the defendant and ex-

cepts to the charge of the court to the jury, wherein and whereby the jury are instructed to find for plaintiffs, if at all, the value of the goods and property, together with 8 per cent interest thereon from the time and date of such said destruction;" and after stating the reasons for objection to that part of the charge, thus concludes: "And for said reasons defendant objects and excepts to that portion of the charge of the court, and tenders herewith its bill of exception thereto and thereof, and asks that the same be signed and filed herein and made a part of the record in this cause, this 8th day of Oct., 1888."

And also another paper entitled "Bill of Exceptions Tended by the Defendant," commencing: "Now comes the defendant in said above cause and excepts to that portion of the charge of the court to the jury relative and appertaining to defendant's interposition and allegation of contributory negligence," etc., etc., stating the words excepted to, and concluding thus: "And defendant tenders this its bill of exception to such said charge so given by the court to the jury, and asks that same be signed and filed herein and made a part of the record in this said cause this 8th day of Oct., 1888." Both these papers were signed by the judge presiding.

There appears on the same 8th of October, a motion by the plaintiffs for leave to enter a remittitur for the sum of four hundred and thirty-five dollars and fifty cents, and an order of court allowing said remittitur as of the 6th day of October, 1888, and stating that the plaintiffs had on that day voluntarily remitted said amount of and from said judgment; but it not appearing to have been done in open court, or with leave of the court, the plaintiffs are now permitted, as of the 6th of October, to remit the amount in question; and it is ordered that the judgment of the 6th day of October, 1888, be corrected and reformed, so that upon the verdict and the remittitur the plaintiffs recover of the defendant the sum of four thousand six hundred and fifty-six dollars and sixty-five cents and costs, "and that this judgment take effect and be of force of and from the 6th day of October, 1888."

On the 9th of October, 1888, a motion for a new trial was overruled by the court, and the defendant excepted. To review the judgment the defendant sued out November 23, 1888, a writ of error from this court, and a motion is now made to dismiss the writ because the matter in dispute is less than five thousand dollars, with which is united a motion to affirm, "on the ground that, even if this court has jurisdiction, it is apparent that the questions involved are so frivolous as not to need further argument, and that the writ of error is sued out for delay only."

Sections 1351, 1352, 1354, 1355 and 1357 of the Revised Statutes of Texas are as follows:

"Art. 1351. Any party in whose favor a verdict has been rendered may in open court remit any part of such verdict, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment, after deducting the amount remitted.

"Art. 1352. Any person in whose favor a

judgment has been rendered may in open court remit any part of such judgment, and such remitter shall be noted on the docket and entered in the minutes, and execution shall thereafter issue for the balance only of such judgment, after deducting the amount remitted."

"Art. 1854. Where there shall be a mistake in the record of any judgment or decree, the judge may, in open court, and after notice of the application therefor has been given to the parties interested in such judgment or decree, amend the same according to the truth and justice of the case, and thereafter the execution shall conform to the judgment as amended."

"Art. 1855. Where, in the record of any judgment or decree of any court, there shall be any mistake, miscalculation or mis-recital of any sum or sums of money, or of any name or names, and there shall be among the records of the cause any verdict or instrument of writing, whereby such judgment or decree may be safely amended, it shall be the duty of the court in which such judgment or decree shall be rendered, and the judge thereof, in vacation, on application of either party, to amend such judgment or decree thereby, according to the truth and justice of the cause; but the opposite party shall have reasonable notice of the application for such amendment."

"Art. 1857. A remitter or correction made as provided in any of the six preceding articles shall, from the making thereof, cure any error in the verdict or judgment by reason of such excess." 1 Sayles' Texas Civil Statutes, 450, 451.

The record of the 6th of October states the remittitur in proper form and the judgment for \$4,656.65 thereupon, but if we are to understand that the remittitur of that date was believed to be ineffective because it did not appear to have been made in open court or with leave of court, it was entirely within the power of the circuit court, on the 8th of October, at the same term and before any writ of error had been sued out, to correct the record according to the fact. As the judgment as it stands is for less than \$5,000, if there were nothing else in the case, we should grant the motion to dismiss. *Pacific Postal Tel. Cable Co. v. O'Connor*, 128 U. S. 394 [32: 488].

But it is contended that the plea or answer by way of reconvention or counter-claim affords sufficient ground for jurisdiction, and that the questions arising thereon cannot be disposed of on a motion to affirm.

Reconvention, as the term is used in practice in Texas, means a cross-demand, and the title of *Counter-Claim*, in the Revised Statutes of that State, is referred to by counsel as descriptive of such cross-action, which is more extensive than set-off or recoupment.

Under this title, section 645 of the Revised Statutes of Texas provides:

"Whenever any suit shall be brought for the recovery of any debt due by judgment, bond, bill or otherwise, the defendant shall be permitted to plead therein any counter-claim which he may have against the plaintiff, subject to such limitations as may be prescribed by law."

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By section 649, if plaintiff's cause of action be a claim for unliquidated or uncertain damages, founded on a tort or breach of covenant, the defendant is not permitted to set off any debt due him by the plaintiff; and if the suit be founded on a certain demand, the defendant is not permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the plaintiff's part.

Section 650 is in these words:

"Nothing in the preceding article shall be so construed as to prohibit the defendant from pleading in set-off any counter-claim founded on a cause of action arising out of, or incident to, or connected with, the plaintiff's cause of action." 1 Sayles' Texas Civil Statutes, 236, 237.

The present alleged counter-claim is founded on the converse of the same cause of action as that counted on by the plaintiffs, and inasmuch as the verdict and judgment determined that the defendant had been guilty of negligence, and that the plaintiffs had not, it may be assumed that the defendant suffered no injury through the action of the court in sustaining the exception to it. Had the verdict been otherwise, the defendant might perhaps have complained that it had not been allowed to recover such damages on its cross-demand as could have been properly thereby claimed. A denial of the right of recovery over did not cut the defendant off from establishing plaintiffs' negligence, if it could. As that question was settled in plaintiffs' favor, the particular ruling became immaterial; but it may be added that the exception was properly sustained, because the recovery by the defendant, if successful on such a cross-action, would have been confined to the natural and proximate consequences of the act complained of, and would not have included such damages as are referred to in its pleading, and as therein claimed. *Plumb v. Woodmansee*, 34 Iowa, 116, approved in *Pinson v. Kirsch*, 46 Tex. 28.

It may be further remarked that the alleged bills of exception do not show that the exceptions were taken on the trial. While exceptions may be reduced to form and signed after the trial, they must appear affirmatively to have been taken before the jury withdrew from the bar. *United States v. Carey*, 110 U. S. 51 [28: 67], and cases cited.

Here it is expressly stated that the exceptions were taken on the 8th day of October, two days after the return of the verdict. This was too late, and, as to the motion for a new trial, the action of the circuit court thereon was in the exercise of its discretion and cannot be reviewed here.

As the cross-demand was not set up until after the plaintiffs had been compelled by the defendant to make their items of loss more specific, and had thus reduced the amount claimed below the jurisdiction of this court, there is color for the contention on the part of the defendants in error that it was put forward for the purpose of giving this court jurisdiction. But assuming this not to have been so, and that the writ of error should not be dismissed, we are of opinion that the motion to affirm must be sustained under the circumstances, and it is so ordered.

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THE FORBES LITHOGRAPH MANUFACTURING COMPANY, *Plff. in Err.*,
v.

ROLAND WORTHINGTON, Collector of Customs for THE DISTRICT OF BOSTON AND CHARLESTOWN.

(See S. C. Reporter's ed. 655-661.)

Duty on iron show cards.

1. Iron show cards are liable to a duty of 45 per centum *ad valorem* under the last paragraph of schedule C of section 2502 of the Revised Statutes, as manufactures of iron not specially enumerated in the Act of March 3, 1883.
2. They are not dutiable as printed matter under schedule M of that Act.

[No. 163.]

Submitted Dec. 13, 1889. Decided Dec. 23, 1889.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment in favor of defendant in an action to recover back duties, alleged to have been illegally exacted by him as the Collector of the Port of Boston, on iron show cards.

Affirmed.

Opinion below, 25 Fed. Rep. 899.

Statement by *Mr. Chief Justice Fuller*:

This cause was heard by the district judge for the District of New Hampshire, holding the circuit court, upon the following agreed statement of facts:

"This was an action in which the writ was dated April 18, 1884, brought by the Forbes Lithograph Manufacturing Company, a corporation located at Boston, in said district, to recover back \$1,081.42, the amount of duties alleged by them to have been illegally exacted by the defendant Worthington, as Collector of the Port of Boston, on certain merchandise described in the invoice and entries as 'iron show cards' imported by them. The pleadings may

tiffs paid the assessed duties under protest, and duly filed such protest with the Collector and their appeal with the Secretary of the Treasury. A copy of one of the protests, which may stand for all, is hereto annexed and marked 'A,' and this action was seasonably brought.

"The Collector exacted a duty of forty-five per centum *ad valorem* (amounting in the aggregate to \$2,482.62), under the clause in schedule C (last section) of the Tariff Law of March 3, 1883, which is as follows: 'Manufactures, articles or wares, not specially enumerated or provided for in this Act, composed wholly or in part of iron, . . . or any other metal, and whether partly or wholly manufactured, forty-five per centum *ad valorem*,' while the said importers claimed that the goods were dutiable at twenty-five per centum *ad valorem* only (the aggregate amounting to \$1,851.20), under the clause in schedule M (first section), which is as follows: 'Books, pamphlets, bound or unbound, and all printed matter, not specially enumerated or provided for in this Act, engravings, bound or unbound, etchings, illustrated books, maps and charts, twenty-five per centum *ad valorem*.'

"The difference between the amount of said duties, at forty-five per cent and at twenty-five per cent, is \$1,081.42, which is the amount that the plaintiffs claim in this case.

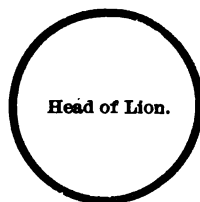
"All the goods charged with the duties were iron show cards or advertising cards or signs.

"They were manufactured in Paris on orders given by the said importers to fill orders from parties here, who used them for advertising purposes (to hang on the walls or in windows or in public places, to give to customers, etc.). The importers imported and sold them to the consumers here for such advertising purposes only. The cards were of different sizes, being on the average about a foot long by six inches wide, and contained generally the name of the person and of the article advertised, with some picture or ornament thereon—for example as follows:

BREWERY
ESTABLISHED

ROBERT SMITH'S

A. D.
1875.



INDIA PALE ALE & BROWN STOUT,

IN BOTTLE.

PHILADELPHIA.
U. S. A.

ON DRAUGHT.

LITH. MAX CREMITZ, PARIS.

FORBES CO., BOSTON, SOLE AGENTS.

be referred to. The plaintiffs imported these cards into the Port of Boston from Paris, in France, by different steamers from Liverpool, the importations being made in ten separate lots, and extending from December 19, 1888, to April 2, 1884.

"On each importation as received the plain-

"These cards were prepared in different colors on plates of sheet iron. It is agreed, if relevant to the issue, that the value of the iron plates before the printing was put upon them was about two or three cents each, and that the other material of the card as material was of like trifling value, while that of the completed

card or sign was about twenty to twenty-five cents.

"These cards or signs were lithographed (that is to say, printed) from lithographic stones on hand presses in the same way that lithographing is done on paper or on cardboard. Samples of said cards are filed herewith, marked 'Exhibit B,' and may be referred to at the hearing.

"The case is submitted by the parties on the above as an agreed statement of facts.

"If upon the foregoing facts the merchandise should have been assessed at 25 per cent, judgment is to be rendered for the plaintiffs for \$1,081.42 and costs; otherwise for defendant for costs."

Copy of the protest was attached to the statement, and samples of the cards accompanied it as exhibits.

The court found for the defendant and entered judgment accordingly, and a writ of error was sued out from this court upon exceptions to the findings and rulings. The opinion is reported in 25 Fed. Rep. 899.

Mr. Selwyn Z. Bowman, for plaintiff in error:

In the interpretation of statutes imposing duties on imported goods, the language adopted, particularly in the denomination of articles, is according to the commercial understanding of the terms used.

Maillard v. Lawrence, 57 U. S. 16 How. 251 (14: 925); *Elliott v. Swartwout*, 85 U. S. 10 Pet. 137 (9: 873); *U. S. v. 112 Casks of Sugar*, 33 U. S. 8 Pet. 277 (8: 944); *Curtis v. Martin*, 44 U. S. 8 How. 106 (11: 516).

The commercial designation, to have any legal effect in construing the law, must be clearly established.

Arthur v. Lahey, 96 U. S. 112 (24: 766); *Arthur v. Morrison*, 96 U. S. 108 (24: 764); *Arthur v. Butterfield*, 125 U. S. 75 (31: 645).

The "commercial understanding" under the Tariff Acts refers rather to specific articles than designation of classes.

Two Hundred Casks of Tea, 22 U. S. 9 Wheat. 430 (6: 128); *Barlow v. U. S.* 32 U. S. 7 Pet. 404 (8: 728); *Elliott v. Swartwout*, 85 U. S. 10 Pet. 137 (9: 873); *Lawrence v. Allen*, 43 U. S. 7 How. 785 (12: 914); *De Forest v. Lawrence*, 54 U. S. 18 How. 274 (14: 143); *Curtis v. Martin*, 44 U. S. 8 How. 106 (11: 516); *Schmieder v. Barney*, 118 U. S. 645 (28: 1180); *Maillard v. Lawrence*, 57 U. S. 16 How. 251 (14: 925).

The use, especially when an article is new and a substitute for other articles, may be and often is an important guide to the classification.

Koch v. Seiberger, 30 Fed. Rep. 424; *Arthur v. Moller*, 97 U. S. 368 (24: 1047); *Arthur v. Swartwout*, 96 U. S. 129 (24: 773); *Arthur v. Jacoby*, 108 U. S. 677 (26: 454); *Adams v. Bancroft*, 3 Sumn. 384.

Mr. Wm. A. Maury, Assistant Atty-Gen., for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

We concur with the district judge in his conclusion that these iron show cards were properly assessed as manufactures of iron, not specially enumerated or provided for in the Act

of March 3, 1863, and as such liable to duty under the last paragraph of schedule C of section 2502 of the Revised Statutes, as enacted by that Act, which reads:

"Manufactures, articles or wares, not specially enumerated or provided for in this Act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter, tin, zinc, gold, silver, platinum or any other metal, and whether partly or wholly manufactured, forty-five per centum *ad valorem*." (22 Stat. 501).

This is conceded by plaintiff in error unless the articles were dutiable as "printed matter" under the first paragraph of schedule M of that section (22 Stat. 510), which is quoted in the statement of facts, and given hereafter.

The diligence of counsel has furnished us with definitions, from many dictionaries and encyclopedias, of the words "print," "printing" and "printed matter," from which it is argued that the essential feature of printing is not the substance on which the printing is done, but the mode of making the impression. But the question here is not whether these iron show cards, being lithographed or printed, could be styled "printed matter" within the meaning of these words as given by lexicographers, but whether they were "printed matter" as those words are used in schedule M of the Act of March 3, 1863.

There was no evidence that signs of this kind were known commercially, or by printers, bookbinders, dealers in books, pamphlets or periodicals, or others, as "printed matter."

In *Arthur v. Moller*, 97 U. S. 365 [24: 1046], certain chromo-lithographs printed from oil stones upon paper were held subject to the duty levied upon printed paper; and *Mr. Justice Hunt*, in delivering the opinion of the court, says that "the term 'print' or 'printing' includes the most of the forms of figures or characters or representations, colored or uncolored, that may be impressed on a yielding surface;" and that "the pictures in question were printed from lithographic stones, by successive impressions, each impression giving a different portion of the view and of a different color. Like other pictures, they are made and used for the purpose of ornament. Equally with engravings, copper plates and lithographs, they are printed, and properly fall within the statutory designation of printed matter. If further argument were needed it would be found in the principle *noscit a sociis*. 'Printed matter' is named in the list with engravings, maps, charts, illustrated papers. With these printed pictures are naturally associated."

Undoubtedly the words "printed matter" are popularly considered as applying to paper or some similar substance commonly used to receive the impression of letters, characters or figures by type and ink, and reference to the legislation of Congress demonstrates that the phrase was used in the schedule in question in this sense.

By section 18 of the Act of March 2, 1861, fixing duties on imports, etc., a duty of fifteen per centum *ad valorem* was levied "on all books, periodicals and pamphlets, and all printed matter and illustrated books and papers." (12 Stat. 187).

In section 94 of the Act of June 30, 1864, appears this paragraph:

"On all printed books, magazines, pamphlets, reviews, and all other similar printed publications, except newspapers, a duty of five per centum *ad valorem*." (13 Stat. 267).

By "Schedule M, Sundries," of section 2504 of the Revised Statutes, it is provided:

"Books, periodicals, pamphlets, blank books, bound or unbound, and all printed matter, engravings, bound or unbound, illustrated books and papers, and maps and charts: twenty-five per centum *ad valorem*." (R. S. 2d ed. 474).

In section 2502 of title XXXIII of the Revised Statutes, as enacted by the Act of March 3, 1883, the first paragraph of the schedule headed "Schedule M, Books, Papers, etc.," reads:

"Books, pamphlets, bound or unbound, and all printed matter, not specially enumerated or provided for in this Act, engravings bound or unbound, etchings, illustrated books, maps and charts: twenty-five per centum *ad valorem*." (22 Stat. 510).

And then follow nine paragraphs, making ten in all in this schedule, relating to blank books, bound or unbound, and blank books for press copying; paper, sized or glued, suitable only for printing paper; printing paper, unsized, used for books and newspapers exclusively; manufactures of paper not specially enumerated; sheathing paper; paper boxes, and all other fancy boxes; paper envelopes; paper hangings and paper for screens or fire-boards, paper antiquarian, demy, drawing, elephant, foolscap, imperial, letter, note and all other paper not specially enumerated or provided for in the Act; pulp, dried, for paper-makers' use.

It is very clear that these iron signs were not dutiable under a schedule headed "books, papers, etc.," and confined throughout to the subject matter thus indicated.

If a duty had been imposed on iron show cards *eo nomine*, the latter would not have been dutiable as "manufactures of iron," any more than "braces and suspenders," though made of rubber, were dutiable as "manufactures of rubber" (*Arthur v. Davies*, 96 U. S. 135 [24: 810]), or "artificial flowers," though made of cotton, were dutiable as "manufactures of cotton." (*Arthur v. Rheims*, 96 U. S. 148 [24: 813]). The specific designation would prevail over the general words which otherwise embraced the article. In *Arthur v. Jacoby*, 108 U. S. 677 [26: 454], decorated porcelain were being subject to one rate of duty and pictures to another, it was held that where it appeared that certain pictures had been painted by hand on porcelain, which, it was proved, "did not in itself constitute an article of chinaware, being manufactured simply as a ground for the painting, and not for any use independent of the paintings," they were taxable as pictures and not as decorated porcelain ware. The question decided, as stated by Mr. Chief Justice Waite at the close of the opinion, was that "the goods were not chinaware, but paintings."

But here the articles were clearly manufactures of iron, and were not "printed matter," within the meaning of the clause relied on by the plaintiff, because those words, as there used, applied only to articles *eiusdem generis* 132 U. S.

with books and pamphlets, which iron show cards were not.

We find no difficulty in concluding that the case was properly decided, and the judgment is affirmed.

NEPHI W. CLAYTON, *Appt.*,

THE PEOPLE OF THE TERRITORY OF UTAH, *ex rel.* WILLIAM H. DICKSON, U. S. Attorney.

(See S. C. Reporter's ed. 632-643.)

Jurisdiction over territorial judgments—authority exercised under the United States—Utah Act of 1878 for election of auditor—conflict with Organic Act—void Act—general office—acquiescence—part of Act valid.

1. This court has jurisdiction to review a judgment of the Supreme Court of the Territory of Utah in which there was drawn in question an authority exercised under the United States within the meaning of the Act of March 3, 1885 (23 Stat. 448), such as an authority exercised by the governor of that Territory in the appointment of an auditor of public accounts of said Territory, in the place of one who had been elected as such officer.
2. Where the Supreme Court of said Territory based its decision upon the power conferred upon the governor by the 7th section of the Organic Act of Utah to make appointments, this power was drawn in question and gives the defendant a right to have the judgment of this court upon it.
3. The Act of the Legislature of Utah of 1878, declaring that the auditor of public accounts shall be elected by the voters of the Territory, is void so far as it is in conflict with the Organic Act of September 9, 1850, creating the Territory of Utah, which provides that the governor with the consent of the Legislative Council shall appoint such officer.
4. In case of a conflict between the Organic Act creating the Territory and any Act of the Territorial Legislature, the Act of Congress must prevail.
5. The office in question is a general office, the appointment to which is provided for in the Organic Act creating the Territory, and the Legislature of Utah cannot change the appointing power and confer it upon anybody but the governor and Council.
6. The acquiescence of the people or of the Legislature of Utah or of any of its officers in the mode for appointing the auditor of public accounts is not sufficient to do away with the clear requirements of the Organic Act on that subject.
7. So much of the Territorial Statute of Utah as creates the office of auditor of public accounts and treasurer is valid.

[No. 148.]

Argued Dec. 5, 1889. Decided Jan. 6, 1890.

APPEAL from a judgment of the Supreme Court of the Territory of Utah affirming a judgment of the District Court of the Third Judicial District of that Territory overruling a demurrer to the complaint and adjudging that the defendant, Nephi W. Clayton, is usurping and unlawfully holding and exercising the office of territorial auditor of Utah Territory, and that he be excluded from said office,

and that he do yield and deliver up the said office to Arthur Pratt, and the books, papers and records belonging to said office. *Affirmed.*

The facts are stated in the opinion.

Messrs. Eppa Hunton and Jeff. Chandler, for appellant:

It is the established policy of the federal government to permit the Territories to enjoy the privilege of self government.

Clinton v. Englebrecht, 80 U. S. 18 Wall. 434 (20: 659); *Snow v. U. S.* 85 U. S. 18 Wall. 317 (21: 784).

The governor has no power to appoint these territorial officers.

If one part of the Legislative Act was void, the whole was void.

Morris v. Carter, 46 N. J. L. 260; *Quinton v. Rogers*, 12 Mich. 163.

No part of the Act creating the office can be separated from the part directing how the officers are to be chosen.

Morris v. Carter, 46 N. J. L. 260; *Quinton v. Rogers*, 12 Mich. 163; *State v. New Brunswick Street & S. Comrs.* 38 N. J. L. 322; *Lathrop v. Mills*, 19 Cal. 513; *State v. Wheeler*, 25 Conn. 290; *Campau v. Detroit*, 14 Mich. 276; *Meshmeier v. State*, 11 Ind. 483; *State v. Dousman*, 28 Wis. 541; *Cooley, Const. Lim.* 214, 219.

Mr. O. W. Chapman, Solicitor-Gen., for appellees.

Mr. Justice Miller delivered the opinion of the court:

This is an appeal from the Supreme Court of the Territory of Utah.

The action was commenced in the District Court of the Third Judicial District of Utah Territory, County of Salt Lake, by a complaint in the name of the People of the Territory of Utah, by William H. Dickson, United States attorney of said Territory, against the present appellant, then defendant, Nephi W. Clayton, under the allegation that he had usurped and intruded into the office of auditor of public accounts in and for said Territory in the year 1879, and ever since that time had held and does still hold and exercise the functions of said office without authority of law.

An additional allegation in the complaint is that, on the 13th day of March, 1886, and after the final expiration and adjournment of the Legislative Assembly and Council of the Territory, Eli H. Murray, governor of said Territory, duly appointed Arthur Pratt to be auditor of public accounts of said Territory, and that thereupon said Pratt was qualified by taking the oath of office and the execution of an official bond, with sufficient sureties, as required by law, and, on the 17th of March aforesaid, was commissioned as such officer; and that, after being so appointed and commissioned, and so qualified, the said Pratt, on the day last mentioned, demanded of defendant that he surrender to him the office and the insignia thereof, which demand was then and there refused by the defendant.

The petition also states that on several occasions during the session of the Legislative Assembly previous to March, 1886, the governor had nominated and presented to said Council the name of a fit person to fill the office of auditor of public accounts, but the Council, at

each of said sessions, failed and refused to take any action thereon, and that this was done with the full knowledge of said Council that the defendant was then unlawfully holding the office and exercising its functions.

The defendant answered this complaint, denying almost every allegation of the petition specifically, or by stating that he is without knowledge on the subject of its averments; and then proceeded to say, that on the 1st day of August, in the year 1880, he was a citizen of the United States of the age of twenty-one years and was eligible to hold office under the laws of Utah Territory; that at the regular election of that year, on the 2d day of August, 1880, he was duly elected auditor of public accounts for the Territory of Utah; and that thereafter, to wit, in September, 1880, Eli H. Murray, the governor of Utah, issued to him, under his hand and the seal of said Territory, a commission as auditor, which was also signed by the secretary of the Territory. And he further alleged that since said election of 1880 no one had been elected to fill the office, nor had defendant resigned, and that he is, by virtue of that election and the commission of the governor, acting as auditor of public accounts of said Territory.

The defendant also demurred to the complaint, and the case was afterwards heard upon the demurrer of the defendant upon the pleadings on file and on the motion of plaintiff for judgment of ouster against the defendant.

In regard to the motion, the court rendered the following judgment:

"It is now ordered and adjudged that the said demurrer of the said defendant be, and the same is hereby, overruled and denied; and it is further ordered and adjudged that the answer of the said defendant is insufficient as a defense or justification for his holding and exercising the functions of said office; that the said defendant, Nephi W. Clayton, is guilty of usurping and unlawfully holding and exercising the said office of territorial auditor of Utah Territory, and that said defendant be, and he is hereby, excluded from the said office and from exercising any of the duties pertaining thereto."

As to the application of Pratt to be admitted into and hold the office of territorial auditor it rendered the following judgment:

"It is further considered, ordered and adjudged that the said Arthur Pratt is the lawfully appointed and commissioned auditor of said Territory, and is entitled, after taking the oath of office and executing such official bond as by law required, to use, hold and exercise the said office, and perform the duties thereof and receive the emoluments thereto belonging, until his successor is duly appointed and qualified.

"And it is further ordered and adjudged that the said defendant, Nephi W. Clayton, do forthwith yield and deliver up to the said Arthur Pratt the said office of territorial auditor, and all the books, papers, keys, safes, furniture, property, moneys and records belonging or pertaining to the said office or the business thereof, and that the said plaintiff have and recover of and from said defendant the

costs herein, taxed at twenty-two dollars and fifty cents."

On appeal to the Supreme Court of the Territory, taken by Clayton, both these judgments were affirmed.

The Legislature of Utah, by an Act approved January 20, 1852, created the offices of treasurer and auditor of public accounts, and defined the duties of each. It declared that those officers should be elected by the joint vote of both houses of the Legislative Assembly, and that their term of office should be four years, and until their successors were elected and qualified, unless sooner superseded by legislative election. An Act of the Legislature, approved February 22, 1878, declares that the territorial treasurer and auditor of public accounts shall be elected by qualified voters of the Territory at the general election in August, 1878, and biennially thereafter.

The case being tried on complaint and answer, the allegation of the defendant Clayton, that he was elected under that law in 1880 to the office of auditor of public accounts, received the commission of the governor upon that election, was duly qualified, gave bond and entered upon the duties of his office, must be taken as true. Also the allegation that no other person has since been elected to the same place, and that he holds over under the Act of 1852, is to be taken as correct. It must also be considered as established in the case that the governor undertook to exercise the power to appoint a suitable man auditor of public accounts, and that he made proper and fit nominations to fill that office to the Council of the Territory at various times, upon which they declined to act; that on the 18th of March, 1886, when such legislative body was not in session, he duly appointed Arthur Pratt to be auditor of public accounts of said Territory; that Pratt thereupon qualified by taking the proper oath and executing a sufficient official bond, and was on the 17th of March aforesaid commissioned as such officer; that he demanded of the defendant that he surrender to him the said office, which demand was then and there refused.

The District Court of the Third Judicial District decided that the Act of 1852, which vested the appointment of the auditor of public accounts in the Legislature by a joint vote of its two branches, and the Act of 1878, which transferred the power to fill this office to an election by the people of the Territory at a general election, were void, as being in conflict with the seventh section of the Organic Act of September 9, 1850, creating the Territory of Utah. That Act is the fundamental law which confers upon the Territory, upon its Legislature, and upon its territorial officers, all the powers which the government of the United States intended they should exercise. 9 Stat. 453. The seventh section is in the following language:

"That all township, district and county officers, not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and Legislative Assembly of the Territory of Utah. The governor shall nominate, and, by and with the advice and consent of

the Legislative Council, appoint all officers not herein otherwise provided for; and in the first instance the governor alone may appoint all said officers, who shall hold their offices until the end of the first session of the Legislative Assembly, and shall lay off the necessary districts for members of the Council and House of Representatives, and all other offices."

This part of the Statute is reproduced almost verbatim in section 1857 of the Revised Statutes of the United States, as applicable to all the Territories.

1. The first question presented to us for decision concerns the jurisdiction of this court to entertain the appeal from the Supreme Court of the Territory. The law which governs that jurisdiction now is the Act of Congress of March 8, 1885 (23 Stat. 443), and is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

"Sec. 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

In regard to the amount in controversy required by the first section of this Act, we are not at all satisfied that any such value can be applied to the office of auditor of public accounts; but we have no difficulty in holding that the record before us presents a case in which there was drawn in question an authority exercised under the United States, within the meaning of the second section. This authority was that exercised by the governor in the appointment of Arthur Pratt, acting upon the hypothesis that there was a vacancy in that office which he had a right to fill.

If the legislation of the Territory of Utah, vesting this appointment at first in the Legislature of the Territory, and afterwards in the votes of the people at a popular election, is valid, of course the governor had no right to make such appointment, and the commission issued upon the election of Clayton in 1880 continues him in the office until his successor is appointed. Under the pleadings in the case as presented to us, it must be held that no successor has been appointed, unless the appointment of Pratt be a valid one. If, therefore, the governor had authority and was the only person who had authority, under the Act organizing the Territory of Utah, and under section 1857 of the Revised Statutes, to make this appointment, then Clayton never was legally appointed, never was auditor of public accounts *de jure*, and the action of the governor in appointing another person to the place was valid.

It will be observed that this second section of the Statute, while it is based upon the general principle which is found in the Act of Congress allowing writs of error from this court to the highest courts of a State, namely, to protect parties against the exercise of an unlawful power on the part of the state authorities, does not use the language which is found in that Act, that to give this court jurisdiction the decision of the state court must be against the right or power set up by the party under the laws of the United States. On the contrary, this peculiar feature of the appellate jurisdiction of this court over that of the state courts is left out when the matter comes to be applied to the Territories, and it is held sufficient that there should be drawn "in question the validity of a treaty or statute of or an authority exercised under the United States;" and it is not required that the decision of the state court should be against the validity of treaty, statute or authority so exercised or claimed. We are therefore very clear that as the Supreme Court of the Territory of Utah based its decision upon the power conferred upon the governor by the seventh section of the Organic Act of Utah to make appointments to office, this power was drawn in question, and gives the defendant Clayton a right to have the judgment of this court upon it.

The motion to dismiss the case for want of jurisdiction is therefore overruled.

2. The next question presented to us is the alleged error of the Supreme Court of the Territory in holding that this power was vested exclusively in the governor and Council as regards the office of auditor of public accounts. We are at some loss to see how there can be any doubt upon this question, if it be admitted that in case of a conflict between the Organic Act creating the Territory, of September 9, 1850 (9 Stat. 458), and any Act of the Territorial Legislature, the Act of Congress must prevail. That Statute is not at all ambiguous in its division of the power of appointment. "All township, district and county officers, not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and Legislative Assembly of the Territory of Utah." This defines very clearly the power of the Legislature of Utah in providing for appointments to office. The next sentence in the same section declares that the governor shall nominate and, with the advice and consent of the Council, appoint all officers not herein otherwise provided for; that is to say, all officers of the Territory who are township officers, district officers or county officers, shall be appointed in such manner as shall be provided by law, namely, by a statute made by the governor and Legislative Assembly of the Territory; but all other officers, all which are not local or confined in their duties to some particular township, district or county, shall be nominated by the governor and by and with the advice and consent of the Council appointed.

That this mode of dividing the power of appointing to offices within the Territories is one to which Congress attached importance, is seen by the fact that it was subsequently adopted in the Organic Acts establishing the Territories of Washington, 10 Stat. 175; Colo-

rado, 12 Stat. 174; Arizona, 12 Stat. 665; Dakota, 12 Stat. 241; Idaho, 12 Stat. 811; Montana, 18 Stat. 88; Wyoming, 17 Stat. 180; and it is reproduced as applicable to all the Territories by section 1857 of the Revised Statutes.

The office in question is not a township office, nor is it a district office, nor is it a county office. It is not in any sense a local office. It is a general office, whose duties concern and pervade the entire Territory of Utah, and whose functions are performed for the benefit of the whole Territory.

The sixth section of the Organic Act is relied on as conferring upon the Legislature of Utah the authority to pass the Act of 1852 and the Act of 1878 in question. The language of section six of that Act is "that the legislative power of said Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this Act;" and it is immediately following this section that it is declared that the governor shall nominate and, by and with the advice and consent of the Council, appoint all officers of the Territory, except township, district and county officers. The inconsistency of an Act which declares that the Legislature shall appoint these officers, or that they shall be appointed by a popular election, with an express provision of the Organic Act that they shall be nominated by the governor and appointed by him with the consent of the Council, is too obvious to require illustration. The governor of the Territory, the secretary of the Territory, the judges of the Territory, the United States marshal and the United States district attorney are all appointed by the President,—these all being general officers, and not local. The law then continues this control of the federal authorities over the officers in the Territory by declaring that wherever the office is a general office and pervades the whole Territory, and is not a township, district or county office, the appointment shall be made by the governor. It is utterly inconsistent, both with the policy and the express language of the Statute, that the Legislature of the Territory of Utah can change the appointing power and vest it in any other body whatever, however popular, or that in the creation of officers of this general character, whose duties and functions pervade the whole Territory, they can confer the appointing power upon anybody else but the governor and Council.

The question of the conflict of a law passed by the Legislature of Utah Territory with this same Organic Act is considered at some length in the case of *Ferris v. Higley*, 87 U. S. 20 Wall. 875 [22: 888]. The Act of Congress contains the provision that "the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace;" and that "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be as limited by law." It was urged in that case that an Act of the Legislature of Utah was valid which conferred upon the probate courts of the Territory power to exercise original jurisdiction, both civil and criminal, as well in chancery as at common law, when not prohibited by legislative enactment. This proposition

was supported by a reference to the same clause of the Organic Act which is relied on in this case, namely, that the legislative power of the Territory extends to all rightful subjects of legislation consistent with the Constitution of the United States and with that Act. It became a question in that case, as in this, whether the law conferring this extraordinary power upon the probate courts was consistent with the Organic Act which conferred the same powers upon the supreme and district courts of the Territory. That law was evidently intended to dispense with the jurisdiction of the courts of the United States appointed by the President and Senate, as far as it could be done, by investing the probate courts, which were under the control of the Legislature of the Territory, with the same powers which the former courts had.

While there was no definition of the powers of probate courts in the Organic Act, this court held that the essential nature of probate courts was not such as to justify the conclusion that they were intended to exercise such powers, and especially it was held that it was not competent for the Legislature to create other courts, or vest in other courts created by the Organic Act powers which had already been vested in the district and supreme courts of the Territory, and that therefore the Statute of the Territory conferring common-law and equity jurisdiction on the probate courts was void, as being in conflict with that provision of the Act of Congress. We think the present case is much clearer than that, because the Act of Congress in unequivocal terms declares where the appointing power to all offices shall be deposited, and the power of appointment to the office now under consideration is distinctly reposed in the governor and Council. The Council, which we have so often referred to, was a body constituting a part of the Legislature of the Territory, which answers to the place of a senate in the general political system of the several States and of the federal government. See section 4 of the Act to Establish Territorial Government for Utah, 9 Stat. 454.

The case of *Snow v. United States*, 85 U. S. 18 Wall. 817 [21: 784], is supposed to conflict with these views. In that case, the office of attorney-general was created by an Act of the Legislature of Utah, whose duty it should be to attend to all legal business on the part of the Territory before courts where the Territory was a party, and prosecute individuals accused of crime in the judicial district in which he kept his office, in cases arising under the laws of the Territory, and such other duties as pertained to his office. This was supposed to be in conflict with the provision of the Organic Act, which authorized the appointment of an attorney for the Territory by the President. The court, however, held that the duties of the office created by the Territorial Legislature were not identical with those of the attorney for the Territory created under the Organic Act, and that it differed especially in that his functions only extended to the prosecution of individuals accused of crime in the judicial district in which he kept his office, in cases arising under the laws of the Territory, and that for other districts a district attorney should be elected in like manner and with like duties.

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And the court with some hesitation based its decision on this ground, and on the fact that the Act had been in operation without contest for many years.

It is true that in a case of doubtful construction the long acquiescence of Congress and the general government may be resorted to as some evidence of the proper construction, or of the validity, of a law. This principle is more applicable to questions relating to the construction of a statute than to matters which go to the power of the Legislature to enact it. At all events, it can hardly be admitted as a general proposition that under the power of Congress reserved in the Organic Acts of the Territories to annul the Acts of their Legislatures the absence of any action by Congress is to be construed to be a recognition of the power of the Legislature to pass laws in conflict with the Act of Congress under which they were created.

The question of the appointing power, which is the matter in controversy here, was not before the court in that case. We do not think that the acquiescence of the people, or of the Legislature of Utah, or of any of its officers, in the mode for appointing the auditor of public accounts, is sufficient to do away with the clear requirements of the Organic Act on that subject. It is also, we think, very clear that only that part of the Statute of Utah which is contrary to the Organic Act, namely, that relating to the mode of appointment of the officer, is invalid; that so much of it as creates the office of auditor of public accounts and treasurer of the Territory is valid; and that it can successfully and appropriately be carried into effect by an appointment made by the governor and the Council of the Territory, as required in the Act of Congress. *The judgment of the Supreme Court of the Territory of Utah is affirmed.*

JAMES JACK, *Appt.*,

v.

THE PEOPLE OF THE TERRITORY OF UTAH, *ex rel.* WILLIAM H. DICKSON, U. S. Attorney.

(See S. C. Reporter's ed. 643, 644.)

1. The same principles govern this case as govern the case of *Clayton v. The People of the Territory of Utah*, *ex rel. Dickson*, *ante*, p. 445.
2. This case differs from that case only in that it concerns the office of territorial treasurer for the Territory of Utah.

[No. 144.]

Argued Dec. 5, 1889. Decided Jan. 6, 1890.

APPEAL from a judgment of the Supreme Court of the Territory of Utah affirming the judgment of the District Court of the Third Judicial District of Utah Territory, overruling a demurrer and adjudging that the defendant, James Jack, usurps and unlawfully holds the office of territorial treasurer of Utah Territory, and that he be excluded therefrom, and that Bolivar Roberts is entitled to hold said office, and that defendant deliver to him said office, and all the books, property and records pertaining thereto. *Affirmed.*

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The facts are stated in the opinion.
Messrs. Eppa Hunton and Jeff. Chandler,
 for appellants.
Mr. O. W. Chapman, Solicitor Gen., for
 appellees.

Mr. Justice Miller delivered the opinion of
 the court:

This case, which is an appeal from the Supreme Court of the Territory of Utah, differs from the preceding case of Clayton against the same appellees, in the fact that Jack was charged with usurping and intruding into the office of territorial treasurer for the Territory of Utah, as Clayton was alleged to be an intruder into the office of auditor of public accounts. These two offices were created by the same Statute of the Territory, at the same time, and the mode of election prescribed by that Statute was changed at the same time by the same Statute to an election by the people, and Jack claims to have been elected treasurer at the same general election in which Clayton was elected auditor; that he received the commission of the governor of the Territory, and that he has held the office ever since by reason of the fact that no other election had been held and no other person had been lawfully appointed to the office. The same principles govern this case as govern the other. The judgment of the Supreme Court of the Territory of Utah was based upon the same grounds, and for the reasons given by us in that case we affirm the judgment in this.

**WILLIAM F. PATRICK ET AL., Plffs. in
 Err.,**

v.

CHARLES H. GRAHAM ET AL.

(See S. C. Reporter's ed. 627-632.)

*Objection to evidence, when stated—objection to
 a model as evidence—personal knowledge—re-
 fusel to give instructions.*

1. It cannot be permitted that, after the case has gone to a hearing, testimony submitted to the jury and a verdict rendered, a party, for the first time, shall state a reason for his objection to that evidence which would make good the objection.
2. This court cannot assume that the ruling of the court below sustaining an objection to a model as evidence was incorrect, where this court has no copy nor description of the model, and the witness who produced it in court below did not swear to its correctness nor that it would illustrate the subject.
3. Testimony of a witness as to the quantity of ore taken out of a mine is properly rejected where it does not appear that the witness personally knew anything about the quantity.
4. An exception will not be sustained to the refusal of the court to give certain instructions to the jury, where the same instructions were substantially given, though in different language, to which no exception was taken.

[No. 152.]

Argued Dec. 10, 1889. Decided Jan. 6, 1890.

IN ERROR to the Circuit Court of the United States for the District of Colorado to review

a judgment in favor of plaintiffs in an action to recover the value of mineral ores converted by defendants to their own use. *Affirmed.*

The facts are stated in the opinion.

Messrs. T. M. Patterson and C. S. Thomas
 for plaintiffs in error.

Mr. A. W. Rucker for defendants in error.

Mr. Justice Miller delivered the opinion of
 the court:

This is a writ of error to the Circuit Court of the United States for the District of Colorado.

In that court, Graham and Guggenheim sought to recover of Patrick and others the value of certain mineral ores taken from the Minnie lode mining claim of the plaintiffs and converted to their own use, alleging that the defendants were guilty of a trespass, and that the quantity taken amounted to five hundred tons of gold, silver and lead-bearing ore of the value of \$60,085. To this the defendants answered, admitting that plaintiffs were owners in fee of the Minnie lode mining claim, but denying that they were sole owners of said claim, and insisting that Samuel Harsh was a co-owner and co-tenant with them. They deny the trespass and conversion of the five hundred tons or any quantity of the ore, and deny that the ore was of the value of \$60,085 or any other sum.

A replication was filed by plaintiffs denying the co-ownership of Harsh, and the cause came on for hearing and was submitted to a jury, who found in favor of the plaintiffs, and assessed their damages at the sum of \$20,779. A motion was made to set aside this verdict and grant a new trial, which was overruled, and a judgment entered for the amount of the verdict in favor of plaintiffs. To this judgment the present writ of error is prosecuted.

It seems to have been conceded at the trial that the defendants, who owned the adjoining mineral claim, called the Colonel Sellers lode, in pursuing that lode, had broken into the vein of the plaintiffs, known as the Minnie lode, which was the prior and superior claim, and that they had taken therefrom a very considerable quantity of valuable ore, which they had mixed with the ore from their own lode and converted to their own use, by selling it with theirs.

The only question in contest before the jury was the rule by which the damages of the plaintiff should be ascertained. As to that subject, the plaintiffs took one or two exceptions to the ruling of the court in regard to the admission of testimony.

The ground of the first assignment of error is, that the court admitted, against the objection of the defendants, certain testimony of Meyer Guggenheim, one of the plaintiffs. In his testimony Guggenheim undertook to detail a conversation which he had had with Patrick and Whiting, two of the defendants, before the bringing of the suit and with regard to the trespass. The question was asked him: "What was said between you upon the subject, commencing with the first conversation you had, if you had more than one? State what the conversation was." To this question, "the defendants, by counsel, then and there objected on the grounds——." But the court overruled the objection, and permitted the witness

to answer. In his answer he stated that Patrick admitted that they had mixed the ores from the Minnie mine and from the Colonel Sellers mine, and he said that he had written to the parties in control of the mine that they should get off the ground.

The objection taken here to this testimony is, that it was part of a conversation had with a view to a compromise of the controversy and that it could not be used as evidence against the party for that reason. The testimony itself, being evidence of the conversion of the ore by the defendants, with a knowledge that it was the property of plaintiffs, was pertinent as to the measure of damages. It was, therefore, only to be excluded, if at all, on some ground other than its want of relevancy to the issue.

The record before us does not show that the defendants at the time of the trial and at the time that the objection was made to the introduction of this evidence gave any reason at all why it should be rejected; much less the reason which they now insist on.

It cannot be permitted that, after the case has gone to a hearing, testimony submitted to the jury and a verdict rendered, a party, for the first time, shall state a reason for his objection to that evidence which would make the objection good. The record is precisely as we have copied it, showing that while defendants "then and there objected on the grounds —," the record is then silent. No grounds were stated so far as we know. For this reason we think there is no error in the record on that subject.

If we were inclined to have any doubt upon this point, it would be satisfied by the language of the court in its charge to the jury, where it is said that "it is in proof that in going over into the plaintiffs' territory the defendants' foreman was in ignorance of the fact that he was upon plaintiffs' ground, and the question is whether, under the circumstances in evidence, this amounts to gross negligence on the part of the defendants." This charge of the court accords with the statement in the bill of exceptions, that in reply to further objection to the testimony relating to the effort to agree, the court said that the "part which is not competent under the rule will be stricken out." It is obvious that the jury were in effect told to disregard any testimony showing that the trespass on the part of defendants was intentional and with knowledge of the rights of plaintiffs.

The next assignment of error is that a witness called by the defendants to testify as to the value and quantity of the ore taken out of plaintiffs' mine (after stating that he had made measurements of the stope from which the plaintiffs' ore had been taken, by which measurement he calculated the amount of ore that had been so taken) had introduced a plat of the mine and of these measurements. He was then asked the question:

"What proportion of the vein comprised in the Minnie and A. Y. mines does this stope bear, according to your measurement? Have you a model that would show that?"

"A. I have a model here.

"Q. Produce it."

To the production and exhibition of this model the plaintiffs objected. The objection was sustained by the court, and to this an ex-

ception was taken by the defendants. This exception is now urged as sufficient to reverse the judgment. But we have no copy of the model here. We have no description of it. The witness did not swear to its correctness. He did not even say that it would illustrate the subject about which he was testifying. He simply said "I have a model here." It is impossible for this court to assume that the judge at the trial was incorrect in refusing to permit such a model to go in evidence.

The defendant J. C. Whiting was introduced as a witness, and in the course of his testimony he was asked: "What companies or smelters were purchasing ores from the Colonel Sellers mine during the months of March, April, May and June, 1883?" to which he answered as follows:

"A. We had in these months a contract running with the Harrison smelter, with the Arkansas Valley, with the Colorado Smelting and Refining Company, the Pueblo, with the Kansas City, and with the Argentine Smelting and Refining Company. I can't remember all.

"Q. In making settlements during this time did you receive duplicate statements from them of the amounts of ore sold?

"A. Ordinarily we didn't get duplicate statements; we got the original statements."

"Q. You received a statement?

"A. Yes, sir.

"Q. Can you state what the gross receipts of ore sold from the Colonel Sellers mine for the month of April, 1885, were?

"A. I can.

"Q. Now state what they were.

"Plaintiffs object to the question on the ground that ore shipments from the Colonel Sellers mine certainly can throw no light upon this case; also the point argued at length that a mixture of high-grade ore from the stope in question with the low-grade ores from the grounds of the Colonel Sellers mine would so reduce the value per ton of ore from plaintiffs' property as to make the statement on that basis manifestly unjust to the plaintiffs.

"The objection was sustained."

The counsel for defendant then said: "I have a stipulation from the other side that the evidence, if received at all, may be introduced in the shape of ore statements verified by the officers of the smelters furnishing them, so as to dispense with the necessity of producing so many witnesses." But this stipulation is nowhere produced in the record. Nor is there any verification of these ore receipts, nor any proof whatever of their truth. The court, we think, very properly rejected the testimony of Mr. Whiting on that subject, for it does not appear that he himself personally knew anything about the quantity of ore taken out during the period alluded to.

These seem to be all the errors assigned on which counsel for plaintiffs in error rely. An exception was taken to the refusal of the court to grant certain prayers for instructions offered by defendants, but these were substantially given, although in different language, in the charge of the court to the jury. This charge presented in a clear and, as we believe, correct light a sound view of the question of damages as it relates to this case. To it no exception

was taken, nor to any part of it. On the whole, we do not find any error in the record, and the judgment of the Circuit Court is accordingly affirmed.

JULIUS K. GRAVES, *Appt.*,

v.

CHESTER C. CORBIN.

THE FIRST NATIONAL BANK OF CHICAGO, ILLINOIS, *Appt.*,

v.

CHESTER C. CORBIN.

(See S. C. Reporter's ed. 571-592.)

Removal of cause from state to federal court—right of removal—single controversy—diversity of citizenship—separate defenses—reversal—when question arises.

1. The case as made by the complaint, and as it stood at the time of the petition for removal, is the test of the right to remove the suit from a state to a federal court.
2. Where a suit is brought to reach the entire property of a limited partnership, and to declare certain judgments against the same void, there is, in the suit, but a single controversy between the plaintiff on the one side and the defendants who have adverse claims against the property on the other, although there are various defendants and various claims by the several defendants.
3. Such suit is not removable for diversity of citizenship from a state to a federal court, by some of the defendants who reside in a State different from the State of the plaintiff, where the other defendants reside in the same State as plaintiff.
4. Where there is but a single cause of action it is not divisible, although each of the several defendants has a separate defense.
5. Separate defenses do not create separate controversies, within the meaning of the Removal Act.
6. Where it appears to this court that the case is one which is not removable, and of which the circuit court should not have taken jurisdiction, it is the duty of this court to reverse any judgment given below and remand the cause, with costs against the party who wrongfully invoked the jurisdiction of the circuit court.
7. The court, in such a case, can review a question as to the jurisdiction of the circuit court only in reviewing its final judgment or decree.

[Nos. 155, 990.]

Argued Dec. 10, 12, 13, 1889. Decided Jan. 6, 1890.

APPPEALS from decrees of the Circuit Court of the United States for the Northern District of Illinois declaring certain judgments, entered on confession, fraudulent as to creditors of a limited partnership, and directing the moneys collected by execution on said judgments to be paid into court for the benefit of the creditors of such partnership. *Reversed, and remanded to state court.*

NOTE.—As to removal of cause by one of two or more defendants, and as to separable controversies, see note to *Sloane v. Anderson*, Bk. 29, p. 899.

As to removal of causes to United States court for local prejudice, see notes to *Gaines v. Fuentes*, Bk. 23, p. 524, and to *Jefferson v. Driver*, Bk. 29, p. 897.

The plaintiff, Corbin, and four of the defendants are citizens of Massachusetts. One of the defendants, the First National Bank of Chicago, is a citizen of the State of Illinois. Twelve of the defendants are citizens of Illinois; four are citizens of Iowa; one is a citizen of New York, one of Ohio, two of Michigan, three of Wisconsin and one of Colorado. The suit was commenced in the Circuit Court of Cook County, State of Illinois. It was removed to the Circuit Court of the United States on a petition of the First National Bank of Chicago on the ground that in the suit there is a controversy wholly between citizens of different States and which can be fully determined as between them, to wit: a controversy between said Bank, which is a citizen of the State of Illinois, and plaintiff, who is a citizen of the State of Massachusetts.

The facts are more fully stated in the opinion.

Mr. J. M. Flower, for appellant:

The record must show citizenship in order to confer jurisdiction when that is the ground relied upon. All of the defendants must be citizens of a different State from that of the plaintiff.

Capron v. Van Noorden, 6 U. S. 2 Cranch, 126 (2: 229); *Breithaupt v. State Bank of Georgia*, 26 U. S. 1 Pet. 238 (7: 127); *Brown v. Keene*, 33 U. S. 8 Pet. 112 (8: 885); *American Bible Soc. v. Price*, 110 U. S. 61 (28: 70).

Nor can a suit be removed from the state court into the United States court unless all the parties on one side of the controversy are citizens of different States from those on the other, or unless the controversy is a separable one.

Grover & B. Sewing Machine Co. v. Florence Sewing Machine Co. 85 U. S. 18 Wall. 553 (21: 914); *Vannevar v. Bryant*, 89 U. S. 21 Wall. 41 (22: 476); *American Bible Soc. v. Price*, 110 U. S. 61 (28: 70).

Mr. Wm. J. Manning, for appellee:

The application for removal takes with it to the federal court the whole case.

Barney v. Latham, 103 U. S. 205 (26: 514); *Langdon v. Fogg*, 18 Fed. Rep. 5; *Kerling v. Cotshausen*, 16 Fed. Rep. 705; *Sheldon v. Keokuk Northern Line Packet Co.* 9 Biss. 307; *Des Moines Nat. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552 (31: 202).

When a separable controversy is removed the whole suit is carried with it, and no part is left to the determination of the state court.

Bushnell v. Kennedy, 76 U. S. 9 Wall. 387 (19: 736); *Edwards v. Connecticut Mut. L. Ins. Co.* 20 Fed. Rep. 452.

Mr. Justice Blatchford delivered the opinion of the court:

On the 1st of March, 1888, Chester C. Corbin filed a bill in equity in the Circuit Court of Cook County, in the State of Illinois, against William A. Boies, Benjamin B. Fay, Lucius W. Conkey and Julius K. Graves, who had

As to removal of causes from state to federal court, where a federal question arises, see note to *Little York G. W. & Water Co. v. Keyes*, Bk. 24, p. 656.

As to removal of causes under Act of 1875 on account of citizenship, see note to *Meyer v. Delaware Railroad Construction Co.* Bk. 25, p. 593.

composed the limited partnership of Boies, Fay & Conkey, in which Graves was the special partner and the three others were the general partners, the partnership being formed under a statute of Illinois, and doing business in Chicago as wholesale grocers and importers. The First National Bank of Chicago, Illinois, Alvin F. Shumway, The Bay State Sugar Refining Company of Massachusetts, The First National Bank of Westboro', Massachusetts, Walter Potter, James M. Flower, Curtis H. Remy and Stephen S. Gregory, the last three being a firm of attorneys-at-law, under the name of Flower, Remy & Gregory, Seth F. Hanchett, sheriff of Cook County, Illinois, and twenty-one other persons and corporations were also made defendants to the bill.

The bill set out that the plaintiff was the creditor of the said limited partnership, as being the owner of two promissory notes made and indorsed by it, and made the following averments: The limited partnership carried on business at Chicago from March, 1882, until January, 1883, and contracted debts during that time amounting to about \$400,000. On the 13th of January, 1883, its assets were insufficient to pay more than about 50 cents on the dollar of its liabilities, and during the time named it borrowed large sums of money, by loans and discounts of commercial paper made by it. On or about December 2, 1882, the members of the partnership, knowing it to be insolvent, and with the intent to hinder, delay and defraud such of its creditors as they did not see fit to prefer, and in contemplation of its insolvency, and with the intent to prefer certain of their creditors, or pretended creditors, and to evade the provisions of the statute of Illinois, pretended to dissolve the partnership, and recorded in the office of the county clerk of Cook County a paper purporting to be a dissolution of it; but the paper was a mere device contrived by them to evade the provisions of the statute, and to give color of validity to the acts of Fay and Conkey, thereafter set forth, in executing the judgment notes, warrants of attorney and confessions of judgment therein-after described. After the pretended dissolution Fay and Conkey pretended to carry on the business under the firm name of "Fay & Conkey," and assumed to be the owners of all the assets of the limited partnership. Boies and Graves pretended to release and convey to Fay and Conkey all their interest in such assets; but such release was void as against the creditors of the limited partnership. By the statute of Illinois under which the partnership was formed, all of its assets were pledged to the payment of its debts ratably, and it was the duty of the four partners, when they first had knowledge of its insolvency, or at the time of its pretended dissolution, to appoint a trustee to take charge of its assets and convert them into money and distribute the same ratably among its creditors. Fay and Conkey, on or about the 22d of January, 1883, in pursuance of said fraudulent scheme, executed in favor of six of the defendants seven promissory notes payable on demand, with warrants of attorney annexed to confess judgment for such amount as might appear to be unpaid thereon, with costs and 5 per cent attorneys' fees, the notes amounting to \$91,353.18, of which one note, for \$40,000,

was in favor of the First National Bank of Chicago, and one note, for \$17,500, was in favor of the defendant Graves. On the 22d of January, 1883, judgments were entered in the Superior Court of Cook County, Illinois, against Fay and Conkey upon each of the seven notes, together with the costs, and 5 per cent attorneys' fees, in favor of the six defendants mentioned, there being seven judgments in all, amounting in the aggregate to \$95,965.88, of which one judgment was in favor of the First National Bank of Chicago, for \$42,000, and one in favor of Graves, for \$18,875. On or about the 22d of January, 1883, Fay and Conkey, in further pursuance of said fraudulent scheme, executed in favor of fifteen of the defendants fifteen promissory notes, payable on demand, with warrants of attorney to confess judgment annexed, amounting in the aggregate to \$120,999.61, of which one note, for \$27,000, was made in favor of Graves, one for \$6,990 in favor of Shumway, one for \$10,000 in favor of The Bay State Sugar Refining Company of Massachusetts, one for \$12,000 in favor of the First National Bank of Westboro', Massachusetts, and one for \$4,800 in favor of Potter. On the 22d of January, 1883, or between that day and the 26th of January, 1883, inclusive, there were entered in the Circuit Court of the United States for the Northern District of Illinois judgments against Fay and Conkey upon each of the last-named fifteen notes, in pursuance of said warrants of attorney, together with the costs and 5 per cent attorneys' fees, in favor of fifteen of the defendants, amounting in the aggregate to \$127,044.61, of which judgments one was in favor of Graves for \$28,350, one in favor of Shumway for \$7,839.50, one in favor of The Bay State Sugar Refining Company for \$10,500, one in favor of the First National Bank of Westboro', Massachusetts, for \$12,600, and one in favor of Potter for \$4,515. On or about the 22d of January, 1883, and immediately after the entry of the judgments in the Superior Court of Cook County, the defendants Flower, Remy & Gregory, as attorneys for the defendants Boies, Fay, Conkey and Graves, and as attorneys of record for the respective plaintiffs in those judgments, caused execution to be issued on each of them against the property of Fay and Conkey, to the sheriff of Cook County, who, by direction of the attorneys, seized and levied on a large quantity of merchandise, of the value of about \$75,000, part of the assets of the limited partnership. The levy and seizure were made in further pursuance of said fraudulent scheme, and with intent to delay, hinder and defraud the plaintiff and other creditors of the limited partnership, and to give a preference to each of the defendants in whose favor the judgments were entered. The sheriff has sold the property seized, with the exception of about \$12,000 worth which was replevied, and has in his possession about \$54,000 as the proceeds of said sales. Immediately after four of the judgments in the Circuit Court of the United States for the Northern District of Illinois were entered, namely, that in favor of the Commercial National Bank of Dubuque, Iowa, for \$14,962.50, that in favor of Graves for \$28,350, that in favor of the Dubuque County Bank of Dubuque, Iowa, for \$12,495, and that in favor

of the Importers and Traders' National Bank of New York City for \$16,800, the defendants Flower, Remy and Gregory, on the 22d of January, 1888, as the attorneys of Boies, Fay, Conkey and Graves, and as the attorneys of the plaintiffs in those four judgments, caused execution to be issued on each of them, directed to the marshal of the district, against the property of Fay and Conkey. The marshal, on the same day, returned those executions *nulla bona*. Thereupon, Flower, Remy and Gregory, as attorneys for the plaintiffs in those four judgments, filed a creditors' bill in the Circuit Court of the United States for the Northern District of Illinois, alleging divers frauds on the part of Fay and Conkey, and praying for the appointment of a receiver. That court appointed as receiver the defendant Hancock, a brother-in-law of Flower, and the books of account and assets of the limited partnership were delivered to him by Fay and Conkey, and he has possession of them, and is collecting them, the drafts, notes, accounts and choses in action amounting to more than \$210,000. Immediately after the entry of the judgments in the circuit court of the United States in favor of seven of the defendants, including Shumway, The Bay State Sugar Refining Company, the First National Bank of Westboro' and Potter, Flower, Remy and Gregory, as attorneys of Boies, Fay, Conkey and Graves, and as attorneys for the plaintiffs in said seven judgments, caused executions to be issued upon them to the marshal, against the property of Fay and Conkey. The marshal returned them *nulla bona*, and thereupon Flower, Remy and Gregory, as such attorneys and on behalf of the plaintiffs in the seven judgments, filed a creditors' bill in the said circuit court of the United States, alleging that Fay and Conkey had concealed their property, and praying the appointment of a receiver. Hancock was appointed such receiver, or his first receivership was extended. The judgments of the circuit court of the United States were rendered in pursuance of the said fraudulent scheme on the part of Boies, Fay, Conkey and Graves. Upon the entry of each of the judgments before mentioned, there was added to and included therein a sum equal to 5 per cent of the original demand on which the judgment was rendered, as attorneys' fees for the entry thereof, the aggregate amount of such attorneys' fees being \$10,657.65. That amount was an excessive charge for the service, and was charged for the purpose of absorbing to that extent the assets of the limited partnership, and Fay and Conkey are interested therein, and have some secret agreement with said attorneys for a division of that sum. Flower, Remy and Gregory are and have been the attorneys of Boies, Fay, Conkey and Graves, and are the attorneys of Hancock, receiver. The plaintiff has applied to Hancock, receiver, for an examination of the books of the limited partnership, for the purpose of ascertaining what settlement, if any, Boies, Fay and Conkey have made with Graves, or what settlement Fay and Conkey have made with Boies. But Hancock refused such examination, and said that such refusal was in accordance with directions given him by Flower, Remy and Gregory, as his attorneys. The judgments so entered on

confession are, or some one or more of them is or are, fictitious, and rendered for more than was due to the plaintiffs therein respectively; and this excess is alleged to exist in regard to twenty-two of the judgments, including the two in favor of Graves and those in favor of the First National Bank of Chicago, Shumway, The Bay State Sugar Refining Company, the First National Bank of Westboro', Massachusetts, and Potter. Fay and Conkey, at the time the notes and warrants of attorney were made and the judgments were entered, knew that the limited partnership was insolvent; and they executed the notes and warrants, and confessed the judgments, with the intention of paying and securing to each of the persons in whose favor the notes and warrants were executed and the judgments were confessed a preference over any other creditors of the limited partnership. The confessions were unlawful acts, prohibited by the statute of Illinois, and the judgments and all acts done in pursuance thereof, and all process issued thereon, and all acts done under such process, are void. None of the persons or firms in whose favor the notes were given knew of the execution of them until after judgment had been entered thereon, and all of the judgments were entered without the knowledge or consent of the persons mentioned as plaintiffs therein. None of the notes were made in the ordinary course of business, but they were all made with intent on the part of Fay and Conkey to carry out the said fraudulent scheme; and all of the judgments were entered by Flower, Remy and Gregory, by direction of Fay and Conkey or of Fay. The property so taken on execution by the sheriff of Cook County, and the assets so transferred to the possession of Hancock as receiver, constitute the whole of the assets of the limited partnership; and its bona fide debts amount to about \$400,000.

The bill waives answers on oath, and prays for a decree that the pretended transfer of the assets of the limited partnership to Fay and Conkey was fraudulent and void; that each of the judgments so entered on confession, the executions issued and the proceedings thereon, or on their return, and everything done under the judgments and executions, or in any suit based on any of the judgments, and every sale or transfer involving any of them, be declared void; that it be decreed that all of the goods levied upon under the executions, and the assets taken possession of by Hancock as receiver, are the property of the limited partnership, and as such subject to the lien, and charged with the payment, of the debt due to the plaintiff, and all other debts owed by the limited partnership, ratably; that each of the defendants be decreed to pay to the receiver to be appointed in this suit whatever money they have received by virtue of their respective judgments or any suit based thereon, out of said property; that such money and all moneys realized by such receiver from the assets of the limited partnership be paid to its creditors ratably; that such receiver be appointed, to convert the property into money and distribute it; that the defendants Flower, Remy, Gregory and the sheriff be temporarily enjoined from paying over to any person any proceeds of the property of the limited partnership, which they now have or may

hereafter receive under any of said judgments, executions or creditors' bills; and that such injunction be made perpetual on a hearing.

Boies, Fay, Conkey, the First National Bank of Chicago, Flower, Remy and Gregory, the sheriff of Cook County, and four others of the defendants, were served with a summons. Flower, Remy and Gregory entered an appearance in the suit for Boies, Fay and Conkey on the 21st of March, 1888, and on the 2d of April, 1888, also entered an appearance for themselves, the sheriff of Cook County and two others of the defendants.

On the 2d of April, 1888, Flower, Remy and Gregory, as solicitors for the defendant the First National Bank of Chicago, served on the solicitors for the plaintiff a notice that, on the 4th of April, 1888, they would present to the Circuit Court of Cook County a petition and bond, on behalf of that Bank, for the removal of the cause to the Circuit Court of the United States for the Northern District of Illinois, and ask for an order removing the cause.

The petition and bond were presented, both of them dated April 2, 1888. The petition was sworn to by the defendant Flower, one of the firm of Flower, Remy & Gregory, who also executed the bond as surety. The petition is made by the First National Bank of Chicago, Illinois, and is entitled in the suit, naming as defendants those against whom the bill prays process. It states "that the controversy in said suit is between citizens of different States, and that your petitioner was at the time of the commencement of this suit and still is a citizen of the State of Illinois; that Chester C. Corbin, the complainant, was then and still is a citizen of the State of Massachusetts;" that twelve of the defendants "were then and still are citizens of the State of Illinois;" that four of them "were then and still are citizens of the State of Iowa;" that one of them was then and still is a citizen of the State of New York; one, of the State of Ohio; two, of the State of Michigan; three, of the State of Wisconsin; one, of the State of Colorado; "that the defendants, The Bay State Sugar Refining Company, the First National Bank of Westboro', Alvin F. Shumway and Walter Potter, were then and still are citizens of the State of Massachusetts;" and that "in the said suit above mentioned there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, a controversy between the said petitioner, who is a citizen of the State of Illinois, and the said complainant, Chester C. Corbin, who is a citizen of the State of Massachusetts."

No order appears to have been made by the state court on the presentation of the petition and bond, but the clerk of that court, on the 9th of April, 1888, signed a certificate under its seal to a transcript of the record in that court, which was filed in the Circuit Court of the United States for the Northern District of Illinois on the 11th of April, 1888; and the cause has since proceeded in the latter court.

The cause was put at issue, proofs were taken by the respective parties, and, on the 17th of November, 1888, a decree was made by the court, finding as facts that on or about the 20th of August, 1882, the limited partnership composed of Boies, Fay, Conkey and Graves was

insolvent, and so continued to the termination of its business, with the knowledge of each of the members thereof; that, with such knowledge, such members continued to do business until the 22d of January, 1888, when Fay and Conkey, assuming to be successors of Boies Fay & Conkey, confessed seven judgments in the Superior Court of Cook County, one of them in favor of the First National Bank of Chicago and one in favor of Graves, and fifteen judgments in the said circuit court of the United States, one of them in favor of Graves, one in favor of The Bay State Sugar Refining Company, one in favor of Shumway, one in favor of the First National Bank of Westboro', Massachusetts, and one in favor of Potter; that the members composing the limited partnership of Boies, Fay & Conkey went through the form of a dissolution thereof, for the purpose of defeating the statute of Illinois which prohibited insolvent limited partnerships from preferring creditors, and to defraud a part of their creditors; that such partnership was still subsisting at the time of the confession and entry of each of the judgments; that the judgments were confessed to prefer certain creditors, but chiefly to save Graves from loss on account of said partnership or on account of liabilities incurred by him on commercial paper made by or on behalf of it; that immediately after the judgments were entered in the Superior Court of Cook County, Graves and Fay caused executions to be issued thereon to the sheriff of that county, who levied them on all the stock in trade and merchandise of the limited partnership, and sold the property at public sale, and with its proceeds, on February 26, 1888, paid to the First National Bank of Chicago, on its judgment, \$40,000, and on the same day paid to Graves, on his judgment in the Superior Court of Cook County, \$9,791.18; that the defendants Flower, Remy and Gregory were employed as counsel by the limited partnership, and by Graves on his own behalf, to enter the judgments by confession, and to advise and represent the said firm and Graves in and about all matters and things affecting it and Graves, and received from them \$2,500 for services rendered and to be rendered in that behalf; that each of the judgments were confessed for the full amount due the several preferred creditors, and in some cases for more than was due, and for 5 per cent in addition thereto for attorneys' fees, which latter amount was intended as a provision for Flower, Remy and Gregory out of the assets of the limited partnership; and that they received without right, out of such assets, on account of attorneys' fees, \$8,559.80.

The decree further found that Fay and Conkey had each taken from the assets of the firm, and fraudulently appropriated to his own use, certain specified sums of money; that Graves had, on the 21st and 22d days of January, 1888, fraudulently appropriated to his own use drafts and checks belonging to the limited partnership, amounting to \$2,741.38; that on the 22d and 23d days of January, 1888, and after the levy of the executions aforesaid, Flower, Remy and Gregory collected drafts and checks belonging to the limited partnership, amounting to \$1,927.96, which they still held; that the judgments in favor of the Dubuque County

Bank, the Commercial National Bank and the Importers and Traders' National Bank were confessed at the special instance of Graves; that the judgment in favor of the Commercial National Bank was not an indebtedness due from the limited partnership to the bank; that Graves owes that partnership a sum equal to its assets which had been applied by his direction in payment of the last-named three judgments; that in a creditors' suit brought by Graves and the last-named three banks against Fay and Conkey, Hancock as receiver, and with the funds in his hands as such, paid to said three banks in the aggregate \$41,525.50, and to Graves, on his judgment in the circuit court of the United States, \$27,232.50; that in a certain other suit by creditors' bill in said circuit court of the United States, wherein The Bay State Sugar Refining Company, Shumway, the First National Bank of Westboro', Massachusetts, Potter and three other persons were plaintiffs, and Fay and Conkey were defendants, and in which also Hancock was receiver, he paid, out of the assets in his hands as such receiver, to The Bay State Sugar Refining Company, on its judgment, \$2,000, to that company on the judgment in favor of Shumway, \$1,598, to the First National Bank of Westboro', on its judgment, \$2,400, to Potter, on his judgment, \$860, and to the other three persons \$2,060 in all; that the two creditors' bills above named, one brought by the Commercial National Bank and others, and the second brought by The Bay State Sugar Refining Company and others, were each brought and prosecuted with the intention of defrauding the creditors of the limited partnership of their just rights; that Fay and Conkey consented to the filing of said bills and the appointment of a receiver thereunder; and that the limited partnership was indebted to the plaintiff in the sum of \$4,359.31.

The decree then proceeded to adjudge that all the property and effects held by the limited partnership on the 20th of August, 1882, and subsequently thereto, and when the judgments were confessed, were a special trust fund for the payment of the firm debts ratably among its creditors; that Graves pay to the clerk of the court within thirty days, for the benefit of the plaintiff and such other creditors of the limited partnership as should prove their right to share in the distribution of the assets of the firm, \$100,796.71, with interest; that Flower, Remy and Gregory in like manner pay to the clerk of the court \$9,886.57; that Fay and Conkey pay in like manner \$2,728.92; that execution issue against the property of such defendants respectively, in case of nonpayment; referring it to a master to take proof of the debts of the creditors of the limited partnership; charging Graves, Fay and Conkey with the costs of the cause; and reserving all matters not decreed upon, including the right to decree against the creditors in whose favor the judgments were confessed, with leave to the plaintiff to apply for such further order as might be necessary in relation to any matter not finally determined by that decree.

Graves and Flower, Remy and Gregory prayed separate appeals to this court, which were allowed. The appeal of Flower, Remy

and Gregory was afterwards dismissed while it was pending in this court.

On the 23d of January, 1888, the plaintiff and other creditors of the limited partnership, having proved their claims before the master to the amount of \$125,737.34 (and the master having reported in favor of said claims on the 9th of July, 1886), filed a petition in the cause, stating that Graves had failed to pay any part of the amount decreed against him; that but very little more had been realized under the decree of November 17, 1885, than sufficient to pay the costs, expenses and solicitors' fees incurred in the suit; and that the petitioners insisted that, under the proofs already taken, they were entitled to a decree against the First National Bank of Chicago for \$50,000. They therefore prayed for a decree against that Bank, requiring it to pay, within thirty days, to the receiver in the cause, \$50,000, with interest at 6 per cent per annum from March 1, 1883.

On the 23d of April, 1888, the circuit court, held by Judge Gresham, delivered an opinion (34 Fed. Rep. 692), in which it recited the grounds on which the decree of November 17, 1885, had been made, and ordered a decree against the First National Bank of Chicago.

The decree was entered on the 3d of May, 1888. It found that on the judgment for \$40,000 in favor of the Bank, confessed by Fay and Conkey as successors of the limited partnership, on January 22, 1883, the Bank had, on or about February 26, 1883, received out of the sale of the assets of that partnership by the sheriff, on an execution in its favor, \$38,708.35; that at the time of the pretended dissolution of the partnership, in October, 1882, and on the 2d of December, 1882, and later, the Bank knew that such partnership was insolvent and unable to pay all its creditors, and knew that the contract for its dissolution was a pretended one and entered into for the purpose of protecting Graves from liability as special partner and as indorser for the firm; that the Bank co-operated with the members of the partnership for the accomplishment of such purpose; and that the judgment was confessed for that purpose, and to obtain an illegal preference over other creditors. It decreed that the Bank pay to the receiver within thirty days the sum so received, with interest at 6 per cent from February 26, 1883, amounting in all to \$50,721.95; and that, if it were not paid, execution should issue against the property of the Bank.

The Bank prayed an appeal to this court. The record on the appeal of Graves was filed in this court October 11, 1886, and the record on the appeal of the Bank was filed October 17, 1888.

Both of the appeals have been argued in full on the merits. But the preliminary question arises as to the jurisdiction of the circuit court in the case, by virtue of the removal of the cause from the state court on the petition of the Bank; and the point is taken by the respective appellants that the circuit court acquired no jurisdiction, because at the time of the commencement of the suit and at the time of its removal, as appears by the petition for removal, the plaintiff and four of the defendants, namely, Shumway, Potter, The Bay State Sugar Refining Company and the First National Bank of

Westboro', were all of them citizens of Massachusetts. The determination of this question must depend upon whether, at the time of the commencement of the suit, there was a separable controversy between the plaintiff and the petitioner for removal, the First National Bank of Chicago. If there was but a single controversy in the entire cause, of course there could be no separable controversy between the plaintiff and the Bank.

By section 2 of the Act of March 3, 1875, chap. 137 (18 Stat. 470), under which the removal took place, it was provided that when, in any suit mentioned in the section, "there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district." The petition for removal states that in the suit "there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them," namely, a controversy between the plaintiff and the Bank. But we are of opinion that there was in the suit but a single controversy, and that that controversy was not wholly between citizens of different States. There were various branches of the controversy, various defendants, and various claims by the several defendants; but the controversy was between the plaintiff, on the one side, and the defendants who were alleged by the bill to have claims adversely to the plaintiff against the property of the limited partnership, as a whole, on the other side.

The case as made by the bill, and as it stood at the time of the petition for removal, is the test of the right to removal. The bill was filed to reach the entire property of the limited partnership. In order to do that, it was necessary to sweep away not some but all of the confessed judgments and all the rights obtained by executions and levies thereunder, and to restore to the assets and moneys of the partnership in the hands of the court the assets and moneys which had been fraudulently diverted therefrom by the members of the partnership, with the co-operation of the various defendants. The bill states that promissory notes were given in favor of the four defendants who were citizens of Massachusetts; that judgments on confession, in pursuance of warrants of attorney, were rendered in the Circuit Court of the United States for the Northern District of Illinois, against Fay and Conkey, in favor of the four Massachusetts defendants; that, immediately after the entry of those judgments, Flower, Remy and Gregory, as the attorneys of the members of the limited partnership, and as the attorneys of record for the plaintiffs in those judgments, caused executions to be issued thereon to the marshal of the district, against the property of Fay and Conkey; that the same were returned *nulla bona*; that thereupon Flower, Remy and Gregory, as such attorneys, and on behalf of the plaintiffs in said four judgments and in three others, filed a creditors' bill in the circuit court of the United States, to reach the property of Fay and Conkey, in which suit a receiver was appointed; that the

said four judgments were entered in pursuance of the fraudulent scheme alleged in the bill, on the part of the members of the limited partnership, to hinder, delay and defraud its creditors, and evade the provisions of the statute of Illinois, and to prefer the plaintiffs in those several judgments over other creditors; that the four judgments in favor of the citizens of Massachusetts were largely in excess of the amount due to them respectively at the time of the entry of the judgments; and that those judgments are void. It prays for a decree declaring the four judgments to be void, and directing the payment to the receiver of all moneys received by such four defendants under the judgments or under any proceedings based thereon. These allegations, with the others contained in the bill, made but a single controversy, as to all of the defendants. The relief asked could not have been granted unless all who were made defendants were parties. Therefore, all of them were necessary parties.

In *Brinkerhoff v. Brown*, 6 Johns. Ch. 189, it was held that a creditors' bill could be filed against several persons relative to matters of the same nature, forming a connected series of acts, all intended to defraud and injure the plaintiffs, and in which all the defendants were more or less concerned, though not jointly in each act. The case there arose on a demurrer to the bill. It was urged that the bill was multifarious in uniting all the defendants and distinct and unconnected matters. Fraud was charged against the five trustees of the Genesee Company, in confessing judgments and causing the property of the company to be sold. There was a charge of a combined fraud, affecting seven of the defendants, two of whom were not concerned in every part of the fraudulent conduct. All the acts sought to be impeached were alleged to have been done with a fraudulent intent as respected creditors. The court says: "There was a series of acts on the part of the persons concerned in this Genesee Company, all produced by the same fraudulent intent and terminating in the deception and injury of the plaintiffs. The defendants performed different parts in the same drama; but it was still one piece—one entire performance, marked by different scenes; and the question now occurs, whether the several matters charged are so distinct and unconnected as to render the joining of them in one bill a ground of demurrer." The court then reviews the leading cases on the subject, and says that the principle to be deduced from them is, "that a bill against several persons must relate to matters of the same nature and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct;" that the general right claimed by the bill was a due application of the capital of the company to the payment of the judgments of the plaintiffs; that the subject of the bill and of the relief, and the only matter in litigation, was the fraud charged in the creation, management and disposition of the capital of the company; that in that charge all the defendants were implicated, though in different degrees and proportions; and that the case fell within the reach of the principle stated, and the demurrer could not be sustained.

This ruling of *Chancellor Kent* was considered, recognized and approved by the Court of Errors of New York, without a dissenting voice, in *Fellows v. Fellows*, 4 Cow. 682. See also *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 592, and 84 N. Y. 30.

The principle above stated has been applied by this court, in considering the question of removal, in cases like the present.

In *Ayers v. Chicago*, 101 U. S. 184 [25: 888], a bill was filed in a state court of Illinois, by the City of Chicago against citizens of Illinois, to enforce a deed of trust. A citizen of Alabama, having a judgment against one of the defendants and claiming a lien on the property covered by the deed of trust, was admitted as a party defendant to the suit, and filed a cross-bill to enforce such lien, and removed the suit into the federal court, on the ground that in the original suit there was a controversy wholly between him and the original plaintiff, and that in the cross-suit the controversy was wholly between citizens of different States. The cause was remanded, and on appeal this court affirmed that decision, saying that the original bill and the cross-bill constituted one suit; that the intervenor was allowed to take part in a controversy between the city and the debtor; that he had no dispute with the debtor, and none separately with the city; that he and the debtor had a controversy with the city as to its lien on the property; that the debtor, who was on the same side of the controversy with him, was a citizen of the same State with the city; and that, such being the case, the suit was not removable.

In *Fidelity Ins. T. & S. D. Co. v. Huntington*, 117 U. S. 280 [29: 898], it was held that a creditor's bill to subject incumbered property to the payment of the judgment of the creditor, by selling it and distributing its proceeds among lienholders according to priority, created no separate controversy as to the separate lienholders, parties defendant, within the meaning of the Removal Act, although their respective defenses might be separate. The court said: "The suit as brought by Huntington is a creditor's bill to subject incumbered property to the payment of his judgment, by a sale and distribution of the proceeds among lienholders according to their respective priorities. There is but a single cause of action, and that is the equitable execution of a judgment against the property of the judgment debtor. This cause of action is not divisible. Each of the defendants may have a separate defense to the action, but we have held many times that separate defenses do not create separate controversies, within the meaning of the Removal Act. *Louisville & N. R. Co. v. Ide*, 114 U. S. 52 [29: 63]; *Putnam v. Ingraham*, 114 U. S. 57 [29: 65]; *Pirie v. Treadt*, 115 U. S. 41 [29: 381]; *Starin v. New York City*, 115 U. S. 248 [29: 888], and *Sloane v. Anderson*, 117 U. S. 275 [29: 899]. The judgment sought against the Fidelity Company is incident to the main purpose of the suit; and the fact that this incident relates alone to this company does not separate this part of the controversy from the rest of the action. What Huntington wants is not partial relief, settling his rights in the property as against the Fidelity Company alone, but a complete decree, which will give him a sale of the entire prop-

erty, free of all incumbrances, and a division of the proceeds as the adjusted equities of each and all the parties shall require. The answer of this company shows the questions that will arise under the branch of the one controversy, but it does not create another controversy. The remedy which Huntington seeks requires the presence of all the defendants, and the settlement, not of one only, but of all the branches of the case."

To the cases above cited may be added *Plymouth Gold Mining Co. v. Amador & S. Canal Co.* 118 U. S. 264 [30: 282]; *Little v. Giles*, 118 U. S. 596, 601 [30: 269, 271]; *East Tennessee, V. & G. R. Co. v. Grayson*, 119 U. S. 240 [30: 382]; *Brooks v. Clark*, 119 U. S. 502, 511 [30: 482, 485]; *Laidly v. Huntington*, 121 U. S. 179 [30: 883]; *Peninsular Iron Co. v. Stone*, 121 U. S. 631 [30: 1020]; *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535 [30: 1285], and *Young v. Ewart*, 132 U. S. 267 [33: 352]. The transcript of the record from the state court in the present case was filed in the circuit court of the United States on the 11th of April, 1888. The decisions of this court above cited were all but one of them made at and after October Term, 1884.

There is nothing in the record before us which shows that the question of the removability of the present case, on the petition for removal which was filed, was raised in the circuit court, either at the time the transcript from the state court was presented to be filed, or afterwards by a motion to remand, except what may be inferred from a statement in the record in the *Graves* case, at the conclusion of the testimony of a witness taken April 6, 1888, that the counsel for the plaintiff stated that he had been before Judge Drummond, in the United States Circuit Court for the Northern District of Illinois, and the judge had taken jurisdiction of the cause under the petition for removal by the First National Bank of Chicago. We find reported, however, the case of *Corbin v. Boies*, 18 Fed. Rep. 3, the present case, where Judge Drummond, in an opinion which appears to have been given on an application to order the transcript from the state court to be filed in the circuit court and the case to be docketed in the latter court, held that there was in the case a controversy which was wholly between the plaintiff and the First National Bank of Chicago, namely, a controversy as to whether the judgment in favor of that Bank was a valid judgment as against the limited partnership, and the plaintiff as one of its creditors; and that the Bank was not interested in any controversy which the plaintiff might have with other creditors of the firm. But, as already shown, this view was erroneous.

Under the provision of section 5 of the Act of March 3, 1875 (18 Stat. 472), that if in any suit removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been removed thereto, that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, it shall proceed no further therein, but shall remand the suit to the court from which it was removed, as justice may require, this court has held that when it appears to this court that the case is one of which, under that provision, the circuit

court should not have taken jurisdiction, it is the duty of this court to reverse any judgment given below, and remand the cause, with costs against the party who wrongfully invoked the jurisdiction of the circuit court. *Williams v. Nottawa Twp.* 104 U. S. 209 [26: 719]. This rule has been recognized by this court to the extent even of taking notice of the want of jurisdiction in the circuit court, although the point has not been formally raised in that court, or in this court, in *Turner v. Farmers Loan & Trust Co.* 106 U. S. 552, 555 [27: 273, 274]; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 386 [28: 462, 465]; *Farmington v. Pillsbury*, 114 U. S. 188, 144 [29: 114, 116], and *King Bridge Co. v. Otse County*, 120 U. S. 325, 226 [30: 623, 624].

In *Stevens v. Nichols*, 180 U. S. 230 [32: 914], it was held that if a proper diversity of citizenship does not appear by the record to have existed, both at the commencement of the suit and at the time of the filing the petition for removal, this court will remand the cause to the circuit court with directions to send it back to the state court, with costs against the party at whose instance the removal was made. This same principle was asserted in *Oregho v. Ohio & M. R. Co.* 131 U. S. 240 [33: 144], where it was also held that where a suit is entered upon the docket of a circuit court as removed on the ground of the diverse citizenship of the parties, and was never in law removed, no amendment of the record made in the circuit court can affect the jurisdiction of the state court or put the case rightfully on the docket of the circuit court as of the date when it was so docketed.

This same rule was applied at the present term in *Jackson v. Allen*, 132 U. S. 27 [33: 249], where the judgment of the circuit court was reversed at the cost of the parties who attempted to remove the cause, and it was remitted to the circuit court, with directions to remand it to the state court.

There is nothing in the foregoing views which involves the decision of this court in *Barney v. Latham*, 108 U. S. 205 [26: 514], which was to the effect that where in a case there was in fact an entirely separate controversy between the plaintiffs and several defendants petitioning for removal, with which controversy another defendant, a citizen of the same State with one of the plaintiffs, had no necessary connection, and which controversy could be fully determined as between the parties actually interested in it, without the presence as a party in the cause of such other defendant, not only could there be a removal, but the removal carried with it into the federal court all the controversies in the suit between all parties to it.

It is suggested that it is a hardship to the plaintiff to reverse his decrees for want of jurisdiction in the circuit court after he has prosecuted his suit in that court successfully, on his being taken into that court adversely more than six years ago. The answer is that the jurisdiction of this court in the present case to review the question of the jurisdiction of the circuit court could only arise on the hearing of an appeal from a final decree of the latter court, because by § 5 of the Act of March 3, 1875 (18 Stat. 472), this court was authorized to review only an order of the circuit court remanding a

cause, and not one retaining jurisdiction over it. Even that provision was repealed by § 6 of the Act of March 3, 1887 (24 Stat. 555); and this court can now review a question as to the jurisdiction of a circuit court only in reviewing a final judgment or decree, although by the Act of February 25, 1889 (25 Stat. 693), it may do so in a case not involving over \$5,000.

It results from the foregoing considerations that both of the decrees of the Circuit Court, as well that against Graves as that against the First National Bank of Chicago, must be reversed, and the case be remanded to the Circuit Court with a direction to remand it to the Circuit Court of Cook County, Illinois, the costs of this court to be paid by the First National Bank of Chicago, the petitioner for removal.

Mr. Chief Justice Fuller did not sit in this case or take any part in its decision.

EDWARD AVERY, Administrator, Plff.
in Err.,

WILLIAM W. CLEARY, Assignee.

(See S. C. Reporter's ed. 604-612.)

Sec. 5057, U. S. Rev. Stat.—suit by assignee in bankruptcy—barred in two years—fraudulent concealment—laches—rights of cestui que trust.

1. A suit by an assignee in bankruptcy, against the administrator of the bankrupt, to recover the proceeds, received by the latter, of policies on the life of the bankrupt, which he had before his bankruptcy assigned in trust for his daughters, of whom the administrator is the guardian, is a suit between the assignee in bankruptcy and one claiming an adverse interest, within the meaning of section 5057, U. S. Rev. Stat.
2. Such suit is therefore barred by the two years' limitation provided by such section.
3. That the bankrupt omitted to mention such policies in his schedules in bankruptcy, and that neither he nor his administrator informed the assignee of them, but took no means to conceal them, does not establish fraudulent concealment of them so as to prevent the running of such Statute of Limitations.
4. There must be no negligence or laches by the assignee in bankruptcy in coming to the knowledge of the fraud, which is the foundation of his suit, the concealment of which is relied upon to defeat the limitation of two years.
5. The rights of a *cestui que trust* under a written transfer in trust do not depend upon the formal acceptance by the trustee of the trust imposed upon him; such rights will be protected by a court of equity even if the trustee declines to act. [No. 162.]

Argued Dec. 13, 1889. Decided Jan. 6, 1890.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment in favor of the plaintiff to recover the proceeds of policies of insurance. *Reversed.*

NOTE.—As to Statute of Limitations in cases of fraud in equity, see note to *Stearns v. Page*, Bk. 12, p. 928.

The action was brought by Cleary, assignee in bankruptcy of Ellis, to recover from Ellis' administrator the moneys received by him on policies of insurance upon the life of Ellis. Before the proceedings in bankruptcy, Ellis assigned the policies to one Morse, in trust to pay the proceeds thereof to Ellis' daughters. He subsequently was adjudged a bankrupt, and, after his death, the insurance company paid to his administrator, the defendant in this action, the proceeds of said policies. Such administrator was also guardian of the daughters for whose benefit the policies were assigned. This action, brought by the assignee in bankruptcy to recover from the administrator the proceeds of said policies received by the latter, proceeds upon the ground that the policies constituted part of the bankrupt's estate and passed to his assignee. The declaration alleges that the existence of the policies was concealed from the assignee and that they remained in the bankrupt's possession until his death, and that the assignee had no knowledge of the policies until shortly before the commencement of this suit, when he demanded the proceeds thereof from the defendant. The answer, besides the general denial, sets up the Statute of Limitations of two years against the assignee under section 5057, Rev. Stat. U. S.

The facts are fully stated in the opinion.

Messrs. Joshua D. Ball and Edward Avery, for plaintiff in error:

As the defendant took no pains to conceal his acts, his mere neglect to go to the plaintiff and give information of what he had done is not such concealment on his part as the Statute contemplates.

Nudd v. Hamblin, 8 Allen, 130, 134.

Acts of Limitations of the several States, where no special provision has been made by Congress, form a rule of decision in the courts of the United States.

McCluny v. Stillman, 28 U. S. 3 Pet. 270 (7: 676); *Ross v. Duval*, 38 U. S. 13 Pet. 45 (10: 51).

The Statute applies not only to suits to recover property belonging to the bankrupt or conveyed in fraud, but also to actions to recover money or debts owing to the bankrupt.

Jenkins v. International Bank, 106 U. S. 571 (27: 304); *Bailey v. Glover*, 88 U. S. 21 Wall. 346 (22: 638); *Gifford v. Helms*, 98 U. S. 252 (25: 59); *Wisner v. Brown*, 122 U. S. 214 (30: 1205).

When there has been no negligence or laches on the part of the plaintiff in coming to the knowledge of the fraud, and the fraud has been concealed, the Statute does not begin to run until the fraud is discovered.

Rosenthal v. Walker, 111 U. S. 185 (28: 395); *Traer v. Clews*, 115 U. S. 528 (29: 467).

Mere failure to discover the cause of action, where there is no element of concealment, does not take the case out of the Statute.

Nudd v. Hamblin, 8 Allen, 133; *Cole v. McGlathry*, 9 Me. 131; *McKown v. Whitmore*, 31 Me. 448; *Rouse v. Southard*, 89 Me. 404; *Yancy v. Cothran*, 32 Fed. Rep. 687; *Norton v. De La Villebeuve*, 13 Nat. Bankr. Reg. 304.

Even had the assignment never been delivered to Morse, the trust would have been supported and upheld. Its delivery was not essential to its validity.

Adams v. Adams, 88 U. S. 21 Wall. 185 (22: 504).

Even had Morse declined the trust, the assignment would still be upheld and a new trustee appointed.

Perry on Trusts, §§ 38, 45; 2 Story, Eq. Jur. § 976; *Bailey v. Kilburn*, 10 Met. 176, 179.

An assignment to a person who has no insurable interest in the life of the assured passes nothing.

Warnock v. Davis, 104 U. S. 775 (26: 924); *Cammack v. Lewis*, 82 U. S. 15 Wall. 643 (21: 244); *Bayne v. Adams*, 81 Ky. 374, 375; *Missouri Valley L. Ins. Co. v. Sturges*, 18 Kan. 93; *Franklin L. Ins. Co. v. Hazzard*, 41 Ind. 116; *Franklin L. Ins. Co. v. Sefton*, 58 Ind. 380.

The only interest that an assignee in bankruptcy has in the money paid on a policy on the life of the bankrupt issued to the bankrupt, where the bankrupt dies after the institution of proceedings in bankruptcy, is the surrender value of the policy.

Re McKinney, 15 Fed. Rep. 535; *Holt v. Everall*, 84 L. T. N. S. 602.

It is only in cases where the facts are clear and not in dispute that the court can direct the jury to render a verdict.

Richardson v. Boston, 60 U. S. 19 How. 263 (15: 639); *Hickman v. Jones*, 76 U. S. 9 Wall. 197, 201 (19: 551, 553); *Bevans v. U. S.* 80 U. S. 13 Wall. 57 (20: 531); *Klein v. Russell*, 86 U. S. 19 Wall. 435 (22: 116); *Moulton v. American L. Ins. Co.* 101 U. S. 708 (25: 1077); *Manchester v. Ericsson*, 105 U. S. 347 (26: 1099); *Phenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30 (27: 65); *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612 (28: 536); *Orleans v. Platt*, 99 U. S. 676 (25: 404); *Randall v. Baltimore & O. R. Co.* 109 U. S. 478 (27: 1003); *Central Nat. Bank v. Royal Ins. Co.* 103 U. S. 733 (26: 459); *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615 (29: 224).

Messrs. Nathan Morse and E. M. Johnson, for defendant in error:

The policies of insurance belonged to the assignee in bankruptcy, and not to Ellis; they can be clearly traced and distinguished from Ellis' own property, if any, in the hands of the administrator.

Trecothick v. Austin, 4 Mason, 16; *Johnson v. Ames*, 11 Pick. 173; *Harlow v. Dehon*, 111 Mass. 195; *Simmons v. Almy*, 100 Mass. 239; *Bancroft v. Consen*, 13 Allen, 50; *Troy Nat. Bank v. Stanton*, 116 Mass. 435, 439.

Section 5057 of the Revised Statutes of the United States has no application to a suit against the bankrupt.

Clark v. Clark, 58 U. S. 17 How. 315 (15: 77); *Phelps v. McDonald*, 99 U. S. 298 (25: 473); *Re Conant*, 5 Blatchf. 54; *French v. Merrill*, 132 Mass. 525; *Minot v. Tappan*, 127 Mass. 333, 339.

That the policies were omitted from the schedules was a concealment of the property by the bankrupt.

Re Goodridge, 2 Nat. Bankr. Reg. 105; *Re Rathbone*, Id. 89; *Re Huseman*, Id. 140.

No instruction should be given to a jury which assumes as a matter of fact that which is not conceded or established by uncontradicted proof.

Knickerbocker L. Ins. Co. v. Foley, 105 U. S.

850 (26: 1055); *Leavenworth Bank v. Hunt*, 78 U. S. 11 Wall. 891 (20: 190); *Washington & G. R. Co. v. Gladmon*, 82 U. S. 15 Wall. 401 (21: 114).

The policies in question were on Ellis' own life, and were assets belonging to his estate, and upon his adjudication in bankruptcy passed to his assignee.

Vetterlein v. Barnes, 124 U. S. 169 (31: 400); *Re Newland*, 7 Ben. 63; *Brigham v. Home L. Ins. Co.* 121 Mass. 319.

If the assignment to Morse was made without consideration, and Ellis was insolvent at the time, no title passed under it as against the assignee in bankruptcy.

U. S. Trust Co. v. Sedgwick, 97 U. S. 304 (24: 954); *Hinde v. Longworth*, 24 U. S. 11 Wheat. 199-213 (6: 454); *Walcott v. Almy*, 6 McLean, 23; *Rundle v. Murgatroyd*, 4 U. S. 4 Dall. 304 (1: 843); *Parish v. Murphree*, 54 U. S. 18 How. 92 (14: 65).

The policy passed to the assignee under the assignment.

Vetterlein v. Barnes, 124 U. S. 169 (31: 400); *Bunyon on Life Assurance*, 2d ed. 211; *Brigham v. Home L. Ins. Co.* 131 Mass. 319; *Schondler v. Wace*, 1 Camp. 487.

The court was justified in instructing the jury that upon the evidence they must find for the plaintiff.

North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727 (31: 287); *Marshall v. Hubbard*, 117 U. S. 415 (29: 919); *Montclair Twp. v. Dana*, 107 U. S. 162 (27: 436); *Griggs v. Houston*, 104 U. S. 553 (26: 840); *Bowditch v. Boston*, 101 U. S. 16 (25: 990); *Anderson County v. Beal*, 113 U. S. 227, 241 (28: 966, 971).

Mr. Justice Harlan delivered the opinion of the court:

In the year 1867 the Connecticut Mutual Life Insurance Company issued three policies of insurance upon the life of Matthias Ellis, numbered respectively 68,428, 68,429 and 68,480, the first two being for \$10,000 each, and the last for \$5,000. Each policy was payable to the executors, administrators and assigns of the assured, upon proof of his death.

On the 19th of May, 1877, the assured, in writing, transferred and assigned these policies, and all profits, dividends, nonforfeiture policies, money or other property that might arise from or be paid for or on account of them, to E. Rollins Morse, in trust, to pay the income, profits or proceeds thereof to his two daughters, Helena and Marie. This assignment was lodged with the insurance company, though it does not clearly appear by whom, nor when, except that it must have been prior to March 1, 1879.

Ellis filed, July 3, 1878, in the District Court of the United States for the District of Kentucky, his petition in bankruptcy, and, having been adjudged a bankrupt, his estate was transferred by the register to Horace W. Bates, who acted as assignee until May, 1882. He was succeeded by the present defendant in error.

The schedules in bankruptcy made no mention of the above policies of insurance.

On the 1st day of March, 1879, policy 68,430 was surrendered to the company for the sum of \$1,054, which amount was applied in payment.

ment as well of the premiums due in that year on policies 68,428 and 68,429 as of future premiums, in cancellation of premium note or credit, and in discharge of the accrued interest on that note. The receipt showing the details of this transaction was signed by Ellis, and by Morse as trustee.

The bankrupt died November 21, 1879, and on the 31st of December in the same year the company paid to his administrator, the plaintiff in error (he being also the guardian of the children of the assured), the sum of \$9,390.43, the proceeds of policy 68,428, and \$258.21, the balance of the surrender value of policy 68,430.

The present action was brought September 30, 1882, by the assignee in bankruptcy to recover from Ellis' administrator the sums so received by the latter. It proceeds upon the ground that the policies constituted part of the bankrupt's estate, and passed to his assignee. The declaration alleges that the existence of the policies was concealed and withheld from the assignee, and remained in Ellis' possession and control until his death, when they were taken possession of by the defendant, in his capacity as administrator, except that policy No. 68,430 had been surrendered by Ellis, on or about March 2, 1879; that the assignee in bankruptcy had no knowledge or information concerning the policies until shortly before the commencement of this suit, "the same being concealed by said Ellis in his lifetime, and since his death by his administrator; and that immediately upon being informed of the existence of said property he demanded the same or the proceeds thereof from the defendant."

The answer puts in issue the material allegations of the declaration, and pleads specially that the cause of action did not accrue to the assignee, nor against the defendant as administrator, within two years before the suing out of the plaintiff's writ.

The court refused to grant any of the defendant's requests for instructions, including one based upon the Statute of Limitations, and instructed the jury that the plaintiff was entitled to recover the two sums claimed by him, with interest on each from the date of the writ. A verdict was thereupon returned in favor of the plaintiff for the sum of \$11,539.56, upon which judgment was rendered.

It is provided by section 5057 of the Revised Statutes of the United States that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed." 14 Stat. 518, chap. 176, § 2.

The court below was asked to rule that the action was barred by this section, "unless the defendant fraudulently concealed from Bates, the first assignee, the alleged cause of action, and that mere omission on the part of the defendant to disclose to Bates, the assignee, the facts, would not amount to a fraudulent concealment." It was also asked to rule that mere

ignorance upon the part of the assignee of the cause of action would not take the case out of the Statute of Limitations. If these instructions, or either of them, ought to have been given, the judgment must be reversed.

The first question to be examined is whether this is a suit "between an assignee in bankruptcy and a person claiming an adverse interest." It is contended that section 5057 has no application to a suit against a bankrupt, and, consequently, none to a suit against his administrator, who takes no greater right in property transferable to or vested in the assignee than the bankrupt had at his death. Without stopping to examine the authorities bearing upon this proposition, it is clear that the rule contended for ought not to control the present case. More than a year prior to the bankruptcy of Ellis he had, by written assignment, transferred these policies to Morse, in trust to pay the income, profits or proceeds thereof to the two infant daughters of the assured. That instrument was delivered to the insurance company many months before the death of the assured. This is manifest from the receipt taken by the company on the first of March, 1879, and which was signed by the assured and by Morse, as trustee. The company must have been aware at that time of the assignment. As it does not appear on what day the written transfer to Morse, for the benefit of the daughters of the assured was delivered to the company, it may be argued that there is an entire absence of proof showing that Ellis had parted with his interest in the policies prior to his bankruptcy. Still, the daughters of the assured must be held as claiming an interest in the policies adverse to the assignee in bankruptcy, at least from the time the written transfer to Morse, as their trustee, was lodged with the insurance company. That must have occurred as early as March 1, 1879, more than three years prior to the commencement of this suit.

This conclusion is not at all affected by the fact that Morse had no recollection, when he testified in this case, of ever having had in his possession the written transfer to him of May 19, 1877. His want of recollection cannot outweigh the fact that on the first of March, 1879, as trustee for the daughters of Ellis, he co-operated with the latter in surrendering policy 68,430, and in applying the amount allowed on account of such surrender to the payment, among other things, of the premiums due and to become due on the other two policies. It is hardly to be supposed that he would have assumed to act as trustee, in matters of such importance, without knowing by whom, and for whose benefit, he was made such trustee. Besides, the rights of the daughters under the above written transfer did not depend upon his formal acceptance of the trust imposed upon him. Those rights would have been protected by a court of equity, even if he had declined to act as trustee.

Nor is it a material circumstance that Morse, after the death of Ellis, stated, in his letter to the insurance company of December 29, 1879, that he could not "find" any assignment of policies 68,429 and 68,430, and did not claim any interest in them. Neither his inability to find the assignment under which he had acted

nor his disclaimer of an interest in the policies, could affect the rights of Ellis' daughters. Further, it is quite manifest that this letter was written merely to facilitate the collection of the proceeds of the policies by the administrator, who was also the guardian of the infant children of the assured. Although the present suit is against the administrator, the latter, in respect to the policies in question, really represents his wards, to whom, so far as we can see from the present record, he must account for the moneys collected from the insurance company.

For the reasons stated, we are of opinion that within the meaning of section 5057 this is a suit between the assignee in bankruptcy and one claiming an adverse interest. It is therefore barred by limitation, unless it can be brought within the rule announced in *Bailey v. Glover*, 88 U. S. 21 Wall. 342, 349 [22: 636, 638]. In that case, the court, construing section 5057, said: "We hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the Statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him." See also *Rosenthal v. Walker*, 111 U. S. 185 [28: 395]; *Traer v. Clews*, 115 U. S. 528 [29: 467].

The ground upon which the plaintiff claims exemption from the limitation of two years is that the schedules in bankruptcy omitted all mention of the policies in question, and that the fact that the policies existed was "concealed and withheld" by the bankrupt in his lifetime, and, since his death, by his administrator.

If it be assumed that Ellis had not, prior to his bankruptcy, delivered the assignment of May 19, 1877, and that his interests and rights in these policies were transferable to his assignee, the mere fact that he omitted any mention of the policies in his schedules in bankruptcy, and that neither he nor his administrator gave information of them to the assignee, would not establish fraud within the meaning of the rule announced in *Bailey v. Glover*. The omission from the schedules of any reference to the policies, and the failure to call the attention of the assignee to them, may have been caused by an honest belief, upon the part of Ellis, that they belonged to his children, or were not such property as the law required to be surrendered to the assignee; and, therefore, he lodged the assignment to Morse—possibly after his bankruptcy—with the insurance company. Be this as it may, the bankrupt's children are to be regarded as asserting an interest in the policies, at least from March 1, 1879, when the receipt of that date was executed. Fraud is not imputable to them, nor to the guardian, simply because neither they nor he informed the assignee in bankruptcy of their claims. Their silence, when they were not under any legal obligation to speak, and when they were unaware of any claim being asserted by the assignee, did not amount to concealment. They did nothing to prevent him from obtaining full information in reference to the assets of the bankrupt. The record discloses no circumstance tending to prove that they

sought to keep their claim from the knowledge of the assignee.

On the contrary, it appears in proof that Bates, the first assignee, was well acquainted with Ellis, and knew that, for many years prior to the bankruptcy, he had carried a large amount of insurance upon his life. It is true he says that he got the impression from conversation with Ellis that many of those policies had lapsed because of the latter's inability to pay the premiums. But he admitted that about the time of the bankruptcy he "learned indirectly that an assignment of some policy or policies had been made to E. Rollins Morse of Boston." He stated that his understanding with said Ellis was, "after learning of the assignment to E. Rollins Morse, that such policy or policies had some time previously passed from his control and were not a part of his assets in bankruptcy, that from such information as he, witness, received, he concluded there was no value to the creditors in such policy or policies." He acted upon this belief as to the situation, and forebore to make such inquiries as due diligence required. He did not cease to be assignee until May, 1882, nearly four years after his appointment, and more than three years after the written transfer to Morse, in trust for Ellis' daughters, had been lodged with the insurance company. If he did not know of such transfer, he could easily have ascertained what policies upon the life of the assured were in force at the time of the adjudication in bankruptcy. It is fundamental, in the rule announced in *Bailey v. Glover*, that there must not be negligence or laches upon the part of the assignee in bankruptcy in coming to the knowledge of the fraud which is the foundation of his suit, and which is relied upon to defeat the limitation of two years. A rigid enforcement of that condition is essential to meet the object of the Statute of Limitations. That object was to secure a prompt determination of all questions arising in bankruptcy proceedings and a speedy distribution of the assets of bankrupts among their creditors. A critical examination of the evidence leaves no room to doubt that, apart from any question as to concealment upon the part of the bankrupt or of his administrator, the assignee did not show such diligence as entitles him to exemption from the limitation of two years prescribed by the Statute. The court below would not have erred if it had given a peremptory instruction to find for the defendant upon the issue as to limitation.

The case presents another question raised by the defendant's requests for instructions, namely, whether, in view of the peculiar nature of contracts of life insurance, any interest which the bankrupt had in these policies—assuming that he had not, at the time of his bankruptcy, effectively transferred them for the benefit of his daughters—passed to his assignee. The defendant contended in the court below, and contends here, for the negative of this proposition, and insists that if any interest passed to the assignee, it was only such as was represented by the cash value of the policies at the time of the bankruptcy. We do not find it necessary to consider these questions, as what has been said will probably re-

sult in a disposition of the whole case under the issue as to the Statute of Limitations.

The judgment is reversed, and the cause remanded, with directions to grant a new trial, and for further proceedings consistent with this opinion

WILLIAM W. CLEARY, Assignee in Bankruptcy of MATTHIAS ELLIS, *Pff. in Err.*,

THE ELLIS FOUNDRY COMPANY.

(See S. C. Reporter's ed. 612-614.)

Affirmance on writ of error—suit by assignee in bankruptcy, when barred by Statute of Limitations.

1. Where plaintiff alone prosecutes a writ of error, the judgment will be affirmed if no error was committed to his prejudice. Although the court below erred in directing a verdict for plaintiff, by reason of the claim having been barred by the Statute of Limitations, yet the judgment will not be reversed if the defendant has not prosecuted a writ of error.
2. Where a bankrupt, at the filing of his petition in bankruptcy, has a policy of insurance on his life, and afterwards assigns the same as security for a debt; and after the death of the bankrupt, the creditor receives from the proceeds of such policy the moneys owing him, and the assignee in bankruptcy afterwards sues the creditor to recover back the moneys thus received,—such suit is a suit between the assignee and a person claiming an adverse interest, and is barred by the two years' limitation prescribed in section 5057, U. S. Rev. Stat.

[No. 79.]

Argued Dec. 13, 1889. Decided Jan. 6, 1890.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment in favor of plaintiff for the cash surrender value of a policy of insurance at the date of filing the petition in bankruptcy. *Affirmed.*

The action was brought by the assignee in bankruptcy of Ellis to recover the amount of a policy of insurance which the bankrupt held on his life at the time of the commencement of the proceedings in bankruptcy and which he afterwards assigned to the Ellis Foundry Company as collateral security for the payment of a debt due to it from Ellis. After the death of Ellis, the Foundry Company received out of the proceeds of this policy, collected by the administrator of Ellis, the amount which Ellis, at his death, owed that corporation. The Company, in its answer, besides a general denial, pleaded, in bar of the action, the Statute of Limitations of two years. The petition in bankruptcy was filed July 3, 1878; the Company received the moneys Dec. 31, 1879; this action was brought Sept. 30, 1882. The plaintiff in the action, the assignee in bankruptcy, was the only party who prosecuted a writ of error. The defendant did not prosecute a writ of error. This court affirmed the judgment, as no error was committed to the prejudice of the plaintiff and as the defendant did not prosecute a writ of error, although the action was barred by limitation, as alleged by the defendant.

The further facts are stated in the opinion.

Messrs. Nathan Moree and E. M. Johnson, for plaintiff in error:

The policy of insurance was an assignable chose in action, and had a market value.

Palmer v. Merrill, 6 Cush. 282; *St. John v. American Mut. L. Ins. Co.* 13 N. Y. 81; *Anthracite Ins. Co. v. Sears*, 109 Mass. 888.

When a policy holder has been adjudged bankrupt, the policy becomes absolutely vested in the assignee, and he has like remedies to recover the same as the bankrupt would have if he had not been adjudged a bankrupt. He has, in addition, the right to set aside a fraudulent transfer of the policy.

Vetterlein v. Barnes, 124 U. S. 169 (31:400); *Re Newland*, 7 Ben. 63; *West v. Reid*, 2 Hare, 249; *Bunyon on Life Assur.* 2d ed. 211; *Brigham v. Home L. Ins. Co.* 131 Mass. 819.

An assignment of a policy to a creditor, made by a party having a right to assign, carries the entire policy and the right to recover from the company for the whole amount due thereon.

Burroughs v. State Mut. L. Assur. Co. 97 Mass. 359; *Bailey v. New England Mut. L. Ins. Co.* 114 Mass. 177.

Mr. Joshua D. Ball, for defendant in error:

It is only in cases where the facts are clear and not in dispute, and there is substantially nothing in dispute to go to the jury, that the court will interpose and direct a verdict.

Richardson v. Boston, 60 U. S. 19 How. 263 (15:639); *Hickman v. Jones*, 76 U. S. 9 Wall. 197, 201 (19:551, 553); *Beans v. U. S.* 80 U. S. 13 Wall. 57 (20:531); *Klein v. Russell*, 86 U. S. 19 Wall. 433 (22:116); *Moulor v. American L. Ins. Co.* 101 U. S. 708 (25:1077); *Manchester v. Ericsson*, 105 U. S. 847 (26:1099); *Phoenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 80 (27:65); *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612 (28:536); *Orleans v. Platt*, 99 U. S. 676 (25:404); *Randall v. Baltimore & O. R. Co.* 109 U. S. 478 (27:1003); *Central Nat. Bank v. Royal Ins. Co.* 103 U. S. 783 (26:459); *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615 (29:224).

The Statute of Limitations applies, not only to suits to recover property belonging to the bankrupt or conveyed in fraud, but also to actions to recover money or debts owing to the bankrupt.

Jenkins v. International Bank, 106 U. S. 571 (27:804); *Bailey v. Glover*, 88 U. S. 21 Wall. 346 (22:638); *Gifford v. Helms*, 98 U. S. 253 (25:59); *Wisner v. Brown*, 122 U. S. 214 (30:1205).

Mere failure to discover the cause of action, where there is no element of concealment, does not take the case out of the Statute.

Norton v. De La Villebeuve, 18 Nat. Bankr. Reg. 304.

If he had the means of discovering the fact, his want of knowledge is to be attributed to his own want of vigilance, and not to concealment by others.

Nudd v. Hamblin, 8 Allen, 133; *Cole v. McGlathry*, 9 Me. 181; *McKown v. Whitmore*, 31 Me. 448; *Rouse v. Southard*, 39 Me. 404; *Fancy v. Cothran*, 82 Fed. Rep. 687.

Mr. Justice Harlan delivered the opinion of the court:

The statement of facts made in *Avery v. Cleary* [ante, p. 469], just decided, is, in the main, 474

applicable to the present case. The additional facts necessary to be stated are these:

On the 21st of May, 1879, Ellis made a written assignment to the Ellis Foundry Company, a Massachusetts corporation, of policy 68,429, and all his rights under it, with all moneys payable or which might be payable thereon. That corporation, at the same time, gave a writing to Ellis showing that it received the above policy as collateral security for the payment of a debt due to it from Ellis of \$5,540.14 within one year from March 1, 1879, with interest, and of all other sums of money that he might owe that Company within four years thereafter. Out of the proceeds of this policy collected by Avery as administrator of Ellis, the Foundry Company received, December 31, 1879, the sum of \$5,901.64, the amount which Ellis, at his death, owed that corporation.

The present action was brought September 30, 1882, to recover from the Company the entire amount received by it on policy 68,429. It proceeds upon the same grounds substantially as those set forth in the other suit. The defendant denied that it had collected such proceeds, and, besides controverting the material allegations of the declaration, pleaded in bar of the action the Statute of Limitations of two years.

At the close of the evidence it claimed the right to go to the jury, and presented certain prayers for instructions which the court declined to give. This claim was denied, and the court ruled, as matter of law, that upon the evidence the plaintiff was entitled to recover from the defendant only the amount the insurance company would have paid the assignee in bankruptcy as the cash surrender value of the policy at the date of the filing of the petition in bankruptcy, namely, July 8, 1878. It being agreed that such value was \$1,200, the jury were instructed to return a verdict in favor of the plaintiff for that amount, with interest from December 31, 1879, the date of the payment by Ellis' administrator to the defendant of the sum of \$5,901.64. To that instruction the plaintiff excepted, but did not present any prayers for instructions. A verdict was returned in conformity with the direction of the court, and judgment was entered thereon.

For the reasons given in the opinion in *Avery v. Cleary*, the peremptory instruction to the jury to find a verdict in favor of the plaintiff for the surrender value of policy 68,429 was erroneous. But as the defendant did not prosecute a writ of error, the judgment below must be affirmed upon the ground that no error was committed to the prejudice of the plaintiff. His action was barred by limitation; for, there can be no doubt that this suit is between the assignee and a corporation claiming an adverse interest.

Judgment affirmed.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Plff. in Err.*,

v.
LUCINDA WANGELIN.

(See S. C. Reporter's ed. 599-603.)

Removal of cause from state to federal court—joint action of trespass—condition of case at
132 U. S.

time of removal—trespass by two corporations—matter affecting the merits—fraudulent joinder of defendants.

1. An action brought in a state court against two jointly for a tort cannot be removed by either of them into the circuit court of the United States, under the Act of March 3, 1875, chap. 137, § 2, upon the ground of a separable controversy between the plaintiff and himself, although the defendants have pleaded severally, and the plaintiff might have brought the action against either alone.
2. The question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court.
3. A declaration which charges two corporations with having jointly trespassed on plaintiff's land, does not show a separable controversy between plaintiff and either defendant.
4. That one corporation is the only real defendant because the other defendant was not in existence at the time of the trespass complained of, is a matter affecting the merits of the case and not the jurisdiction, and cannot be tried on the petition to remove.
5. In this case, it was not alleged in the petition for removal, or offered to be proved, that one of the defendants was fraudulently joined for the purpose of depriving the other defendant of the right to remove the case.

[No. 169.]

Submitted Dec. 19, 1889. Decided Jan. 6, 1890.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois to review a judgment remanding this cause to the state court. *Affirmed.*

The original action was trespass, brought in a state court of Illinois against a corporation of Kentucky and a corporation of Illinois, for breaking into and entering plaintiff's close and tearing up and taking away a railroad switch. The case was removed into the circuit court of the United States upon the petition of the Kentucky corporation on the ground that there was a separate controversy between it and the plaintiff which could be fully determined between them. The petition of removal also alleged that the Illinois corporation was not incorporated at the time of the alleged trespass, that the railroad was sold under a mortgage foreclosure and conveyed by the purchasers to that corporation and was since occupied by the Kentucky corporation under a lease from the receiver.

Statement by Mr Justice Gray:

The original action was trespass, brought in a court of the State of Illinois on May 10, 1883, by Lucinda Wangelin, a citizen of Illinois, against the Louisville and Nashville Railroad Company, a corporation of Kentucky, and the Southeast and St. Louis Railway Company, a corporation of Illinois, for breaking and entering her close, and tearing up and carrying away a railroad switch, and thereby destroying the connection between a coal mine of the plaintiff and the St. Louis and Southeastern Railway, and injuring the value of

the mine, to her damage in the sum of \$6,000. The defendant corporations after being duly served with process severally pleaded not guilty.

The case was removed into the circuit court of the United States upon a petition of the Louisville and Nashville Railroad Company, alleging that there was a separate controversy between it and the plaintiff, which could be fully determined between them; and specifically alleging that the St. Louis and Southeastern Railway Company, an Illinois corporation, built and owned the railway and the switch mentioned in the declaration in 1870, and operated the railway until November 1, 1874; that thenceforth that railway was held and operated by a receiver appointed in a suit to foreclose a mortgage from that company until January 1, 1880; then by the Nashville, Chattanooga and St. Louis Railway Company under a lease from such receiver until May 1, 1880, and by the Louisville and Nashville Railroad Company under an assignment of that lease until January 27, 1881; and on November 16, 1880, was sold under a decree of foreclosure to purchasers for the Southeast and St. Louis Railway Company, and by such purchasers conveyed on January 27, 1881, to that company; that the Southeast and St. Louis Railway Company was incorporated under the Law of Illinois on November 12, 1880, and not before; that the supposed trespasses alleged in the declaration were committed, if at all, in August, 1880; that at that time "the defendant, the Southeast and St. Louis Railway Company, had no corporate or legal existence, and no existence in fact, had no stockholders, officers, agents, employes or servants, and had taken no steps whatever to become a corporation, and was not in any way acting as a corporation or otherwise;" that that company never came into possession of that railway until January 27, 1881, when it entered into a contract with the Louisville and Nashville Railroad Company, under which this Company had since operated that railway; and that at the time of the supposed trespasses this Company was in the sole and exclusive possession of that railway, operating it under the aforesaid assignment of lease.

Annexed to the petition for removal was an affidavit of the vice-president of the Louisville and Nashville Railroad Company to the truth of its allegations.

In the circuit court of the United States, the Louisville and Nashville Railroad Company, by leave of the court, filed additional pleas, setting up, among other things, the matters alleged in the petition for removal.

Upon a motion of the plaintiff to remand the cause to the state court "for reasons apparent upon the face of the record," the court on April 7, 1886, ordered it to be remanded; and on April 9, 1886, the Louisville and Nashville Railroad Company sued out this writ of error.

Mr. J. M. Hamill, for plaintiff in error:

The joinder by plaintiffs in a state court of defendants, citizens of the same State, who have no interest in the controversy and whose relation to the suit appears from the record, will not deprive the defendants in interest, citizens of another State, of the right to remove the cause to the federal courts.

Wood v. Davis, 59 U. S. 18 How. 467 (15:460); *Carnel v. Banks*, 28 U. S. 10 Wheat. 181 (6:297); *Broune v. Strode*, 9 U. S. 5 Cranch. 303 (3:108); *Boon v. Chiles*, 88 U. S. 8 Pet. 532 (8:1034).

The courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists.

McNutt v. Bland, 48 U. S. 2 How. 9 (11:159).

This court will not suffer its jurisdiction to be ousted by the mere joinder or nonjoinder of formal parties.

Wormley v. Wormley, 21 U. S. 8 Wheat. 421 (5:651); *Walden v. Skinner*, 101 U. S. 589 (25:967); *Arapahoe County v. Kansas Pac. R. Co.* 4 Dill. 277-288; *Removal Cases*, 100 U. S. 457 (25:593); *Bacon v. Rives*, 106 U. S. 99 (27:69).

This case does not fall within the rule laid down in *Peper v. Fordyce*, 119 U. S. 469 (30:435); *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535 (30:1235); *Plymouth Gold Min. Co. v. Amador & S. Canal Co.* 118 U. S. 264 (30:232); *Rand v. Walker*, 117 U. S. 340 (29:907); *Thayer v. Life Assn. of America*, 112 U. S. 717 (28:664).

It cannot be claimed that a defendant who had no existence at the time the right of action accrued is an indispensable party to a suit.

Louisville & N. R. Co. v. Ide, 114 U. S. 52 (29:63); *Pirie v. Tvedt*, 115 U. S. 41 (29:331); *Starin v. New York City*, 115 U. S. 248 (29:388); *Sloane v. Anderson*, 117 U. S. 275 (29:899).

Mr. Charles W. Thomas for defendant in error.

Mr. Justice Gray delivered the opinion of the court:

It has been often decided that an action brought in a state court against two jointly for a tort cannot be removed by either of them into the circuit court of the United States, under the Act of March 3, 1875, chap. 137, § 2, upon the ground of a separable controversy between the plaintiff and himself, although the defendants have pleaded severally, and the plaintiff might have brought the action against either alone. 18 Stat. 471; *Pirie v. Tvedt*, 115 U. S. 41 [29:331]; *Sloane v. Anderson*, 117 U. S. 275 [29:899]; *Plymouth Gold Min. Co. v. Amador & S. Canal Co.* 118 U. S. 264 [30:232]; *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535 [30:1235].

It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner—unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court.

In *Plymouth Gold Min. Co. v. Amador & S. Canal Co.*, above cited, a suit by a canal company against a mining corporation and its agents, for polluting a stream of water belonging to the plaintiff, was held to have been rightly remanded to the state court in which it had been commenced, although the corporation's petition for removal alleged that it was the only real defendant, and that the other de-

fendants were nominal parties only, and were sued for the purpose of preventing the corporation from removing the cause into the circuit court of the United States. *Chief Justice Waite* in delivering judgment said: "It is possible, also, that the company may be guilty and the other defendants not guilty; but the plaintiff in its complaint says they are all guilty, and that presents the cause of action to be tried. Each party defends for himself, but until his defense is made out the case stands against him, and the rights of all must be governed accordingly. Under these circumstances the averments in the petition, that the defendants were wrongfully made [parties] to avoid a removal can be of no avail in the circuit court upon a motion to remand, until they are proven; and that, so far as the present record discloses, was not attempted. The affirmative of this issue was on the petitioning defendant. That corporation was the moving party, and was bound to make out its case." 118 U. S. 270, 271 [30:233, 234].

In *Little v. Giles*, 118 U. S. 596 [30:269], where a bill in equity charged the defendants jointly with having fraudulently deprived the plaintiff of her property, *Mr. Justice Bradley*, delivering the opinion of the court, said that one of the defendants "could not, by merely making contrary averments in his petition for removal, and setting up a case inconsistent with the allegations of the bill, segregate himself from the other defendants, and thus entitle himself to remove the case into the United States court." 118 U. S. 600, 601 [30:270, 271].

So in *East Tennessee, V. & G. R. Co. v. Grayson*, 119 U. S. 240, 244 [30:382, 388], in a suit in equity against two corporations, the question was whether there was a separable controversy between one of them and the plaintiff which would warrant a removal into the circuit court of the United States; and it was said by *Chief Justice Waite*, and adjudged by this court, that the allegations of the bill must, for the purposes of that inquiry, be taken as confessed. To the same effect is *Graves v. Corbin* (*ante*, p. 462), just decided.

In the case at bar, the declaration charged two corporations with having jointly trespassed on the plaintiff's land. Whether they had done so or not was a question to be decided at the trial; and it is not contended, and could not be, in the face of the decisions already cited, that the record of the state court, as it stood at the time of the filing of the petition for removal, showed a separable controversy between the plaintiff and either defendant.

The argument in support of the jurisdiction of the federal court is that the Louisville and Nashville Railroad Company was the only real defendant, because, at the time of the trespass complained of, the other defendant was not in existence. But this was a matter affecting the merits of the case, and one which the plaintiff was entitled to deny and disprove at the trial upon the issues joined by the pleadings. Both the defendants were sued and served as corporations, and pleaded as such, in the state court; and it is not denied that each of them was a corporation when the action was brought. The question whether one of them was in existence as a corporation at the time of the alleged tres-

pass did not affect the question whether it could be now sued, but the question of its liability in the action; in other words, not the jurisdiction, but the merits, to be determined when the case came to trial. It could not be tried and determined in advance, as incidental to a petition by a co-defendant to remove the case into the circuit court of the United States.

As to the suggestion, made in argument, that the Southeast and St. Louis Railway Company was fraudulently joined as a defendant in the state court for the purpose of depriving the Louisville and Nashville Railroad Company of the right to remove the case into the circuit court of the United States, it is enough to say that no fraud was alleged in the petition for removal, or pleaded, or offered to be proved, in the circuit court.

Judgment affirmed.

WILLIAM H. ROBERTSON, Collector of the PORT OF NEW YORK, *Plff. in Err.*,

CHARLES A. EDELHOFF ET AL.

(See S. C. Reporter's ed. 614-626.)

Duty on ribbons for hats—directing verdict for plaintiff.

1. Ribbons composed of silk and cotton, in which silk is the component part of chief value, used exclusively as trimmings for ornamenting hats and bonnets, and which have a commercial value only for that purpose, are liable to a duty of only twenty per cent *ad valorem* under "Schedule N,—Sundries" of section 2502 of title 33, Rev. Stat. (22 Stat. 511), as enacted by the Act of March 3, 1883.
2. It is proper for the circuit court to direct a verdict for the plaintiff, where there is no question of fact for the jury, and where the defendant does not ask to go to the jury.

[No 170.]

Argued Dec. 19, 20, 1889. Decided Jan. 6, 1890.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of plaintiff for the excess of duties collected on hat ribbons or hat bands and upon certain charges and commissions and coverings. *Affirmed.*

The facts are stated in the opinion.

Mr. O. W. Chapman, Solicitor Gen., for plaintiff in error.

Messrs. Joseph H. Choate and Tremain & Tyler for defendants in error.

Mr. Justice Blatchford delivered the opinion of the court:

This is an action brought in the Superior Court of the City of New York, by Charles August Edelhoff and Emil Rinke against William H. Robertson, Collector of the Port of New York, on the 25th of March, 1884, and removed by the defendant into the Circuit Court of the United States for the Southern District of New York, to recover an excess of duties paid under protest on goods entered at the custom-house on the 20th of August, 1883, the duty having been paid on the same day.

The case was tried by Judge Coxe and a jury, on April 12th, 1886. The articles in dispute

were ribbons, composed of silk and cotton, in which silk was the component material of chief value. There was due protest and appeal. The Collector assessed a duty of 50 per cent *ad valorem* upon the goods, under the following clause in "Schedule L,—Silk and Silk Goods," in section 2502 of title 33 of the Revised Statutes, as enacted by the Act of March 3, 1883 (22 Stat. 510): "All goods, wares and merchandise, not specially enumerated or provided for in this Act, made of silk, or of which silk is the component material of chief value, fifty per centum *ad valorem*." The plaintiffs claimed in their protest and upon the trial that the goods were liable to only 20 per cent duty, under the following provision in "Schedule N,—Sundries," of the same title (Id. 512): "Hats, and so forth, materials for: Braids, plaits, flats, laces, trimmings, tissues, willow sheets and squares, used for making or ornamenting hats, bonnets and hoods, composed of straw, chip, grass, palm leaf, willow, hair, whalebone or any other substance or material not specially enumerated or provided for in this Act, twenty per centum *ad valorem*."

On the trial the undisputed evidence was that the articles in question were used exclusively as trimmings for ornamenting hats and bonnets, and had a commercial value only for that purpose. The defendant offered no evidence on that subject in contradiction of that put in by the plaintiffs. At the close of the testimony, the defendant asked the court to direct a verdict in his favor, upon the ground that the foregoing provision in schedule N, in regard to "Hats, and so forth, materials for," should be construed as embracing only articles made of a substance or material not elsewhere specially enumerated or provided for in the Act of 1883, and articles made only of straw, chip, grass, palm leaf, willow, hair, whalebone or some other like substance or material; but this request was denied by the court, and the defendant excepted. The court then, at the request of the plaintiffs, directed the jury to find a verdict in their favor, for the excess of duties collected on the hat-ribbons or hat-bands, and upon certain charges, commissions and coverings, in regard to which there was no dispute; and the defendant excepted to such action of the court. The jury found a verdict accordingly for the plaintiffs, on which a judgment was entered in their favor, to review which the defendant has brought a writ of error.

That the articles in question, silk being their component material of chief value, were liable to a duty of 50 per cent *ad valorem*, as "goods, wares and merchandise not specially enumerated or provided for in this Act, made of silk, or of which silk is the component material of chief value," if they were not specially enumerated or provided for in the Act of 1883, is plain. The question, and the only question, therefore, is whether they come under the clause, "Hats, and so forth, materials for," as being "trimmings," "used for making or ornamenting hats, bonnets, and hoods," composed of any of the seven substances specifically named, "or any other substance or material, not specially enumerated or provided for in this Act," and were thus liable to a duty of only 20 per cent *ad valorem*.

It is to be especially noted that the Act of

1888 does not, in schedule L, in regard to silk and silk goods, or elsewhere, impose any duty upon silk ribbons by that name, or upon ribbons made of silk or of which silk is the component material of chief value, otherwise than as they may be covered by the clause above quoted in regard to 50 per cent duty.

We think it perfectly clear that the words "composed of," in the 20 per-cent clause above quoted, relate to the eight articles previously specifically mentioned in that clause, and not to the words, "hats, bonnets and hoods," also, that the words in the same clause, "not specially enumerated or provided for in this Act," relate to the same eight articles, and not to the words, "hats, bonnets and hoods," or to the words, "any other substance or material." The clause is to be read as if the word "and" were inserted before the word "composed," and again after the word "material," so that the clause, as far as the question involved in the present case is concerned, would read: "Trimmings used for ornamenting hats, bonnets and hoods, and composed of" any of the seven articles specially named, "or any other substance or material, and not specially enumerated or provided for in this Act."

We cannot agree with the contention of the defendant that the words "any other substance or material" are to be read as if they were "any other *like* substance or material," because, while "straw, chip, grass, palm leaf, willow" are vegetable substances, "hair" and "whalebone" are animal substances. There is no identity of genus among the two descriptions of articles specifically mentioned; and we see no warrant for interpolating the word "like," and applying it distributively to each of the two classes of substances specifically mentioned. The contention that, in the presence of the words "any other substance or material," the naming of seven substances specifically is surplusage and without meaning, because the words "any other substance or material" are adequate to cover those seven substances, seems to us without force in view of the well-known tautological phraseology of provisions in Tariff Acts.

There is a clause in schedule N of section 2502 of title 38 of the Revised Statutes, as enacted by the Act of March 3, 1883 (22 Stat. 511), which it is proper to consider in connection with the clause in regard to "Hats, and so forth, materials for," and which reads as follows: "Bonnets, hats and hoods, for men, women and children, composed of chip, grass, palm leaf, willow or straw, or any other vegetable substance, hair, whalebone or other material, not specially enumerated or provided for in this Act, thirty per centum *ad valorem*."

It will conduce to the solution of the question in hand to consider prior legislation on the subject.

In section 22 of the Act of March 2, 1861, chap. 68 (12 Stat. 192), a duty of 30 per cent *ad valorem* was imposed on "flats, braids, plaits, sparterre and willow squares, used for making hats and bonnets," and on "hats and bonnets for men, women and children, composed of straw, chip, grass, palm leaf, willow or any other vegetable substance, or of hair, whalebone or other material, not otherwise provided for," and by section 16 of the same

Act (p. 186), the following duties were imposed on silk and silk articles: "On silk in the gum, not more advanced in manufacture than singles, tram, and thrown or organzine, fifteen per centum *ad valorem*; on all silks valued at not over one dollar per square yard, twenty per centum *ad valorem*; on all silks valued at over one dollar per square yard, thirty per centum *ad valorem*; on all silk velvets or velvets of which silk is the component material of chief value, valued at three dollars per square yard, or under, twenty-five per centum *ad valorem*; valued at over three dollars per square yard, thirty per centum *ad valorem*; on floss silks, twenty per centum *ad valorem*; on silk ribbons, galloons, braids, fringes, laces, tassels, buttons, button cloths, trimmings, and on silk twist, twist composed of mohair and silk, sewing silk in the gum or purified, and all other manufactures of silk, or of which silk shall be the component material of chief value, not otherwise provided for, thirty per centum *ad valorem*." By this provision, a duty of 30 per cent was imposed on "silk ribbons" by name. No question of the kind before us could have arisen under that Statute.

In section 8 of the Act of July 14, 1862, chap. 163 (12 Stat. 551), are found the following clauses in regard to duties: "On bonnets, hats and hoods, for men, women and children, composed of straw, chip, grass, palm leaf, willow or any other vegetable substance, or of silk, hair, whalebone or other material, not otherwise provided for, forty per centum *ad valorem*; On braids, plaits, flats, laces, trimmings, sparterre, tissues, willow sheets and squares, used for making or ornamenting hats, bonnets and hoods, composed of straw, chip, grass, palm leaf, willow or any other vegetable substance, or of hair, whalebone, or other material not otherwise provided for, thirty per centum *ad valorem*." There was no provision in that Act in regard to silk, or silks, or silk ribbons, other than the one in the first of the two clauses above quoted, in regard to bonnets, hats and hoods composed of silk. So the provision of the Act of 1861, in regard to silk, silks and silk ribbons, remained in force, and the provision in the second clause above quoted, in regard to trimmings, could not apply to silk ribbons, because they were "otherwise provided for" in the Act of 1861; though the question would not have been material, because silk ribbons were, under the Act of 1861, subject to 30 per cent duty, and the trimmings were, under the Act of 1862, subject to the same duty.

By the Act of June 30, 1864 (13 Stat. 202), duties on imports were increased, and by section 8 of that Act (p. 210), from July 1, 1864, in lieu of existing duties, the following were imposed on silk and articles of silk: "On spun silk for filling in skeins or cops, twenty-five per centum *ad valorem*. On silk in the gum not more advanced than singles, tram, and thrown or organzine, thirty-five per centum *ad valorem*. On floss silks, thirty-five per centum *ad valorem*. On sewing silk, in the gum or purified, forty per centum *ad valorem*. On all dress and piece silks, ribbons and silk velvets, or velvets of which silk is the component material of chief value, sixty per centum *ad valorem*. On silk vestings, pongees, shawls,

scarfs, mantillas, pelerines, handkerchiefs, veils, laces, shirts, drawers, bonnets, hats, caps, turbans, chemisettes, hose, mitts, aprons, stockings, gloves, suspenders, watch-chains, webbing, braids, fringes, galloons, tassels, cords and trimmings, sixty per centum *ad valorem*. On all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for, fifty per centum *ad valorem*.¹ Thus the duty on silk ribbons by name was advanced from 80 per cent, as in the Act of 1861, to 60 per cent.

No subsequent legislation until the Revised Statutes of June 22, 1874, affected the duty on silk ribbons. In "Schedule M.—Sundries," of section 2504 of the Revised Statutes (2d ed. p. 474), were contained the following provisions: "Bonnets, hats and hoods, for men, women and children, composed of chip, grass, palm leaf, willow or any other vegetable substance, hair, whalebone or other material, not otherwise provided for: forty per centum *ad valorem*; composed of straw: forty per centum *ad valorem*;" and (p. 476): "Hats, etc., materials for.—Braids, plaits, flats, laces, trimmings, tissues, willow sheets and squares, used for making or ornamenting hats, bonnets, and hoods, composed of straw, chip, grass, palm leaf, willow, or any other vegetable substance, or of hair, whalebone, or other material, not otherwise provided for: thirty per centum *ad valorem*;" and in "Schedule H.—Silks and Silk Goods" (p. 469): "Silk in the gum not more advanced than singles, tram and thrown or organzine: thirty-five per centum *ad valorem*. Spun silk for filling in skeins or cops: thirty-five per centum *ad valorem*. Floss silks: thirty-five per centum *ad valorem*. Sewing silk in the gum or purified: forty per centum *ad valorem*. Silk twist, twist composed of mohair and silk: forty per centum *ad valorem*. Dress and piece silks, ribbons and silk velvets, or velvets of which silk is the component material of chief value: sixty per centum *ad valorem*. Silk vestings, pongees, shawls, scarfs, mantillas, pelerines, handkerchiefs, veils, laces, shirts, drawers, bonnets, hats, caps, turbans, chemisettes, hose, mitts, aprons, stockings, gloves, suspenders, watch-chains, webbing, braids, fringes, galloons, tassels, cords and trimmings, and ready-made clothing of silk, or of which silk is a component material of chief value: sixty per centum *ad valorem*. Buttons and ornaments for dresses and outside garments made of silk, or of which silk is the component material of chief value, and containing no wool, worsted or goats' hair: fifty per centum *ad valorem*. Manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for: fifty per centum *ad valorem*."

Thus, in the clause in regard to "Bonnets, hats and hoods," the word "silk," found in the Act of 1862, was omitted in the Revised Statutes; and silk ribbons, or ribbons of which silk was the competent material of chief value, were made by the Revised Statutes dutiable *eo nomine* at 60 per cent, as in the Act of 1864.

Then came the Act of February 8, 1875 (18 Stat. 807), by the first section of which the following provision was made in regard to duties on silk and articles of silk, in lieu of then existing duties: "On spun silk, for filling,

in skeins or cops, thirty-five per centum *ad valorem*; on silk in the gum, not more advanced than singles, tram and thrown or organzine, thirty-five per centum *ad valorem*; on floss silks, thirty-five per centum *ad valorem*; on sewing silk, in the gum or purified, forty per centum *ad valorem*; on lastings, mohair cloth, silk twist, or other manufactures of cloth, woven or made in patterns of such size, shape or form, or cut in such manner, as to be fit for buttons exclusively, ten per centum *ad valorem*; on all goods, wares and merchandise not otherwise herein provided for, made of silk, or of which silk is the component material of chief value, irrespective of the classification thereof for duty by or under previous laws, or of their commercial designation, sixty per centum *ad valorem*: *Provided*, That this Act shall not apply to goods, wares or merchandise which have, as a component material thereof, twenty-five per centum or over in value of cotton, flax, wool or worsted."

By that Act, ribbons of silk, or ribbons in which silk was the component material of chief value, were not made dutiable *eo nomine*, but were dutiable at 60 per cent, as "goods, wares and merchandise not otherwise herein provided for, made of silk, or of which silk is the component material of chief value." They were not otherwise provided for in the Act of 1875. This Act superseded all prior statutes in regard to goods made of silk, or of which silk was the component material of chief value. Of course, under the Act of 1875, the goods in question here would have been dutiable at 60 per cent.

Then came the Act of 1888, the three provisions in which, in regard to "Bonnets, hats and hoods," "Hats, and so forth, materials for," and "Silk and silk goods," have been before quoted. The changes made in that Act from the Revised Statutes of 1874, in regard to "Bonnets, hats and hoods," were these: Those articles were qualified with the words "not specially enumerated or provided for in this Act," and the duty was reduced from 40 per cent to 80 per cent. The changes made in regard to "Hats, and so forth, materials for," were these: the words, "Willow, or any other vegetable substance, or of hair, whalebone or other material not otherwise provided for," were changed to the words, "Willow, hair, whalebone or any other substance or material, not specially enumerated or provided for in this Act," and the rate of duty was reduced from 80 per cent to 20 per cent. Changes were made in the schedule in regard to "Silks and silk goods." The duty of 60 per cent on silk ribbons *eo nomine* was omitted, and also the like duty on silk trimmings, or of which silk was the component material of chief value; and the duty of 50 per cent on "Manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for," was changed to a like duty on "All goods, wares and merchandise, not specially enumerated or provided for in this Act, made of silk, or of which silk is the component material of chief value."

Section 6 of the Act of March 3, 1888, provides that, on and after the 1st of July, 1888, "the following sections," being twenty-three sections, one of which is section 2502, with

schedules A to N, "shall constitute and be a substitute for title thirty-three of the Revised Statutes of the United States," thus abolishing all enactments found in the original title 33, in regard to duties on imports.

It is thus seen that, by the Act of 1888, no duty is imposed upon silk ribbons by name. Under the Revised Statutes of 1874 silk ribbons, being charged by name with a duty of 60 per cent, were not charged with a duty of 50 per cent as "manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for," because they were otherwise provided for; and they could not have been liable to a duty of 30 per cent as "trimmings . . . used for . . . ornamenting hats, bonnets and hoods," and not otherwise provided for, because they were otherwise provided for, in schedule H, as silk ribbons by name, at 60 per cent. But when we come to the Act of 1888, silk ribbons are not therein specifically named in schedule L or elsewhere, and are not dutiable at 50 per cent, as silk goods not specially enumerated or provided for in the Act of 1888, because in the clause in regard to "Hats, and so forth, materials for," they are specially enumerated and provided for in that Act, as trimmings used for making or ornamenting hats, bonnets and hoods, and composed of some other substance or material than the seven substances specially named, and are not otherwise specially enumerated or provided for in that Act, and are therefore dutiable at 20 per cent.

The question, however, is not only clear on principle on a review of the statutory provisions, but it is disposed of by decisions of this court.

In *Arthur v. Zimmerman*, 96 U. S. 124 [24: 770], the articles imported were composed of cotton, and were known commercially as "hat braids." The collector imposed duty upon them under that clause of section 6 of the Act of June 30, 1864 (13 Stat. 209), which provided for a duty of 85 per cent on "cotton braids, insertings, lace trimmings or bobbins, and all other manufactures of cotton." The importers claim that they were dutiable at only 30 per cent. It appeared that the articles were used exclusively for making and trimming hats and bonnets, and the circuit court and this court held them to be dutiable at only 30 per cent, under that clause of section 8 of the Act of July 14, 1862, chap. 163 (12 Stat. 557), and of schedule M of section 2504 of the Revised Statutes (2d ed. p. 476), which imposed that rate of duty on trimmings used for making or ornamenting hats, bonnets and hoods, and composed of other material than the substances specifically named, and not otherwise provided for.

But the question in regard to goods substantially identical with those in question in the present case was presented to this court and decided by it in the case of *Hartranft v. Langfeld*, 125 U. S. 128 [31: 672]. The goods in that case were imported into Philadelphia, and entered at the custom-house there in September and October, 1883. The suit was begun on the 28th of February, 1884. It was tried on April 6th, 1886. The writ of error was sued out August 5th, 1886, while the writ of error in the present case was brought September 29th, 1886. The two transcripts of record were filed

in this court the same day, October 18, 1886, but the *Langfeld Case* was advanced, on motion, and heard February 15, 1888, while the present case has stood on the docket until reached in its regular order.

The articles in the *Langfeld Case* were velvet ribbons made of silk and cotton, in which silk was the material of chief value. The collector assessed upon them a duty of 50 per cent, under that clause of schedule L of section 2502 of title 33 of the Revised Statutes, as enacted by the Act of March 3, 1883 (22 Stat. 510), before quoted, which reads as follows: "All goods, wares and merchandise, not specially enumerated or provided for in this Act, made of silk, or of which silk is the component material of chief value, fifty per centum *ad valorem*." The plaintiffs in the suit claimed, and the jury found, under the instructions of the court, that the duty ought to have been assessed under the paragraph in schedule N of section 2503 of the same title, providing for "Hats, and so forth, materials for," above quoted, and that the duty should have been only 20 per cent. The goods in question there were "trimmings," and were used "for making or ornamenting hats, bonnets and hoods." There was no evidence that they were used exclusively for that purpose. The testimony on the part of the plaintiffs tended to show that they were used chiefly for making or ornamenting hats, bonnets and hoods, but that they might also be, and sometimes were, used for trimming dresses. The testimony on the part of the defendant tended to show that they were dress trimmings equally with hat trimmings, and were commonly used as much for the one purpose as the other. The circuit court charged the jury that the use to which the articles were chiefly adapted and for which they were used, determined their character within the meaning of the Statute; and that, if the articles were hat trimmings, chiefly used for making and ornamenting hats, the jury should find a verdict for the plaintiffs, the suit having been brought by the importers against the collector, to recover the difference between 20 per cent and 50 per cent. The defendant had requested the court to charge the jury that if the articles were not specially enumerated or provided for, and silk was their component material of chief value, they were dutiable at 50 per cent, under the clause before quoted, and the verdict should be for the defendant; also, that if the jury should find that silk was the component material of chief value in them, and they were not exclusively or specially used for hat trimmings, they were not subject to the 20 per cent duty; also, that if the jury should find that the articles could properly be classified, under the above rules, as liable to 20 per cent duty, and also as liable to 50 per cent duty, they were dutiable at the higher rate, and the verdict should be for the defendant; and also that, unless the jury should find that the articles were not specially provided for, and were fitted only for use for making or ornamenting hats, their verdict should be for the defendant. The circuit court declined to give those instructions, and the defendant excepted.

It appears by the opinion of this court that it was contended here, on the part of the defendant, that the true construction of the Stat-

ute was not only that the use of the material must be for making or ornamenting hats, bonnets and hoods, but that the material itself must be in some one of the forms named in the clause regarding "Hats, and so forth, materials for." This court, however, held that, under the charge of the court as given, the objection was not well taken that the charge would have authorized a recovery if the goods in question were materials used for making or ornamenting hats, although not coming within the enumeration of the articles so specified. This court further said that the circuit court instructed the jury that they must find the goods in question to be "trimmings," chiefly used for making or ornamenting hats, bonnets and hoods, composed of a material not otherwise specially enumerated or provided for. This court also said that velvet ribbons were not specially mentioned as subject to a duty by that name or description; that they were manifestly trimmings, according to the natural meaning of that word, and because they were used to trim either hats or dresses; and that the real controversy was as to the purpose for which, as "trimmings," they were principally used. As to the request of the defendant to charge the jury that, if they should find that the articles could be classified properly as subject to 20 per cent duty and also as subject to 50 per cent duty, they were liable to duty at the higher rate, under the provision of section 2499 of the Revised Statutes, this court said that the principle of that section was not applicable to the case, because the ribbons were found by the jury to be trimmings chiefly used for making or ornamenting hats; that this brought them within the provision of schedule N, which fixed the duty at 20 per cent; and that, being thus specially provided for, they were excluded from the operation of all other provisions. On these views, this court affirmed the judgment of the circuit court.

Therefore, in addition to the conclusion which results from considering the history of the legislation on the points involved, we are of opinion that the decision in the case of *Hartman v. Langfeld* controls this case, and that it was proper for the circuit court to direct a verdict for the plaintiffs. Such practice has been often sanctioned by this court. There was no question of fact for the jury, and the defendant did not ask to go to the jury. *Bevans v. United States*, 80 U. S. 13 Wall. 56 [20:531]; *Walbrun v. Babbitt*, 83 U. S. 16 Wall. 577 [21:489]; *Hendrick v. Lindsay*, 98 U. S. 143 [28:855]; *Arthur v. Zimmerman*, 98 U. S. 124 [24:770]; *Arthur v. Morgan*, 112 U. S. 495 [28:825]; *Anderson County v. Beal*, 118 U. S. 227, 242 [28:966, 971]; *Marshall v. Hubbard*, 117 U. S. 419 [29:920]; *North Pennsylvania R. Co. v. Commercial Bank*, 128 U. S. 727, 738 [31:287, 388].

Judgment affirmed.

DAVID RICHMOND, *Plff. in Err.*,
v.

MARSHALL B. BLAKE, Collector of Internal Revenue for the SECOND COLLECTION DISTRICT OF NEW YORK.

(See S. C. Reporter's ed. 592-599.)

Banker, who is—stocks received for sale—tax on capital of a banker.

182 U. S.

1. One who has a place of business where stocks are received for sale is, by section 3407, Rev. Stat. U. S., a banker.
2. Where one has a room or place indicated by a sign over the door, where his mail matter is received, and where he can be met by his clients, and where they can deliver stocks to be sold by him, and buys and sells stocks for his customers, stocks, when delivered to him at this place of business for sale, are "received" by him "for sale," within the meaning of the Statute.
3. One who, in his business of buying and selling stocks for others, regularly employs capital, by use of which interest is earned upon moneys advanced by him for his customers, is, under the Statute, a banker, whose capital, employed in his business, is liable to a tax of one twenty-fourth of one per cent per month under section 3408, U. S. Rev. Stat.

[No. 171.]

Argued Dec. 20, 1889. Decided Jan. 6, 1890.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment for the defendant in an action to recover moneys alleged to have been illegally exacted from him under an alleged illegal assessment made upon capital employed in his business. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Henry Edwin Tremain and Mason W. Tyler, for plaintiff in error:

The business of banking is distinguished from the business of a stock broker by many peculiarities.

Markham v. Jaudon, 41 N. Y. 256; *Baker v. Drake*, 53 N. Y. 216; *Warren v. Shook*, 91 U. S. 710 (28: 428); *Clark v. Gilbert*, 5 Blatchf. 333; *Peabody v. Gilbert*, 5 Blatchf. 334, note; *U. S. v. Fisk*, 70 U. S. 8 Wall. 445 (18: 243).

Messrs. Alphonso Hart, Solicitor of Internal Revenue, and O. W. Chapman, Solicitor-General, for defendant in error:

What does and what does not constitute a banker, within the meaning of section 3407 of the Revised Statutes of the United States.

Selden v. Equitable Trust Co. 94 U. S. 419 (24: 249); *Warren v. Shook*, 91 U. S. 704 (28: 421); *U. S. v. Bank of Montreal*, 21 Fed. Rep. 236; *Oulton v. German Sav. & Loan Soc.* 84 U. S. 17 Wall. 109 (21: 618).

Mr. Justice Harlan delivered the opinion of the court:

This action was brought to recover certain sums of money paid under protest by the plaintiff in error to the United States in the years 1881, 1882 and 1883, and which he alleged were exacted from him under an illegal assessment made upon capital employed in his business.

If within the meaning of the Statutes under which the assessment was made the plaintiff was a banker, and if the capital assessed was employed in the business of banking, the judgment must be affirmed.

By section 3407 of the Revised Statutes of the United States, it is provided that "every incorporated or other bank, and every person, firm or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check or order, or where money is advanced or loaned on stocks,

bonds, bullion, bills of exchange or promissory notes, or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or for sale, shall be regarded as a bank or a banker." 13 Stat. 251, chap. 173, § 79; 14 Stat. 115, chap. 184, § 9.

Section 3408 provides that there shall be levied, collected and paid a tax of one twenty-fourth of one per centum each month upon the average amount of the deposits of money, subject to payment by check or draft, or represented by certificates of deposit or otherwise, whether payable on demand or at some future day, with any person, bank, association, company or corporation engaged in the business of banking; also, "a tax of one twenty-fourth of one per centum each month upon the capital of any bank, association, company, corporation, and on the capital employed by any person in the business of banking beyond the average amount invested in United States bonds: *Provided*, That the words 'capital employed' shall not include money borrowed or received from day to day, in the usual course of business, from any person not a partner of or interested in the said bank, association or firm." 13 Stat. 277, chap. 173, § 110; 14 Stat. 187, 146, chap. 184, § 9; 17 Stat. 625, chap. 315, § 37; 18 Stat. 311, chap. 36, § 19.

That the plaintiff, during the period covered by the assessment against him, employed a capital in his business is beyond dispute; for he distinctly states that the capital used by him in his business ranged from \$30,000 to \$50,000. Upon that basis he made his returns for taxation. But did he, during that period, have a place of business where stocks were received for sale? If he did, then, by the very terms of the Statute, he was a banker under the definition given in section 3047.

It is contended by him that he was only a stock broker, and, within the true meaning of section 3407, did not have "a place of business," nor "receive" stocks for sale. That he had a room or place, indicated by a sign over the door, where his mail matter was received, and where he was, or could be, met by his clients, and where the latter could deliver stocks to be sold by him, or under his supervision, and that he bought and sold stocks for his customers, is abundantly shown by his own testimony. Still, he insists that when stocks were delivered to him at this place of business for sale they were not "received" by him "for sale," within the meaning of the Statute. We cannot assent to this view.

In support of this position the plaintiff cites *Warren v. Shook*, 91 U. S. 704 [23: 421], and *Selden v. Equitable Trust Co.* 94 U. S. 419 [24: 249]. In the first of those cases the question was whether a firm, holding a special license as bankers, was liable to the tax imposed by section 99 of the Act of June 30, 1864. (13 Stat. 273.) That Statute imposed a tax of one twentieth of one per centum upon the par value of stock and bonds sold by "brokers and bankers doing business as brokers." It was held that Congress intended to impose the duty prescribed by section 99 upon bankers doing business as brokers, although a person, firm or company, having a license as a banker, might be exempted by subdivision nine of section 79 of the Act of 1864, as amended by the

Act of March 3, 1865 (13 Stat. 472), from paying the special tax imposed upon brokers. Nothing more is decided in that case.

In *Selden v. Equitable Trust Co.* the question was whether corporations whose business was to invest their own capital—not that of others—in bonds secured by mortgage upon real estate, and to negotiate, sell and guarantee such bonds, were banks or bankers within the meaning of section 3407 of the Revised Statutes. It was held that they were not; that Congress did not intend that a person or corporation selling its own property, not that received from other owners for sale, should be classed as a banker or bank for the purposes of taxation. The court, in that case, referred to section 3407 as describing three distinct classes of artificial and natural persons, distinguished by the nature of their business: first, those who have a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check or order; second, those having a place of business where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes; third, those having a place of business where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or for sale. In respect to the third class it was said: "The language of the Statute is, 'where' such property is 'received' 'for discount or for sale.' The use of the word 'received' is significant. In no proper sense can it be understood that one receives his own stocks and bonds, or bills or notes, for discount or for sale. He receives the bonds, bills or notes belonging to him as evidences of debt, though he may sell them afterwards. Nobody would understand that to be banking business. But when a corporation or natural person receives from another person, for discount, bills of exchange or promissory notes belonging to that other, he is acting as a banker; and when a customer brings bonds, bullion or stocks for sale, and they are received for the purpose for which they are brought, that is, to be sold, the case is presented which we think was contemplated by the Statute. In common understanding, he who receives goods for sale is one who receives them as agent for a principal who is the owner. He is not one who buys and sells on his own account."

This language embraces the present case. The plaintiff was not a broker who, without employing capital of his own, simply negotiated purchases and sales of stocks for others, receiving only the usual commissions for services of that character. In his business of buying and selling stocks for others, he regularly employed capital, by the use of which interest was earned upon moneys advanced by him for his customers, substantially as it would be earned by a bank upon money loaned to its customers. In the parlance of the Stock Exchange, he might be called a stock broker; yet, here were all the conditions, which, under the Statute, made the case of a banker, whose capital, employed in his business, was liable to a tax of one twenty-fourth of one per centum each month. It is not a sufficient answer to this view to say that the business of a stock broker is ordinarily distinct from the business of a banker, or that according to the common

understanding a stock broker is not a banker. A stock broker may do some of the kinds of business that are usually done by bankers, and many banks and bankers do business which, as a general rule, is only done by stock brokers. Congress did not intend that the question of taxation upon capital employed in the business of banking should depend upon the mere name given to such business, either by those engaged in it or by others. When the plaintiff admits, as he does, that his business was that of buying and selling stocks for his customers, and that in such business he employed capital, he proves that he was a banker within the statutory definition, and that, within the meaning of section 8408, his capital was employed in the business of banking. He brings himself within the rule that Congress prescribed for determining who, for the purposes of the taxation in question—though not necessarily in the commercial sense—were bankers and what was banking business. That rule is expressed in words that leave no doubt as to what was the intention of Congress. *The judgment below gives effect to that intention, and it is affirmed.*

Mr. Justice Field and Mr. Justice Miller dissent.

THE UNITED STATES, *Appt.*,
v.
JESSE D. CARR.

(See S. C. Reporter's ed. 644-655)

Mail contract, construction of—acquiescence—presumption that public officers have done their duty, extent of—delinquency in carrying the mails—assumption.

1. Where, in a contract for carrying the mails, places are designated as on the line of the mail route from one point to another and back, the contractor is required to return through the same places on his way back. He cannot return by a shorter route.
2. In order to establish an acquiescence equivalent to assent in a certain mode of dealing with the subject matter of the contract, the burden is on the contractor to show knowledge or information, by the Department, of his conduct in the premises.
3. The presumption that public officers have done their duty is not a substitute for proof of an independent and material fact.
4. Although it is the duty of a postmaster to report to the Postmaster-General every delinquency of a contractor, yet it is not to be assumed that he reported a delinquency, unless proof is given that he had knowledge of it.
5. The certificate of the second assistant postmaster-general that the mails had been carried without any delinquencies so far as shown by the returns received, indicates that the "returns received" did not show the nonperformance of the contractor.
6. Where it appears from the findings that the first information received by the Postmaster-General that the mail was not carried as contracted for was at a certain date, it will not be assumed that the responsible officers of the Department knew of the manner of its being carried before that time, or acquiesced therein.

[No. 411.]

Submitted Dec. 3, 1889. Decided Jan. 6, 1890.
182 U. S.

A PPEAL from a judgment of the Court of Claims in favor of the petitioner to recover compensation for carrying the mail under a contract with the Postmaster-General to carry the United States mail from Salinas City to Gabilan, California, and back from Gabilan to Salinas City. *Reversed.*

Petitioner carried the mails from Salinas City to Gabilan by way of Santa Rita and Natividad, a circuitous route in length 15 miles, and, on the return trip he carried them directly from Gabilan to Salinas City, a distance of about 10 miles, without passing through Natividad and Santa Rita. The compensation named in the contract was paid to him for over three years and then was refused on the ground that he had not performed his contract as he had not carried the mails on his return trip through Natividad and Santa Rita. The Postmaster-General also deducted from other contracts for carrying the mails by him certain amounts, on account of moneys which had been paid him on the first-named contract, on account of his failure to carry the mails on the return trip over the same route; that he carried them on the outward trip.

Reported below, 22 Ct. Cl. 152.

Statement by Mr. Chief Justice Fuller:

Carr filed his petition against the United States in the Court of Claims on the 17th of February, 1885, averring that the Postmaster-General entered into a contract in writing with him in April, 1878, for carrying the mails of the United States from Salinas City, in the State of California, to Gabilan, in that State, and back from Gabilan to Salinas City, for the annual sum of \$796, a copy of which contract he attached to his petition; that at the time of the letting of the contract, and for upwards of four years prior thereto, the mails were carried upon the route aforesaid, outward from Salinas to Santa Rita, a distance of three miles, and from Santa Rita to Natividad, a distance of four miles, and from the last-named place to Gabilan, a distance of eight miles, and on the return trip direct from Gabilan to Salinas, a distance of about ten miles, without passing through Natividad and Santa Rita; that he believed that the mode of transportation last aforesaid was established under the authority of the Postmaster-General for said route, and proposed to carry the mails upon said route for the compensation aforesaid, upon the understanding that the mails were, during the term of the contract, intended by said proposal to be carried in the manner before stated; that he commenced service under the contract July 1, 1878, and for four years, including the 30th day of June, 1882, carried the mails six times a week from Salinas, by way of Santa Rita and Natividad, to Gabilan, and back direct from Gabilan to Salinas, by a direct line, not passing through Natividad and Santa Rita; that the compensation was paid up to January 1, 1882, but not from the first of January to the first of July, 1883; and that the Postmaster-General has refused to pay petitioner the sum of \$398, the amount of compensation due for the period last mentioned, upon the ground that petitioner had not performed his contract, inasmuch as he had not carried the mails from Gabilan to Salinas by way of Natividad and Santa Rita.

Petitioner further alleged that at the letting he presented proposals to the Postmaster-General for carrying the mails upon four other routes for the period of four years, namely, from July 1, 1878, to June 30, 1882, and obtained contracts therefor at certain compensation in the proposals named; that from the compensation due on the last-named contracts, \$348.25 was withheld on account of the first-named contract, and there was also deducted from the four last contracts the sum of \$35.92, for certain alleged delays in the transportation of the mail. Petitioner therefore prayed judgment for the sum of \$782.17.

The findings of fact and conclusion of law are as follows:

"I.

"In April, 1878, the Postmaster-General and the claimant entered into a contract to carry the mails on route No. 46,118, in the State of California, from Salinas, by Santa Rita and Natividad, to Gabilan, and back, six times a week, for the annual sum of \$796. The material portions of said contract are set forth in finding V.

"II.

"The mails were carried on said route under said contract for four years, commencing July 1, 1878, and ending June 30, 1882, as follows:

"The mails were carried by the claimant from Salinas, by way of Santa Rita and Natividad, to Gabilan, and back to Salinas, by a direct route from Gabilan to Salinas. The distance from Salinas, by Santa Rita and Natividad, to Gabilan is 12 miles; the distance from Gabilan to Salinas by a direct route is 10 miles.

"That the said route was operated by the claimant since the year 1870, the mails being always carried in the same manner in which the same was carried by the claimant, namely, from Salinas, by way of Santa Rita and Natividad, to Gabilan, and from Gabilan to Salinas direct, and until the date of the certificate of inspection of the 12th of May, 1882, have always been certified as duly carried and paid for accordingly by the Postoffice Department. The provisions of the contract under which said service was performed were in all respects similar to the provisions of the contract sued on.

"III.

"For the failure of claimant to carry the mails *via* Santa Rita and Natividad, as aforesaid, from July 1, 1878, to March 31, 1882, the Postmaster-General, upon May 13, 1882, entered a deduction from his compensation of \$746.25, which deduction equals one quarter of the total compensation fixed by the contract for whole service under it during the period covered by the alleged delinquency.

"There is no proof that any subsequent failure to said date of the claimant to carry the United States mail *via* Santa Rita and Natividad has ever come to the notice of the Postmaster-General or the Postoffice Department.

"IV.

"In the advertisement of November 1, 1877, inviting proposals for carrying the mails of the United States in certain States and Territories, the Postmaster-General invited bids for carrying said mails on the following route in California, to wit:

"'46,118. From Salinas, by Santa Rita and Natividad, to Gabilan, 15 miles and back, six times a week.

"'Leave Salinas daily, except Sunday, at 1 P. M.;

"'Arrive at Gabilan by 7 P. M.;

"'Leave Gabilan daily, except Sunday, at 6 A. M.;

"'Arrive at Salinas by 12 M.

"'Bond required with bid, \$1,800.'

"V.

"'No. 46,118. \$796.

"'This article of contract, made on the 15th of March, 1878, between the United States of America (acting in this behalf by the Postmaster-General) and J. D. Carr, contractor, and A. B. Jackson, of Salinas, Monterey County, California, and George Pomeroy, of Salinas, Monterey County, California, as his sureties, witnesseth: That whereas J. D. Carr has been accepted, according to law, as contractor for transporting the mail on route No. 46,118, from Salinas, Cal., by Santa Rita and Natividad, to Gabilan and back, six times a week, at \$796 per year, for and during the term beginning July 1, 1878, and ending June 30, 1882.

"'For which services, when performed, the said J. D. Carr, contractor, is to be paid by the United States the sum of \$796 a year, to wit: Quarterly, in the months of November, February, May and August, through the postmasters on the route, or otherwise, at the option of the Postmaster-General; said pay to be subject, however, to be reduced or discontinued by the Postmaster-General, as hereinafter stipulated, or to be suspended in case of delinquency.

"'It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease or extend the service, in accordance with law, he allowing a *pro rata* increase of compensation for any additional service thereby required, or for increased speed, if the employment of additional stock or carriers is rendered necessary; and in case of decrease, curtailment or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for the service retained: *Provided, however,* That, in case of increased expedition, the contractor may, upon timely notice, relinquish the contract.

"'It is hereby also stipulated and agreed by the said contractor and his sureties as aforesaid that they shall forfeit—

"'1. The pay of a trip when it is not run, and, in addition, if no sufficient excuse for the failure is furnished, an amount not more than three times the pay of the trip.

"'2. At least one fourth of the pay of the trip when the running is so far behind time as to fail to make connection with a depending mail.

"'3. For violating any of the foregoing provisions touching the transmission of commercial intelligence more rapidly than by mail; or giving preference to passengers or freight over the mail or any portion thereof, or

for leaving the same for their accommodation; or carrying, otherwise than in the mail, matter which should go by mail; or transporting persons engaged in so doing, with knowledge thereof, a penalty equal to a quarter's pay.

"4. For violating any other provision of this contract touching the carriage of the mails, or the time and manner thereof, without a satisfactory explanation of the delinquency, in due time, to the Postmaster-General, a penalty in his discretion. That these forfeitures may be increased into penalties of a higher amount, in the discretion of the Postmaster-General, according to the nature or frequency of the failure and the importance of the mail: *Provided*, That, except as herein otherwise specified, and except as provided by law, no penalty shall exceed three times the pay of a trip in each case."

* * * * *

[Duly signed, sealed and delivered.]

"VI.

" 'CERTIFICATE OF INSPECTION.

" 'POST-OFFICE DEPARTMENT,

" 'OFFICE OF THE SECOND ASSISTANT POSTMASTER-GENERAL,

" 'DIVISION OF INSPECTION,

" 'Washington, D. C., October 23, 1878.

" 'Sir: I hereby certify that the mails have been carried by contractors in accordance with provisions of contract, or orders, on routes stated herein by number in the State of California, without any failures or delinquencies, so far as shown by returns received, for the quarter ended September 30, 1878.

* * * "46,118 * * *

" 'J. L. French,

" 'Acting Second Assistant Postmaster-General.

" 'To the Auditor of the Treasury
for the Postoffice Department.'

"On March 22, 1882, Second Assistant Postmaster-General addressed a letter to the postmaster at Natividad and received information from him on April 6, 1882, that the mail was not carried from Gabilan by way of Natividad and Santa Rita, and that such had been the practice since the present contractor had the contract. The postmaster at Santa Rita certified to the Postmaster-General that such had been the practice since he became postmaster. The date of the letters as to the continuance of the mode of carrying the mails was May 1, 1882.

"CONCLUSION OF LAW.

"Upon the foregoing facts the court determines, as a conclusion of law, that the claimant is entitled to recover the sum of \$746.25."

Judgment was thereupon rendered in favor of the petitioner for \$746.25, from which the defendant appealed to this court. The opinion of the Court of Claims will be found in 22 Ct. Cl. 152.

Messrs. W. H. H. Miller, Atty-Gen., and Heber J. May, Assistant Attorney, for appellant.

Messrs. A. J. Willard and Sam'l M. Lake for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court:

The amount sued for was \$782.17, of which
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the sum of \$35.92, the aggregate of some small deductions upon other contracts, was disallowed by the Court of Claims, and that result accepted by the claimant.

It appears from the third finding that the Postmaster-General deducted from the claimant's compensation, under contract No. 46,118, \$746.25, "which deduction equals one quarter of the total compensation fixed by the contract for whole service under it during the period covered by the alleged delinquency;" being the three years and three quarters from July 1, 1878, to March 31, 1882. It follows, then, that the contractor performed the service for the months of April, May and June, 1882, as required by the contract, as hereafter considered. As to \$898 of the \$746.25, that sum was withheld from the compensation under the contract in question, the last two quarters not having been paid, but the balance of \$348.25 was deducted from moneys coming to the petitioner on other contracts, and he contends that it should not have been so deducted, because that amount had been voluntarily paid by the United States, and therefore could not be recovered back. But if the contractor was not entitled to \$746.25 of the compensation provided by this contract, and if payments were made thereon up to the last two quarters by mistake, for service that had not been performed, or under such circumstances as brought them within section 4057 of the Revised Statutes, then the payments could be recovered back, and their deduction in part from other money coming to petitioner was proper in the settlement of the accounts between the parties.

Section 4057 is as follows:

"In all cases where money has been paid out of the funds of the Post-Office Department under the pretence that service has been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and in all other cases where money of the Department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion or misconduct of any officer or other employé in the postal service, the Postmaster-General shall cause suit to be brought to recover such wrong or fraudulent payment or excess with interest thereon."

This section was applied in *United States v. Barlow*, 132 U. S. 271, 281 [38:346, 851], and *Mr. Justice Field*, in delivering the opinion, quotes with approval the language of *Baron Parke* in *Kelly v. Solari*, 9 Mees. & W. 54, 58, that "where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it;" and adds: "Reasons for the application of the rule are much more potent in the case of the contracts of the government than of contracts of individuals; for the government must necessarily rely upon the acts of agents,

whose ignorance, carelessness, or unfaithfulness would otherwise often bind it, to the serious injury of its operations." Nothing more need be said on this point, and this brings us to the real question in the case.

Claimant contracted to carry the mails "from Salinas, by Santa Rita and Natividad, to Gabilan, 15 miles and back." The time to be taken on the trip was specified at six hours each way. There is no ambiguity in this contract, from which a doubt could arise as to whether the return route was to be identical with the outward route. Where places are designated as on the line of a mail route from one point to another and back, no reason is perceived for their omission on the return. There may be instances where retracing the road is not deemed important, or is impracticable in view of particular exigencies; but if so, the difference in route would be specified. And where the transportation is for a given number of miles and back, this does not mean the number named one way and an indefinite and less number the other.

The contractor was clearly required to return to Salinas from Gabilan by the same way he went to Gabilan from Salinas.

The Court of Claims did not take any other view of the language of the contract, but determined the case to the contrary upon the ground that the contract had been otherwise "construed by the claimant, and the responsible power of the defendants, and that construction became and was the contract at the time the services were performed covered by the period of deductions." This conclusion is reached as to the Post-Office Department upon the reasoning that as "it was the duty of the postmasters connected with the mail route at the termini to report to the Department the manner in which the service was performed, and the presumption is that they performed their duty and that the Department was advised, not only during the time of the performance of the contract in controversy, but the antecedent contracts, covering the same service embraced in contract No. 46,118," and as the evidence was "that on October 23, 1878, the acting second assistant postmaster-general certified to the auditor of the treasury for the Post-Office Department that for the quarter ending September 30, 1878, there had been no failure or delinquency in the execution of the contract upon the part of the contractor;" and as "it is safe to assume that for all preceding payments the same certificate was made, based upon reports furnished by the postmasters connected with route No. 46,118;" the acts of "the responsible officers of the Department being in possession of the same information and knowledge" as the postmasters, "commit the defendant to the construction of the agreement as placed upon it by the parties who performed the labor of its execution, and who were cognizant of the mode in which it was performed."

The Department did not direct or affirmatively permit the contractor to pursue the course he did, and if he could recover in whole or in part, upon the ground of an acquiescence equivalent to assent in a certain mode of dealing with the subject matter of the contract, the burden was on him to show knowledge or information by the Department of his conduct

in the premises. No evidence to establish such knowledge or information having been adduced, the case was made to rest upon the presumption that the postmasters at the termini, where the schedules of the time of the arrival and departure of the mails were kept and registers thereof made and returned, were acquainted with the terms of the contract and claimant's noncompliance therewith, and, this being presumed, upon the further presumption that they must have reported the failure in performance to the Department.

In *United States v. Ross*, 92 U. S. 281, 284 [23: 707, 708] *Mr. Justice Strong*, speaking for the court, says:

"The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. Best, in his *Treatise on Evidence*, section 300, says: 'The true principle intended to be asserted by the rule seems to be, that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy.' Nowhere is the presumption held to be a substitute for proof of an independent and material fact."

Section 3849 of the Revised Statutes provides that "every postmaster shall promptly report to the Postmaster-General every delinquency, neglect or malpractice of the contractors, their agents or carriers, which comes to his knowledge."

By none of the findings of fact is it shown that the delinquency in question ever came to the knowledge of the postmasters at the termini of this mail route. But under finding VI. it appears that "on March 22, 1882, second assistant postmaster-general addressed a letter to the postmaster at Natividad and received information from him on April 6, 1882, that the mail was not carried from Gabilan by way of Natividad and Santa Rita, and that such had been the practice since the present contractor had the contract. The postmaster at Santa Rita certified to the Postmaster-General that such had been the practice since he became postmaster. The date of the letters as to the continuance of the mode of carrying the mails was May 1, 1882;" and from finding III., that the Postmaster-General instantly repudiated that manner of carrying the mails, and that they were not so carried for the remaining quarter under the contract.

Of course the postmasters at Santa Rita and Natividad knew that the mails did not come back through those places, but it does not follow that they were aware that the contractor was obliged so to carry them. Indeed, as they made no effort to have this state of things remedied, so far as appears, it is rather to be presumed that they were not aware that it was the result of the delinquency of the contractor.

The fact of knowledge on the part of the

postmasters of the delinquency, from which the inference is drawn that they reported it, was a fact to be proven and not to be presumed. If they knew of the delinquency it was undoubtedly their duty to report it, but it is not to be assumed that they did report it, without some evidence of such knowledge; and upon this record the irresistible inference is that the delinquency, if reported, would not have been permitted to continue.

The certificate of the second assistant postmaster-general is dated October 23, 1878, and states that the mails had been carried "without any failures or delinquencies, so far as shown by returns received, for the quarter ended September 30, 1878." As the contract was a plain one, and was not performed according to its terms, we think this certificate indicates clearly that the "returns received" did not show the nonperformance. So far from strengthening the alleged presumption that the postmasters reported the facts as they existed, its effect is to the contrary. What they did report, in fact, is not shown; and, inasmuch as under finding VI. no other inference can be drawn than that the first information that the Postmaster-General had that the mail was not carried from Gabilan by way of Natividad and Santa Rita, was April 6, 1882, we cannot accept the conclusion that the responsible officers of the Department were in possession of information and knowledge of the conduct of the contractor before that time, and acquiesced in the manner in which he carried the mails during the period in question, or during the preceding years, in respect to which it is found that he so operated the route under a similar contract.

We can find nothing in the findings to justify us in holding that the Department paid this claimant the full measure of his compensation prior to March 31, 1882, with knowledge of the manner in which he was performing the work, or that the Department ever put the interpretation upon the contract which is now contended for, or induced the contractor to enter into the contract by reason of any such interpretation on its part. The deduction of \$746.25 was properly made, and the conclusion of law on the facts found was erroneous.

The judgment is reversed, and the cause remanded with directions to enter judgment for the United States.

THOMAS H. MILLER ET AL., *Appls.*,

v.

THE TEXAS AND PACIFIC RAILWAY
COMPANY ET AL.

MARTHA R. WORRALL ET AL., *Appls.*,

v.

THE TEXAS AND PACIFIC RAILWAY
COMPANY ET AL.

WILLIAM DUNLAP ET AL., *Appls.*,

v.

THE TEXAS AND PACIFIC RAILWAY
COMPANY ET AL.

(See S. C. Reporter's ed. 662-693.)

Texas' decree—contingent limitations and executory devises, when bound by decree—abandoned location of Texas land—rights of subsequent locator—compliance with statute—possession as notice—Rutledge title—land certificates, chattels—effect of location—estoppel by warranty in deed—Statute of Limitations.

done location of Texas land—rights of subsequent locator—compliance with statute—possession as notice—Rutledge title—land certificates, chattels—effect of location—estoppel by warranty in deed—Statute of Limitations.

1. A decree of the district court of a county of Texas having the proper jurisdiction, declaring a will of lands in Texas to be void, is a valid decree, where all the necessary parties were before the court when it was rendered.
2. Contingent limitations and executory devises to persons not in being may be bound by a decree against a person claiming a vested estate of inheritance; but a person in being claiming under an executory devise, not subject to any preceding vested estate of inheritance by which it may be defeated, must be made a party to a suit affecting his rights.
3. A settler may abandon one location of land in Texas and adopt another, and the land in the abandoned location then becomes public land, subject to location by other parties.
4. A subsequent locator having actual notice of a prior location will be postponed to the superior rights of the prior locator, although the subsequent location has passed into a patent.
5. The failure of the prior locator to comply with a statute requiring the survey to be returned to the land office within eight months under a penalty of being void, inures to the benefit of the State and not to the benefit of the subsequent locator.
6. Where one is in notorious possession of land, no other person can lay any new location upon it, without being charged with full knowledge of the claim of ownership of the possessor.
7. As between the parties in this suit, the Rutledge title must prevail, and it is a sufficient protection to the defendants against the title set up in the cross-bills.
8. Texas land certificates are chattels, and may be sold by parol agreement and delivery, whereby the purchaser acquires a right to locate the land and procure a patent in the name of the grantee, but for his own use, he becoming thereby the equitable owner of the land located.
9. A location of lands under such a certificate, by the owner or his agent, gives a title and possession good against the State and all other persons claiming by inferior title.
10. In Texas, the clause in a deed "to have and to hold to the grantee, his heirs and assigns forever, free from the just claim or claims of any and all persons whomsoever, claiming or to claim the same," is a general warranty and carries to the grantee, by estoppel, a subsequent title which comes by inheritance to the grantor.
11. In that State, where the Statute of Limitations has commenced to run against a party, it is not suspended by his death, and the period of limitation cannot be extended by the connection of one disability with another. The Statute of Limitations is a bar to the claims set up by the complainants, both in the original and in the cross-bills.

[Nos. 787, 867, 868.]

Submitted Jan. 2, 1889. Decided Jan. 6, 1890.

APPEALS from a decree of the Circuit Court of the United States for the Northern District of Texas dismissing the original and cross-bills; the bill being filed to maintain the alleged equitable title to land by Thomas H. Miller and others, claiming as devisees of Rutledge, and

the cross-bills being filed by Dunlap and Worrall and others. *Affirmed.*

The action was brought originally in the District Court of Tarrant County, Texas, as an action of trespass to try title and to recover possession of 320 acres of land in the City of Fort Worth. Much of the land is laid out in streets and covered with buildings, and about 100 acres of it is occupied by tracks, station-houses, depots and shops of railroad companies. The suit was removed into the Circuit Court of the United States for the Northern District of Texas. In that court a repleader took place on the equity side of the court. Thomas H. Miller and others, claiming as devisees of Rutledge, filed a bill to maintain their alleged equitable title to the land and made the other parties defendants, who all filed answers; and the intervenors, Dunlap and others, and Worrall and others, also filed separate cross-bills, to which the other parties filed answers. The land in question, when the title set up by the complainants originated, to wit, in 1852 and 1868, was of small value, but, having become the site of a portion of the City of Fort Worth, it has acquired a very great value.

The facts are fully stated in the opinion.

Mr. F. G. Morris, for Miller *et al.*, appellants:

In proceedings *in rem*, notice of some kind, either general or special, actual or constructive, is essential to the exercise of jurisdiction.

Windsor v. McVeigh, 93 U. S. 274 (23: 914); *Earle v. McVeigh*, 91 U. S. 503 (23: 398); *Woodruff v. Taylor*, 20 Vt. 65.

The rules of common law and equity as to parties to suits apply in this State except in cases governed by statutes.

Whiting v. Turley, Dall. Dec. 454; *Jackson v. Alexander*, 8 Tex. 109; *Denison v. League*, 16 Tex. 399; *Connell v. Chandler*, 11 Tex. 249; *Allison v. Shilling*, 27 Tex. 450.

The rules of common law and equity as to the form and effect of judgments are administered in this State, in the absence of statutes governing a subject.

Hall v. Harris, 11 Tex. 300; *McCoy v. Crawford*, 9 Tex. 353; *Hulme v. Janes*, 6 Tex. 242; *Morrison v. Loftin*, 44 Tex. 22.

The executor, if sued as such in a suit to contest the will, did not so represent these plaintiffs' devisees as to bind them by the judgment.

Moore v. Guest, 8 Tex. 117; *Parker v. Parker*, 10 Tex. 83; *Hagerty v. Bagerty*, 12 Tex. 456; *Vickery v. Hobbs*, 21 Tex. 570; *Becton v. Alexander*, 27 Tex. 659; *Franks v. Chapman*, 61 Tex. 576.

In suits by or against the trustee for the recovery of the trust property, the beneficiary is a necessary party.

Boles v. Linthicum, 48 Tex. 224; *Huffman v. Cartwright*, 44 Tex. 296; *Hall v. Harris*, 11 Tex. 300; *Holland v. Baker*, 3 Hare, 72; *Woodward v. Wood*, 19 Ala. 213; *Van Doren v. Robinson*, 16 N. J. Eq. 256; *Richards v. Richards*, 9 Gray, 313; *Ward v. Hollins*, 14 Md. 158; 1 Daniell, Ch. Pr. (5th ed.) 220, and *note*; Story, Eq. Pl. § 207; 2 Perry, Trusts, § 878.

All devisees and legatees, as well as the executors, are necessary parties to a suit to set aside a will, and they would not be bound by the judgment unless they were made parties.

McArthur v. Scott, 118 U. S. 340 (28: 1015); *Reformed Presbyterian Church v. Nelson*, 85 Ohio St. 642; *Holt v. Lamb*, 17 Ohio St. 384; *McMaken v. McMaken*, 18 Ala. 576; *Brown v. Riffin*, 94 Ill. 560; *Vance v. Beam*, 2 Dana (Ky.) 155; *Rogers v. Thomas*, 1 B. Mon. 890; *Eddie v. Parke*, 31 Mo. 513; *Singleton v. Singleton*, 8 B. Mon. 340; *Connolly v. Connolly*, 32 Gratt. 657; *Pomeroy, Remedies and Remedial Rights*, § 264; *Haws, Parties to Actions*, § 22.

No person is bound by a judgment, in a collateral proceeding or elsewhere, to which he has not become a party in person or by representative.

Hulme v. Janes, 6 Tex. 242; *Hall v. Harris*, 11 Tex. 300; *McCoy v. Crawford*, 9 Tex. 353; *Morrison v. Loftin*, 44 Tex. 23.

William Rutledge did not represent these plaintiffs in said suit.

McArthur v. Scott, 118 U. S. 340 (28: 1015); *Lanchester v. Thompson*, 5 Madd. 413; *Calvert, Parties*, 44, 169; *Monarque v. Monarque*, 80 N. Y. 320; *Downin v. Sprecher*, 35 Md. 474.

The survey in question presumed to be made by authority of the owner of the certificate until the contrary is shown.

Poor v. Boyce, 12 Tex. 440; *Hollingsworth v. Holshausen*, 25 Tex. 628; *Steel v. Finley*, 8 Yeates (Pa.) 169; *Galt v. Galloway*, 29 U. S. 4 Pet. 332 (7: 876).

The forfeiture, if any, could only be enforced by due process of law.

Snider v. Melvin, 60 Tex. 487; *Hamilton v. Avery*, 20 Tex. 612; *Sherwood v. Fleming*, 25 Tex. Supp. 408; *Wright v. Hawkins*, 28 Tex. 452; *Burleson v. Durham*, 46 Tex. 157; *Schulenberg v. Harriman*, 88 U. S. 21 Wall. 44 (22: 551); *Ruch v. Rock Island*, 97 U. S. 693 (24: 1101).

No presumption from long possession against remaindermen.

Arnold v. Stevens, 24 Pick. 106; *Salmons v. Davis*, 29 Mo. 181; *Wells v. Prince*, 9 Mass. 508; *Wallingford v. Hearl*, 15 Mass. 471; *Heath v. White*, 5 Conn. 228; *May v. Hill*, 5 Litt. (Ky.) 313; *Holt v. Lamb*, 17 Ohio St. 374; *Jackson v. Schoonmaker*, 4 Johns. 390; *Bradford v. Caldwell*, 2 Head (Tenn.) 496; *Williams v. Conrad*, 11 Humph. 412.

No limitation against these plaintiffs while they were remaindermen, during the continuation of the life estate.

Holt v. Lamb, *supra*; *Pendley v. Madison*, 83 Ala. 484; *McCorry v. King*, 3 Humph. 267; *McLtvain v. Porter* (Ky.) 7 S. W. Rep. 309; *Jackson v. Schoonmaker* and *Bradford v. Caldwell*, *supra*.

If plaintiffs ever acquired the life tenant's right of entry, they also acquired another right of entry at her death which is not barred.

Hartley's Digest, art. 168, §§ 59, 60; *Stevens v. Winship*, 1 Pick. 318; *Doe v. Danvers*, 7 East, 321; *Hunt v. Burns*, 2 Salk. 422.

The defendants' claim under the Rutledge title was not such "title or color of title" as would support the three years' Statute of Limitations.

Marsh v. Weir, 21 Tex. 97; *Hussey v. Moser*, 70 Tex. 42; *Castro v. Wurzbach*, 18 Tex. 128; *Brownson v. Scanlan*, 59 Tex. 222; *Long v. Brennehan*, 59 Tex. 210; *Cannon v. Vaughan*, 12 Tex. 399; *Newman v. Dallas*, 26 Tex. 642;

Smith v. Power, 28 Tex. 80; *Thompson v. Cragg*, 24 Tex. 582.

A deed to the wife's separate property without her separate acknowledgment is null and void, and will not support the three years' Statute of Limitations.

Berry v. Donley, 26 Tex. 787; *Fitzgerald v. Turner*, 43 Tex. 79; *Johnson v. Bryan*, 62 Tex. 623.

No warranty, only non-claim, deed.

Pike v. Galvin, 29 Me. 185; *Partridge v. Paten*, 33 Me. 483; *Loomis v. Pingree*, 43 Me. 314; *Jackson v. Bradford*, 4 Wend. 622; *Read v. Fogg*, 60 Me. 481; *Blanchard v. Brooks*, 12 Pick. 47; *Patterson v. Pease*, 5 Ohio, 190; *Kercheval v. Triplett*, 1 A. K. Marsh. 493; *Dougal v. Fryer*, 3 Mo. 40; *Raymond v. Holden*, 2 Cush. 264; *Wallace v. Miner*, 6 Ohio, 370; *Connor v. McMurray*, 2 Allen, 204.

No estoppel from setting up the truth, when the truth does not contravene the deed or acts in making it.

Wheelock v. Henshaw, 19 Pick. 341; *Cuthbertson v. Irving*, 4 Hurl. & N. 742; *Pelletreau v. Jackson*, 11 Wend. 110, 118; *Pargeter v. Harris*, 7 Q. B. 708.

A survey by a valid land certificate is a right which the State could not take away.

Sherrwood v. Fleming, 25 Tex. Supp. 408; *Wright v. Hawkins*, 28 Tex. 471; *Burleson v. Durham*, 46 Tex. 157; *Patrick v. Nance*, 26 Tex. 301; *Snider v. Methvin*, 60 Tex. 499.

The United States court, after removal of the case to it, had power to grant full relief to plaintiffs, if they have shown a good equitable title.

Dewey v. West Fairmont Gas Coal Co. 123 U. S. 329 (81: 179); *Pacific R. Co. v. Missouri Pac. R. Co.* 111 U. S. 506 (28: 499); *Krippendorf v. Hyde*, 110 U. S. 276 (28: 145).

Relief should be to compel conveyance to plaintiffs of the legal title and delivery of possession.

White v. Cannon, 78 U. S. 6 Wall. 443 (18: 923); *Silver v. Ladd*, 74 U. S. 7 Wall. 219 (19: 138); *Meador v. Norton*, 78 U. S. 11 Wall. 442 (20: 184).

Defendants not entitled to affirmative relief without filing cross-bill.

Ford v. Douglas, 46 U. S. 5 How. 148 (12: 89); *Bronson v. LaCrosse & M. R. Co.* 67 U. S. 2 Black, 528 (17: 359); *Hubbard v. Turner*, 2 McLean, 519; *Morgan v. Tipton*, 3 McLean, 389; *Chapin v. Walker*, 6 Fed. Rep. 794, 2 McCrary, 175.

Mr. J. M. Morphis, for Martha R. Worrall et al., appellants:

The acknowledgment, for lack of any certificate of privity examination of Adaline S. Worrall, is neither in form nor substance a compliance with the Texas statutes, and the deed to which it is annexed is therefore wholly ineffectual to pass the title to the property attempted to be conveyed, which is recited to be the sole and separate property of Adaline S. Worrall, and is absolutely void.

Berry v. Donley, 26 Tex. 787; *Fitzgerald v. Turner*, 43 Tex. 79; *Johnson v. Bryan*, 62 Tex. 623; *Looney v. Adamson*, 48 Tex. 619.

The court erred in holding that the heirs of I. R. Worrall were estopped by the warranty or assurance clause of the deed.

Schaffner v. Grutzmacher, 6 Iowa, 137; *Childs*

v. McChesney, 20 Iowa, 431; *Blain v. Harrison*, 11 Ill. 386; *Pike v. Galvin*, 29 Me. 185; *Partridge v. Paten*, 33 Me. 483; *Loomis v. Pingree*, 43 Me. 314; *Jackson v. Bradford*, 4 Wend. 622; *Read v. Fogg*, 60 Me. 481; *Blanchard v. Brooks*, 12 Pick. 47; *Patterson v. Pease*, 5 Ohio, 190; *Kercheval v. Triplett*, 1 A. K. Marsh. 493; *Dougal v. Fryer*, 3 Mo. 40; *Raymond v. Holden*, 2 Cush. 264; *Wallace v. Miner*, 6 Ohio, 370; *Connor v. McMurray*, 2 Allen, 204; *Strawn v. Strawn*, 50 Ill. 33; *Jackson v. Vanderheyden*, 17 Johns. 167; *Griffin v. Sheffield*, 38 Miss. 359; *Sinclair v. Jackson*, 8 Cow. 543.

Mr. Sawnie Robertson, for Dunlap et al., appellants:

Where the present enjoyment of a chattel involves a consumption of the thing itself any future limitation over is void.

Annin v. Vandoren, 14 N. J. Eq. 187; *Gray*, Restraints on Alienation, §§ 53, 58; *Tiedeman*, Real Prop. § 546; *Washb.* Real Prop. 724; *Smith v. Bell*, 31 U. S. 6 Pet. 68 (8: 822).

The Millers, appellants, are bound by the order of the District Court of Gonzales County setting aside the probate of said will.

Newson v. Chrisman, 9 Tex. 117; *Franks v. Chapman*, 60 Tex. 50, 61 Tex. 577; *Parker v. Parker*, 10 Tex. 36; *Moore v. Guest*, 8 Tex. 117.

The failure to deny material averments is an admission of the facts contained in such averments, and such admission is conclusive against the pleader.

Story, Eq. Pl. § 605; *Woods v. Morrell*, 1 Johns. Ch. 107; *Hunter v. Bradford*, 3 Fla. 285; *Barrow v. Bailey*, 5 Fla. 23; *Welcker v. Price*, 2 Lea (Tenn.) 667; *Robinson v. Stewart*, 10 N. Y. 194; *Jackson v. Hart*, 11 Wend. 349; *Hoboken Sav. Bank v. Beckman*, 33 N. J. Eq. 53; *Sayre v. Fredericks*, 16 N. J. Eq. 205; *Parkman v. Welch*, 19 Pick. 234; *Hudgins v. Kemp*, 61 U. S. 20 How. 52 (15: 855).

The evidence clearly establishes an abandonment of the survey.

Johnson v. Eldridge, 49 Tex. 507; *House v. Talbot*, 51 Tex. 463; *McKinney v. Grassmeyer*, 51 Tex. 382; *Wyllie v. Wynne*, 26 Tex. 44; *Booth v. Upshur*, 26 Tex. 73; *Frederick v. Hamilton*, 38 Tex. 388.

The heirs of John Childress—John and George—taking under the legislative grant of the State of Texas, would take all of the title to the lands secured by virtue of that certificate.

McKinney v. Brown, 51 Tex. 94; *Causici v. La Coste*, 20 Tex. 269; *Todd v. Masterson*, 61 Tex. 619.

A tenant in common of a land certificate has a right to make a location for his own benefit to the extent of his interest.

Parker v. Spencer, 61 Tex. 155; *Farris v. Gilbert*, 50 Tex. 356; *Glasscock v. Hughes*, 55 Tex. 479; *Galveston City Co. v. Scott*, 42 Tex. 535.

The Statute as to an acknowledgment of a deed by a married woman has been repeatedly construed by the Supreme Court of Texas.

Cross v. Everts, 28 Tex. 532; *Berry v. Donley*, 26 Tex. 746; *Langton v. Marshall*, 59 Tex. 296; *Johnson v. Bryan*, 62 Tex. 623; *Looney v. Adamson*, 48 Tex. 621.

The Statute of Limitations does not commence to run against a party claiming under the government until the right accrues to the claimant.

Smith v. Power, 23 Tex. 29; *Lindsey v. Miller*, 81 U. S. 6 Pet. 666-673 (8: 538); *Chiles v. Calk*, 4 Bibb, 354; *Kimbro v. Hamilton*, 28 Tex. 560.

When one holding a deed to land described by metes leases part of said land to a tenant by specified metes, then the possession of said tenant is only co-extensive with the bounds specified in the lease, and not with the whole tract.

Texas Land Co. v. Williams, 51 Tex. 61; *Cunningham v. Frandteen*, 26 Tex. 34; *Read v. Allen*, 68 Tex. 158.

The possession of one tenant in common is the possession of all.

Moody v. Butler, 68 Tex. 210; *Towery v. Henderson*, 60 Tex. 297; *Teal v. Terrell*, 58 Tex. 262.

The recital of one deed in another binds the parties and those who claim under them by matters subsequent.

Carver v. Jackson, 29 U. S. 4 Pet. 82 (7: 761); *Crane v. Morris*, 81 U. S. 6 Pet. 611 (8: 514); *Hardy v. De Leon*, 5 Tex. 244; *Kimbro v. Hamilton*, 28 Tex. 561; *Peters v. Clements*, 46 Tex. 115; *Sprig v. Bank of Mt. Pleasant*, 35 U. S. 10 Pet. 264 (9: 416); *Deery v. Cray*, 72 U. S. 5 Wall. 802 (18: 655).

When a conveyance of land, purchased with community funds, or the separate funds of a husband, is made to the wife by the husband or by his direction, the presumption as between the husband and wife and against others not claiming as bona fide purchasers, is that the conveyance was intended as a gift to the wife.

Smith v. Strahan, 16 Tex. 314; *Story v. Marshall*, 24 Tex. 305; *Smith v. Boquet*, 27 Tex. 507; *Peters v. Clements*, 46 Tex. 114.

The cross-bill filed by William Dunlap and his co-appellants was proper, and the relief prayed should have been granted.

8 Pomeroy, Eq. Jur. 416, § 1877, notes 2 and 3; *Schenck v. Peay*, 1 Woolw. 175-184; Freeman, Co-tenancy, §§ 504, 515.

Mr. A. S. Lathrop, for the Texas & Pacific Railway Company *et al.*, appellees:

Unlocated land certificates, being personal property, are the subject of verbal sale and delivery, and such sales are not within the Statute of Frauds and need not be in writing.

Randon v. Barton, 4 Tex. 292; *Cox v. Bray*, 28 Tex. 247; *Johnson v. Newman*, 43 Tex. 640; *Parker v. Spencer*, 61 Tex. 164; *Campbell v. Texas & N. O. R. Co.* 2 Woods, 270, 271; *Stone v. Brown*, 54 Tex. 334.

Wm. Rutledge was "vested with a remainder over in fee."

Croxall v. Shererd, 72 U. S. 5 Wall. 287 (18: 579); *Buford v. Holkiman*, 10 Tex. 572.

When the owner of the first vested estate of inheritance is a party to the proceedings, the decree is binding upon the remainderman.

Pomeroy, Rem. § 262; Freeman, Judgments, (8d ed.) § 172; *Redmond v. Collins*, 4 Dev. L. 430, 27 Am. Dec. 223, 224; *Meade v. Rutledge*, 11 Tex. 44, 45; *Thomas v. Jones*, 10 Tex. 54, 55; *McAnear v. Epperson*, 54 Tex. 223; *Wheeler v. Ahrenbeak*, 54 Tex. 536; *Jones v. Parker*, 67 Tex. 78.

A judgment of a domestic court of competent jurisdiction upon a subject matter within the ordinary scope of its power and proceedings, is entitled to absolute verity in a collateral action.

Fitch v. Boyer, 51 Tex. 336; *Murchison v.*

White, 54 Tex. 82, 83; *Tennell v. Breedlove*, 54 Tex. 543; *Treadway v. Eastburn*, 57 Tex. 213; *Mikeeka v. Blum*, 68 Tex. 44.

The probate proceedings were proceedings *in rem*, not subject to collateral attack, and binding upon and conclusive of the rights of complainants and all other persons.

Big. Est. (4th ed.) 211; 2 Redf. Wills. (3d ed.) *63, and note 39; *Steele v. Renn*, 50 Tex. 481; *Hodges v. Baughman*, 8 Yerg. 186; *Scott v. Calvit*, 3 How. (Miss.) 143, 153; *State v. McGlynn*, 20 Cal. 271; 3 Redf. Wills, 63; *Orr v. O'Brien*, 55 Tex. 156; *Box v. Lawrence*, 14 Tex. 555; *Franks v. Chapman*, 61 Tex. 579, 580; *Parker v. Parker*, 10 Tex. 86; Wells, Res Adjudicata, 340, § 426; *Singleton v. Singleton*, 8 B. Mon. 356; *Ballou v. Hudson*, 13 Gratt. 682; *Irwin v. Scriber*, 18 Cal. 504-507; *Deslonde v. Darrington*, 29 Ala. 95; *Woodruff v. Taylor*, 20 Vt. 65; *Wooley v. Russ*, 24 La. Ann. 482; *Hunt v. Acers*, 28 Ala. 580; *Wills v. Spraggins*, 3 Gratt. 555.

Bringing a suit to set aside a will is an election to claim against it.

George v. Bussing, 15 B. Mon. 559; *Little v. Birdwell*, 27 Tex. 688; 2 Redf. Wills (3d ed.) *253, § 66.

If the devisee of property for life declines to accept the devise, it vests in possession in those to whom it is limited in remainder.

Jarman, Wills (5th ed. by Bigelow) *574; *Yeaton v. Roberts*, 28 N. H. 459; *Adams v. Gillespie*, 2 Jones, Eq. 244; *Macknet v. Macknet*, 24 N. J. Eq. 277; 2 Washb. Real Prop. (4th ed.) top p. 719; Tiedeman, Real Prop. § 396; Wms. Real Prop. *207; 2 Washb. Real Prop. 554, § 22; *Holderby v. Walker*, 3 Jones, Eq. 46; *Thompson v. Hoop*, 6 Ohio St. 480; *Holt v. Lamb*, 17 Ohio St. 387.

The legal title draws to itself the seisin and possession.

Whitehead v. Foley, 28 Tex. 289; *Horton v. Crawford*, 10 Tex. 888.

Under the Texas statutes, disabilities cannot be accumulated.

White v. Latimer, 12 Tex. 62; *Thompson v. Cragg*, 24 Tex. 588; *Ford v. Clements*, 13 Tex. 597; *Huntton v. Nichols*, 55 Tex. 217; *Becton v. Alexander*, 27 Tex. 659; Angell, Lim. (3d ed.) § 479.

The Statute begins to run from the time the cause of action first accrued.

Horton v. Crawford, 10 Tex. 890; *Erhard v. Hearne*, 47 Tex. 478; *Harrison Machine Works v. Reigor*, 64 Tex. 89; *McDonald v. McGuire*, 8 Tex. 369; *McArthur v. Scott*, 113 U. S. 407 (28: 1086); *Connolly v. Hammond*, 58 Tex. 17; *Thomas v. White*, 3 Litt. (Ky.) 177; *Holloway v. Holloway*, 30 Tex. 175; *Burleson v. Burleson*, 28 Tex. 417.

The possession of Daggett was constructive notice of the nature of his claim; the registration of his deed from Johnson was notice. Such possession was notice to appellants and all other persons.

Woodson v. Collins, 56 Tex. 175; *Heath v. White*, 5 Conn. 228; *Jackson v. Schoonmaker*, 4 Johns. 390; *Woodson v. Smith*, 1 Head, 277.

The mere failure to sue, or to enter during the time limited, does not bar the title; but there must have been adverse possession, continued for the statutory length of time.

Neddy v. State, 8 Yerg. 249; *Smith v. Mc*

Call, 2 *Humph.* 168; *Angell*, *Lim.* (3d ed.) § 369, and *note 4*.

The saving of the Statute is only to those to whom the right of action first accrues.

Huntton v. Nichols, 55 *Tex.* 217; *Becton v. Alexander*, 27 *Tex.* 659; *Angell*, *Lim.* (3d ed.) § 479.

In a contest between two different grantees, both claiming under patents from the State, the junior patent will be color of title sufficient to support the three years' Statute of Limitations against the elder patent.

League v. Rogan, 59 *Tex.* 432, 438; *Galan v. Goliad*, 32 *Tex.* 776; *Stafford v. King*, 30 *Tex.* 277; *Whitehead v. Foley*, 28 *Tex.* 12.

A deed from a tenant in common to a specific portion of a tract held in common, is not void.

Arnold v. Cauble, 49 *Tex.* 533; *Fitch v. Boyer*, 51 *Tex.* 347; *Camoron v. Thurmond*, 56 *Tex.* 33; *Rutherford v. Stamper*, 60 *Tex.* 447.

Such a deed is color of title, and will be sufficient to support the plea.

League v. Rogan, 59 *Tex.* 429; *Pearson v. Burditt*, 26 *Tex.* 157; *Wofford v. McKinna*, 23 *Tex.* 43; *Downs v. Porter*, 54 *Tex.* 59.

However defective the title under which the party in possession claims, it is nevertheless such color of title as to make the possession adverse.

Angell, *Lim.* § 404; *Pillow v. Roberts*, 54 *U. S.* 18 *How.* 472 (14: 228); *Wright v. Mattison*, 59 *U. S.* 18 *How.* 56 (15: 283); *Beverly v. Burke*, 9 *Ga.* 448; *Mossely v. Withie*, 26 *Tex.* 726; *Weisinger v. Murphy*, 2 *Head*, 679; *Wright v. Kleyla*, 2 *West. Rep.* 217, 104 *Ind.* 228; *Freeman, Co-Ten. and Part.* (2d ed.) §§ 197, 224, and *note 2*; *Wood*, *Lim.* 526, § 259, *note 10*; *Angell*, *Lim.* (3d ed.) § 404, *note 1*; *Downs v. Porter*, 54 *Tex.* 59; *Erhard v. Hearne*, 47 *Tex.* 478.

Daggett's possession was continuous and extended to the limits of the boundaries, as described in the deed under which he held.

Cantagrel v. Von Lupin, 58 *Tex.* 578; *Whitehead v. Foley*, 28 *Tex.* 285; *Parker v. Baines*, 65 *Tex.* 608, 609.

The demand of appellants was stale, and on that ground a court of equity would refuse to enforce it.

Hume v. Beale, 84 *U. S.* 17 *Wall.* 336 (21: 602); *Russell v. Transylvania University*, 14 *U. S.* 1 *Wheat.* 432 (4: 129); *McKnight v. Taylor*, 42 *U. S.* 1 *How.* 161 (11: 86); *Hayward v. Eliot Nat. Bank*, 96 *U. S.* 611 (24: 855); *Carlisle v. Hart*, 27 *Tex.* 350; *Connolly v. Hammond*, 51 *Tex.* 648; *Parker v. Spencer*, 61 *Tex.* 155.

Worrall's deed of the land in controversy, belonging to the community estate of himself and his wife, was sufficient to convey, even though the property stood of record in the name of his wife.

Poe v. Brownrigg, 55 *Tex.* 138; *Pisley v. Huggins*, 15 *Cal.* 131, 132.

If a deed is void only as against one of two grantors, but not as to the other, as in case of a deed of the wife's land by the husband and wife, with a defective privy examination of the wife, the deed will be effectual as an estoppel on the grantor as to whom it is valid, though not as to the other.

Irion v. Mills, 41 *Tex.* 315; *Big. Estoppel*, (4th ed.) 340, and *note 4*; *Freeman, Co-Ten. and Part.* (2d ed.) § 207.

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If Worrall had no interest in the land, his subsequent interest in the same, as against the heirs of the grantor, passed by estoppel or rebutter to the grantee.

Big. Estoppel, (4th ed.) 387, 388; *Hannon v. Christopher*, 34 *N. J. Eq.* 459; *Cocks v. Rogan*, 5 *Ark.* 698; *McWilliams v. Nisly*, 2 *Serg. & R.* 517; 3 *Washb. Real Prop.* (4th ed.) 104; *Ruffin v. Johnson*, 5 *Heisk.* 604; *Rawle*, *Cov.* (4th ed.) 445, 446; *Nixon v. Carco*, 28 *Miss.* 426; *Doyle v. Peerless Petroleum Co.* 44 *Barb.* 240; *Richardson v. Levi*, 67 *Tex.* 359; *Sedg. & Waite*, *Trial of Title*, § 850, and *note 1*; *Gould v. West*, 32 *Tex.* 352, 353; *Harrison v. Boring*, 44 *Tex.* 262.

The law presumes that whatever is acquired during marriage is community property.

Wright v. Hays, 10 *Tex.* 130; *De Blane v. Lynch*, 28 *Tex.* 25; *Cooke v. Bremond*, 27 *Tex.* 457; *Lott v. Keach*, 5 *Tex.* 394; *Johnson v. Burford*, 39 *Tex.* 242.

Recitals in a deed bind all persons who are parties thereto; but this rule does not extend to that which is merely descriptive, or an averment which is not essential.

Osborne v. Endicott, 6 *Cal.* 149, 65 *Am. Dec.* 499; *Den v. Chaffin*, 3 *Dev. L.* 108, 22 *Am. Dec.* 712; *Joeckel v. Easton*, 11 *Mo.* 118, 47 *Am. Dec.* 143, 144; *Spicer v. Spicer*, 16 *Abb. Pr. N. S.* 112; *McGeary's Appeal*, 72 *Pa.* 365.

It is an indispensable requisite of an estoppel that it must be reciprocal; "both parties must be bound, or neither is estopped."

Schuhman v. Garratt, 16 *Cal.* 100; *Lansing v. Montgomery*, 2 *Johns.* 383.

The property was purchased during the coverture, with community funds, and belongs to the community, and not the separate estate of Mrs. Worrall.

Zorn v. Turner, 45 *Tex.* 521; *McDaniel v. Weiss*, 53 *Tex.* 259; *Chapman v. Allen*, 15 *Tex.* 282; *Parker v. Chance*, 11 *Tex.* 513; *Huston v. Curt*, 8 *Tex.* 240; *Wallace v. Campbell*, 54 *Tex.* 89.

The mere direction of the husband to make the conveyance in the name of the wife, does not rebut the legal presumption.

Smith v. Strahan, 16 *Tex.* 316; *Higgins v. Johnson*, 20 *Tex.* 390; *Mitchell v. Marr*, 28 *Tex.* 331; *Story v. Marshall*, 24 *Tex.* 305; *Cooke v. Bremond*, 27 *Tex.* 457; *Baker v. Baker*, 55 *Tex.* 577; *Parker v. Coop*, 60 *Tex.* 118; 1 *Perry*, *Trusts*, (3d ed.) § 133.

Daggett did not recognize the superior title to be in Worrall by purchasing from him.

Freeman, Co-Ten. and Part. (2d ed.) § 106; *Towery v. Henderson*, 60 *Tex.* 297.

Equity may presume a partition.

Freeman, Co-Ten. and Part. (2d ed.) § 408. A partition of lands may be made orally.

Huffman v. Cartwright, 44 *Tex.* 301; *Johnson v. Johnson*, 65 *Tex.* 87.

The right of the owner of the certificate to land attaches at the date of his file and application, and cannot be defeated by the act of the officer.

De Montel v. Speed, 53 *Tex.* 339; *Hamilton v. Avery*, 20 *Tex.* 635; *Sherwood v. Fleming*, 25 *Tex. Supp.* 408; *Milam County v. Bateman*, 54 *Tex.* 163; *Gullett v. O'Connor*, 54 *Tex.* 408.

A patent issued on a junior location is voidable at the suit of the party having the prior right.

League v. Rogan, 59 Tex. 427; *Decourt v. Sprout*, 66 Tex. 368.

Intervenor appellants are each and all of them barred of their right of recovery, by reason of the different Statutes of Limitation, and because their demand is stale.

Hunton v. Nichols, 55 Tex. 217; *Holloway v. Holloway*, 80 Tex. 175; *Burleson v. Burleson*, 28 Tex. 417; *Watson v. Hopkins*, 27 Tex. 642; *Whitehead v. Foley*, 28 Tex. 284.

Mr. Justice Bradley delivered the opinion of the court:

This suit was originally an action of trespass to try title, brought in March, 1884, in the District Court of Tarrant County, Texas, by William L. Foster and his children, William D. Foster and others, against Elizabeth J. Daggett and her husband, E. B. Daggett, and The Texas and Pacific Railway Company, The Missouri Pacific Railway Company, The Fort Worth and Denver Railway Company and The Gulf, Colorado and Santa Fé Railway Company, to recover possession of 320 acres of land in the City of Fort Worth. Much of the land in question is laid out in streets and covered with buildings, and nearly 100 acres of it is occupied by the said Railroad Companies, or some of them, for their tracks, station-houses, freight depots, shops, etc. The plaintiffs claimed title as heirs at law of one Thomas P. Rutledge, through Eliza A. Foster, wife of William L. Foster, and mother of the other plaintiffs, who had been the wife and widow of said Rutledge, and mother of his only son, deceased. The defendants filed answers, claiming the lands under an alleged purchase from Rutledge of his head-right certificate under which the lands were located, and also under an independent title derived by purchase from the heirs of one John Childress; and also by long and undisturbed possession. No patent for the lands had ever been granted on the Rutledge title, which was older than the Childress title; but a patent was granted on the latter in June, 1868; so that the various claims under the Rutledge title were of an equitable character, which, in the Texas jurisprudence, is equally available with the legal title.

In October, 1884, Thomas H. Miller and others, children of one Alsey S. Miller, intervened in the suit as plaintiffs, claiming the same land as devisees of Thomas P. Rutledge.

On the 20th of April, 1885, William Dunlap and others filed their petition in the suit, claiming one-half interest in the lands as heirs at law of Adaline S. Worrall, wife of one I. R. Worrall; and on the 28d of March, 1886, Martha R. Worrall and others intervened as plaintiffs, claiming the other half interest in the lands as heirs at law of said Adaline, through the said I. R. Worrall. The Dunlaps and the Worralls claim under the same right, and allege that Adaline S. Worrall became entitled to the lands by purchase from the heirs of John Childress, and that, on her dying without issue in 1870, her brothers and sisters, represented by William Dunlap and others, inherited one half of her interest, and her husband, I. R. Worrall, represented by his mother, Martha R. Worrall, and others, inherited the other half.

In December, 1885, the original plaintiffs,

William L. Foster and his children, took a nonsuit, and were dismissed out of the case, leaving three sets of claimants to the land, to wit, (1) the original defendants, the Daggetts and the Railroad Companies, who were in possession, claiming under all the titles; (2) Thomas H. Miller and others, claiming as devisees of Thomas P. Rutledge; (3) the Dunlaps and the Worralls, claiming under John Childress, through Adaline S. Worrall.

In March Term, 1886, the last set of claimants, William Dunlap and others, and Martha R. Worrall and others, who were citizens of other States than Texas, removed the proceedings into the Circuit Court of the United States for the Northern District of Texas; and in that court a repleader took place on the equity side of the court. Thomas H. Miller and others, claiming as devisees of Rutledge, filed a bill to maintain their alleged equitable title to the land, and made the other parties defendants, who all filed answers; and the intervenors, Dunlap and others and Worrall and others, also filed separate cross-bills, to which the other parties filed answers. The court below dismissed both the original and cross-bills and this appeal is brought from that decree.

The land in question, when the titles set up by the complainants originated in 1852 and 1868, was of small value; but having become the site of a portion of the City of Fort Worth, and of an important railroad center, it has acquired a very great value, and is the subject of earnest litigation.

The Rutledge title originated under a head-right for 320 acres of land in Texas, granted in October, 1846, to Thomas P. Rutledge as an emigrant, by the Board of Land Commissioners of Gonzales County, where he then resided. It is alleged by the defendants, and proof was adduced to show, that Rutledge sold this certificate to one Matthew Brinson in or about 1848, and that Brinson sold it to one M. T. Johnson in 1851. It was located by Johnson (in Rutledge's name) on the premises in dispute in 1851 or 1852, and a survey in pursuance of such location was made January 8, 1852, by A. J. Lee, deputy surveyor for the Robertson Land District. It had previously been located on lands in Fannin County, but the evidence shows (as we think) that that location was abandoned, and that the location on the lands in dispute took the place of it.

The following is a copy of the survey made by Lee, to wit:

"The State of Texas, Robertson Land District.

"I have surveyed for Thomas P. Rutledge 320 acres of land situated in Tarrant County, about $\frac{1}{2}$ of a mile S. E. from Fort Worth and $\frac{1}{4}$ miles S. 44 W. from Birdville, by virtue of his head-right certificate No. 184, class 3rd, issued by the board of land comm'rs for Gonzales County on the 12th day of October, 1846—

"Beginning at the S. E. cor. of W. W. Warnell's 1,280 sur., now in the name of R. Briggs, at a stake, whence a hackberry 2 in. di. brs. S. 67 E. 77 vs. and an elm 2 in. di. brs. N. 68 W. in the head of a hollow; thence west 1,344 vs. to said Warnell's S. W. cor., a stake and mound in prairie; thence south 1,344 vs. to a stake and mound in prairie; thence east 1,344

vs. to a stake and mound in prairie; thence north 1,344 vs. to the place of beginning.

"Surveyed the 8th day of January, 1852.

"A. J. Lee, D. S. R. L. D.,

"Mercer Fain & T. I. Johnson, Chainers."

This survey was duly recorded in the records of the land district and filed in the General Land Office of the State; but no patent was issued upon it.

The tract thus surveyed was an exact square of 1,344 varas or 1,244½ yards on each side. One E. M. Daggett located another tract of 320 acres somewhere in the same neighborhood, and in the year 1853 or 1854 he made an exchange with Johnson for the lot in question, and in June, 1855, Johnson executed to Daggett a deed, of which the following is a copy, to wit:

"The State of Texas, County of Tarrant:

"Know all men by these presents that I, M. T. Johnson, of the State and county aforesaid, for and in the consideration of the three-hundred-and-twenty-acre land certificate issued by the Board of Land Commissioners of Shelby County, in the name of E. M. Daggett, class 3rd, and as deeded to me by said Daggett this day, I have bargained, sold and aliened unto the aforesaid E. M. Daggett all and singular the head-right certificate of T. P. Rutledge, and I warrant and defend the right and title of said head-right to his heirs or legal representatives free from myself and heirs, &c., & place E. M. Daggett forever in full ownership, the said head-right being located near Fort Worth, bounded on the east by a survey in the name of M. T. Johnson, a colony certificate, and on the west by a survey made of Jennings, and on the north by a survey in the name of Rebecca Briggs, all to be divested from me, my heirs or any person claiming the same, and placing E. M. Daggett, his heirs or legal representatives, in full ownership of the same forever.

"Given under my hand and seal this 28rd day of June, A. D. 1855.

"M. T. Johnson. [L. s.]

"Attest: Julian Feild.

"John P. Smith."

This deed was duly proved and recorded on the 80th day of March, 1857. Daggett, according to the weight of the testimony, went into possession of the land in 1854, prior to the date of the deed; built upon and improved it, and occupied it as his homestead (with the exception of such portions as he sold or leased to other parties), until his death April 19th, 1888. The defendants Elizabeth J. Daggett and her husband claim portions of the land under the will of said E. M. Daggett, and the Railroad Companies claim other portions as his grantees; and both allege that the possession of said E. M. Daggett and of themselves under him has been continuous for nearly thirty years prior to the commencement of the suit; namely, from the time when said Daggett first took possession of the land in 1854; and that such possession has been under a deed duly registered from the time the said deed was given by Johnson to Daggett.

T. H. Miller & Co., the complainants, deny that Rutledge ever sold his head-right certificate to Brinson, or anyone else, and claim that

its location on the land in question inured to the benefit of Rutledge alone, and to themselves as his devisees, under a will made, by him on the 7th of June, 1848. That will is in evidence. By it Rutledge devised, first, all his property to his wife, Eliza A. Rutledge, for 21 years after his death; and after giving some directions about certain specific personal property, devised as follows:

"Fifth. I direct that after the expiration of twenty-one years from and after my death, all of my estate, both real and personal, shall be owned and enjoyed by my offspring or child or children by my said wife. . . .

"Seventh. In the event of the death of my said wife without offspring by me at her death which may survive her, I direct that all of my estate, real and personal, shall be owned equally by the children of Alsey S. Miller which may survive me, which he may have by his present wife.

"Eighth. In the event of the death of the offspring which I may have by my said wife, I direct that my said wife shall have all of my estate, both real and personal, for and during her life. . . .

"Ninth. I do appoint the said Alsey S. Miller, of said county and State, my executor of this my last will and testament."

Rutledge died on the 10th of January, 1850, leaving surviving him his wife, Eliza A. Rutledge, and an infant son, William M. Rutledge, who was born after the making of the will, but who died in 1854, about six years of age. Eliza A. Rutledge, after her husband's death, married William L. Foster in July, 1850, by whom she had several children, and died in February, 1881.

The will was regularly proved in April, 1850, by Alsey S. Miller, the executor, whose wife was a sister of Eliza A. Rutledge, and whose children were the devisees in remainder named in the will. It will be seen that the said remainder was a contingent one, to vest only in case of the death of the testator's wife without offspring by him. It was also limited after the fee which was primarily given to the testator's child.

More than two years after the probate of the will, proceedings were instituted by William L. Foster and his wife Eliza A. Foster, in the District Court of Gonzales County, having the proper jurisdiction, to have the will declared null and void. Alsey S. Miller, the executor, was made defendant, and the court appointed S. B. Conley guardian *ad litem* for William M. Rutledge, the infant child of the testator. The petition for nullity of the will alleged that the property of the deceased was community property; that the will was made before the birth of the child; that the disposition made was contrary to law, and trammelled with illegal and embarrassing conditions. It further stated that the executor had faithfully performed his trust, had paid all debts of the estate, and was ready to close it. The executor filed an answer, admitting the allegations of the petition, and not opposing its prayer. The guardian *ad litem* filed an answer, leaving the matter under the control of the court to act in its wise discretion as to justice should seem meet. The court thereupon made a decree as follows:

"Saturday, October 28d, 1852.

"Came all the parties by their att'ys, and S. B. Conley, Esq., guardian *ad litem* for the minor, W. M. Rutledge, and the matters and things being all before the court by the pleading and record evidence therein, the same was submitted to the court, and, being heard, it is ordered, adjudged and decreed by the court that the will of the deceased, Thomas P. Rutledge, made on the 7th June, 1848, and admitted to probate on the 29th April, 1850, be, and the same is hereby, declared to be null, void and of no effect, and that the same be in all things set aside and held for naught. It is further ordered, adjudged and decreed that the said Eliza Ann Foster, as relict of said Rutledge, deceased, and the said W. M. Rutledge, minor, be entitled to take, receive and hold all the property of said deceased jointly between them as heirs-at-law, be the same real, personal or mixed, and subject to the action of the County Court of Gonzales County as to distribution after the debts are paid and estate closed by the report of the executor, whose acts under the will are not impaired by this decree, and that said court is required to make the yearly allowance to the said Eliza Ann Foster, in accordance with law and the order of said county court. It is further ordered and adjudged that the executor, out of the funds of the estate, pay the costs herein expended, and that this decree be duly certified to the county court for observance."

If this decree is valid, it disposes of the claim of the complainants Thomas H. Miller and others, which is based on the devise of the will. The precise question came before the Supreme Court of Texas in the recent case of *Thomas H. Miller et al. v. W. L. Roster et al.* (not yet reported), and was decided against the contention of the appellants Miller *et al.* The Commission of Appeals held that the decree of nullity was valid, and that all the necessary parties were before the court when it was rendered. This decision was approved by the Supreme Court.

It is contended by appellants that the decision in the case of *McArthur v. Scott*, 118 U. S. 840 [28:1015], is adverse to this view. But a careful examination of that case will show that this is not correct. The decree setting aside the will in that case was held not to be binding upon certain grandchildren of the testator, not born when it was passed, because their interests (which were executory) were supported by a legal trust estate in the executors, which was not represented in the proceedings. No trustee of that estate was made a party. The executors had resigned their office, and the court had accepted their resignation; and no new trustee had been appointed in their stead, as might have been done. There was no party in the case to represent the will, or the interests created by it, or the legal estate which supported those interests. This was the special ground on which the decision in *McArthur v. Scott* was placed, as is fully expressed in the opinion.

In the present case the executor was a defendant in the proceedings instituted for avoiding the will, and appeared and filed an answer; and the infant son of Rutledge, who was devisee in fee of the whole estate after the termination of his mother's interest, was represented

in the proceedings by a guardian *ad litem*. Moreover, if the circumstance is of any consequence, the executor was interested on behalf of his own children that the will should stand,—as they were the principal devisees in remainder. We think that the Supreme Court of Texas was right in holding that all the necessary parties were before the court. We are also of opinion that the decree avoiding the will cannot be attacked collaterally; and that it is binding on the appellants Thomas H. Miller and others. The entire estate was represented before the court,—a particular estate in the widow, and the fee-simple remainder in the infant son. The interests of the appellants Thomas H. Miller and others, as devisees under the will, was a mere contingent interest, a mere executory devise. In such a case it is sufficient to bind the estate in judicial proceedings to have before the court those in whom the present estate of inheritance is vested. *Lord Redesdale's* authority on this point is decisive. In *Giffard v. Hort*, 1 Sch. & Lef. 386, 408, he says: "Where all the parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive. It has been repeatedly determined that if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remaindermen are barred." In another part of the same opinion *Lord Redesdale* said: "Courts of equity have determined on grounds of high expediency that it is sufficient to bring before the court the first tenant in tail in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life." *Ibid.* These propositions are substantially repeated in his *Treatise of Pleading*, 173, 174, where he adds: "Contingent limitations and executory devises to persons not in being may in like manner be bound by a decree against a person claiming a vested estate of inheritance; but a person in being, claiming under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance by which it may be defeated, must be made a party to a bill affecting his rights." In the present case, it is true, some of the children of Alsey S. Miller were in being at the time of the proceedings in question (1852); but there was a "preceding vested estate of inheritance," by which their executory devise might be defeated, namely, the estate vested in the infant child of Thomas P. Rutledge, who was a party to the proceedings. We are of opinion that the bill of Thomas H. Miller and others was properly dismissed by the court below.

The complainants in the cross-bills, William Dunlap and others and Martha R. Worrall and others, claim the lands under the other source of title, that of John Childress; and, to avoid the effect of the defendants' claim under the Rutledge certificate, they deny that it was assigned by Rutledge to Brinson, or by Brinson to M. T. Johnson; deny that it was ever lawfully located on the land in question; and aver that, if it was ever properly located thereon, it became void by noncompliance with the Land Laws of Texas.

The Childress title arose in the following manner: John Childress, a brother-in-law of the late Mr. Justice Catron, and brought up in his family, was an early emigrant to Texas under the patronage of his uncle, Sterling C. Robertson, empresario of a colony on the Brazos River. His first visit to Texas was in 1884, and in 1886 he took his wife and two children with him, namely, John W. Childress and George R. Childress. Though numbered among the colonists of Mr. Robertson, for some reason he failed to obtain any valid grant of land, though undoubtedly entitled to one. He died in Texas in the fall of 1887. By an Act of the Legislature of Texas, passed February 18, 1890, the Commissioner of the Court of Claims was authorized to issue to the heirs of John Childress a land certificate for one league and one labor of land (amounting to about 4,805 acres). His widow had, in the mean time, married one Miles Johnson, by whom she had a daughter named Mary. As the Act of the Legislature was expressed to be for the benefit of the heirs of John Childress, it would seem that no interest in the grant inured to the said Mary. On the 9th of March, 1890, a land certificate was issued by the Commissioner of the Court of Claims to the heirs of John Childress as authorized by the Act. It was procured by, and delivered to, a lawyer of Austin by the name of John A. Green, who was employed by Judge Catron on behalf of the heirs to attend to the business. The heirs, John W. Childress and his brother George, seem to have been of a roving disposition. John appeared at Austin in December, 1890, and, supposing that his brother George, who had not been heard from recently, was dead, he gave Green a power of attorney to locate the said certificate in the following manner, namely, one third for the benefit of his brother George, if he should be alive, and if not, then for John's own benefit; one third for the benefit of Green, as a compensation for his services; and one third for the benefit of one John O. St. Clair, to whom John W. Childress had sold his own share. No location of the certificate was made until after the war.

In May, 1887, Green sold his one third of the certificate to Doctor I. R. Worrall, of Austin. The deed given cannot be found, but it is alleged on the part of William Dunlap and others, and Martha R. Worrall and others, that it was given to Worrall's wife, Adaline S. Worrall, under whom they claim. The deed, as above said, is lost, and the records of Tarrant County were destroyed by fire in the spring of 1878, but Mr. Furman, a lawyer of Fort Worth, had, before the fire, made an abstract of titles from the county records, and in that abstract he finds, against other things, (1) a transfer from John W. Childress to John A. Green, conveying one third of the grantor's interest in the Childress certificate, filed October 8th, 1868 (date not given); (2) a transfer of the same interest from John A. Green to Adaline S. Worrall, dated May 15th, 1867, filed October 12th, 1868. In addition to this evidence, in the deed from Dr. Worrall and his wife to E. M. Daggett, dated September 30th, 1869, and hereafter to be mentioned, it is recited that the land in question (conveyed by that deed) was the separate property of said Adaline S. Worrall. We think, therefore, that it may be regarded as

proven that the deed for the one third of the Childress certificate, given by John A. Green in May, 1867, was given to Adaline S. Worrall, though Green himself says that he has no recollection to that effect and that all his transactions were with Dr. Worrall himself.

On the 28th of January, 1868, Dr. Worrall presented to the county surveyor of Tarrant County the following application for a survey, to wit:

"Austin, Jan'y 28th, 1868.

"County Surveyor, Tarrant County, Texas: "Sir: By virtue of certificate No. 186, issued by W. S. Hotchkiss to Jno. Childress' heirs, now in your office, you will please survey for me 1,806,336 sq. vs. (320 acres) of land about one mile S. E. of Fort Worth, being the same land heretofore surveyed in the name of T. P. Rutledge, the field notes of which are hereby adopted as a full description of the survey:

"Beginning at the S. E. cor. of A. Briggs' survey and the S. W. corner of B. F. Crowleys and running so as to embrace and include all the vacant land connected with said point. That is the said Rutledge survey.

"I. R. Worrall."

A survey was made accordingly on the top of the Rutledge survey by adopting the notes of the same, and the county surveyor certified it as follows, to wit: "I, A. G. Walker, county surveyor for Tarrant County, do hereby certify that the survey designated by the foregoing plot and field notes was this day made by me by adopting field notes of the survey which was made, as above stated, the 16th January, 1852, and which I believe to be correct, and that the same is upon s'd survey which is in the name of T. P. Rutledge, certificate No. 134, class 3rd, issued by the Board of Land Commissioners of Gonzales County the 12th day of October, 1846." Dated "this 28th day of May, 1868." On the 17th of June, 1868, a patent was issued on this survey to "the heirs of John Childress, deceased, their heirs and assigns."

It thus appears that the Childress survey, under which the complainants in the cross-bills claim title to the land in dispute, was purposefully made by Dr. Worrall on the top of the Rutledge survey, under which Daggett had been in possession of the land for thirteen years. Of course such a title cannot be maintained unless the survey made under the Rutledge certificate was void. It is contended that it was void, first, because the certificate had been located on other lands in Fannin County, before its location on the lot at Fort Worth. This is true. Rutledge had procured a conditional head-right certificate for 320 acres as early as March 20th, 1839, from the Board of Land Commissioners of Washington County; and had in March, 1846, procured a survey under it for 320 acres in Fannin County, which was duly examined and approved, and filed in the General Land Office; but was afterwards indorsed as forfeited for nonreturn of unconditional certificate by 1st August, 1857. Rutledge seems to have abandoned this survey, and in October, 1846, obtained a new certificate in Gonzales County, as before stated, under which the survey in Fort Worth, Tarrant County, was made. It was permitted to a settler to abandon one location and adopt another. Indeed,

the new certificate and location operated as an abandonment of the first, and the land became public land again, subject to location by other parties. In *McGimpsey v. Ramsdale*, 3 Tex. 344, the court sustained a survey made after a former survey under the same head-right had been abandoned, the judge who delivered the opinion saying: "If the question was a new one, I should feel strongly inclined to deny the right of Ramsdale to have raised his former location; but the practice commenced with our land system, and to upset it now would disturb land titles to an incalculable extent." We do not think that the location of Rutledge's head-right in Fannin County was sufficient to prevent his obtaining a new certificate and a location in Tarrant County, unless he had sold or otherwise disposed of the lands in Fannin County. There is no proof in the case that he had done so; although one of the witnesses, Nance, who resides in Fort Worth, testifies that in September, 1859, being in Austin, and having understood that Daggett could not get his land patented, inquired of Mr. White, the then commissioner of the General Land Office, why he could not, and the reason given was, that the conditional certificate had been issued long before and had been long before located in Fannin County by another man, to whom it belonged. But as there is no proof of this fact in the record, except the said hearsay testimony, we must conclude that this ground of objection to the Rutledge location is not sustained.

We do not deem it necessary to take particular notice of the Cass County location under the Rutledge certificate, which seems to have been abandoned; or of the survey under the William Sparks certificate, which was fully satisfied by other locations, and was never set up as establishing any right to the property in dispute. These documents may for the time have deterred the commissioner of the General Land Office from granting a patent to Daggett; but we do not see that they present any insurmountable obstacle to the validity of the survey made by Johnson.

Another ground urged for maintaining that the said location was void when the Childress location was made is, that the unconditional certificate was withdrawn from the General Land Office and not returned within the time required by law. The old wrapper in which it had been folded, and which also contained the survey, was indorsed with the words, "forfeited for nonreturn of unconditional certificate by 1st Aug., 1857." And yet there was another still older memorandum in pencil, faint and partly obliterated, which read thus: "Unconditional certificate withdrawn by M. T. Johnson . . . Dec. 14, '57, for relocation." A. B. McGill testifies that he was a clerk in the General Land Office from 1859 to 1866, except a short period towards the close of the war; and was chief clerk from 1865 or 1866 to 1870; that the indorsement, "forfeited for nonreturn of unconditional certificate by 1st Aug., 1857," is in his handwriting, and was written when he was chief clerk; that the other indorsement, "Unconditional certificate withdrawn by M. T. Johnson . . . Dec. 14, '57, for relocation," is in the handwriting of Robert M. Elgin, who was chief clerk of the said office in 1857, and

until the close of the war; that only the commissioner and chief clerk were authorized to make such memoranda or indorsements on the files; that he (McGill) had no recollection of having seen the pencil memorandum at the time of making his indorsement in ink; that from the appearance of the indorsements he would say that the pencil indorsement was made prior to the time when he (McGill) made the indorsement in ink referred to.

Joseph Spence, formerly commissioner of the land office, testifies as follows:

"I was commissioner of the land office in 1868. The first knowledge that I had of the Thomas P. Rutledge survey in Tarrant County was after the Childress survey had been made and returned. Dr. I. R. Worrall controlled the Childress survey and was anxious to get a patent upon it. Upon examination of the Childress survey, it was ascertained to cover the Thomas P. Rutledge survey. Mr. A. B. McGill, who was chief clerk of the land office, referred to me both the Childress and the Rutledge papers, with the information that the Rutledge certificate was not found among the papers of the file. We then together examined the papers, but failed to find the certificate. I remarked to him that we had better not patent until further investigation. Shortly afterwards Dr. Worrall insisted upon the patent issuing on the Childress certificate, and we, not finding the Rutledge certificate, determined to issue the patent on said Childress certificate, and did so."

This evidence shows that the Rutledge certificate was not in the land office, or could not be found therein, in 1868, when the Childress patent was issued, and when undoubtedly McGill, the chief clerk, made the indorsement testified to by him. But it fails to prove that it was not in the office on the 1st of August, 1857. The indorsements on the back of the certificate itself show that it was filed in the office October 4th, 1852 (probably at the same time with the survey); and across its face, in red ink, is written "Registered and approved Dec. 11, 1857." (Signed) "Jas. O. Illingsworth, Comm'r of Claims." This memorandum, in connection with the old pencil memorandum on the wrapper, "Withdrawn by M. T. Johnson . . . Dec. 14, '57," shows that, at that time, December, 1857, Johnson, who was undoubtedly acting for Daggett, was attending to the final authentication of the Rutledge certificate and survey, by getting it approved by the commissioner of claims; and that, for some reason, not now disclosed, he carried it away with him. [The presentation of the certificate to the commissioner of claims, and its registry by him, were made in pursuance of an Act passed August 1st, 1856, which created the said officer, and required all land certificates (with certain exceptions) to be presented to him for registry within two years, or to be forever barred from location, surveys and patent.] The whole evidence, taken together, instead of showing, as supposed by McGill in 1868, when he made the indorsement on the wrapper, that it had not been returned to the office by the 1st of August, 1857, rather shows that it was never removed from the office until December, 1857. How long it was then detained does not appear. We infer

from the testimony that it was in the office in 1867. The official land map of Tarrant County was made in that year, and the land in question was marked and designated as the T. P. Rutledge survey, and so continued until 1878. This would hardly have been done if the certificate had not been in the office. When it was taken out of the office, after that, does not appear—probably it was taken out by Daggett for some purpose and neglected to be returned, as it was shown that he was very careless about his papers. J. P. Smith, a lawyer of Fort Worth, and administrator of Daggett, testifies that in 1879 or 1880 he was counsel for him in a suit of Turner's heirs against him for a community interest under their grandmother, Daggett's wife (who had died in 1871), and he wanted the certificate in question; and not finding it in the land office, he had Daggett to search for it, and Daggett found it in his own safe and gave it to Smith, who, after keeping it two or three days, carried it to Austin by Daggett's authority, and handed it to the commissioner of the land office, and requested him to have it returned to its proper file in the office.

The laws which gave importance to the locality or place of deposit of the certificate were an Act of the Legislature of Texas passed August 30th, 1856, and another Act passed April 25th, 1871. (Paschal's Dig. vol. I. art. 4210, p. 701, and vol. II. arts. 7096-7099, p. 1453). The first of these Acts declared "that all owners or holders who have conditional certificates now located, or surveys upon lands, shall return to the General Land Office the unconditional certificates, together with the field notes of the same, on or before the first day of August, 1857; and unconditional certificates which are not returned by that time, the said locations and surveys shall be null and void, and all such locations and surveys made by virtue of such conditional certificates shall become public domain, and subject to be located upon as other vacant lands." In our view of the evidence, this Law did not affect the Rutledge title. The prima facie proof is that the certificate was in the land office from 1852 to December, 1857, and that the chief clerk, McGill, made a mistake in indorsing the wrapper as he did, "Forfeited for nonreturn of unconditional certificate by 1st August, 1857." As already suggested, this indorsement was probably made in 1868, when Dr. Worrall applied for a patent on the Childress survey, and no doubt was honestly made. McGill admits that he did not notice the pencil memorandum on the old wrapper.

By the Act of 25th April, 1871, it was provided that in all cases of location and survey of lands, by virtue of any genuine land certificate, including head-rights, etc., the certificate should be returned to the General Land Office with the field notes within the time prescribed for returning field notes [which was twelve months from the date of survey]; and the withdrawal of it from the office should render the location and survey null and void; with a proviso allowing a withdrawal where the certificate had only been located in part; and by the second section of the Act it was provided that, in all such cases if the certi-

cate was not on file in the General Land Office at the time of passing the Act, and had not been withdrawn for locating an unlocated balance, it should be returned to, and filed in, the said office within eight months from the passage of the Act, or the location and survey should be void. It was strenuously contended that the case was within this Statute, and therefore that the Rutledge survey was void. But it is not absolutely certain from the evidence that the Rutledge certificate was not in the land office when the Act of 1871 was passed, or that it was not returned thereto within eight months from that time, which period expired on the 24th of December, 1871. It is true, it was not found by the clerk in 1868 when the patent was issued on the Childress survey; and it was not found on a subsequent search in 1875. Resort must be had to presumptions to conclude that it was not there in 1871. Will such a presumption be raised in favor of another title superposed upon the land at a time when the Rutledge certificate was perfectly valid, and possession was enjoyed under it? And even if it were sufficiently proven that the certificate was not in the office during the years in question, the question would still arise whether the claimants under the Childress survey and patent can take advantage of this circumstance to maintain their title to the property. When that title was created, in 1868, as already intimated, the Rutledge survey was in full force and effect, and Daggett was in possession under it, and had been so for thirteen years. Did, therefore, the injunction of the Statute of 1871, requiring the survey to be returned to the land office within eight months, under penalty of being void if not so returned, inure to the benefit of the holders of the Childress patent, or did it inure to the benefit of the State? The Childress survey when made was void, and therefore the patent issued upon it was void, because made and granted upon lands already appropriated under an elder title, which title, at that time, was perfectly valid, and only became invalid by noncompliance with a Statute subsequently passed for reasons of public policy. Did the Childress survey and patent, which were void at their inception, become invested with life and validity by means of the subsequent Law and the failure to comply with it? If the question was only one between the holders of the Rutledge title and the State, then no parties other than the State could take advantage of the omission to comply with the Law.

The practice of locating certificates upon prior rightful locations is not favored by the laws of Texas. It was declared by the Act of August 30th, 1856 (Paschal's Dig. vol. I. art. 4575), that whenever an entry is made upon any land which appears to be appropriated, deeded or patented by the books of the proper surveyor's office, or records of the county court or General Land Office, the party shall abide by it; and if judgment be rendered against him he shall not have the right to lift or re-enter the certificate, but the same shall be forfeited. The purpose of this Act was further secured by the Constitution of 1869, by the 10th article of which, section 3, it was declared that "all certificates for land located after the 30th day

of October, 1856" (referring undoubtedly to, but mistaking the date of, the last-mentioned Act), "upon lands which were titled before such location of certificate, are hereby declared null and void," with a proviso in favor of inadvertent conflict with older surveys. Of course if the certificate was made void, the location and survey were *a fortiori* void, and the obtaining of a patent could not mend the matter, for it was decided by the Supreme Court of Texas, in *Morris v. Brinlee*, 14 Tex. 285, that a subsequent locator having actual notice of a prior location will be postponed to the superior rights of the prior locator, although the subsequent location may have passed into a patent.

The provision of the Constitution of 1869, just cited, was retrospective, was in force when the Act of 1871 was passed, and was carried forward, as to all future locations and surveys, into the Constitution of 1876, which declared, "that all genuine land certificates heretofore or hereafter issued shall be located, surveyed or patented only upon vacant and unappropriated public domain, and not upon any land titled or equitably owned under color of title from the sovereignty of the State, evidence of the appropriation of which is on the county records or in the General Land Office," or when the appropriation is evidenced by the occupation of the owner, or of some person holding for him." (Art. XIV. §2.)

These constitutional provisions (whose validity upon the subject in hand cannot be seriously questioned), taken in connection with the Act of 1856, had the effect to make void the location of the Childress certificate upon the land in dispute; for, at that time (1868) the said land was "appropriated" and "titled" by the survey under the Rutledge certificate, which was duly recorded in the county records and entered and filed in the General Land Office, plotted on the map of Tarrant County, and evidenced by the long-continued occupation of Daggett. If, then, the Childress location was absolutely void at its inception, how could it be revived by the subsequent failure of Daggett to comply with the Act of 1871? It seems to us quite clear that it could not be, and that said failure inured to the benefit of the State alone. But the State has never availed itself of the omission; and it is probable that nothing but a direct proceeding to vacate the survey would be effectual for the purpose. Daggett and those claiming under him having always been in notorious possession of the land, no person could lay any new location upon it without full knowledge of their pretensions to the ownership; and it was held by the Supreme Court of Texas in the recent case of *Snider v. Methvin*, 60 Tex. 487, that no one having knowledge of the continued claim of those who made title to land under a certificate could acquire any right to said land, although said certificate had been taken from the land office prior to the passage of the Act of 1871, and was not returned within the period required by that Act. It is true that the certificate in that case had been taken from the office by a person who had no interest in it, or right to control it; but the parties interested had notice of its absence in time to have supplied a duplicate, but did not do so until after the prescribed time had expired.

In the present case the certificate was returned to the office in 1879 or 1880, from which it had probably been inadvertently detained by Daggett. As between the parties to this controversy, our opinion is that the Rutledge title must prevail, and that it is a sufficient protection to the defendants against that set up by the complainants in the cross-bills.

This view of the case renders of less importance a question which might have been very material as between the original complainants, Thomas H. Miller and others, and the defendants, had not the former been barred by the decree annulling Rutledge's will. We refer to the question as to the assignment by Rutledge of his certificate to Brinson and by Brinson to M. T. Johnson. We are satisfied from the evidence in the case that Rutledge sold said certificate to Brinson and that Brinson sold it to Johnson, at whose instance, and in whose behalf, it was located on the land in question. M. J. Brinson, son of Matthew Brinson, to whom it is alleged Rutledge sold the certificate, testifies that about 1848 or 1849 Rutledge and one Gill were in the business of horse-raising and horse-trading, and were occasionally at his father's place in Shelby County, and one deal they made with him was the sale to him of the land certificate in question, for which the witness' father gave them a pony belonging to witness (who was then about twenty years old), and his father gave him another horse instead of it; then afterwards, about 1851, M. T. Johnson bought the certificate of witness' father; and that Johnson afterwards traded it to Captain B. M. Daggett. It is true, the witness did not handle the certificate, but derived his knowledge of it from conversation with his father and contemporaneous knowledge of the transactions. The witness further states that whilst his father (Matthew Brinson) owned the certificate he employed Gill to locate it, or have it located for him; but found that he was making a fraudulent use of the certificate, using it in what he termed "lariating land," in Fannin County; and he was obliged to institute proceedings to get possession of it, and finally got it back from some member of Gill's family after his death.

But no assignment of this certificate from Rutledge can now be found. If one ever existed, it is lost or has been destroyed. However, if a sale of the certificate was actually made by Rutledge to Brinson, and by the latter to Johnson, it matters little whether it was actually assigned in writing or not, as it is well settled in Texas that the land certificates of that State are chattels, and may be sold by parol agreement and delivery, whereby the purchaser acquires a right to locate the certificate and procure a patent in the name of the grantee, but for his own use, he becoming thereby the equitable owner of the land located. *Cox v. Bray*, 28 Tex. 247; *Peeny v. Hurt*, 33 Tex. 146; *Stone v. Brown*, 54 Tex. 384; *Parker v. Spencer*, 61 Tex. 155, 164. In *Cox v. Bray*, Chief Justice Moore said: "But even if the contract were within the Statute" [of Frauds] "the payment of the purchase money, the location of the land, the procuring of the patent, and the possession and improvement made upon it by the defendant and those under whom he claims, would, as has been frequently decided by this

court, have presented sufficient equity to have entitled the defendant to a decree of title, if he had brought a suit for this purpose within a reasonable and proper time. And it certainly could not be less effectual to protect him against the wrongful efforts of the vendor to deprive him of his possession and equitable title to the land, however long he may have delayed his suit for this purpose."

Even when a written assignment was made, it was often made with a blank space left for the name of the assignee, to be filled up with the name of any subsequent purchaser who saw fit to insert his own name therein,—much the same as blank assignments of corporation stock, which pass from hand to hand, perhaps a dozen times, before they are filled up with the name of an assignee. It is distinctly stated in *Hill v. Moore*, 62 Tex. 610, 614, that "land certificates were the subjects of transfer, and often passed through the hands of many persons by an assignment in blank." In that case one Jowell owned a land certificate as community property, and, after his wife's death, sold it to one who was a purchaser in good faith, and without notice of the community. The heirs of the wife brought suit for a portion of the land located under the certificate; and contended that the purchaser was bound to take notice of the wife's interest. But it did not appear on the record whether the certificate was issued on Jowell's own head-right, or some other person's. The court held that, for all that appeared, it might have been obtained in the way indicated above. "So far as the record shows," says the court, "it may have been true that Jowell purchased the certificate through a blank assignment, and that he transferred with this assignment on it, simply by delivering it to the persons through whom the appellee claims; if so, his name would not even appear, either on the certificate or on any writing by which the transfer was made, and in such case a purchaser would not be put on inquiry as to the rights of other persons, unless it be of those persons who claim by inheritance from the original grantee, or someone in whom a right vested by operation of law at the time the certificate issued."

There seems to have been an assignment of this kind of Rutledge's unconditional certificate. Two witnesses are sworn in the case who distinctly testify that they saw it, with Johnson's name inserted as assignee. One of these is C. G. Payne, of Dallas County, Texas, an attorney-at-law. He states that in January, 1868, he visited the land office at Austin, to investigate some land claims and land locations in Tarrant County. Whilst there he examined the Rutledge claim. He says he found that two certificates had been issued to Rutledge; namely, a conditional one upon which a survey had been made in Cass County, and an unconditional certificate transferred by Rutledge to M. T. Johnson, and by Johnson located in Tarrant County at Fort Worth upon the land now in controversy, the field notes and survey returned to the General Land Office, and there filed, mapped and platted, and the patent refused on account of the conditional certificate located in Cass County. He says that the transfer of the latter certificate from Rutledge to Johnson was written in a coarse, rough, round

handwriting. The usual form of transfers of certificates was used. The substance of said transfer was an assignment of all right, title, claim and interest of said T. P. Rutledge of, in and to the said certificate to the said M. T. Johnson, and authority therein authorizing the commissioner of the General Land Office to issue the patent to the said M. T. Johnson or to his assigns. On his cross-examination the witness says that the transfer was acknowledged before some officer authorized to use a seal, and had his certificate of acknowledgment and seal thereon. He states that he also saw the deed from Johnson to E. M. Daggett on record in Tarrant County.

The other witness who testifies to having seen the assignment of the unconditional certificate from Rutledge to Johnson is W. H. H. Lawrence. He testifies that he was engaged in the land business at and about Fort Worth; that he had transactions with E. M. Daggett from 1873 to 1878, and examined his title papers at his request, especially in reference to the 320-acres tract known as the Rutledge survey; that this examination was made, he thinks, in 1876, and he distinctly remembers making a favorable report to Daggett after he had finished the examination. He further says: "My recollection is that among the papers I examined was the Thomas P. Rutledge certificate. I did find a transfer of such certificate to M. T. Johnson. I am sure of this, because had it not been present I should have known that the title from Rutledge was defective." Being asked from whom, to whom and the form thereof, he said: "I can only say that it was from Rutledge to M. T. Johnson, and in the usual form of transfers of such certificates." The witness further states: "If there had been no transfer I should have discovered it and made a different report." To another interrogatory he added: "I had occasion in very many cases to look up the titles of different lands in Texas, and became familiar in the course of five years in the land business at Fort Worth with the general laws of the State in regard to lands, as also familiar with the examination of titles."

Apparently (but perhaps not necessarily) opposed to the hypothesis that the certificate in question was purchased by Johnson from Brinson is the evidence of Henry Beaumont, who testifies that in the winter of 1851-52 he placed a lot of land certificates, including the T. P. Rutledge certificate for 320 acres, in the hands of M. T. Johnson for location, under a written contract; and that the certificate in question had come into his hands with others from a party (whose name he does not mention) who had been engaged in locating and surveying lands, and was then retiring from the business. In corroboration of this testimony a receipt in the handwriting of M. T. Johnson was produced in evidence, a copy of which is as follows, to wit:

"Rec'd, Austin, March 9th, 1852, of Henry Beaumont the following land certificates, to be located or accounted for, viz.:

Four leagues Calhoun County school	Acres.
lands for location.....	17,712
Thomas Rutledge H. R., 320, class 3.	
Gonzales County, 12 Oct., 1846.....	82

Wm. P. Milby H. R., 640, class 3, No. 24, Liberty County, 4th March, 1845 640
 John Becton, 320 H. R., 3rd class, No. 234 Victory County..... 320
 Sam'l Hudler, bounty warrant, dated Jan'y 1st, 1838, signed Barnard Bee Sec. War..... 1,280
 James H. Barnwell, bounty warrant, 7th January, 1837, signed G. W. Poe, pay gen'l..... 320
 Toby scrip, No. 864, to Almanzo Houston, dated Oct. 10, 1836..... 640
 (Signed duplicate.)
 (Sign'd) M. T. Johnson.
 Indorsed: 'Henry Beaumont land matters.' "

A duplicate of this receipt was found amongst Johnson's papers after his death by J. P. Smith, his administrator.

It is somewhat difficult to reconcile this evidence with that of the other witnesses. There is evidently wanting some undiscovered explanation of the discrepancy. Beaumont says that he only had the certificate for location, and that Johnson was to divide with him the emoluments thereof,—which were always one third of the land located. From the testimony of J. P. Smith, Johnson's administrator, it appears that Beaumont and Johnson had had dealings together in the location of land certificates for some years prior to the date of the receipt, to wit, in 1850 and 1851. The certificates mentioned in the receipt were probably received by Johnson at some time, or at different times, previous to the giving of the receipt. One of the certificates was that of Wm. P. Milby, for 640 acres, class 3, No. 24, issued 4th of March, 1845. This certificate was located June 25th, 1850,—a year and nine months before the date of the receipt. The certificate in question, that of Rutledge, was located January 8th, 1852, two months before the date of the receipt. The suggestion of the complainants that the survey was antedated has no evidence to support it. That, in some way, Johnson had become entitled to these certificates (especially to the Rutledge certificate) is corroborated by strong circumstances. Smith, Johnson's administrator, says that Beaumont never asserted any claim to the land mentioned in the receipt. He had correspondence and communications with Beaumont after Johnson's death. He says there was an agreement between them that Johnson should locate the certificates placed in his hands by Beaumont, and was to have for doing so one half of such interest as Beaumont had in them; yet no claim for any accounting was ever made after Johnson's death. It is quite possible that Beaumont obtained the Rutledge certificate from Gill, who used it as a "liar's" for improperly locating land; and that Johnson bought it of Brinson on ascertaining that it belonged to him. This would explain why Beaumont never asserted any claim to the land located under it, although it subsequently became so valuable.

Be all this as it may, it is clear that Johnson, either as owner of the certificate or as an agent employed for locating it, and as such having, according to usage, an interest in the lands to be surveyed, was fully authorized to make the location under it which he did make, and to take possession of the lands either for his own use

(if he was the owner) or for the use and benefit of himself and the actual owner; and that his title and possession thus acquired were good against all the world, except those who could produce a better title than that which the certificate and the location under it secured. The legal title, it is true, was in Rutledge's heirs; but the equitable title was in Johnson (if he did in fact purchase the certificate); and, in any event, one third of such equitable title belonged to him, as the authorized locator of the certificate, and the residue was in his hands and possession for the use of the owners whom he represented. The location and survey were good as against the State, and all other persons claiming by inferior title. E. M. Daggett as purchaser from Johnson, and obtaining possession from him, and the defendants as successors of Daggett, became entitled to the benefit of the Rutledge survey as a protection against all persons claiming under a title inferior thereto.

But this is not the whole case. There are other points which go to fortify the position of the defendants, which it is proper to notice.

After the Childress certificate was located by Dr. Worrall in 1868, E. M. Daggett, who had then been in possession under the Rutledge title for the space of fourteen years, purchased in, as he supposed, the entire Childress claim. In 1868 or 1869 George R. Childress, the second son of John Childress, appeared at Fort Worth, having returned from California, where he had been residing for many years. He did not know that his brother John was living, but supposed him dead, and that he, George, was his father's sole heir. He claimed the land in question, and Daggett compromised with him for about three hundred dollars, and George gave a deed selling and relinquishing all his right and title to Daggett in fee, with a general warranty against himself, his heirs and all others. He afterwards went to Austin, saw Green, learned of his brother's being alive, and confirmed the arrangement made by the latter with Green, who acted therein for the benefit of Dr. Worrall.

In September, 1869, Daggett also compromised the claim of Dr. Worrall and procured a deed from him and his wife, Adaline S. Worrall. This deed is in the usual form of deeds of bargain and sale. It is dated 30th of September, 1869, recites a consideration of three hundred dollars, conveys to Daggett the land in dispute by metes and bounds, as in the Childress patent, and recites that the land was the separate property of the said Adaline S. Worrall, referring to the deeds from John W. Childress to Green and from Green to the said Adaline. The deed concluded with this habendum and warranty, to wit: "To have and to hold to him, the said E. M. Daggett, his heirs and assigns forever, free from the just claim or claims of any and all persons whomsoever, claiming or to claim the same." The deed was acknowledged before a notary public, and a certificate of said acknowledgment was made in due form, with one exception; it contains no statement that Adaline S. Worrall, the wife, was privily examined by the officer apart from her husband. This is necessary in order to validate a conveyance of the wife's separate property in Texas, and its absence cannot be

supplied by showing that she was actually privily examined. *Berry v. Donley*, 26 Tex. 737; *Fitzgerald v. Turner*, 43 Tex. 79; *Looney v. Adamson*, 48 Tex. 619; *Johnson v. Bryan*, 62 Tex. 628. To the same effect see *Elliott v. Peirsol*, 26 U. S. 1 Pet. 328, 340 [7: 164]; *Hitz v. Jenks*, 123 U. S. 297, 303 [31: 156, 158]. This seems to be a fatal defect; and it is on this defect that the complainants in the cross-bills rely. Their position is, that the land was Mrs. Worrall's separate property, that she never executed any conveyance of it according to law, and that it was hers when she died in November, 1870, and descended, one half to her husband, Dr. I. R. Worrall, and one half to her brothers and sisters, represented by William Dunlap and others. The complainants in the other cross-bill, Martha R. Worrall and others, claim the other half of the property as heirs of Dr. Worrall, being his mother and his brothers and sisters. They contend that Dr. Worrall had no interest to convey when he executed the deed with his wife in 1869, and hence the one-half part which he inherited from his wife in November, 1870, was unaffected by that conveyance. It is true, if the deed contained a warranty, he would be estopped from claiming the land; but it is contended that the clause above recited does not amount to a warranty. It has been decided, however, by the Supreme Court of Texas that words substantially such as those contained in the deed do import a general warranty. In *Rowe v. Heath*, 23 Tex. 618, the following words were so construed, to wit: "For him the said R. H., his heirs and assigns, to have and to hold forever, as his own right, title and property, free from the claim or claims of me, my heirs or creditors, and all other persons whomsoever, to claim the same or any part thereof lawfully." In our judgment the deed of Worrall and his wife did contain a general warranty, and the one-half part of Adaline S. Worrall's interest which descended to Dr. Worrall by estoppel to Daggett when Dr. Worrall inherited the same from his wife.

The other questions arise on the Statute of Limitations. The defendants pleaded the limitations of three years and of five years, and also peaceable possession for thirty years. The Act of February 5th, 1841, first created the limitations referred to. The 15th section created that of three years, declaring that "every suit, to be instituted to recover real estate, as against him, her or them, in possession under title, or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards;" not computing the duration of disability from minority, coverture or insanity; and by "title" meaning regular claim of transfer from or under the sovereignty of the soil; also reserving the right of the government.

The 16th section created the limitation of five years, declaring that "he, she or they who shall have had five years like peaceable possession of real estate, cultivating, using or enjoying the same, and paying tax thereon, if any, and claiming under a deed, or deeds, duly registered, shall be held to have full title, precluding all claims, but shall not bar the government;" and saving disabilities for non-age, coverture or insanity.

Now supposing that the prerogative of the

government prevented the Statute from running until after the patent issued to the heirs of John Childress in June, 1868, it certainly commenced to run at that time against those who claimed under the patent; and the facts present a strong case of adverse possession on the part of E. M. Daggett and his grantees. They were in full, continuous and peaceable possession for a period, altogether, of thirty years, namely, from 1854 to 1885, when William Dunlap and others appeared as intervenors in this suit; and from 1854 to 1886, when the Worralls intervened. This possession was complete in the use, cultivation and enjoyment of the land in dispute, and the payment of taxes thereon. It was claimed and exercised under a regular deed of conveyance from M. T. Johnson, dated 28d June, 1855, which granted and conveyed, not only the certificate of Rutledge, but the land located under it, describing and identifying the same; and which was duly registered in the records of Tarrant County on the 30th of March, 1857. It is difficult to see why the plea of limitation of five years at least is not a good bar against the heirs of Adaline S. Worrall. She died November 4th, 1870, and one half her estate descended to her husband, I. R. Worrall, who survived to the 22d September, 1871. The Statute, having commenced to run against him, was not suspended by his death, and had been running more than fourteen years at the commencement of the suit. The other half of Adaline S. Worrall's estate descended to her brother, John Cook, and her two sisters, Alizannah, wife of William Dunlap, and Matilda, wife of Dr. Jonas Fell. John Cook was living at Adaline's death, and survived to August, 1873. The sisters were married women when Adaline S. Worrall died, but as her disability as a married woman had already prevented the Statute from running during her lifetime, their disability, according to the law of Texas, cannot be added to hers. It was decided by the Supreme Court of Texas in the cases of *White v. Latimer*, 12 Tex. 61, and *McMasters v. Mills*, 30 Tex. 591, that one disability cannot be tacked to another so as to prolong the disabilities beyond the continuance of that which existed when the cause of action accrued. See also Wood on Limitations, section 251, and notes. According to this rule the Statute commenced to run at the death of Adaline S. Worrall, on the 4th of November, 1870. If this is so, as we think it is, the complainants in the cross-bills are barred by the Statute of Limitations.

The new Statute of Limitations contained in the Revised Statutes, which went into effect on the 1st day of September, 1879, does not materially differ, so far as its application to the present case is concerned, from the old Statute of 1841; and it is explicit in declaring that "the period of limitation shall not be extended by the connection of one disability with another." (Art. 3225, Rev. Stat.)

In our judgment, the Statute of Limitations is a complete bar to the claims set up by the complainants both in the original and in the cross-bills, whether we are right or not in regard to the validity of the Rutledge title.

The decree of the Circuit Court is affirmed.

SAMUEL HILL ET AL., *Appts.*,

v.

DANIEL B. WOOSTER.

(See S. C. Reporter's ed. 693-701.)

Suit to procure patent to be issued—patentable invention—box creamery—invention or discovery necessary to a patent.

1. Under section 4915, U. S. Rev. Stat., the circuit court may adjudge that the applicant is entitled, according to law, to receive a patent for his invention or for any part thereof; and if the adjudication is in favor of the right of the applicant, it shall authorize the commissioner to issue the patent.
2. But no adjudication can be made in favor of the applicant, unless the alleged invention for which a patent is sought is a patentable invention; neither the circuit court nor this court can overlook the question of patentability.
3. Nothing in the four claims of Wooster in this action constitutes a patentable invention. It is not a patentable invention to add a lower compartment to a box creamery on legs.
4. A person, to be entitled to a patent, must have invented or discovered some new and useful art, machine, manufacture or composition of matter, or some new and useful improvement thereof; and it is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must, under the

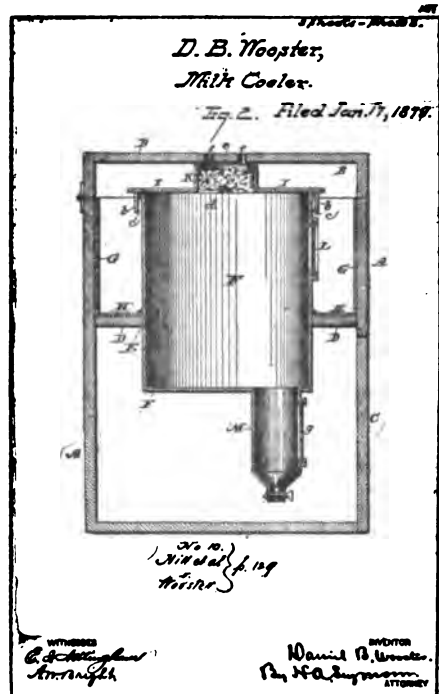
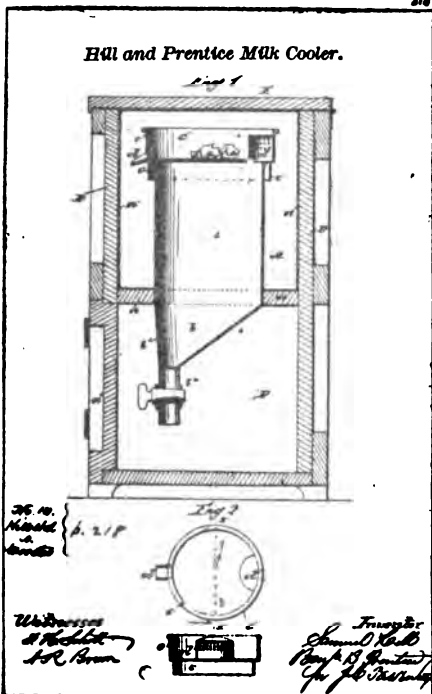
Constitution and the Statute, amount to an invention or discovery.

[No. 10.]

Argued Nov. 19, 20, 1889. Decided Jan. 13, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Vermont that Daniel B. Wooster was the original and first inventor of the improvement, called a "Cabinet Creamery," set forth in his claims, and was entitled to receive a patent therefor as set forth in his application filed Jan. 17, 1879, and that Hill & Prentice were not the original and first inventors of such improvement. *Reversed.*

This was a suit in equity brought by Daniel B. Wooster against Samuel Hill, Benjamin B. Prentice and The Vermont Farm Machine Company, under section 4915 of the Revised Statutes, which provides that when a patent on application is refused, the applicant may bring a suit in equity to procure a decree that the plaintiff is entitled to receive a patent for his invention, and authorizing the commissioner to issue such patent. The bill prays for a decree adjudging Wooster to be the first inventor of the invention of a "Cabinet Creamery," as embraced in his claims, and entitled to receive a patent for his invention. The answer denies that Wooster was the first inventor and avers that Hill & Prentice were the first inventors and entitled to a patent.



NOTE.—For what patents are granted and when they are declared void, see note to *Evans v. Eaton*, Bk. 4, p. 433.

As to patentability of invention, see notes to *Thompson v. Bolsseller*, Bk. 29, p. 76, and to *Corning v. Burden*, Bk. 14, p. 683.

As to distinction between inventions of mechanism or products and processes, and when the latter may be patented, see note to *Corning v. Burden*, *supra*.

The examiners in the Patent Office and the commissioner of patents awarded priority of invention to Hill & Prentice. The circuit court decided in this suit that Wooster was the first inventor of the improvement called a "Cabinet Creamery," and entitled to receive a patent therefor, as set forth in his application. From this decree the defendants appealed to this court.

The facts are fully stated in the opinion.

Opinion below, 22 Fed. Rep. 880.

Mr. William Edgar Simonds, for appellants:

Illustrative drawings of conceived idea do not constitute an invention, and unless they are followed up by seasonable observance of the requirements of the Patent Laws, they have no effect upon a subsequently granted patent to another.

Reeves v. Keystone Bridge Co. 1 Pat. Off. Gaz. 466; *Smith v. O'Connor*, 4 Pat. Off. Gaz. 638; *Electric R. R. Signal Co. v. Hall R. R. Signal Co.* 6 Fed. Rep. 608; *Detroit Lubricator Mfg. Co. v. Renchard*, 9 Fed. Rep. 298.

In attempting to defeat patentees on the ground of prior invention, such prior invention must have reached a practical result before the patentees made their invention.

Union Metallic Cartridge Co. v. U. S. Cartridge Co. 7 Fed. Rep. 344; *U. S. Stamping Co. v. Jewett*, 7 Fed. Rep. 869; *Webster Loom Co. v. Higgins*, 21 Pat. Off. Gaz. 2081, 105 U. S. 580 (26: 1177); *Atlantic Works v. Brady*, 23 Pat. Off. Gaz. 1930, 107 U. S. 192 (27: 438).

Amid conflicting evidence the first maker of the embodied invention is, in default of preponderating proof to the contrary, the inventor.

Edwards v. Requa, Com. Dec. 1869, p. 28; *Jennings v. Winters*, Com. Dec. 1869, p. 38; *Holman v. Foley*, Com. Dec. 1870, p. 97; *Clark v. Osborn*, Com. Dec. 1874, p. 220; *Ware v. Bullock*, Com. Dec. 1875, p. 11.

He who claims to have imparted the invention to his opponent takes upon himself the burden of proof.

Mowbray v. Shaffner, Com. Dec. 1870, p. 35.

As against a patentee, an applicant must show conclusively that he reduced to practice and completed form prior to invention by the patentee.

McKnight v. Van Wagenen, Com. Dec. 1869, p. 126; *Sargent v. Burge*, Com. Dec. 1877, p. 62; *Halliday v. Paine*, Com. Dec. 1877, p. 112; *Wyman v. Knowles*, 13 Pat. Off. Gaz. 320; *James v. Campbell*, 21 Pat. Off. Gaz. 337, 104 U. S. 356 (26:786).

Mr. Stephen C. Shurtleff, for appellee:

At the time Hill and Prentice made the preliminary statement of 1880 they were the owners of the invention in controversy, and their declarations are entitled to full weight; and any person who takes the invention afterwards, takes it subject to the liability of its being defeated by the declaration of the former owner.

Miller v. Bingham, 29 Vt. 82; *Downs v. Belden*, 46 Vt. 674; *Alger v. Andrews*, 47 Vt. 288; *Batchelder v. Kinney*, 44 Vt. 150.

The omission of a witness to testify to material facts on a former trial, which he now relates, is admissible.

Briggs v. Taylor, 35 Vt. 57.

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Something more than the uncorroborated statement of parties should be shown, in order for the court to find a disputed fact.

Bering v. Haworth, 14 Pat. Off. Gaz. 117.

It is immaterial whether the patentee is the inventor of any one or more of the elements of the combination; these may all be old; but if the patentee was the first to combine for the purpose specified in his patent, his patent will be good.

Carr v. Rice, 1 Fish. Pat. Cas. 198; *Hovey v. Stevens*, 1 Woodb. & M. 290; *Buck v. Hermande*, 1 Blatchf. 898; *Gray v. James*, Pet. C. C. 894; *Furbush v. Cook*, 2 Fish. Pat. Cas. 668; *Buck v. Gill*, 4 McLean, 174; *Evans v. Eaton*, 16 U. S. 8 Wheat. 454 (4: 483); *Swift v. Whisen*, 3 Fish. Pat. Cas. 348.

The presumption arising from silence is far stronger than preponderance in the number of witnesses.

Smith v. Fay, 6 Fish. Pat. Cas. 446.

The witness' attention must be called to the subject matter with reasonable certainty as to time and place, but the sayings of a party are always admissible, whether his attention has been called to the substance of his declarations or not.

May v. Brownell, 3 Vt. 463; *Alger v. Andrews*, 47 Vt. 288; *Downs v. Belden*, 46 Vt. 674; *Hayward Rubber Co. v. Dunklee*, 30 Vt. 29; *Miller v. Bingham*, 29 Vt. 82; *Davis v. Windsor Sav. Bank*, 48 Vt. 532.

The rule is that a plaintiff is entitled to rest on making out a prima facie case, and, afterwards, to adduce additional as well as rebutting testimony; that the defendant is, in general, required to go through with his evidence before resting.

This rule supposes, however, that the case as first made out by the plaintiff fairly apprises the defendant of the ground on which the right of recovery is finally to be supported.

Clayes v. Ferris, 10 Vt. 112; *Kent v. Lincoln*, 32 Vt. 598; *Thayer v. Davis*, 38 Vt. 163.

The appellee's exhibit, Lamson letter, is admissible to show that the appellants have been trying to manufacture evidence. This is always admissible in evidence, and raises a presumption against the party making such attempt.

Winchell v. Edwards, 57 Ill. 41; *The Tillie*, 7 Ben. 383; *Moriarty v. London, C. & D. R. Co.* L. R. 5 Q. B. 314.

Mn. Justice Blatchford delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the District of Vermont, by Daniel B. Wooster against Samuel Hill, Benjamin B. Prentice and the Vermont Farm Machine Company, under section 4915 of the Revised Statutes, which reads as follows: "Whenever a patent on application is refused, either by the commissioner of patents or by the Supreme Court of the District of Columbia upon appeal from the commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may

appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

The substance of the allegations of the bill is as follows: Wooster, on the 17th of January, 1879, filed in the Patent Office an application for a patent for an "improvement in milk-coolers." The commissioner of patents declared an interference between that application and letters-patent No. 207,788, granted September 8, 1878, to said Hill & Prentice, for an "improvement in milk-coolers," an interest in which patent had been assigned to the defendant The Vermont Farm Machine Company. Testimony was taken, and priority of invention was adjudged by the Patent Office in favor of Wooster, in respect to the claim in issue in the interference; and Wooster, by a separate application for that purpose, was granted a patent containing that claim, on the 14th of June, 1881, No. 242,805, for an "improvement in milk-coolers." On the 30th of March, 1880, Hill & Prentice filed an application for a patent for an "improvement in milk-setting apparatus." They also, on the 10th of November, 1880, filed an application for a reissue of their patent No. 207,788. Both of the last-mentioned two applications were declared to be in interference with the application of Wooster, of January 17, 1879. Testimony was taken by both parties, and the commissioner of patents decided to grant a patent for certain of the claims to Hill & Prentice, or to The Vermont Farm Machine Company as their assignee, and refused to grant a patent for them to Wooster. Four of those claims arose on the application filed by Hill & Prentice on the 30th of March, 1880, and were as follows:

"1. The combination, with a cabinet provided at its top with a cover or lid and having a door in its side, of an ice receptacle located in the upper portion of the cabinet, and an elongated milk receptacle, the upper portion of which is located within the ice receptacle and its discharge conduit arranged to extend below the ice receptacle.

"2. In a milk-cooling apparatus, the combination, with a cabinet or box having its top and side provided with covers or doors, of a vertical elongated milk receptacle provided with a discharge regulating valve or stop-cock at its lower end, and an ice receptacle having an open top and surrounding the upper portion of the milk receptacle.

"3. A milk-cooling apparatus consisting essentially of a vertically elongated milk receptacle, provided with a discharge opening at its lower end, an ice receptacle having an open top and surrounding the upper portion of the milk receptacle, and a cabinet having a cover which extends over the milk and ice receptacles, and with a side door for preventing admission of the outer air to the lower portion of the milk receptacle, when desired.

"4. A milk-cooling apparatus, consisting of a cabinet provided with an upper and lower compartment, an ice receptacle having an open top and located in the upper compartment of the cabinet, a vertically elongated milk receptacle, the upper portion of which is located in the ice receptacle and its lower end constructed to project downward into the lower compartment of the cabinet, and a valve or stop-cock connected with the lower end of the milk receptacle."

The decision against Wooster and in favor of Hill & Prentice covered three other claims which arose on Hill & Prentice's application for a reissue, filed November 10, 1880; but it is not necessary further to allude to them, as there is no contest in this court in regard to them.

The bill contains the following statement as to the invention of Wooster: "The object of your orator's invention being to provide a milk-cooler of such construction that a milk receptacle of a depth greater than its width may have its upper portions only subjected to cold, and thus cause the contained milk to rise and descend in reverse vertical currents. The upper strata of milk, being subjected to cold, will part in whole or in part with its cream, and then descend, its place being supplied by an ascending current of warmer milk from the lower portion of the vessel. And, further, to provide the milk-cooler with a combined ventilator and filter, whereby the milk may be thoroughly ventilated. And, further, to provide a milk-cooler with a transparent eduction tube, to be attached to the lower portion of the cooling vessel, whereby the milk can be easily or readily inspected while being drawn from the cooler and the milk and cream accurately separated and deposited in separate vessels."

The bill prays for a decree adjudging Wooster to be the first inventor "of the invention embraced in the claims hereinbefore set forth, and entitled, according to law, to receive a patent for said invention."

The answer of the defendants denies that Wooster was the first inventor of either of the claims marked 1, 2, 3 and 4, and avers that Hill & Prentice were the first inventors thereof, and are entitled to a patent for those claims.

The cause was put at issue by a replication, voluminous proofs were taken, and the case was heard by Judge Wheeler. His opinion is reported as *Wooster v. Hill*, 22 Fed. Rep. 830.

In the Patent Office, the examiner of interferences awarded priority of invention to Hill & Prentice, in regard to the above claims 1, 2, 3 and 4. On appeal to the examiners-in-chief by Wooster, they affirmed such decision of the examiner of interferences. On an appeal by Wooster to the commissioner of patents, the latter affirmed the decision of the examiners-in-chief, and afterwards denied a motion for a reconsideration of his decision.

The opinion of the circuit court discusses the questions involved solely as questions of fact as to priority of invention, as between Wooster on the one side and Hill & Prentice on the other, and states that considerable evidence was produced before the court which was not before the Patent Office. The court was of opinion that Hill & Prentice were the first inventors of an

open-box creamery standing on legs, with the lower part of the cans extending through the bottom of the box downward, and the upper part surrounded by water in the box, for cooling the top of the milk in the cans, as shown in the patent No. 207,788, granted to them on September 8, 1878. The "cabinet" mentioned in the four claims before recited applied to a cabinet creamery closed all the way down, but having a door in front, for access to the lower part of the can, in contradistinction to an open-box creamery standing on legs. The court was of opinion, on the evidence, that Wooster was the first inventor "of the cabinet creamery as an improvement upon the box creamery, as that is shown in the patent of Hill & Prentice." It thereupon entered a decree adjudging that Hill & Prentice were not the original, first and joint inventors of the improvements set forth in the four claims before recited, and that Wooster was the original and first inventor of the improvement called a cabinet creamery, set forth in those four claims, and was entitled to receive a patent therefor, as set forth in his application filed January 17, 1879. From this decree the defendants have appealed to this court.

The provision of section 4915 is that the circuit court may adjudge that the applicant "is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear;" and that, if the adjudication is in favor of the right of the applicant, it shall authorize the commissioner to issue the patent. It necessarily follows that no adjudication can be made in favor of the applicant, unless the alleged invention for which a patent is sought is a patentable invention. The litigation between the parties on this bill cannot be concluded by solely determining an issue as to which of them in fact first made a cabinet creamery. A determination of that issue alone, in favor of the applicant, carrying with it, as it does, authority to the commissioner to issue a patent to him for the claims in interference, would necessarily give the sanction of the court to the patentability of the invention involved.

The parties to the present suit appear to have been willing to ignore the question as to patentability in the present case, and to have litigated merely the question of priority of invention, on the assumption that the invention was patentable. But neither the circuit court nor this court can overlook the question of patentability. The bill claims a patent for what it alleges was invented by Wooster as a patentable invention; and the answer of the defendants is founded upon the view that Hill & Prentice were the first inventors of the improvements covered by the four claims in question, as patentable inventions.

We are of opinion that nothing in those four claims constitutes a patentable invention. A cabinet constitutes an element in each of the combinations covered by the four claims. This cabinet is nothing more than a boxing or covering in of the open space forming the lower part of the prior open-box creamery standing on legs. In the application of Wooster, filed January 17, 1879, in an amendment filed by him March 29, 1879, he says: "I am aware

that long rectangular milk receptacles have been provided with a water-chamber extending around the upper portion thereof; also, that water-coolers have been inclosed within a box or casing, and their upper ends inclosed within an ice receptacle having a perforated bottom; also, that a milk receptacle has been provided with an ice receptacle extending through the centre of the same; and hence I would have it understood that I do not claim the construction above referred to."

In the application of Hill & Prentice, filed March 30, 1880, they say in the specification: "The lower chamber or compartment serves to protect that part of the milk vessel which is in contact with this chamber from free contact with the outer air, preventing the temperature from unduly varying; and it also serves as a suitable place wherein to store butter, milk or dairy appliances, this being practically a refrigerating chamber."

In the decision of the examiners-in-chief on appeal, made July 12, 1882, they say: "The idea of applying a cooling medium to the top of milk cans while the bottom should be exposed to the ordinary temperature of the dairy-room was old, and Wooster expressly disclaims any broad pretension to such method, and says that he is aware that milk receptacles have been provided with a water-chamber around the upper portion, and that water-coolers have been boxed and their upper parts enclosed in ice receptacles and the lower end perforated, and milk receptacles been provided with an ice receptacle extending through the centre of the same. So, to start with, we find that whatever either has done is merely to improve upon means for more effectually carrying out this mode of treating milk, to obtain the best results in raising and securing cream. As a structure, the cabinet would seem almost anticipated by the water-cooler of which the parties made a double use; but this is not before us, except so far as showing us to what a limited extent the examiner conceded patentability of matter included in the claims allowed and put in interference." The examiners-in-chief seem, therefore, not to have considered that the question of patentability was before them, but that they were limited to considering the question as to which of the two parties first made the structure in the form in which it was presented.

The examiners-in-chief proceed: "When the parties came to the office they undoubtedly supposed, each for himself, that they had made a great discovery in keeping the top of the milk cool and the bottom warm. So we find that both of them seem to have obtained new light in regard to the state of the art, and, by repeated amendments, came down to quite restricted claims. We now come down to the material matter: Which of the parties devised and first reduced to practice the box, with lid, inclosing the cooler tank, having the elongated can extending through the bottom, etc.? The idea of drawing off the milk from the bottom was old, and the glass to afford inspection was old. And which of them conceived of and first reduced to practice the cabinet form, or the above box and tank and can construction, with the lower part of the can also inclosed? It is certainly a very small matter of invention,

this inclosing the bottom part, after the inclosing of the cooler tank, and after what has been done in refrigerators and water-coolers."

In the brief of the defendants, who are the appellants here, it is stated that the four claims in question "are confined to a cabinet creamery," and "are simply for adding the lower compartment to a box creamery on legs." We are of opinion that they are entitled to have the decree below reversed, on the ground that it was not a patentable invention to add a lower compartment to a box creamery on legs. The only allusion to this question in the brief for Wooster, the plaintiff and appellee, is the remark that no question is made in the answer but that one party or the other is entitled to a patent, and that, therefore, evidence which does not tend to show which party is entitled to the patent is irrelevant and should be suppressed. This court, however, has repeatedly held that, under the Constitution and the Acts of Congress, a person, to be entitled to a patent, must have invented or discovered some new and useful art, machine, manufacture or composition of matter, or some new and useful improvement thereof, and that "it is not enough that a

thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must, under the Constitution and the Statute, amount to an invention or discovery." The cases on this subject are collected in *Thompson v. Boisselier*, 114 U. S. 1, 11, 12 [29: 76, 79, 80]. To them may be added *Stephenson v. Brooklyn Crosstown R. Co.* 114 U. S. 149 [29: 58]; *Yale Lock Mfg. Co. v. Greenleaf*, 117 U. S. 554 [29: 952]; *Gardner v. Herz*, 118 U. S. 180 [80: 158]; *Pomace Holder Co. v. Ferguson*, 119 U. S. 835 [30: 406]; *Hendy v. Golden State & Miners' Iron Works*, 127 U. S. 870, 875 [32: 207, 209]; *Holland v. Shipley*, 127 U. S. 896 [32: 185]; *Pattee Plow Co. v. Kingman*, 129 U. S. 294 [32: 700]; *Brown v. District of Columbia*, 180 U. S. 87 [32: 868]; *Day v. Fair Haven & W. R. Co.* 182 U. S. 98 [33: 265]; *Watson v. Cincinnati R. Co.* 182 U. S. 161 [33: 295]; *Marchand v. Emken*, 182 U. S. 195 [33: 832]; *Royer v. Roth*, 182 U. S. 201 [33: 822].

The decree of the Circuit Court is reversed, and the case is remanded to that court with a direction to dismiss the bill, with costs.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1889.

Vol. 133.

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THE DECISIONS OF THE Supreme Court of the United States,

AT
OCTOBER TERM, 1889.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

TIMOTHY CASE, Receiver of the GREEN BAY AND MINNESOTA RAILROAD COMPANY, Appt.,

DAVID M. KELLY ET AL.

(See S. C. Reporter's ed. 21-29.)

Power of a railroad company to acquire land—statutory authority—Public Act—equity—payment for improvements—decree.

1. The Green Bay and Minnesota Railroad Company, a Wisconsin corporation, has no authority, under the laws of that State, to receive an indefinite quantity of lands, whether by purchase or gift, with no limitation upon their use or upon their sale; but it is limited to the lands necessary to such uses as are appropriate to the operations of its railroad.
2. The corporation, in order to be entitled to buy and sell, to receive and hold, the title to real estate, must have some statutory authority of the State in which such lands lie, to enable it to do so.
3. The charter of such Company is a Public Act of which courts must take judicial notice, it being declared by the Legislature to be a Public Act.
4. Although the courts would hesitate to deprive such corporation of lands conveyed to it for other than corporate purposes, they will not aid it to violate the law and obtain title to lands which it is not authorized to hold.
5. Where a court of equity decrees that a plaintiff is entitled to land held in trust for it, it may direct that he should pay the value of improvements placed upon it by the trustee while in his possession.
6. Where the plaintiff has no right to take the property, it is not injured by a decree of the court which fails to grant such right, although such property was fraudulently acquired by the defendant.

[No. 2.]

Argued Jan. 26, 1888. Decided Jan. 6, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Wisconsin for the conveyance of certain pieces of land as necessary and proper to said Railroad Company for its use for track,

133 U. S.

right of way, depots and other similar proper and necessary uses, and directing the payment for certain improvements made by defendants upon property. *Affirmed.*

The action is to procure a declaration of trust and a decree ordering conveyances by the defendants of certain lands alleged to have been granted to them in trust for such Railroad Company. The court decreed a conveyance of such part of the land as was necessary for corporate uses by the Railroad Company, and refused to decree the conveyance of the other parts of the land.

The other facts are stated in the opinion.

Mr. Walter C. Larned, for appellant:

Courts cannot take judicial notice of private acts.

Atchison, T. & S. F. R. Co. v. Blackshire, 10 Kan. 477; *Horn v. Chicago & N. W. R. Co.* 38 Wis. 468; *Perry v. New Orleans, M. & C. R. Co.* 55 Ala. 418; *Mandere v. Bonsignore*, 28 La. Ann. 415; *Broad Street Hotel Co. v. Weaver*, 57 Ala. 26; *Chapman v. Colby*, 47 Mich. 46; *Workingmen's Bank v. Converse*, 38 La. Ann. 963; *Hailes v. State*, 9 Tex. App. 170.

The finding of the court in this case, that the Company could only take such lands as were needed for railroad purposes, is wrong for the reason that the State alone by a proceeding of *quo warranto* has any right to inquire into such a question.

Union Nat. Bank v. Matthews, 98 U. S. 621 (25: 188); *Leasure v. Hillegas*, 7 Serg. & R. 813; *Gouldie v. Northampton Water Co.* 7 Pa. 233; *Runyan v. Coster*, 89 U. S. 14 Pet. 128 (10: 382); *Bank of Virginia v. Poitauz*, 8 Rand. (Va.) 186; *McIndoe v. St. Louis*, 10 Mo. 577; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640 (24: 648).

If a person lays out money on another's property, with knowledge or notice of the true state of the title, he has no claim to be reimbursed.

8 Pomeroy, Eq. Jur. § 1241, note; *Rennie v. Young*, 2 DeG. & J. 136; *Dart v. Hercules*, 57 Ill. 446; *Cannon v. Copeland*, 43 Ala. 252.

A purchaser with notice is not entitled to compensation for improvements.

2 Story, Eq. Jur. § 1237; *Davidson v. Bar-*

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clay, 63 Pa. 406; *Cook v. Kraft*, 8 Lans. 512; *Ramsden v. Dyson*, L. R. 1 H. L. 129.

Mr. Geo. H. Noyes, for appellees:

The charter of the Railroad Company was not a private, but a public, Act, of which the court below could take judicial notice.

People v. Ottawa Hydraulic Co. 8 West. Rep. 499, 115 Ill. 281; *Covington Drawbridge Co. v. Shepherd*, 61 U. S. 20 How. 227, 232 (15: 896, 898); *Junction R. Co. v. Bank of Ashland*, 79 U. S. 12 Wall. 226 (20: 385).

The charter in question would be considered a public Act, of which the court would take judicial notice.

State v. Lean, 9 Wis. 279; *Clark v. Janesville*, 10 Wis. 136; *Rochester v. Alfred Bank*, 13 Wis. 432; *Castello v. Landwehr*, 28 Wis. 522.

The Company, under its charter, could not purchase, receive or hold, nor could it take by eminent domain lands for speculative purposes or for any other than railroad purposes.

Rensselaer & S. R. Co. v. Davis, 48 N. Y. 137.

The property would be decreed to such *cestui que trust* without regard to any question of actual fraud. In such a case the party holding the title, as trustee, is allowed his improvements.

Lewin on Trusts, 444; *Cook v. Berlin Woolen Mill Co.* 56 Wis. 643, 43 Wis. 433; *Benson v. Culler*, 58 Wis. 107; *Blodgett v. Hitt*, 29 Wis. 169; *Green v. Dixon*, 9 Wis. 582; *Pratt v. Thornton*, 28 Me. 355, 48 Am. Dec. 498; *Spindler v. Atkinson*, 8 Md. 409; *Perry on Trusts*, §§ 206, 207.

Mr. Justice Miller delivered the opinion of the court:

The Green Bay and Minnesota Railroad Company being in the hands of a receiver, namely, Timothy Case, in the Circuit Court of the United States for the Eastern District of Wisconsin, in a suit by the Farmers' Loan and Trust Company, to foreclose a mortgage on said railroad, said Receiver was directed by the court to take possession of all the property, real and personal, of said Company, namely, its road-bed, lands, right of way, and all its other property and rights whatsoever, with authority to bring suits in the name of the Railroad Company as he should be advised by counsel to be necessary. Under this order Mr. Case, as Receiver, brought the present suit, stating that he sues in behalf of said Railroad Company, and as Receiver, the defendants David M. Kelly, Henry Ketchum and George Hiles and the Arcadia Mineral Spring Company, a corporation created by the laws of the State of Wisconsin.

The allegations of the bill are, that the defendants Kelly, Ketchum and Hiles, who were officers of the Railroad Company during its period of construction, had procured numerous donations of land from citizens who were interested in the construction of the road, along its line, intended to be for the use and benefit of the Railroad Company, and to assist it in such construction. The fundamental allegation of the bill is, that these defendants, representing to the persons who made the donations that they were officers of the road, and soliciting these grants for the benefit of the road, took the conveyances to themselves individual-

ly; that they did this in a fraudulent manner, by making the grantors in the conveyances believe that they, as the officers of the Company, could receive the conveyances for the benefit of the road, and that either the grantors did not really know to whom the conveyances were made, or were induced to believe that when made the grantees held the lands as a trust for the benefit of the road. These defendants not recognizing this trust, and the conveyances on their faces being merely conveyances to the individuals, either separately or collectively, to wit, to Ketchum, Kelly and Hiles, who now refuse to convey to the Company or to admit its right to the lands, this suit is brought to have a declaration of the trust made by the court and a decree ordering conveyances by the defendants of the land to the corporation.

It is further alleged that the mortgage in process of foreclosure in the court under which Case is acting as Receiver covered all the lands of the corporation, and would cover these lands if the title of the corporation in them was established.

The defendants Kelly, Ketchum and Hiles filed answers, in which they denied all fraud or deception, denied that they held the lands in trust for the Railroad Company, and denied the right of plaintiff to any relief. A decree for want of an answer was taken *pro confesso* against the Arcadia Mineral Spring Company: replications were filed to the answers, the case was put at issue as regards the three principal defendants, and an immense mass of testimony, documentary and otherwise, was taken.

The circuit court on the hearing was of opinion that the conveyances made by various persons to Kelly and Ketchum and Hiles of the lands described in the bill were made by the grantors and received by the defendants as contributions to the Railroad Company to aid in the construction of its road; and that if the Railroad Company had authority by law to receive such grants and to hold such real estate, it would be entitled to the relief sought in the bill in this case. But being also of opinion that by the laws of Wisconsin, and under its charter, it could only receive and hold lands for the defined purposes of the road, it held that only such lands as were necessary and proper for the immediate use of the road could be recovered in this suit. 18 American and English Railroad Cases, 70. It therefore entered the following interlocutory decree:

"This day came the parties, by their counsel, and, on consideration of the pleadings and proofs in this cause and the arguments of counsel thereon, it is ordered, adjudged and decreed by the court that the complainant is entitled to recover from the defendants the title and possession of all such lands mentioned in the bill of complaint as are required by the Railroad Company for right of way, depot buildings and other necessary railroad purposes, as described and limited in the charter of the Company, and that the bill of complaint as to all other portions of the lands described therein be dismissed.

"For the purpose of ascertaining what lands are required for right of way, depot grounds,

and other railroad purposes, as above stated, and also the extent and value of any improvements made by defendants, this cause is referred to Hon. James H. Howe, as special master of this court, who will take such additional proof as either party may offer upon reasonable notice, the evidence to close by the first day of October next, and the report of the master to be filed herein by the 20th day of October next. The master will accompany his report with such reasons as he may deem proper in support of the conclusions reached by him. For that purpose he may visit the premises and report the result of his personal examination."

The master made his report, accompanied by the testimony, to which exceptions were taken both by Case, the Receiver, and by the defendants Hiles and Kelly, which exceptions were overruled by the court, and a final decree entered. From this the present appeal is taken.

That decree, after specifying certain pieces of land which the court considered as necessary and proper to the road for its use in the way of track, right of way, depots and other similar, proper and necessary uses, ordered the conveyance of these pieces of land by Kelly and by Ketchum and by Hiles and by the Arcadia Mineral Spring Company to the Railroad Company. It also directed a master to ascertain and report the value of certain improvements made by Hiles upon a portion of this property, and report the same to the court, for which Hiles was to be paid in case complainant should elect to take such improvements.

The principal question suggested by this appeal is, whether the complainant, as representing the Railroad Company, can maintain a suit for these lands; that is to say, whether the company was endowed by the Legislature of Wisconsin with a capacity to receive an indefinite quantity of lands, with no limitation upon their use, or upon their sale, or whether they were limited to the lands necessary to such uses as were appropriate to the operations of a railroad.

It is not pretended that there is any general statute of the State of Wisconsin which authorizes either this Company or any other corporation to purchase and hold lands indefinitely, as an individual could do, without regard to the uses to be made of such real estate. The charter of the Company, approved April 12, 1866, chapter 540, authorizes it to acquire real estate, namely, the fee simple in lands, tenements and easements, for their legitimate use for railroad purposes. It is thus authorized to take lands 100 feet in width for right of way, and also such as is needed for depot buildings, stopping stages, station-houses, freight-houses, warehouses, engine-houses, machine-shops, factories, and for purposes connected with the use and management of the railroad. This enumeration of the purposes for which the corporation could acquire title to real estate must necessarily be held exclusive of all other purposes, and as the court said at the time of making its interlocutory decree, "it was not authorized by its charter to take lands for speculative or farming purposes."

It must be held, therefore, that there was no authority under the laws of Wisconsin for this

corporation to receive an indefinite quantity of lands, whether by purchase or gift, to be converted into money or held for any other purpose than those mentioned in its Act of incorporation.

To this view of the subject counsel urges several objections. The first of these which we will notice is that the charter of the corporation is a private Act of which the court cannot take judicial notice, and that as it was not pleaded nor offered in evidence, nor otherwise brought to the attention of the court, it could not be the foundation of its judgment. To this there are two sufficient answers. The first of which is, that if the Statute creating this corporation gave it no power to receive and hold lands in the manner we have mentioned, then it had no such power by virtue of any law of the State of Wisconsin; for a corporation, in order to be entitled to buy and sell, to receive and hold, the title to real estate, must have some statutory authority of the State in which such lands lie, to enable it to do so, and the absence of such provision in the law of its incorporation does not create any general statute which authorizes any such right.

Another answer is, that in the charter of the Railroad Company itself, Laws of Wisconsin of 1866, chapter 540, section 14, it is expressly enacted that "this Act is hereby declared to be a public Act, and shall take effect and be in force from and after its passage and publication." To this it is replied by counsel for appellant that the Statute of Wisconsin cannot make that a public law which in its essential nature is a private law. However this may be, we do not doubt the authority of the Legislature of a State to enact that after the passage and publication of one of its statutes the courts of the State shall be bound to take judicial notice of it without its being pleaded or proven before them. This rule, thus prescribed for the government of the courts of the States, must be binding in proceedings in federal courts in the same State. Indeed, the distinction between public and private Acts has become very artificial and shadowy since legislative bodies have adopted the principle of publishing in printed form all statutes which they pass. Some of the States keep up the distinction by making a difference in the manner in which public and private acts shall be published, and in such cases this difference is to be observed and may become of some consequence; but the power of the Legislature to declare in any case that after the passage and publication of any of its laws they shall be judicially noticed as public Acts cannot, we think, be doubted.

It is next objected to the principle adopted by the court that the limitation upon the power of the corporation to receive land is one which concerns the State alone, and the title to such lands in a corporation can only be defeated by a proceeding in the nature of a *quo warranto* on behalf of the State. The case of *Union Nat. Bank v. Matthews*, 98 U. S. 621 [25:188], is strenuously relied on to support this view. We need not stop here to inquire whether this Company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in

the Railroad Company or attempted to be so vested. The Railroad Company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the Statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the Company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the Company in violating the law, and enabling the Company to do that which the law forbids.

Another alleged error in the decree of the court relates to that part of it which authorizes Hiles to recover the value of his improvements, if the corporation chooses to take the improvements. We do not think this objection sufficient to reverse the decree. In the first place the right of the plaintiff to have this land is not based so much upon the ground of the defendants having purchased it for the benefit of the road, as upon the offer of counsel of Hiles to convey it in case he were paid for the improvements. But if we suppose that Hiles held this land in trust for the benefit of the plaintiff, and is willing to acknowledge that trust, there is no reason why, in a court of equity, when the complainant asserts his right to the land and claims to recover both the title and possession from this trustee, he should not pay the value of the improvements which that trustee has placed upon it. It is further to be observed that the option is given to complainant to take these improvements with the land or to reject the improvements and take the land without them, in which latter case he is merely required to give the owners of the improvements access to the land for the purpose of removing them. If he desires the improvements he can keep them by paying for them. Hiles paid for the land when he got the title, and we see nothing unjust or inequitable in his receiving compensation for improvements made in good faith upon the land which he is now willing to convey to the Company, if the Company chooses to take them at their appraised value.

We are urged to consider that if this decree is affirmed, dismissing the bill of the Railroad Company, the defendants will be left in the possession of property fraudulently acquired, of considerable value, for which they gave no consideration. The answer to this is, that such a question cannot be raised by the plaintiff in this case, because, having no right to take the property, it is not injured by a decree of the court which fails to grant such right. The other questions must be between the defendants in this case and those from whom they took deeds of conveyance, or such other parties, public or private, as may show that they have an interest in the controversy.

The decree of the Circuit Court is affirmed.

Mr. Chief Justice Fuller did not hear this case and took no part in its decision.

WILLIAM T. WASHBURN, Executor, ET AL., *Apprs.*,
v.

ASHBEL GREEN ET AL.

(See 'S. C. as *Richardson's Err.* v. *Green*, Reporter's ed. 80-50.)

Director of corporation—fiduciary relation—trust fund—stock, assessability of—bonds transferred to director by unfair means—moneys advanced—interest—clerk's fees.

1. A director and officer of a joint-stock corporation occupies a fiduciary relation and his dealings with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, are viewed with jealousy and distrust by the courts, and may be set aside on slight grounds.
2. Where a corporation becomes insolvent, its capital stock is a trust fund for the payment of its debts, and if not paid in full, a court of equity can require it to be paid up.
3. Where shares of such capital stock are voted to a director as a bonus, he is subject to the liabilities thereon which would attach to a shareholder who has taken stock but has not paid for the same, although there is a contract between him and the Company that such stock shall not be assessable.
4. Where bonds of the Company are transferred to a director by unfair means and in a clandestine manner, he cannot be regarded as a legal and equitable pledgee thereof, and, if sold by sheriff on his judgment against the Company, his purchase of them at the sheriff's sale vests in him no title.
5. Where a director advanced money to redeem bonds of the Company from a pledge, charged the money to the Company and received its notes therefor, and then attempted to levy upon and sell the bonds and himself become the purchaser thereof at a nominal sum, and thus gain an unconscionable advantage over other bondholders, no allowance should be made to him by way of equitable salvage for the money thus advanced by him.
6. Interest on the bonds should only be allowed from the date when they were delivered to the owners and holders of them.
7. Motion by an intervening petitioner in the suit, whose appeal was dismissed, to have refunded to him \$450, deposited by order of the court with the clerk, for two printed copies of the record, granted to the extent of \$200.

[No. 19.]

Argued Oct. 17, 18, 1889. Decided Jan. 30, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Michigan, in a foreclosure suit in regard to the priority of the claims of creditors to the fund who are allowed to intervene and prove their respective claims for priority, al-

NOTE.—As to right to pledge stock, and rights of pledgee of same, see note to *Anderson v. Philadelphia Warehouse Co.* Bk. 28, p. 478.

As to preferred stock, its issue, and rights of holders of same, see note to *Warren v. King*, Bk. 27, p. 769.

As to when taxation of stock or shares in corporation impairs obligation of contract, see note to *Providence Bank v. Billings*, Bk. 7, p. 389.

As to fiduciary position of directors, their contracts and dealings with corporation, see note to *Koehler v. Black River Falls Iron Co.* Bk. 17, p. 389.

lowing a portion of the claim of Richardson, an intervening creditor, as respects certain bonds held by him, and rejecting it as to other bonds claimed by him. *Affirmed.*

The facts are stated in the opinion.

Mr. Lyman D. Norris, for appellants.

Messrs. Daniel P. Hays, T. J. O'Brien, J. Hubley Ashton, D. A. McKnight, Henry M. Dechert and Henry T. Dechert, for appellees:

Delivery is necessary to a pledge.

Casey v. Cavaroc, 96 U. S. 467 (24: 779); *Thurber v. Oliver*, 26 Fed. Rep. 224.

A trustee cannot deal with trust property for his own benefit.

Marsh v. Whitmore, 88 U. S. 21 Wall. 178, 183 (22: 482, 484); *Wardell v. Union Pac. R. Co.* 108 U. S. 651, 658 (26: 509, 511).

The office of director of a railroad company is fiduciary in its character, and such director is incapacitated from dealing in his own behalf in respect to the corporation property, or in respect to any matter involving his powers and duties as such director.

Hoyle v. Plattsburgh & M. R. Co. 54 N. Y. 314; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587 (23: 328); *Barnes v. Brown*, 80 N. Y. 527, 535; *Aberdeen R. Co. v. Blakie*, 1 Macq. H. L. Cas. 461.

The appellants, Richardson and Day, are not entitled to claim the 800 bonds voted to Richardson at the meeting of August 8d, 1875, for the reason that the meeting was not a legal meeting of the Company, binding upon either the stockholders, the bondholders or other creditors of the Company.

Rez v. Liverpool, 2 Burr. 728; *Rez v. Chetwynd*, 7 Barn. & C. 695; *Wiggin v. Freewill Baptist Church*, 8 Met. 801; *Stow v. Wyse*, 7 Conn. 214; *People v. Albany Med. Col.* 26 Hun. 351; *Metropolitan Elevated R. Co. v. Manhattan R. Co.* 14 Abb. N. C. 288; *Re East Norfolk Tramways Co.* L. R. 5 Ch. Div. 968.

The appellants, Richardson and Day, are not entitled to the 400 bonds claimed, for the reason that Richardson was a director of the Company, which was then insolvent.

Bradley v. Converse, 4 Cliff. 875; *Bradley v. Farwell*, 1 Holmes, 433; *Coons v. Tome*, 9 Fed. Rep. 532; *Wardell v. Union Pac. R. Co.* 108 U. S. 651, 658 (26: 509, 511); *Thomas v. Brownville, Ft. K. & P. R. Co.* 109 U. S. 522 (27: 1018).

Assuming that Richardson had a lien upon these 600 bonds, he lost and surrendered such lien when he delivered them to the sheriff of the County of New York, and allowed them to be sold under his attachment and execution.

Jacobs v. Latour, 5 Bing. 130; *Wingard v. Banning*, 39 Cal. 543; *Legg v. Willard*, 17 Pick. 140; *Meeker v. Wilson*, 1 Gall. 419; *Evans v. Warren*, 122 Mass. 303; *Bean v. Bolton*, 3 Phil. 87.

Contracts made between the corporation and the officers and directors of the Company, as individuals, are void as against public policy.

Wardell v. Union Pac. R. Co. 108 U. S. 651 (26: 509), and cases cited.

The directors of a corporation are subject to the obligations which the law imposes upon trustees and agents, and they cannot, with respect to the same matters, act for themselves 188 U. S.

and for it, nor occupy a position in conflict with its interests.

Sanger v. Upton, 91 U. S. 60 (23: 222); *Griswold v. Seligman*, 72 Mo. 110; *Upton v. Englehart*, 3 Dill. 497; *Wardell v. Union Pac. R. Co.* 108 U. S. 651 (26: 509); *Knowlton v. Congress & E. Spring Co.* 57 N. Y. 518; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Gardner v. Butler*, 80 N. J. Eq. 702; *Webster v. Upton*, 91 U. S. 65 (23: 384); *Duncomb v. N. Y. etc. R. Co.* 88 N. Y. 1.

The appeals herein should be dismissed for irregularity, inasmuch as the names of the parties appellees are not set forth in the appeals.

Smith v. Clark, 58 U. S. 12 How. 21 (13: 875); *The Protector*, 78 U. S. 11 Wall. 87 (20: 48).

The report of the master, as to the matters of fact, is prima facie correct, and the court will not wander at large into the evidence to ascertain whether, by possibility, the master was wrong in his conclusions or not.

Medaker v. Bonebrake, 108 U. S. 72 (27: 655); *Tilghman v. Proctor*, 125 U. S. 149 (31: 668); *Donnell v. Columbian Ins. Co.* 2 Sumn. 366; *Mason v. Crosby*, 8 Woodb. & M. 258; *Paddock v. Commercial Ins. Co.* 104 Mass. 521; *Richards v. Todd*, 127 Mass. 167.

A judgment against a mortgagor corporation, prior to the receivership, but subsequent to the mortgage, is held subject to the mortgage.

Central Trust Co. v. East Tenn. V. & G. R. Co. 30 Fed. Rep. 897; *Duncan v. Mobile & O. R. Co.* 2 Woods, 542; *Hills v. Case*, 9 Biss. 549; *Kelly v. Green Bay & M. R. Co.* 10 Biss. 151; *Porter v. Pittsburgh Steel Co.* 122 U. S. 281 (30: 1210).

The equitable principles upon which the decisions in the leading cases of *Fosdick v. Schall*, 99 U. S. 285 (25: 339), and *Burnham v. Bowen*, 111 U. S. 776 (28: 596), and in other cases of that class, are founded, are not applicable to claims such as the present, accrued for the original construction of a railroad while there was a subsisting mortgage upon it.

This was expressly adjudged in *Porter v. Pittsburgh B. Steel Co.* 120 U. S. 671 (30: 888), affirmed on application for rehearing, 122 U. S. 280 (30: 1210).

Subsequent creditors cannot be heard to impeach an executed contract, where the dealings with the Company, of which they claim the benefit, occurred after the contract was executed.

Graham v. La Crosse & M. R. Co. 102 U. S. 148 (26: 106); *Porter v. Pittsburgh B. Steel Co.* 120 U. S. 678 (30: 838).

Mr. Justice Lamar delivered the opinion of the court:

This is a suit in equity, originally brought in the Circuit Court of the United States for the Western District of Michigan by Ashbel Green and William Bond, trustees, against the Chicago, Saginaw and Canada Railroad Company, a corporation organized under the laws of the State of Michigan, to foreclose a mortgage given by that Company on all its property and effects of whatsoever description to the plaintiffs, to secure the payment of 5,500 of its bonds of \$1,000 each, payable to said trustees or bearer.

The suit was commenced on the 16th of Nov-

ember, 1876. A receiver was at once appointed. The Company made no defense, but numerous parties, holders of the bonds thus secured, and others with claims of various kinds against the Company, with leave of the court, intervened in the case, and were allowed to prove their respective claims. The controversy resolved itself into a contest for priority among the respective claimants in the distribution of the proceeds of the sale of the mortgaged property thereafter to be made.

On the 30th of June, 1882, a decree was rendered that the bill was well filed, and that the complainants were entitled to a foreclosure. The matter was referred to a master to take testimony and report upon the validity, and also the priority, of the various claims filed. On the 6th of November, 1882, the master filed his report, in which he divided the claims presented into four classes, numbered A, B, C and D, respectively. In class C he placed the claims secured by the first mortgage bonds, and the amount of said security. In this class was the claim of Benjamin Richardson for money furnished to aid in the construction of the road, amounting with interest, to \$273,282.87, secured, as the master found, by 200 bonds, amounting to \$374,904. Exceptions to this report were filed by nearly all of the parties interested, but, in the main, it was confirmed by the court, and, on the 3d of May, 1883, a decree was entered on the question of priority among the respective claimants in the distribution of the fund arising from the sale of the mortgaged property, which had occurred. This decree, among other things, provided that, after certain expenses and certificates given by the receiver had been paid, the remainder of the fund should be ratably divided among the bond claimants, and where the bonds were held as collateral security no greater amount should be allowed than sufficient to satisfy the debt thus secured.

Benjamin Richardson's claim is in this class. It was for 600 bonds claimed as collateral security for the amount of money advanced by him for the construction of the road, and for 1,105 other bonds which he alleged he had redeemed from certain bankers in London, and, in another form, was for 3,574 bonds which he had purchased at an execution sale in New York City that was had to satisfy a judgment he had obtained against the Railroad Company in the Court of Common Pleas for the City and County of New York for the amount of his debt with interest. The decree allowed Richardson's claim as respects 200 of the 600 bonds, but rejected it as to the other bonds claimed by him.

Subsequently that decree was amended by the decree of October 8, 1883, so as to correct certain mistakes in the calculation of interest upon the bonds. The effect of this latter decree was to reduce Richardson's share of the proceeds by \$2,173.91 from what the original decree of May 3, 1883, had made it; and also to reduce in like manner the share of one of the other intervening parties, the Wrought Iron Bridge Company of Canton, Ohio, by the sum of \$183.60.

Four separate appeals were taken from the decree of May 3, 1883, and an appeal was also taken by Richardson and his assignee, Henry

Day, from the amended decree of October 8, 1883. At the last term of the court all the appeals were dismissed except that of Richardson and Day from the decree of October 8, 1883. *Richardson v. Green*, 130 U. S. 104 [82: 872]. Before the decision at the last term of the court was rendered Richardson died, and his legal representatives are now prosecuting the appeal. As a decision upon the questions presented by this appeal affects the distribution decreed by the court below of \$137,154.94 among the other claimants, it becomes necessary to examine the facts and to give consideration to the equities which relate to the claims of all those parties.

The Chicago, Saginaw and Canada Railroad Company was organized about the 4th of December, 1872, under an Act of the Michigan Legislature approved April 18, 1871, with a capital stock of \$4,200,000, divided into 4,200 shares, for the purpose of building a railroad from St. Clair, in the eastern part of the State, to Grand Haven, on Lake Michigan, a distance of about 210 miles.

The original incorporators each subscribed for 210 shares of this capital stock, 5 per cent of which was paid in. This was all the stock ever subscribed, and all the money paid in on any stock. Nine of those corporators were elected directors, all but three of whom resigned in 1873, transferring their stock, it is supposed, to those three. The stock subscribed and the money paid on it may, for all practical purposes, be considered as having afterwards disappeared from the organization.

For the purpose of raising funds to build the road and equip it the corporation executed a mortgage and issued 5,500 seven-per-cent bonds of \$1,000 each, due in 30 years, with interest payable semi-annually, and placed them in the hands of its executive committee to be put upon the market. Before selling any of its bonds, however, the corporation borrowed considerable money from various parties, giving the bonds as security, at the rate of two dollars in bonds for every dollar borrowed, and also giving, as a bonus, to the parties from whom the money was borrowed, a large amount of capital stock.

These loans were negotiated with the following persons: (1) With a syndicate of four persons in Philadelphia, designated in the record as the "Philadelphia parties," who advanced money to the Company on the terms above stated until the amount aggregated, according to the report of the master, \$143,629.62. The number of bonds pledged to the syndicate, as collateral security for this loan, was 462. The Philadelphia parties claimed before the court below to be entitled to prove all the bonds held by them to the full amount of principal and accrued interest; and to a share in the proceeds of the fund derived from the sale of the mortgaged property to the extent of their loans and the interest thereon. The decree of the court allowed their claim, to the extent of 287.26 bonds only, that number being twice the amount of the principal advanced. The second party from whom the Company obtained a loan was the appellant Richardson, upon terms hereinafter stated. The third party was George G. Sickles of New York, who loaned the Company \$100,000 upon a pledge of 250 of the bonds, as collateral, and also a bonus of \$100,000 full-

paid stock. Afterwards his son, Daniel E. Sickles, bought 163 of the bonds for the consideration that he would assume and pay the debts due his father, which he afterwards did. The bonds held by the elder Sickles were then returned to the Company. Daniel E. Sickles claimed that, as an innocent purchaser, he was entitled to priority over the other collateral bondholders, who were the directors, officers and promoters of the Company. His demand for priority was disallowed by the court; and the only part of his claim that was allowed was, that as innocent purchaser of the 163 bonds he might prove them to the full amount of his principal and interest.

After the negotiation for the three loans above named, Thomas M. Nelson contracted with the Company to ballast and iron the first twenty miles of the road from the Town of St. Louis west, etc. This contract he substantially performed. Two months afterwards he entered into another contract with the Company to clear, grub and grade the road, and build bridges and culverts on the second division thereof to Lakeview. Part of this second contract was assigned to the claimant Soule. This contract also, with the exception of a part of the grading, was performed by these parties. They had no security for the payment for their services. They relied on the solvency of the Company and the assurances of Richardson, who was then a director and the treasurer of it, that arrangements were perfected for the payment of the work as fast as it progressed. The Company failed to pay the amount due on these contracts. Suits were brought, judgments obtained, and executions issued which were returned *nulla bona*. They presented their claims to the master, who reported in their favor, and allowed them priority over the bondholders to the amount of \$16,342.68. Exceptions to this finding, having been filed, were sustained by the court below, which allowed their debt, but put it in the fourth class, to be paid *pro rata* from any surplus remaining after the bondholders were paid.

The claim of the Wrought Iron Bridge Company was based upon a contract with the Railroad Company, under which it built an iron bridge across the Saginaw River, which was sold by the receiver for the sum of \$20,000. This claimant was allowed a share in the proceeds of the sale on the basis of the 66 bonds of which it had become the actual owner.

The claim of Stevens was based upon a bona fide loan made to the Company by him. By the decree of the court below he was allowed a share in the funds to the extent of 32 bonds.

Any modification of the decree of the court below favorable to the contention of the appellants herein will correspondingly reduce the allowances made to the above-mentioned claimants.

The loan of \$100,000 by Richardson to the Railroad Company, on which he obtained the first 200 bonds, as collateral, was made by him on the 31st of March, 1875, under a contract with the Company, in which he agreed to lend the corporation that amount upon certain terms, which, among others, were, (1) that the Company should deliver to him 200 mortgage bonds of \$1,000 each; (2) that, within fourteen days, he should be elected a director of the

Company; (3) that John A. Elwell, of New York City, should be employed by the Company at a salary of \$2,500, and his personal expenses, for the purpose of superintending the construction of the road and of looking after the interests of Richardson; (4) that as a further collateral security the Company should lease the first 20 miles of the road as soon as it should be completed, and assign such lease to Richardson, and should also assign to him all the subsidy notes pertaining to that division of the road, he to retain all the money derived from the lease and subsidy notes, and render unto the Company, at final settlement, 7 per cent interest upon the money so received; and (5) that the Company should execute and deliver to Richardson 1,250 full-paid shares of capital stock of \$100 each. Although, on its face, this was to be fully paid-up stock, it was understood that no money was to be actually paid for it, the consideration, as recited in the agreement, being Richardson's services, good offices and influence in favor of the Company in the financial world.

In the contest for priority among the claimants before the master the judgment creditors of the corporation claimed that they entered into the contracts with the Company whereon they obtained their judgments relying upon its resources, which they were led to think were ample by reason of the amount of the outstanding paid-up stock in the hands of such responsible stockholders and owners as Richardson and the Philadelphia parties; and it was contended that those stockholders should not be allowed to share in the proceeds arising from the sale of the mortgaged property on the basis of the bonds held by them, as collateral, unless they should first pay to the Company the full amount of the shares of stock of which they had held themselves out to the world as the owners. The master concurred in this view, but, because there was no proof of the actual value of the stock, he declined to make any deduction from the amount due to Richardson, but limited his claim to the 200 bonds. The appellants received the amount which the decree allowed, but appealed to this court from that decree, contending that they were entitled to a larger share of the fund on the basis of the additional 400 bonds.

To determine the merits of the contention of the appellants, a somewhat minute statement of the circumstances which led the board of directors to vote to Richardson those 400 additional bonds becomes necessary. The 1,250 shares of paid-up stock for which he paid nothing made him the largest stockholder in the Company. He and the Philadelphia parties held all the outstanding stock with the exception of a few shares, and the entire and absolute control of the corporation was thus in their hands. Richardson soon controlled a majority of the board, and dominated its proceedings. He was at once made a director, according to the contract. He became chairman of its executive committee and its managing director. The lease of the first 20 miles of the road was made to him, and that part was turned over to his possession. He had John A. Elwell, his coadjutor and representative, elected a director, who became, successively, secretary, auditor and a member of the executive commit-

tee of the board. He afterwards caused Ambrose, Hamm and Cooper to be put upon the board of directors, to each of whom he assigned small portions of his stock to enable them to vote in furtherance of his schemes and interests; and the 1,250 shares of paid-up stock were in due time issued to him.

At a meeting of the board of directors, held on the 5th of July, 1875, although he had advanced nothing beyond his original loan already secured, he demanded 100 additional bonds, representing \$100,000, as collateral, and the board, yielding to his exactions, unanimously adopted a resolution directing the secretary and treasurer to deposit with him that number of bonds for such purpose. Within one month afterwards, to wit, August 5, 1875, Richardson was unanimously elected treasurer of the Company, to fill the vacancy caused by the resignation of E. P. Ferry, which he had tendered to take effect when his accounts should be adjusted by the executive committee, and when the personal obligations he had made should be settled, or he be relieved therefrom. The board of directors also voted to Richardson 800 additional first-mortgage bonds as collateral. How he accomplished these results, to wit, the resignation of Ferry, his own election as Ferry's successor, and also the vote to himself of the 800 bonds, is very fully explained by the testimony of the directors and of Richardson himself. Ferry thus states why he resigned: "Mr. Richardson said to me that he thought that, advancing as much money as he did, he not only should have all the moneys of the Company in his hands, as treasurer, to see that they were properly disbursed, but also the securities of the Company under his control." In explanation of his tendering his resignation, to take effect upon being settled with and relieved from personal responsibility, he says: "I had indorsed the Company's notes to the amount of about \$20,000, and furnished them with money, both. I had advanced the Company, as treasurer, from my own funds, in the neighborhood of \$10,000. I think it was \$9,000 and something." He further stated that Mr. Richardson assured him that the adjustment and release asked for should be effected. He also stated that Richardson had never performed those promises. The vote of 800 bonds to Richardson is thus explained by himself: "I demanded of the board 800 more bonds, and got them by resolution of the board." The resolution directed a conveyance to Richardson of 800 of the first-mortgage bonds of the Company upon the consideration of advances made and to be made by him. The fact is, that the sum actually advanced by him in addition to his original loan, for which these 400 bonds were successively voted to him, amounted to a little over \$31,000. The terms upon which he made the demand for these additional bonds are stated by Ferry and Elwell. At this same meeting, held August 3, 1875, Richardson introduced the following resolution:

"Resolved, That the president and secretary be, and they are hereby, authorized to execute a contract for the purpose of grading, tying and bridging the Company's located road from its western terminus to Lakeview."

Elwell testifies that Richardson stated to the board that if they would, by resolution, authorize him to receive 800 additional bonds of the Company of \$1,000 each, he would make further advances to a sufficient amount for the Company to go on with the extension and equipment of the road to Lakeview. It was in consideration of these promised advances that the resolution was adopted directing the 800 bonds to be conveyed to him. This promise was never fulfilled by Richardson. Elwell testifies that he advanced no money for the extension or equipment of the road to Lakeview, nor did he purchase any iron or other material to be used on that part of the road. Both Richardson and Ferry, according to their own testimony, considered that the action of the board of directors placed Richardson, as treasurer, in the shoes of Ferry, at least with regard to the custody of the unissued bonds of the Company. These bonds, 2,985 in number, were deposited with a Safe Deposit Company in New York City, subject to the control of Ferry. Ferry immediately drew an order on that company authorizing it to deliver to Richardson all the bonds belonging to the Railroad Company deposited with it, and, through Elwell, gave to Richardson the key to the vault in which they were kept, in order that he (Richardson) might take possession of them. Armed with this order to the Trust Company to deliver the bonds to him, as treasurer, Richardson, on the 30th of August, 1875, in company with Messrs. O. W. Child and M. J. Baney, proceeded to the place of business of the Trust Company, and, his order having been accepted by that company, took possession of all the unissued bonds there belonging to the Railroad Company, Messrs. Child and Baney counting them and making a memorandum of them. This memorandum of the number counted included the 400 now claimed by the appellants, as collateral security. On the following day, Richardson, claiming to act under the authority of the aforesaid resolutions of the board of directors voting the 400 bonds to him as collateral security, and the order of the president of the Company to Ferry, separated 400 of the bonds from the remainder (Child and Baney assisting him), and placed them in a tin box, which he afterwards kept in his personal possession.

On the 11th of October, 1875, Richardson was appointed managing director, irrevocable, and chairman of the executive committee; and, on the 12th of the same month, he gave to Ferry the following receipt:

"Received of Edward P. Ferry, treasurer of the Chicago, Saginaw & Canada Railroad Co., twenty-two hundred and eighty-nine (2,289) of the first-mortgage bonds of the Company, numbered as detailed by the memorandum above, dated New York, Aug. 20, '75, and signed by O. W. Child & M. J. Baney, placed in my custody as chairman of the executive committee of said R. R. Co., in accordance with the resolution of the board of directors passed Oct. 11, '75, for custody, disposal or sale.

"Benjamin Richardson.
"Indorsed: Benjamin Richardson. Receipt
—2,289 bonds. Oct. 12, 1875."

The list thus receipted for by Richardson, as

chairman of the executive committee, included the 400 bonds numbered from 3,201 to 3,600, inclusive, which he previously, as before stated, had separated from the original number, and claimed had been pledged to him as collateral security. It is safe to say, too, we think, that no one interested in the affairs of the Company, except Elwell and Richardson, knew, at that time, that Richardson was holding those 400 bonds in any other capacity than as treasurer of the Company. Elwell testified that at the meeting of October 11, 1875, none of the other parties knew that Richardson had those bonds.

W. J. Kelley testified that, at a meeting of the board of directors on that day, the understanding of the board derived from Richardson's statement was, that he had in his possession only the original 200 bonds as collateral. Secured in the possession of the Company's bonds, Richardson refused to comply with the conditions on which Ferry had resigned. On the 16th of August, 1875, Elwell inclosed in a letter to Richardson two renewal notes to be substituted for those on which Ferry had been indorser, saying: "Mr. Ferry demands that, before he resigns his office of treasurer and turns everything over to you, that you shall indorse the renewal notes personally, as he did the original ones, and it is for that purpose that I send them, and they ought to be returned to Mr. Ferry immediately, so as to reach him the last of this week, to be used in the bank next Monday. . . . Mr. Ferry gave me one of his envelopes stamped, in which you had better inclose the notes to him. . . . Mr. Ferry has agreed to turn over to you or to deliver to me for you on your order all books, accounts, vouchers, etc., in his possession as treasurer upon the two notes being returned to him indorsed." Richardson remonstrated with Elwell against this, and on the 21st of the same month he replied to Elwell's next letter, declining to sign the notes, and declaring himself indifferent to Elwell's retention of the books and papers pertaining to the office of treasurer, inasmuch as he (Richardson) had already become, not only the treasurer, but also the receiver, advancer and chief controller of the Company. On that day the board of directors voted 120 bonds to Richardson as a bonus. Counsel for the appellants insist in their brief that this was done in his absence, and that he repudiated this resolution and refused to take those bonds. This statement is in conflict with that of Kelley, president of the Company, who testifies that Mr. Richardson was present, and, so far from objecting to the vote of the bonus to him of 120 bonds, he insisted upon it; but as they make no claim on these bonds as a bonus, it is not necessary to add anything further, except the remark that the action of the board illustrates the readiness of the directors to subserve all Richardson's wishes.

At the meeting of July 8, 1876, the board, in anticipation of the foreclosure of the mortgage then determined on, passed resolutions auditing the entire account of Richardson against the Company, and declared the sum of \$185,584.18 to be due to him from it. Another resolution, unanimously adopted, ratified and approved the bonds issued to him for that aggregate sum. A third resolution was adopted directing the secretary to execute and deliver to

him the notes of the Company at 7 per cent, payable at such times as could be agreed on with Richardson, and that there should be embodied in the note an authority to the holder, in default of payment, to sell such bonds without notice and with the right to become himself the purchaser if sold at public sale. On the same day, immediately after the meeting, Elwell, the secretary, gave to Richardson those notes, in which were recited the numbers of the 600 bonds under discussion. On the same day, Richardson and Ferry addressed to the mortgage trustees a written request to institute proceedings to foreclose the mortgage. These notes, on the 17th of July, at the request of Richardson, were torn up by Elwell, and demand notes, bearing the same date, substituted therefor. Forthwith Richardson commenced suit against the corporation in the Court of Common Pleas of the City of New York on those notes; and on the 12th of August obtained the judgment hereinbefore mentioned. Execution was issued on that judgment, and, as the proofs clearly show, the sheriff levied upon and sold all the bonds of the Company which had been placed in Richardson's custody, namely, the 600 bonds which he claimed had been pledged to him as aforesaid, and 2,974 other bonds, including 1,105 which he claimed to have redeemed from a bank in London. At the sale Richardson purchased all those bonds at the price of \$50 each, \$178,700. A short time after this sale and purchase, to wit, November 16, 1876, this suit for foreclosure was commenced, and as an intervenor therein he claimed that by virtue of his purchase at the sheriff's sale he became the absolute owner of the entire 3,574 bonds. Afterwards he appears to have confined his claim to the 600 bonds alleged to have been held by him originally as collateral security and the 1,105 bonds just referred to. It would seem from the briefs filed in this court by counsel on behalf of appellants that the claim here is confined to the 400 bonds above described.

In view of all the facts and circumstances presented by this record we are unable to see any such superior equity arising out of the transactions of Richardson with this Company as entitles him to a priority over the other creditors in the distribution of the fund in question; or anything in his mode of getting possession of the 400 bonds which gives him a better claim to them than that of the other creditors. While we may not be prepared to concur with the master in some of the reasons upon which he based his report, yet we do not think either that report or the decree of the court below confirming it contains any error of which the appellants can complain.

Richardson's relation to the subject matter of this controversy was threefold: (1) that of a creditor of an insolvent corporation claiming for his debt priority of payment over those of all other creditors, out of the fund arising from a foreclosure sale of the mortgaged property; (2) that of a director and officer of that corporation at the time his debt against it was created; and (3) that of the largest shareholder of its capital stock. Undoubtedly his relation as a director and officer, or as a stockholder of the Company, does not preclude him from entering into contracts with it, making loans

to it and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions not, perhaps, with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the Company as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement. In *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 588 [23: 329], *Mr. Justice Miller*, delivering the opinion of the court, said: "That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others."

In relation to the rights and liabilities of a stockholder, this court said in *Sawyer v. Hoag*, 84 U. S. 17 Wall. 610, 620 [21: 731, 735], *Mr. Justice Miller* again delivering the opinion of the court: "We think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation." Proceeding to show that this trust cannot be defeated by a simulated payment of the stock subscription, nor by any device short of an actual payment in good faith, he concluded with these words: "It is therefore but just that, when the interest of the public or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to a rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him."

In the case last cited the stockholder nominally paid the stock subscription, but the money was immediately taken back as a loan, and it was claimed by him as a valid payment. The transaction was characterized by the court as a "fraud upon the public who were expected to deal with them."

In *Graham v. La Crosse & M. R. Co.*, 102 U. S. 143, 161 [26: 106, 111] this court said, *Mr. Justice Bradley* delivering the opinion: "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which in other circumstances are as much the absolute property of the corporation as any man's property is his."

In the more recent case of *Wabash, St. Louis & Pacific R. Co. v. Ham*, 114 U. S. 587, 594 [29: 285, 286], it was said by this court, speaking through *Mr. Justice Gray*: "The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that

when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them."

Can the transaction between Richardson and the insolvent corporation of which he was largely the owner and controller, especially with respect to the claim he is urging in this case, stand the test of the fairness and good faith which, as a director and stockholder, he owed to the corporation, its creditors and bona fide bondholders? His very first transaction with the corporation, by which he introduced himself into it as a stockholder, was an illegal and fraudulent act. We refer to the agreement on the part of the Company to issue to Richardson 1,250 shares of bonus stock. At the time this agreement was made and the stock issued in pursuance thereof, the statutes of Michigan provided: "That it shall not be lawful for any railroad company, existing by virtue of the laws of this State, nor for any officer of any such company, to sell, dispose of or pledge any shares in the capital stock of such company, nor to issue certificates of shares in the capital stock of such company, until the shares so sold, disposed of or pledged, and the shares for which such certificates are to be issued, shall have been fully paid." (2 Comp. Laws, par. 7757.)

We have seen that all the acts of Richardson as director, stockholder, chairman of the executive committee and treasurer, all of which offices he held at one time, had their origin in this bonus stock. After having exercised all the privileges and powers of a stockholder in the corporation, it cannot be seriously contended that he is to be held exempt from the liabilities which would attach to a bona fide shareholder who has taken shares purporting to be paid up, but which in truth are not paid up. The case of *Scoville v. Thayer*, 105 U. S. 143, 153, 154 [26: 968, 973], bears a close analogy to this. *Mr. Justice Woods*, delivering the opinion of the court in that case, said: "The stock held by the defendant was evidenced by certificates of full-paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it . . . But the doctrine of this court is, that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside; that when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full." The same rule is laid down in *Ex parte Daniell*, 1 De G. & J. 372. In that case the directors of the company allotted to themselves a number of shares by a resolution that the shares so allotted were to be treated as paid-up stock in full. Daniell, one of the directors, was not present at the time the resolution was adopted, but he afterwards accepted the shares allotted to him. An order having been made for winding up the company, assessments were made upon those

shares for the purpose, it is supposed, of paying the debts of the company. It was held that Daniell was liable to those assessments to the same extent as if the resolution had not provided that the shares were to be treated as paid-up stock.

The principle underlying all of the decisions which we have cited upon this point is, that the capital stock of a corporation, when it becomes insolvent, is in law assets of the corporation, to be appropriated to the payment of its debts; and that creditors have the right to assume that the stock issued by the corporation and held by its stockholders as paid-up stock had been paid up, or, if unpaid, that a court of equity, at the instance of the proper parties, could require it to be paid up. In the case now before us, the bonds claimed by the appellants were voted to Richardson by his associate directors, every one of whom owed his election to the holders of this bonus stock alone. The total amount of the advances made by him, for which these bonds are collateral, is very little larger than one half of the amount of the stock which he had as paid-up stock. If the stock given to him and the Philadelphia parties had been really paid-up stock, there would have been no insolvency on the part of this corporation.

Irrespective of the question whether he can be made liable for the face amount of this stock, or for its proved value, the facts we have detailed certainly do not entitle his claim to outrank that of any bona fide creditor, whether secured or unsecured, in the matter of distribution.

The master found that the 400 bonds had never been delivered by the Company to Richardson in his individual capacity, in pledge as collateral security for the moneys advanced. It is strenuously argued in behalf of appellants that the evidence taken under the order of the court, after the findings of the master had been made and his report filed, for the purpose of explaining the receipt given by Richardson to his predecessor, Ferry, is sufficient to overturn the master's report on that point. That evidence was before the court when it rendered the decree complained of, and, so far as the decree shows, it was not regarded as essentially modifying the facts as found by the master. We think the conclusion of the court was correct. We do not deny that cases may arise in which, if everything were admitted to be fairly done, with the knowledge and acquiescence of the Company, such a personal possession as that which Richardson obtained, although not such an actual delivery as the board had intended and directed, might be considered as equivalent to a legal delivery. But under the special circumstances of this case, in view of the unfair means employed by Richardson to have the entire body of the Company's bonds transferred from the custody of Ferry into his own custody, and the clandestine manner in which he took out the 400 from that body, not only without notice of the fact to the Company, but with an implied, if not an expressed, denial of the transactions, we do not think that he can be regarded as standing in the position of a legal and equitable pledgee; or that he ever acquired, as such pledgee, a lien on the 400 bonds. But even if there could be any

doubt on this point, Richardson himself by his own act has removed it. He waived and abandoned all claim to any lien, as a pledgee, by his voluntary surrender and delivery of the bonds to the sheriff of the County of New York, as the property of the Company, to be sold under execution. If the 400 bonds were not delivered to Richardson, as we think the court below correctly held, it follows that the unissued bonds were not subject to attachment or to execution as valid and binding obligations against the Company, and that Richardson's purchase at the sheriff's sale vested in him no title or ownership in them.

Counsel for the appellants in their brief put not a little stress upon the fact that Richardson's claim is based upon the advance of actual money for the enterprise to the full amount of \$185,584.18. The answer to this is, that the decree of the court below recognized his claim to the entire amount and gave him his ratable share of the proceeds of the sale, upon the footing of the 200 bonds delivered to him, up to the amount of \$273,282.87. We are of the opinion that that decree gave him the fullest measure of allowance to which he could possibly be justly entitled.

It is hardly necessary to say much with respect to the claim of Richardson to the 1,105 bonds alleged by him to have been redeemed as aforesaid. Upon this question the master says:

"The case is briefly this: The board of directors sent one of their number as financial agent to Europe with authority to negotiate a sale of bonds. While there, to defray expenses, he borrowed a sum of money from a Mr. Stevens and pledged to him 50 of the bonds as collateral security; these, together with the 1,105 bonds, this agent and Stevens deposited with the Consolidated Bank of London, with agreement that the bonds should not be delivered to anyone without the joint order or consent of the agent and Stevens. The agent was withdrawn from Europe; the indebtedness due Stevens was allowed to go to protest, and the directors were fearful Stevens would not only sell the bonds pledged, but would also sell the 1,105, and the purchaser obtain title to the whole, and thus render nearly valueless the securities held by the directors. To prevent this calamity Richardson advanced the money, charged it to the Company, and received its notes therefor. He then attempted to do what he was fearful might have been done in London, namely, levy upon and sell the 1,105 bonds and himself become the purchaser at a nominal sum, and thus gain an unconscionable advantage over other bondholders. It is a general rule that fraud or any gross misconduct on the part of the salvors in connection with the property saved will work a forfeiture of the salvage; and the evidence in this case with reference to the means employed to obtain a levy on the bonds in question and the sale thereof fully justifies us in the conclusion, which I have reached, that no allowance ought to be made to Richardson by way of 'equitable salvage' for the moneys advanced by him to obtain the return of the bonds to the Company."

We fully agree with what is said by the master, and do not deem it essential to add anything further on that point.

As regards the decree of October 8, 1888, we think it sufficient to say that the corrections made by it, as regards the calculations of interest on the bonds in the original decree were correct and proper, and were warranted by the law. The original decree had allowed interest on some of the bonds owned and held as collateral security from the date of their issue. The amendatory decree simply allowed such interest to be calculated from the date when the bonds were actually delivered to the owners and holders of them. Such correction was eminently legal and just.

The decree of the court below is affirmed.

In connection with this case a motion has been made by Thomas M. Nelson, one of the intervening petitioners in the suit, whose appeals were dismissed at the last term of the court*, to have refunded to him the sum of \$450, deposited with the clerk under the order of this court of January 14, 1889, requiring such deposit to be made in order that his counsel might have two printed copies of the record.

This motion is based upon the following grounds:

(1) That the petitioner was not one of the principal litigants in the appeals, but was simply an intervening judgment creditor, having no interest in the matter of the controversy between the bondholders and the trustees;

(2) That his demand is quite small when compared with the amount involved in the controversy between the principal litigants; and

(3) That he was not a necessary party to the determination of the questions involved in the controversy between the main parties to the litigation, but simply intervened as the only manner in which he could protect his rights under his judgment against the Company for work and labor performed for it in the construction of the road.

The motion is granted to the extent of \$200.

*See Bk. 32, p. 372.

THOMAS H. MASON ET AL., *Appts.*,
v.

THE PEWABIC MINING COMPANY
ET AL.

THE PEWABIC MINING COMPANY
ET AL., *Appts.*,
v.

THOMAS H. MASON ET AL.

(See S. C. Reporter's ed. 50-64.)

Corporation, expiration of—reorganization—rights of stockholders—purchasing assets of

old company—superior right—power of majority of stockholders—stockholders as partners—sale of property of an expiring corporation—proceeds to be divided—liability for business done after dissolution.

1. Where a charter of a corporation expires, a majority of the stockholders, proposing to form a new company, have no right, as against a minority, to make an arbitrary estimate of the property of the corporation to be transferred to the new company and require the minority to go into the new company, or receive for their interest in the property of the old company a sum fixed by those who are buying them out.
2. Such majority, in constituting a new company, have no right to become the purchaser of the assets of the old company at their own valuation.
3. There is no superior right in two or three men in the old company, who may hold a preponderance of the stock, to acquire an absolute control of the whole of it in a way which may be to their interest, or which they may think to be for the interest of the whole.
4. Those holding a majority of the stock cannot place a value upon it at which a dissenting minority must sell or do something else which they think against their interest, any more than those holding a minority of the stock can do it.
5. The rights of the stockholders in regard to the assets of an expiring corporation do not differ from those of partners on the dissolution of the partnership.
6. Such right, in the absence of an agreement to the contrary, is to have the property converted into money, and its value ascertained, by a sale, even though a sale is not necessary to the payment of debts.
7. One or more of those thus interested cannot be compelled to accept for their interest a calculated value, being their proportion of a valuation set by the others, or to take away their share of the property; but anyone may have the whole assets sold and the proceeds divided.
8. Where directors of a corporation conduct its business after its dissolution without any attempt to wind it up, and assess its stock and collect the assessments, they must, in a proceeding to wind up the affairs of the corporation, to pay its debts, and to realize its assets and distribute them among its shareholders, account for the proceeds of the business done since its dissolution.

[Nos. 188, 240.]

Argued Dec. 17, 18, 1889. Decided Jan. 13, 1890.

APPEALS from a decree of the Circuit Court of the United States for the Western District of Michigan that the affairs of the Pewabic Mining Company be wound up, that its assets and property be sold at public vendue for cash to the highest bidder and the proceeds distributed among its stockholders unless the

NOTE.—*Dissolution of partnership—Effect of as between the partners—Carrying on business by some of the partners after termination of partnership—Accountability for proceeds.*

A dissolution of a copartnership does not destroy the joint tenancy of partners in partnership property and create a tenancy in common. The partnership, with all its incidents, continues for purpose of settling partnership concerns, and until that is effected. *Murray v. Mumford*, 6 Cow. 441, Anth. N. P. 204.

On dissolution by one partner's becoming insolvent, the remaining partner has not a right, as of

course, to close up the business, as a surviving partner has. The copartner has a right to demand the appointment of a receiver. But the solvent partner ought to be appointed receiver, if he will give security necessary, and his capacity and integrity are unquestioned. *Hubbard v. Guild*, 1 Duer, 662.

Use of partnership property, by either party, after dissolution of a partnership, must be accounted for if required, although it was only a partnership in the proceeds, and not in the stock. *Pine v. Ormsbee*, 2 Abb. Pr. N. S. 375.

Circumstances under which a surviving partner is not liable to account for the profits of the busi-

amount bid for the entire property shall be no more than the amount proposed to be paid for it by the new company above its debts; and denying an accounting by the directors of the Company for the proceeds of its business done since the expiration of its charter. *Decree affirmed so far as it directs a sale of the property and the distribution of the proceeds among the stockholders, and reversed so far as it refuses an accounting for the transactions of the Company after the expiration of its charter.*

The facts appear in the opinion.
Opinion below, 25 Fed. Rep. 882.

Messrs. Don M. Dickinson and Alfred Russell, for Mason et al.:

The action of the old Company conveying its property was void.

Atty-Gen. v. Perkins, 78 Mich. —; *Foster v. Essex Bank*, 16 Mass. 245.

A stockholder cannot be forced into a new enterprise, or be compelled to receive anything else than his honest *pro rata* as a distributee of the fair value of the assets in cash.

Ulley v. Donaldson, 94 U. S. 47 (24:56); *Clearwater v. Meredith*, 68 U. S. 1 Wall. 25, 39-41 (17: 604, 608, 609).

On the winding up of the business of a corporation the proceeds must be distributed in cash. The business cannot be disposed of in any other manner except by unanimous consent.

McCurdy v. Myers, 44 Pa. 535; *Black v. Delaware & R. Canal Co.* 24 N. J. Eq. 455; *Re Empire Assur. Corp.* L. R. 4 Eq. 841; *Olinch v. Financial Corp.* L. R. 4 Ch. 117; *Frothingham v. Barney*, 6 Hun, 386; *Gregory v. Patchett*, 33 Beav. 595; *Tuttle v. Michigan Air Line*

R. Co. 35 Mich. 249; *Mowrey v. Indianapolis & C. R. Co.* 4 Biss. 78.

No amendment to articles of association effecting a fundamental change in the enterprise or business is within the power of the parties or of the Legislature to authorize as against a non-assenting stockholder, although the majority may assent.

Joy v. Jackson & M. Plank Road Co. 11 Mich. 171; *Detroit v. Detroit & H. Plank Road Co.* 48 Mich. 140; *Black, Const. Prohibition*, 146, note, 54, note.

Corporations like this are in truth little more than private partnerships.

Foss v. Harbottle, 2 Hare, 491.

The directors become trustees at the expiration of the charter.

Bliss v. Matteson, 45 N. Y. 22; *Butts v. Wood*, 87 N. Y. 317; *Thornton v. Marginal F. R. Co.* 128 Mass. 34; *Foster v. Essex Bank*, 16 Mass. 245; *Simmons v. Hanover*, 23 Pick. 194; *Orease v. Babcock*, 23 Pick. 384; *Mumma v. Potomac Co.* 33 U. S. 8 Pet. 281 (8:945); *Greenwood v. Union Freight R. Co.* 105 U. S. 18 (26:961); *Selma First Nat. Bank v. Colby*, 88 U. S. 21 Wall. 609, 615 (22:687, 689).

Civily dead, the property of an insolvent corporation is administered as a trust fund.

Mollen v. Moline Malleable Iron Works, 181 U. S. 352 (38:178); *Lum v. Robertson*, 78 U. S. 6 Wall. 277 (18:743).

And it was their duty to convert assets into money, pay debts, and distribute the net proceeds.

Mann v. Butler, 2 Barb. Ch. 362; *Blatchford v. Ross*, 54 Barb. 42; *Hartford & N. H. R. Co. v. Croswell*, 5 Hill, 383, 386; *Simpson v.*

ness, conducted after his partner's decease. *Wilson v. Simpson*, 15 N. Y. Week. Dig. 171.

Where, after the dissolution of a partnership, and notice thereof by publication and mailing to persons with whom the late firm had dealings, the business is carried on by one of the former partners, with the consent of the others, in the firm name, the retiring partners will be liable on notes indorsed by such partner in the firm name, and discounted in the usual course of business, at his request, by one with whom the late firm had dealings, and who had no notice or knowledge of the dissolution. *National Shoe & Leather Bank v. Hers*, 99 N. Y. 629, 15 N. Y. Week. Dig. 22.

One partner cannot terminate the partnership at will by notice or by suit, but can terminate it only for some one of the recognized causes sufficient in law to authorize courts to wind up partnerships. *Hubbel v. Buhler*, 43 Hun. 82; *Henn v. Walsh*, 2 Edw. Ch. 129; *Goodman v. Whitcomb*, 1 Jac. & W. 589; *McElvey v. Lewis*, 78 N. Y. 373; *Skinner v. Tinker*, 34 Barb. 333; *Peacock v. Peacock*, 16 Ves. Jr. 49; *Featherstonhaugh v. Fenwick*, 17 Ves. Jr. 298; *Law v. Ford*, 2 Paige, 310; *Marten v. Van Schalk*, 4 Paige, 479.

After dissolution one of the partners may sue the other for his share of moneys collected by the latter since dissolution, and need not bring any action for an accounting. *Crosby v. Nichols*, 3 Bosw. 450; *Howard v. France*, 43 N. Y. 593; *Crater v. Bininger*, 45 N. Y. 545; *Chapin v. Dobson*, 78 N. Y. 74; *Brigg v. Hilton*, 99 N. Y. 517; *Ferguson v. Baker*, 5 N. Y. S. R. 842.

The renewal of a lease obtained after dissolution of a partnership does not change the rule that one partner cannot take a new lease in renewal of an existing one of the firm, in his own name, or for his own benefit, without being liable to account for it 133 U. S.

to the partnership. *Johnson v. Loughery*, 6 Cent. Rep. 273, 115 Pa. 129; *Spiess v. Rosswogg*, 16 Jones & S. 135, aff'd, 96 N. Y. 651.

Upon the dissolution of a firm by the death or bankruptcy of one of its members, it is the duty of the surviving or solvent members to take possession of the firm assets and perform its contracts, extinguish its liabilities and close up its business, in the manner most advantageous to the interests of all the parties concerned; it is the right of the representatives of a deceased or bankrupt partner to share in the profits of all business unfinished at the dissolution, but completed afterward, and a valuation of such business as of the time of the dissolution will not be required unless peculiar circumstances, exempting the particular case in equity from the operation of the general rules, exist. *Wedderburn v. Wedderburn*, 22 Beav. 84; *Simpson v. Chapman*, 4 DeG. M. & G. 154; *Case v. Abeel*, 1 Paige, 396; *Murray v. Mumford*, 6 Cow. 441; *McClean v. Kennard*, L. R. 9 Ch. App. 386; *Collender v. Phelan*, 79 N. Y. 372; *King v. Leighton*, 100 N. Y. 386.

A partnership formed by persons interested in a railway company, for the single purpose of purchasing stock in another railway company with the design of securing its control for the benefit of their corporation,—*Held*, to be terminated by the sale of a portion of the stock purchased, and a distribution of the balance among the copartners, so that such copartners were not entitled to participate in the profits of a subsequent transaction personally entered into by the active managing member of the firm. *Kennedy v. Porter*, 109 N. Y. 526.

Where the surviving partner continues to use the capital of his deceased partner in the business he may be charged with the proportionate share of the profits during the time it is so used instead of

Westminster Palace Hotel Co. 8 H. L. Cas. 712; *Lyde v. Eastern Bengal R. Co.* 36 Beav. 19; *Erie R. Co. v. Vanderbilt*, 5 Hun, 124; *McCray v. Junction R. Co.* 9 Ind. 858; *State, Brown, v. Bailey*, 16 Ind. 46; *Kerr, Injunctions*, 558; *Campbell's Case*, L. R. 9 Ch. 1; 2 Perry, Trusts, 2d ed. §§ 768, 769; *Ringgold v. Ringgold*, 1 Harr. & G. 11, 25; *Russell v. Russell*, 86 N. Y. 581; *Ives v. Davenport*, 8 Hill, 873; *Taylor v. Earle*, 8 Hun, 1; *Davis' Appeal*, 14 Pa. 371.

It makes no difference that the trustees act in perfect good faith, and actually for the interest of all the stockholders.

Gardner v. Ogden, 22 N. Y. 327; *Swoyer's Appeal*, 5 Pa. 377; *Hurst v. Fisher*, 1 Harr. & G. 88; *Frothingham v. Barney*, 6 Hun, 886.

If the majority sell to themselves they must account for the fair value; they cannot bind the minority by fixing their own price upon the assets.

Ervin v. Oregon R. & Nav. Co. 20 Fed. Rep. 577; *Brewer v. Boston Theatre*, 104 Mass. 878-895; *Hodgkinson v. National Live Stock Ins. Co.* 26 Beav. 478; *Atwood v. Merryweather*, L. R. 5 Eq. 464, note; *Gregory v. Patchett*, 83 Beav. 595; *Wardell v. Union P. R. Co.* 103 U. S. 651 (26:509); *People v. Township of Overysel*, 11 Mich. 222; *Flint & P. M. R. Co. v. Dewey*, 14 Mich. 477, 486; *German American Seminary v. Kiefer*, 43 Mich. 105; *Great Luxembourg R. Co. v. Magnay*, 25 Beav. 586, 23 Beav. 646; *York & N. M. R. Co. v. Hudson*, 16 Beav. 505; *Atty.-Gen. v. Wilson*, 1 Craig & Ph. 1; *Benson v. Heathorn*, 1 Younge & C. Ch. 326; *Aberdeen R. Co. v. Blaikie*, 1 Macq. 461; *Imperial M. C. Asso. v. Coleman*, L. R. 6 H. L. 189; *Re Madrid*

Bank, L. R. 2 Eq. 216; *Kochler v. Black River Falls Iron Co.* 67 U. S. 2 Black, 715 (17:339); *James v. Milwaukee & M. R. Co.* 73 U. S. 6 Wall. 752 (18:885); *Drury v. Milwaukee & S. R. Co.* 74 U. S. 7 Wall. 299 (19:40); *Cumberland Coal & I. Co. v. Sherman*, 80 Barb. 553; *Abbot v. American H. Rubber Co.* 83 Barb. 586; *Simons v. Vulcan Oil & M. Co.* 61 Pa. 202; *Kimmell v. Geeting*, 2 Grant, Cas. 125; *Ashhurst's Appeal*, 60 Pa. 290; 1 Redfield, Railw. 5th ed. 605-613; *Robinson v. Smith*, 8 Paige, 222; *Colquitt v. Howard*, 11 Ga. 566; *Hodges v. New England Screw Co.* 1 R. I. 812; *Port v. Russell*, 86 Ind. 60; *Newby v. Oregon C. R. Co.* 1 Sawy. 63; *Michoud v. Girod*, 45 U. S. 4 How. 508 (11:1076); *Concord R. Co. v. Clough*, 49 N. H. 257; *Heath v. Erie R. Co.* 8 Blatchf. 847; *Wright v. Oroville Gold, S. & C. Min. Co.* 40 Cal. 20; *European & N. A. R. Co. v. Poor*, 59 Me. 277; *Paine v. Lake Erie & L. R. Co.* 31 Ind. 283; *Goodin v. Cincinnati & W. W. Canal Co.* 18 Ohio St. 169; *Story*, Eq. §§ 1255, 1257, 1265; *Gilman O. & S. R. Co. v. Kelly*, 77 Ill. 426-435, and cases cited; *Butler v. Watkins*, 80 U. S. 18 Wall. 456 (20:629); *Green's Brice*, Ultra Vires, chap. VII.

The acts of the board in the expenditure of the money in carrying on business after the expiration of the charter, April 4, 1883, were beyond their powers, and they are responsible for all losses and expenditures in that behalf.

Gray v. National S. S. Co. 115 U. S. 116 (29:809); *Hill, Trustees*, Am. notes, 580; *Thompson*, Liability of Officers of Corporations, 875; *Field*, Corporations, § 178; *Parish v. Wheeler*, 22 N. Y. 508; *Angell & A. Corporations*,

with interest. *Booth v. Parks*, 1 Molloy, 466; *Brown v. De Tastet*, Jacob, 284, as explained in 4 Russ. 126; *Simmons v. Leonard*, 3 Hare, 591; *Wedderburn v. Wedderburn*, 22 Beav. 84, 2 Keen, 722, 4 Myl. & Cr. 41, 2 Beav. 208, 17 Beav. 158, 18 Beav. 465; *Featherstonhaugh v. Fenwick*, 17 Ves. Jr. 298; *Waring v. Cram*, 1 Pars. Sel. Eq. Cas. 516, 522; *McKnight v. Walsh*, 23 N. J. Eq. 137; *Long v. Majestre*, 1 Johns. Ch. 305; *Washburn v. Goodman*, 17 Pick. 519; *Ogden v. Astor*, 4 Sandf. 811; *Barfield v. Loughborough*, L. R. 8 Ch. App. 1; *Marjrum v. Saunderford*, 1 Romilly, Notes of Cases, 110, and note, p. 114; *Case v. Abeel*, 1 Paige, 393, 396, 397; *Chambers v. Howell*, 11 Beav. 6; *Parsons*, Partn. *443.

And so of the rents and profits of real estate owned by the partnership. *Smith v. Walker*, 38 Cal. 385.

But a proper allowance should be made for the management and care of the business; and such allowances are in some cases very liberally made. *Brown v. De Tastet*, Jacob, 284, 297, as explained, 4 Russ. 126; *Cook v. Collingridge*, Jacob, 622-24; *Waring v. Cram*, 1 Pars. Sel. Eq. Cas. 522; *Featherstonhaugh v. Turner*, 25 Beav. 382.

Although if there be fraud or other improper practices by the survivor, such allowances may be refused. 1 Romilly, Notes of Cases, 115; *Burden v. Burden*, 1 Ves. & B. 170; *Stooken v. Dawson*, 17 L. J. N. S. Ch. 232, affirming 6 Beav. 371.

And if the survivor is charged with profits he is entitled to deduct for bad debts. *Washburn v. Goodman*, 17 Pick. 519.

And so for the amount properly paid a clerk or proper assistant, by a share of the profits. *Hall's Appeal*, 40 Pa. 409.

But there is no absolute rule that the survivor shall be charged with profits. The principle of di-

vision may be affected by considerations of the source of the profits, the nature of the business and all circumstances of each particular case. *Willett v. Blanford*, 1 Hare, 253, 295-99; *Wedderburn v. Wedderburn*, 23 Beav. 84; 1 Romilly, Notes of Cases, 116-118; *Simpson v. Chapman*, 4 De G. M. & G. 154.

Where the goodwill belongs to the survivor, he will not be charged with profits resulting from that. *Wedderburn v. Wedderburn*, 23 Beav. 84; *Holden v. McMakin*, 1 Pars. Sel. Eq. Cas. 270; *Parsons*, Partn. 2d ed. *444.

Where two out of three partners dissolve the partnership and form a new copartnership, the third, if insolvent and indebted to the firm, cannot claim a share of the profits of the new firm. *Hyde v. Easter*, 4 Md. Ch. 80.

Instead of profits, the survivor may be charged with interest at the legal rate. *Washburn v. Goodman*, 17 Pick. 519; 1 Romilly, Notes of Cases, 117; *McKnight v. Walsh*, 23 N. J. Eq. 137.

The right to profits may be lost by laches of the representatives of the deceased. *Clements v. Hall*, 2 De G. & J. 173; 1 Romilly, Notes of Cases, 117; *Smith v. Drake*, 23 N. J. Eq. 302.

As to application of partnership assets to debts and rights of individual and partnership creditors therein, see note to *United States v. Hack*, Bk. 8, p. 941.

As to when partner is liable on contracts in firm name, after dissolution, and what notice of dissolution is necessary to avoid liability, see note to *Lovejoy v. Spafford*, Bk. 23, p. 351.

As to effect of admissions of partner after dissolution on his copartners, see note to *Thompson v. Bowman*, Bk. 18, p. 738.

As to rights and powers of surviving partners, see note to *Moore v. Huntington*, Bk. 21, p. 642.

§ 290; Green's Brice, *Ultra Vires*, 397 *et seq.*; Perry, *Trusts*, § 184.

Mr. Thomas H. Talbot, for Pewabic Mining Company *et al.*:

A compulsory sale of the corporate property of the expiring defendant corporation cannot be ordered by the court as an absolute right.

Sparhawk v. Union P. R. Co. 54 Pa. 401.

The court is not bound to decree a dissolution, even when a majority of the directors and stockholders request it to be done.

Re Niagara Ins. Co. 1 Paige, 258.

To entitle a stockholder to maintain a suit of this nature, he must act for the benefit of the company.

Irvin v. Susquehanna Turnp. Co. 2 Penr. & W. 471; *Filder v. London, B. & S. C. R. Co.* 1 Hem. & M. 489; *Waterbury v. Merchants Union Express Co.* 50 Barb. 168; *Belmont v. Erie R. Co.* 52 Barb. 662.

The suit must be a bona fide one, faithfully, truthfully, sincerely directed to the benefit and the interests of stockholders as stockholders.

Forest v. Manchester, S. & L. R. Co. 4 DeG. F. & J. 126, 180; *Ffooks v. South Western R. Co.* 1 Smale & G. 142, 167; *Robson v. Dodds, L. R.* 8 Eq. 301.

The majority who would go forward are required to secure to the dissentients the payment of the value of their portion of the corporate property. Upon the furnishing of such security the majority are allowed to go forward with their organization or enterprise.

Lauman v. Lebanon V. R. Co. 30 Pa. 42; *State, Brown, v. Bailey*, 16 Ind. 46 (51); *Re South Barrule Slate Quarry Co. L. R.* 8 Eq. 688.

Mr. Justice Miller delivered the opinion of the court:

These are an appeal and a cross-appeal from a decree of the Circuit Court of the United States for the Western District of Michigan. On March 31st, 1884, there was filed in the Circuit Court for that District the bill of complaint of Thomas G. Mason, William Hart Smith and Sullivan Ballou, who describe themselves as citizens of the State of New York, against The Pewabic Mining Company, a corporation existing under the laws of the State of Michigan, Johnson Vivian, a citizen of the State of Michigan, and Henry Billings, Thomas H. Perkins, Alden B. Buttrick and Daniel L. Demmon, citizens of the State of Massachusetts, and The Pewabic Copper Company, a corporation created under the laws of the State of Michigan. The bill professes to be filed in behalf of the complainants above named, and of all the stockholders in the Pewabic Mining Company who may desire to join herein and take the benefit of the proceedings of the court. The bill is too long to copy in full in this opinion. The substance of it is, that the complainants were members of the Pewabic Mining Company, a corporation organized under the laws of Michigan on the 4th day of April, 1853, with a capital stock of twenty thousand shares of \$25 each, afterwards increased to forty thousand, which was invested in a copper mine near Houghton, Michigan. The complainants allege themselves to be, at the time of the filing of the bill, the owners of 2,650 shares of the stock of the Company. They allege that the charter of the Company expired on April 4th, 1884 U. S.

1888, but that nevertheless the directors who were elected in March of that year, disregarding this fact, continued the ordinary business of the corporation, and among other things made an assessment of \$88,000 on the capital stock, which was paid. They further allege that at the annual meeting of the stockholders on the 26th of March, 1884, for the election of directors and for other purposes, the following resolutions were adopted, against the vote and the protests of the complainants:

"Resolved, That the board of directors be authorized to sell and dispose of the property of the Company for a sum not less than \$50,000; that the president and secretary be authorized to execute all conveyances necessary to carry out the contract for the sale of the property of this Company made by the board of directors, and that the board of directors be, and hereby are, authorized to close up the business of the Company.

"Resolved, That it is the sense of this meeting of stockholders that the property shall be sold to a new corporation, organized under the laws of Michigan, on the basis of forty thousand shares, and that the stock of such new corporation shall be issued to and received by the stockholders of this Company in payment for the same, stockholders to have the right to receive equal number of shares in new company, if they so elect, on surrendering certificates of this Company, within thirty days after April 12, 1884, and in case a stockholder does not take stock of the new corporation he is to receive his *pro rata* share in money."

The vote in favor of the adoption of these resolutions was 27,919 shares against 6,754 shares in the negative. On the same day a certificate of incorporation under the laws of Michigan was executed, forming the Pewabic Copper Company, and filed two days afterwards. Its capital stock was also forty thousand shares at \$25 each, which was taken up by the defendant corporators, who, with two others, were named as the first directors, being the same persons who controlled the old Company. The third article of this association declared that no cash is actually paid on the capital stock. The cash value of real and personal property conveyed to the company contemporaneously with its organization is the sum of \$50,000.

The Constitution of the State of Michigan declares, article 14, section 10, that no corporation, except for municipal purposes or for the construction of railroads, plank-roads and canals, shall be created for a longer time than thirty years. A Statute of Michigan (1 Howell's Statutes, section 4867) enacts that all corporations whose charters shall expire by their limitation, or shall be annulled for forfeiture or otherwise, shall nevertheless continue to be bodies corporate for the term of three years after the time they would have been so dissolved, for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, dispose of and convey their property, and divide their capital stock, but not for the purpose of continuing the business for which such corporations have been or may be established.

The bill prayed for an injunction and re-

straining order forbidding the defendants from carrying out the purpose of transferring the property of the Pewabic Mining Company to the new corporation. It also prayed for the appointment of a receiver to take charge of the effects of the Pewabic Mining Company, that they might be sold, the debts of the Company paid, and the remainder of the proceeds distributed among the stockholders.

The defendants answered the bill, admitting substantially its principal allegations, stating as an excuse for continuing the operations of the Company beyond the period of its thirty years' existence that they were not aware of the time when that thirty years expired. They assert that, in all they had done since, they had acted honestly and fairly, and had the assent of the majority of the stockholders; that the arrangement under which they proposed to transfer the property of the Pewabic Mining Company to the new corporation was one which met with the approval of the majority of the stockholders, and a still greater preponderance of the stock in the corporation. They allege that they offered to pay the dissenting stockholders for their stock at the rate of \$50,000 for the value of the whole stock, which was the sum at which it was to be sold to the new company, or to permit them to exchange it for stock in the new company, share for share, and they insist that this was just and fair, and what they had a right to do, and that they should still be permitted to carry out this plan. They say that the complainants, in refusing to accede to the new arrangement, are acting in the interest of rival copper mining companies, whose mines adjoin that of the Pewabic Company, and that their object is to force a sale at public auction, when those companies, whose shareholders are wealthy, will have an unfair advantage in purchasing the property below its real value. They repeat their offer to pay the defendants for the *pro rata* value of their stock, estimating the whole at \$50,000, or to exchange it for stock in the new company. Replication was filed.

The court refused the appointment of a receiver, but did issue a restraining order against the defendants to prevent the consummation of the sale to the Pewabic Copper Company. A special master was appointed, with all the powers usually possessed by a master in chancery, to whom the case was referred, with directions to ascertain what assets and property, real and personal, were owned by the defendant, the Pewabic Mining Company, on the 26th day of March, A. D. 1884, and also what assets and property, real and personal, said Company owned at the time of filing the bill of complaint in this case, on the 31st day of March, 1884; and also to ascertain the fair cash value of such assets and property at the several dates aforesaid, distinguishing the value of the several parcels and kinds of said property, and for that purpose to take testimony and make report thereon.

The report of the master shows the value of the property belonging to the Pewabic Company to be much greater than \$50,000, and the defendants concede it to be worth \$75,000, which they profess a willingness to pay. The master took many depositions as to the value of this property on the part of plaintiffs and

defendants, and he says: "Between the extremes of the testimony I find it very difficult to say what these several parcels of property are worth, but for the purposes of this reference I find the value of the several classes as follows:

"Stamp mill plant, including pumps and buildings	\$40,000 00
Mining equipment, not including dwellings	35,000 00
89 dwellings	30,000 00
Wood and timber	27,286 59
Mining supplies	30,000 00
Cash on hand	9,197 23
Copper on hand	43,757 06
Water front, stamp mill site	2,000 00
Real estate and mining rights	250,000 00
Mine buildings and shops	30,000 00
Bills receivable	1,058 67

"Total

\$498,412 24"

Upon final hearing, the circuit court decreed that the equity of the case is with the complainants, and "that the affairs of the Pewabic Mining Company be and are hereby decreed to be wound up." It then directs that "all the assets and property of the Pewabic Mining Company be sold at public vendue for cash to the highest bidder: *Provided*, That if at such sale the bid for the aggregate of the property and assets should not be in excess of \$50,000, above the amount of the debts of the Company existing at the time of the sale, then the arrangement for the sale of such property, made at the stockholders' meeting in Boston on the 26th day of March, 1884, as set up in defendants' answer, shall be carried out under the direction of the special master, hereinafter designated, and as provided by the resolution adopted by the stockholders at said meeting," etc. It was further ordered that "the cause be referred to Peter White, as special master, for the following purposes, and with the following powers, to wit: That said master proceed to ascertain the assets and property and the amount of debts of said Pewabic Mining Company, and to this end he may consider the evidence already taken in the cause, and may further, upon notice to the solicitors of the different parties, set days for hearing evidence, and either party may produce witnesses as in the ordinary course of a master's proceedings, and that he report to this court the proceedings and findings thereon, and that after ascertaining the assets and debts of said Company, and making report thereof to this court, said master shall proceed to the sale of said property at public vendue to the highest bidder in one body, after giving the notice required by law, and that he make report thereof. And it is further decreed that if the highest bid for such property at such sale shall amount to more than \$50,000 over and above the indebtedness of said Pewabic Mining Company, then that the arrangement for the sale of said property, made at said meeting of the stockholders at Boston, must be set aside and held to be null and void, and the Pewabic Mining Company be enjoined perpetually from selling to the Pewabic Copper Company, and that Company is enjoined from receiving its transfer of the property." It is then decreed "that the defendants Vivian, Billings, Perkins, Buttrick and Demmon, directors of said Pewabic Company, are not liable to pay to complainants and other stockholders any money received by them since the expiration of the charter of said Pewabic

Mining Company, April 4, 1888, and that an accounting by said defendant directors is hereby denied as to such expenditure made by them after the expiration of the charter."

The complainants in the bill prayed an appeal from that part of the decree which refused the prayer for an accounting on the part of the directors of the Pewabic Company of their transactions since the date of the expiration of the charter. This appeal is numbered on our docket 168. The defendants all appeal from the principal decree, which directs a sale of the property and the distribution of its proceeds among the stockholders of the Pewabic Mining Company in the event that a sum is bid for all of said property in a lump which exceeds the amount of the indebtedness of the Pewabic Mining Company and the sum of \$50,000, which appeal is numbered 240.

With regard to the main question, the power of the directors and of the majority of the corporation to sell all of the assets and property of the Pewabic Mining Company to the new corporation under the existing circumstances of this case, we concur with the circuit court. It is earnestly argued that the majority of the stockholders—such a relatively large majority in interest—have a right to control in this matter, especially as the corporation exists for no other purpose but that of winding up its affairs, and that, therefore, the majority should control in determining what is for the interest of the whole, and as to the best manner of effecting this object. It is further said that in the present case the dissenting stockholders are not compelled to enter into a new corporation with a new set of corporators, but have their option, if they do not choose to do this, to receive the value of their stock in money.

It seems to us that there are two insurmountable objections to this view of the subject. The first of these is that the estimate of the value of the property which is to be transferred to the new corporation and the new set of stockholders is an arbitrary estimate made by this majority, and without any power on the part of the dissenting stockholders to take part, or to exercise any influence, in making this estimate. They are therefore reduced to the proposition that they must go into this new Company, however much they may be convinced that it is not likely to be successful, or whatever other objections they may have to becoming members of that corporation, or they must receive for the property which they have in the old Company a sum which is fixed by those who are buying them out. The injustice of this needs no comment. If this be established as a principle to govern the winding up of dissolving corporations, it places any unhappy minority, as regards the interest which they have in such corporation, under the absolute control of a majority, who may themselves, as in this case, constitute the new company, and become the purchasers of all the assets of the old Company at their own valuation.

The other objection is that there is no superior right in two or three men in the old Company, who may hold a preponderance of the stock, to acquire an absolute control of the whole of it, in the way which may be to their interest, or which they may think to be for the interest of the whole. So far as any legal

right is concerned, the minority of the stockholders has as much authority to say to the majority as the majority has to say to them: "We have formed a new Company to conduct the business of this old corporation, and we have fixed the value of the shares of the old corporation. We propose to take the whole of it and pay you for your shares at that valuation, unless you come into the new corporation, taking shares in it in payment of your shares in the old one." When the proposition is thus presented, in the light of an offer made by a very small minority to a very large majority who object to it, the injustice of the proposition is readily seen; yet we know of no reason or authority why those holding a majority of the stock can place a value upon it at which a dissenting minority must sell or do something else which they think is against their interest, more than a minority can do.

We do not see that the rights of the parties in regard to the assets of this corporation differ from those of a partnership on its dissolution, and on that subject Lindley on Partnership says, page 555, original edition:

"In the absence of a special agreement to the contrary, the right of each partner on a dissolution is to have the partnership property converted into money by a sale, even though a sale may not be necessary to the payment of debts. This mode of ascertaining the value of the partnership effects is adopted by courts, unless some other course can be followed consistently with agreement between the partners; and even where the partners have provided that their shares shall be ascertained in some other way, still if owing to any circumstance their agreement in this respect cannot be carried out, or if their agreement does not extend to the event which has in fact arisen, realization of the property by a sale is the only alternative which a court can adopt."

The authorities cited by Lindley for this proposition amply support it.

In the case of *Crawshaw v. Collins*, 15 Ves. Jr. 218, a commission of bankruptcy had been issued against Noble, one of the members of a partnership engaged in the business of manufacturing pumps and engines. The assignee of Noble filed a bill, asking for a division of the assets, which consisted largely of patents, and upon a very full argument upon the subject, Lord Eldon says: "Another mode of determination of a partnership is not by efflux of time, but by the death of one partner." The question then is, he says, "whether the surviving partners, instead of settling the account and agreeing with the executor as to the terms upon which his beneficial interest in the stock is still to be continued, subject still to the probable loss, can take the whole property, do what they please, and compel the executor to take the calculated value. That cannot be without contract for it with the testator. The executor has a right to have the value ascertained in the way which it can be best ascertained, by sale."

In 17 Ves. Jr. 298, a case more analogous to the present one came before the court. In that case (*Featherstonhaugh v. Fenwick*) the parties were engaged as partners in the business of manufacturing glass, and after deciding one of the questions in the case, to wit, that the

partnership was dissolved or should be dissolved by decree of the court, the master of the rolls, *Sir William Grant*, proceeded to say: "The next consideration is whether the terms upon which defendants proposed to adjust the partnership concern were those to which the plaintiff was bound to accede. The proposition was that a value should be set upon the partnership stock, and that they should take his proportion of it at that valuation, or that he should take away his share of the property from the premises. My opinion is clearly that these are not terms to which he is bound to accede. They had no more right to turn him out than he had to turn them out, upon those terms. Their rights were precisely equal—to have the whole concern wound up by a sale, and a division of the produce. As therefore they never proposed to him any terms which he was bound to accept, the consequence of continuing the trade with his stock and his risk is, they come under liability for whatever profit may be produced by that stock." He then refers to the case of *Crawshay v. Collins*, just cited, with approval.

In the case of *Hale v. Hale*, 4 Beav. 369, Joseph Hale, who carried on the trade of a brewer in partnership with George Hale, and two other persons, died leaving a will. The master of the rolls, in discussing the relative rights of the surviving partners and the executor of the deceased, says in regard to the executor:

"He is not obliged to submit to the statement of the account which is made by the continuing parties,—clearly not, in the absence of all contract to that effect, which is admitted to be the case here. He has a right to say, 'I must have the actual value of my partnership assets determined, and though it may be very inconvenient for you to have the value obtained in the manner prescribed by the law, yet if we cannot otherwise agree, I must have it ascertained by the only mode by which it can be ascertained accurately, namely, by a sale for what it will fetch in the market.'"

The next case, *Wild v. Milne*, 26 Beav. 504, was a case bearing a closer analogy to this, because the parties were engaged in the mining business, to wit, working a colliery. In consequence of some disagreements, the plaintiff gave notice to dissolve and instituted this suit to have the partnership wound up. He did not allege that there were any debts, but prayed that the partnership property might be sold and applied to the payment of the debts, and that the surplus might be divided. This was resisted by defendant Milne alone. On the hearing, the master of the rolls, *Sir John Romilly*, said: "I am clearly of opinion that this is an ordinary case of partnership, and when it is dissolved or terminated, any one of the partners is entitled to have the whole assets disposed of. In this case it is admitted that anyone can put an end to the partnership. The result, is that that which forms the partnership assets must be disposed of for the purpose of settling the account between the partners. I consider this established by *Crawshay v. Maule*, 1 Swanst. 518-526." And after pointing out the difficulty in the mode of dividing the property, which consisted partly of real estate, of the use of the

shaft, of the machinery and engines, etc., he said: "The court is compelled by the exigency and circumstance of these cases to direct a sale."

The cases of *Rowlands v. Evans* and *Williams v. Rowlands*, 80 Beav. 302, arose out of another partnership in mining business very much like the case before us. Some of the partners interested desired that the mining business might be carried on by a miner and receiver, but the plaintiff objected to this. One of the partners had become a lunatic, and his business was in the hands of a committee, and the question was whether the partnership be dissolved and the property sold, or a receiver appointed to conduct the operations of the concern. The master of the rolls said: "I do not think the point is touched by the decisions. The difficulty is this: 'The court cannot compel persons to be in this situation—either to carry on business with the committee of a lunatic, subject to all the inconveniences of having a manager appointed by the court, and subject to appeal to the House of Lords. No one would bid for a share in a mine to be carried on by a committee of a lunatic, nor give the value of a share of a lunatic under such circumstances. I think the value of the whole must be ascertained by a sale by auction, and that some indifferent person well acquainted with these matters should be directed to sell the property, and that all parties should have liberty to bid.'"

In the case of *Burdon v. Barkus*, 4 De G. F. & J. 42, which came before the lords justices of appeal from the vice chancellor's court, *Lord Justice Turner*, delivering the opinion, said: "The next inquiry to be considered is the inquiry as to a valuation of the stock and plant, which is objected to on both sides—by the defendant, as importing that the stock is to be valued; by the plaintiff, as importing that it might be valued as of a going concern. I think both of these objections were well grounded. There was no agreement between these parties for stock and plant being taken by either party on the termination of the partnership, and in the absence of such an agreement a partner cannot, as I conceive, be compelled to take, nor can he compel his copartner to take, the stock at a valuation. Each is entitled to have it ascertained by a sale, and as the defendants claim to have the stock dealt with as the stock of a going concern, I do not see how it can be maintained, for the plaintiff is certainly not bound to continue the concern."

These English authorities would seem to be conclusive of the right of the plaintiffs in the present case to have a sale of the property. The same doctrine is very decisively announced in the case of *Dickinson v. Dickinson*, 29 Conn. 600. This was a bill in regard to a partnership, the main object of which was to procure the division of certain property which the plaintiff claimed to belong to the partnership. The court said: "The plaintiff has no equitable claim to a decree in his favor. So far as the bill asks for a division of the property, we suppose this object could only be effected by a sale of the property and the conversion of it into cash, and then dividing the cash, because as between partners there is no other mode, where they do not concur, of ascertaining the value of partnership property or of disposing of it."

The court then refers to the case of *Sigourney v. Munn*, 7 Conn. 11, and cites the language of Judge Hosmer in that case, as follows: "In every case in which a court of equity interferes to wind up the concerns of a partnership, it directs the value of the stock to be ascertained in the way it can best be done, that is, by the conversion of it into money. Every partner may insist that the joint stock shall be sold."

In the Supreme Court of Michigan, in *Godfrey v. White*, 48 Mich. 171, which is mainly important as showing the concurrence of the highest court of the State under whose laws the Pewabic Mining Company was organized, that court decided that certain lands which constituted a part of the partnership property should not be partitioned between the partners, but should be sold and the proceeds divided. See also *Briges v. Sperry*, 95 U. S. 401 [24: 390].

We do not say there may not be circumstances presented to a court of chancery which is winding up a dissolved corporation and distributing its assets, that will justify a decree ascertaining their value, or the value of certain parts of them, and making a distribution to partners or shareholders on that basis; but this is not the general rule by which the property in such cases is disposed of in the absence of an agreement.

We are of opinion that on the appeal of the defendants from this part of the decree, it must be affirmed.

However honest the directors may be who conducted the business of this corporation for nearly a year after its dissolution without any attempt to wind it up, but who, on the contrary, assessed \$88,000 on the shares of the stock and collected it, and did much other of the ordinary business of mining operations, it seems to us eminently proper that in this proceeding, by which the court undertook to wind up the affairs of the corporation to pay its debts, and to realize its assets, and distribute them among the shareholders, these directors should account for what they did in that time. We do not decide, nor do we think it was necessary for the court below to have decided, whether those directors had anything in their hands which should be accounted for in the final liquidation of the partnership affairs, or whether they had not. It is the object of such an inquiry as that sought by complainants in their bill to ascertain this fact. It was not a part of the matter referred to the commissioner in the former reference. We think it is a proper subject of investigation to be made by a master to whom the matter shall be referred, with express directions to ascertain and report upon that subject. (See authorities already cited.) *That part of the decree, therefore, of the court denying this relief is reversed, and the case remanded to the court below with directions to appoint a master, and to direct such an inquiry and report.*

Bradley, J.:

I think the opinion of the court asserts too strongly the right of the minority stockholders to insist upon a sale. In many cases in this country a valuation of the interest of a minority, under the direction of the court, has been deemed a proper method of as-

certaining their share in the assets, where a sale would be prejudicial to the interests of the whole.

Mr. Justice Gray was not present at the argument, and took no part in the decision of this case.

BENJAMIN U. KEYSER, Receiver of the
GERMAN-AMERICAN NATIONAL BANK OF
WASHINGTON, D. C., *Plff. in Err.*,
v.

JANE C. HITZ.

(See S. C. Reporter's ed. 138-152.)

Savings banks, when may become national banks—deputy comptroller, when may act as comptroller—certificate—judicial notice—objection—erroneous instructions—transfer of bank stock to a married woman—her liability thereon—intent of transfer—evidence—estoppel—husband's use of avails—ownership—transfer on bank books—legal capacity—shareholder in national bank—liability of married woman—coverture.

1. After the passage of the Act of 1876, savings banks organized in the District of Columbia under an Act of Congress, and having a capital stock paid up in whole or in part, were entitled to become national banking associations in the mode, and subject to the conditions, prescribed by section 5154, U. S. Rev. Stat.
2. A deputy comptroller of the currency may exercise the powers and discharge the duties attached to the office of comptroller during a vacancy in that office, or during the absence or inability of the comptroller. Rev. Stat. §§ 178, 237.
3. This court takes judicial notice of the fact that at the date of his certificate a deputy comptroller of the currency was such officer; and if he signs as acting comptroller, it will be assumed that at the date of his certificate he was authorized to exercise the powers and discharge the duties of the comptroller, and was at the time acting comptroller.
4. An objection that after the trial court had adjourned, the certificate was, by the trial justice, permitted to be inserted in the record, will not be considered where it was not presented to the court whose judgment is here for review. The record must be taken as it was presented to the general term.
5. Instructions to the jury not based upon any evidence, and having no evidence to support them, are erroneous.
6. The intent with which a husband caused transfers of stock of a bank to be made to his wife is wholly immaterial, even if the object was to conceal his property from creditors; if she became the owner of the stock, she would be liable to be assessed as a shareholder.
7. If she became aware of the transfers, after they were made, and thereafter received the dividends, she became a shareholder and liable for the debts of the bank, as fully as if the transfers had been made originally with her knowledge and consent.
8. If the checks for the dividends were indorsed by her, she is estopped to say that she did not know their contents, and was not the owner of the shares of stock upon which the dividends were declared, where each check is payable to her.

NOTE.—As to taxation of shares in national banks, see note to *Providence Bank v. Billings*, Bk. 7, p. 599.

order, and is on its face for dividends on stock standing in her name on the books of the Bank.

9. If the wife indorsed the checks in blank or to the order of her husband, and delivered them to him, the mode in which he disposed of the proceeds is of no consequence in a suit to recover against her assessments on the stock.
10. Although the mere transfer of stocks to the wife's name without her knowledge or consent, on the books of a Savings Bank afterwards converted into a National Bank, would not make her liable as a shareholder of the National Bank, yet if, after such transfer, she joined in the application to convert the Savings Bank into a National Bank, or ratified such transfer, or accepted the benefits of the ownership of the stock, she is liable to be treated as a shareholder.
11. The record made of the transfers upon the books of the Bank was sufficient, as between her and the Bank, to work a change of ownership, and new certificates were not necessary to her becoming the owner of the stock so transferred.
12. A married woman has the legal capacity to receive a transfer of stock in moneyed corporations, though the consideration may have proceeded wholly from the husband.
13. As she was not incapacitated from becoming the owner of stock in a bank, and was a shareholder in the Savings Bank, she became, upon the conversion of that Bank into a National Bank, a shareholder in the latter.
14. A married woman is not exempted, by reason of her coverture, from the liability imposed by Congress upon shareholders in national banks.
15. Coverture of the defendant will not prevent the plaintiff from recovering a judgment against her for the amount of the assessment in question, if she was, within the meaning of the statute, a shareholder in the Bank at the time of its suspension.

[No. 42.]

Argued Oct. 25, 28, 1889. Decided Jan. 6, 1890.

IN ERROR to the Supreme Court of the District of Columbia to review a judgment affirming a judgment of the Special Term and Circuit of that Court, in favor of defendant. *Reversed.*

The action was to recover of the defendant, Jane C. Hitz, a married woman, an assessment on stock of a National Bank which had suspended business and of which the plaintiff was receiver. The assessment was made by the comptroller of the currency for the par value of stock.

The facts are fully stated in the opinion.

Mr. Leigh Robinson, for plaintiff in error:

The charge of the court should always be based upon the facts as proved, and not upon an assumed state of facts which has no existence under the evidence in the case.

Paschal v. Davis, 3 Ga. 256; *Hollister v. Johnson*, 4 Wend. 643; *Reed v. Greathouse*, 7 T. B. Mon. 558; *Brown v. Wilson*, 1 Litt. (Ky.) 230; *Hite v. Blandford*, 45 Ill. 12; *Myers v. Hart*, 10 Watts, 107; *Paterson v. Arnold*, 45 Pa. 416; *McDonald v. Trafton*, 15 Me. 228; *People v. San Francisco*, 27 Cal. 656.

It is error to submit a question of fact to the jury of which there is no evidence.

Sartwell v. Wilcox, 20 Pa. 122; *Grove v. Hodges*, 55 Pa. 519; *Stein v. Bowman*, 38 U. S. 13 Pet. 223 (10: 186); *Graff v. Pittsburgh & S. R. Co.* 31 Pa. 489.

A party cannot, by holding his peace, have

the benefit of a contract if it should afterwards turn out to be profitable, and retain a right to repudiate it if otherwise.

Law v. Cross, 66 U. S. 1 Black, 539 (17: 187); *Mundorff v. Wickersham*, 68 Pa. 87.

A married woman is at liberty to avail herself of the agency of her husband as if they had not been united in marriage.

Owen v. Caroley, 36 N. Y. 600.

When married women clothe others with apparent authority to act for and bind them, they are estopped from disputing it.

Bodine v. Killen, 53 N. Y. 98; *Tremain v. Allen*, 15 Hun, 4.

Where an agent does any act for the use of his principal, and the principal enjoys the benefits and fruits of the act, he cannot afterwards say that the act was illegal.

Ruggles v. Washington County, 3 Mo. 496; *Hastings v. Bangor House*, 18 Me. 436; *Low v. Connecticut & P. R. Co.* 46 N. H. 284; *Reid v. Hibbard*, 6 Wis. 175; *Beidman v. Goodell*, 56 Iowa, 592; *Waterson v. Rogers*, 21 Kan. 529; *Hovil v. Pack*, 7 East, 164; *Cornwall v. Wilson*, 1 Ves. Sr. 509; *Farmers L. & T. Co. v. Walworth*, 1 N. Y. 438; *Clark v. Rails*, 58 Iowa, 201.

A person cannot keep the product of the act of his agent and repudiate the latter's authority.

Coykendall v. Constable, 99 N. Y. 809; *National L. Ins. Co. v. Minch*, 58 N. Y. 144; *Hathaway v. Johnson*, 55 N. Y. 98; *Cobb v. Hatfield*, 46 N. Y. 588; *Masson v. Boet*, 1 Denio, 69; *Voorhees v. Earl*, 2 Hill, 288; *Hogan v. Weyer*, 5 Hill, 889; *Southern Express Co. v. Palmer*, 48 Ga. 85; *Maddux v. Bevan*, 39 Md. 485; *Hoeey v. Blanchard*, 18 N. H. 145.

A wife who permits her husband to control her property is bound to notify third parties if he exceed his authority.

Bergen v. Keiser, 17 Ill. App. 505; *Louisville Coffin Co. v. Stokes*, 78 Ala. 872.

When on the trial of a cause a fact is distinctly alleged and shown by the plaintiffs and not denied at all by the defendant, it is error for the court to indicate to the jury that the fact is in dispute, and to submit to them the question whether it occurred or not.

Youngman v. Miller, 98 Pa. 196; *Finger v. Leach*, 70 Mo. 43.

A charge to the jury that they have a right to draw an inference which is opposed to all the testimony, is erroneous.

Carey v. Hughes, 17 Ala. 888.

It is error to lay down a correct qualification of a rule of law, when there is no evidence touching the subject matter of the qualification.

Webb v. Robinson, 14 Ga. 216.

Fraud and collusion are never presumed, but must be proved.

Aston v. Aston, 1 Ves. Sr. 268; *Stewart v. English*, 6 Ind. 179; *Nichols v. Patten*, 18 Me. 239; *Blaisdell v. Cowell*, 14 Me. 370; *Coulson v. Coulson*, 5 Wis. 79; *Cummins v. Hurlbutt*, 92 Pa. 165; *Brady v. Barnes*, 42 Conn. 512.

It is error to charge a jury upon a supposed or conjectural state of facts of which no evidence has been offered.

U. S. v. Breitling, 61 U. S. 20 How. 254 (15: 902); *Michigan Bank v. Eldred*, 76 U. S. 9 Wall. 544 (19: 763); *Hamilton v. Singer Mfg. Co.* 54 Ill. 370; *Oxley v. Storer*, 54 Ill. 161; *Hewitt v. Begole*, 22 Mich. 31.

A rule, no less of morals than of law, imposes silence on a party who seeks to contradict previous statements, upon the faith of which others have dealt.

White v. Brocas, 14 Ohio St. 348; *Beardsley v. Foot*, 14 Ohio St. 416; *Manufacturers & T. Bank v. Hazard*, 80 N. Y. 226; *Kirk v. Hartman*, 68 Pa. 106; *Coleman v. Pearce*, 26 Minn. 128; *McOlellan v. Kennedy*, 8 Md. 230; *Fitts v. Brown*, 20 N. H. 898; *Bigelow v. Foss*, 59 Me. 164; *Cornish v. Abington*, 4 Hurl. & N. 555; *Blair v. Wait*, 69 N. Y. 118; *Hambleton v. Central O. R. Co.* 44 Md. 552; *Day v. Caton*, 119 Mass. 518; *Preston v. American Linen Co.* 119 Mass. 400.

Married women may be estopped by their deliberate conduct, as well as anyone else.

Norton v. Nichols, 85 Mich. 148; *Godfrey v. Thornton*, 48 Wis. 690; *Sharpe v. Foy*, L. R. 4 Ch. App. 85; *Re Lusk's Trusts*, Id. 591; *Bergen v. Keiser*, 17 Ill. App. 508; *Sanger v. Upton*, 91 U. S. 59 (23: 221); *Hawkins v. Glenn*, 181 U. S. 339 (33: 191).

A general objection to evidence will not authorize this court to review any questions which might arise if specific objection had been made and overruled.

Wheeler v. Billings, 88 N. Y. 263; *Nowell v. Doty*, 88 N. Y. 88; *Wait v. Maxwell*, 5 Pick. 219.

The admission of evidence to which no objection was made known at the time is not ground for objection afterwards.

Ross v. Reed, 14 U. S. 1 Wheat. 483 (4: 141); *Suydam v. Williamson*, 61 U. S. 20 How. 427 (15: 978); *Phenix Ins. Co. v. Lanier*, 95 U. S. 171 (24: 388); *Peoria & O. R. Co. v. Neill*, 16 Ill. 269; *Courtright v. Deeds*, 87 Iowa, 509.

It is presumptive evidence that one is a stockholder, when his name appears on the books of the company.

Hoagland v. Bell, 86 Barb. 57; *Turnbull v. Payson*, 95 U. S. 418 (24: 437); *Pittsburgh, W. & K. R. Co. v. Applegate*, 21 W. Va. 172; *McHoss v. Wheeler*, 45 Pa. 32; *Whitman v. Grapite Church*, 24 Me. 236; *Agricultural Bank v. Burr*, 24 Me. 256; *Coffin v. Collins*, 17 Me. 442; *Owings v. Speed*, 18 U. S. 5 Wheat. 420 (18: 124).

The registry of the stockholder's name upon the stock-book of the company, opposite the number of his shares, gives him his title.

New Albany & S. R. Co. v. McCormick, 10 Ind. 499; *Moore v. Jones*, 8 Woods, 55.

It is not essential that certificates of stock shall issue at all.

Chester Glass Co. v. Dewey, 16 Mass. 94; *Burr v. Wilcox*, 22 N. Y. 551.

Without a certificate, the shareholder has a complete power to transfer his stock (*Davenport Nat. Bank v. Gifford*, 47 Iowa, 575; *Cecil Nat. Bank v. Watons town Bank*, 105 U. S. 217 (26: 1089); to receive dividends (*Ellis v. Merrimack Bridge*, 2 Pick. 243); and he is undeniably liable as a stockholder.

Agricultural Bank v. Wilson, 24 Me. 278; *Mitchell v. Beckman*, 64 Cal. 117.

Parties are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely.

Cadle v. Baker, 87 U. S. 20 Wall. 650 (22: 448); *Wheelock v. Kost*, 77 Ill. 396; *Hufaker v. Mon-*

ticello Bank, 12 Bush, 287; *McBroom v. Lebanon*, 81 Ind. 269; *Voorhees v. Circleville Bank*, 19 Ohio, 468.

One who gives a note to a corporation is estopped to deny that there is such a corporation.

Nashua F. Ins. Co. v. Moore, 55 N. H. 48.

A married woman may take by purchase, unless her husband expressly dissents.

Co. Litt. 8 a; *Baxter v. Smith*, 6 Binn. 429.

A husband might, at common law, make to his wife a gift of a chattel.

Clough v. Russell, 55 N. H. 282.

In equity, a husband and wife may contract with, and convey to, each other.

Slanning v. Style, 3 P. Wms. 888; *Lucas v. Lucas*, 1 Atk. 270; *Hannan v. Ozley*, 28 Wis. 521; *Cooke v. Husbands*, 11 Md. 492; *Chew v. Beall*, 18 Md. 849; *Lloyd v. Pughe*, L. R. 14 Eq. 241; *Gover v. Owings*, 16 Md. 91; *Gill v. Woods*, 81 Ill. 64; *Wood v. Wood*, 88 N. Y. 575; *Sayers v. Wall*, 26 Gratt. 354; *Horder v. Horder*, 28 Kan. 391; *Wood v. Broadley*, 76 Mo. 23; *Majors v. Everton*, 89 Ill. 56; *Thompson v. Allen*, 103 Pa. 44; *Drury v. Biacoe*, 42 Md. 162; *George v. Outting*, 48 N. H. 181; *Standeford v. Devol*, 21 Ind. 404; *Bent v. Bent*, 44 Vt. 555; *Barron v. Barron*, 24 Vt. 875; *Jaycox v. Caldwell*, 87 How. Pr. 240; *State v. Reigart*, 1 Gill, 1; *Hayt v. Parks*, 89 Conn. 357; *Bryant v. Bryant*, 8 Bush, 155; *Tullis v. Fridley*, 9 Minn. 79; *Wilson v. Wilson*, 118 Ind. 415; *People v. Ft. Edward Bank*, 86 Hun, 607; *Sweeney v. Boston Five Cents Sav. Bk.* 116 Mass. 384.

A husband vests an interest in shares of bank stock in his wife by causing them to be transferred into her name on the books of the bank.

Deming v. Williams, 26 Conn. 226; *Lucas v. Lucas*, 1 Atk. 270; *Walter v. Hodge*, 2 Swanst. 108; *Hill v. Pine River Bank*, 45 N. H. 808; *McMillan v. Peacock*, 57 Ala. 180.

The husband cannot revoke his gift.

Raymond v. Pritchard, 24 Ind. 518; *Bent v. Bent*, 44 Vt. 555.

The wife is competent to act as if she were a *feme sole*.

Powell v. Powell, 9 Humph. (Tenn.) 490; *Peacock v. Monk*, 2 V. & S. Sr. 190; *Hulme v. Tenant*, 1 Bro. Ch. 19; *Pitt v. Jackson*, 2 Bro. Ch. 51; *Harris v. Harris*, 7 Ired. Eq. 114; *Picquet v. Swan*, 4 Mason, 444.

A gift of personal property by a husband to his wife is valid.

Kelly v. Campbell, 3 Abb. App. Dec. 492; *Lockwood v. Cullin*, 4 Robt. 129; *Knapp v. Smith*, 27 N. Y. 277; *Savage v. O'Neil*, 44 N. Y. 302; *Caldwell v. Renfrew*, 88 Vt. 218; *Wilber v. Fradenburgh*, 52 Barb. 478; *Spring v. Hight*, 22 Me. 408; *Warren v. Brown*, 25 Miss. 66; *Gill v. Woods*, 81 Ill. 64.

By the instruments executed to the defendant the legal title to the stock was transferred to her.

Loitch v. Wells, 48 N. Y. 605-607; *Matthewman's Case*, L. R. 8 Eq. 781; *Butler v. Cumpston*, L. R. 7 Eq. 21; *Luard's Case*, 1 DeG. F. & J. 544; *Adams v. Bracket*, 5 Met. 280; *Stanwood v. Stanwood*, 17 Mass. 57; *Re Reciprocity Bank*, 22 N. Y. 15; *Sayles v. Bates*, 15 R. I. 347.

Her coverture does not exempt her from the liability imposed by the National Currency Acts upon all stockholders in national banks.

Anderson v. Lino, 14 Fed. Rep. 405; *Hobart v. Johnson*, 19 Blatchf. 359; *Witters v. Sowles*, 32 Fed. Rep. 130, 768.

A wife may be sued alone, and her estate alone is liable.

Madden v. Gilmer, 40 Ala. 637; *Bostic v. Love*, 16 Cal. 69; *Melcher v. Kuhland*, 22 Cal. 522.

The nonjoinder of the husband would be matter for a plea in abatement only, and by a failure to interpose such plea the objection is waived.

Dallon v. Midland Counties R. Co. 13 C. B. 474; *Bendix v. Wakeman*, 12 Mees. & W. 97, 1 Dow. & L. 450; *Milner v. Milner*, 3 T. R. 627; *Morgan v. Cubitt*, 3 Exch. 612; *Evans v. Chester*, 2 Mees. & W. 847; *Moses v. Richardson*, 8 Barn. & C. 421; *Guyard v. Sutton*, 3 C. B. 153; *Young v. Ward*, 21 Ill. 225.

Mr. Enoch Totten, for defendant in error:

The defendant was a married woman and cannot be held for this assessment.

Sykes v. Chadwick, 85 U. S. 18 Wall. 141 (21: 824); *Bundy v. Cocks*, 128 U. S. 185 (32: 397); *Drury v. Foster*, 69 U. S. 2 Wall. 24 (17: 780); *Agricultural Bank v. Rice*, 45 U. S. 4 How. 225 (11: 949); *Witters v. Sowles*, 32 Fed. Rep. 764; *Fetter v. Newhall*, 21 Blatchf. 445; *Lorillard v. Standard Oil Co.* 18 Blatchf. 199.

Merely formal or fraudulent transfers of the stock of national banks will be disregarded.

Orleans Nat. Bank v. Case, 99 U. S. 628 (25: 448); *Bowden v. Johnson*, 107 U. S. 251 (27: 386); *Davis v. Stevens*, 17 Blatchf. 259; *Anderson v. Philadelphia Warehouse Co.* 111 U. S. 479 (28: 478); *South Bend Nat. Bank v. Lanier*, 78 U. S. 11 Wall. 369 (20: 172); *Johnston v. Laflin*, 103 U. S. 800 (26: 582); *Whitney v. Butler*, 118 U. S. 655 (30: 266).

If the defendant indorsed the dividend checks and signed the application for conversion, she did so in total ignorance of the nature of the papers, and is not estopped.

Cummaek v. Lewis, 82 U. S. 15 Wall. 648 (21: 244).

The attempted conversion of the Savings into a National Bank was unwarranted by law, and void.

Field on Corp. 17, §§ 11, 120, 22; *Huntington v. Dist. of Col. Sav. Bank*, 96 U. S. 388 (24: 777); *Coite v. Society for Savings*, 32 Conn. 173; *Osborn v. Byrne*, 43 Conn. 155; *Morrill v. Jones*, 106 U. S. 466 (27: 267).

Mr. Justice Harlan delivered the opinion of the court:

This action is based upon an assessment made by the comptroller of the currency on the stockholders of the German-American National Bank of the City of Washington, which suspended business on the 30th day of October, 1878, and of which the plaintiff in error was appointed receiver. The assessment was upon the stockholders, equally and ratably, to the amount of one hundred per centum of the par value of their shares. It was averred in the declaration filed by the receiver that the defendant, Jane C. Hitz, held or owned at the time of the Bank's suspension two hundred shares of its stock, of the par value per share of one hundred dollars; and that by reason thereof the plaintiff was entitled to recover from her the sum of twenty thousand dollars, with interest on each half of that sum from the

dates they should have been respectively paid under the notice given by the receiver.

The defendant pleaded: first, that she was never indebted as alleged; second, that she never at any time held or owned shares of stock in this Bank, and if it appeared upon its books or otherwise that any of the stock stood in her name, the entries to that effect were fraudulent, and were made for the purpose of cheating her; third, that since August 15, 1856, she has been the wife of John Hitz. She filed an additional plea, averring that there was not, nor had ever been, any such national banking association as the German-American National Bank, of which the plaintiff was receiver; meaning, by this plea, that no such association was ever organized in conformity with the statutes of the United States.

There was evidence before the jury tending to establish the following facts:

In the year 1872 certain persons, among whom was John Hitz, the husband of the defendant, availed themselves of the provisions of the Act of Congress of May 5, 1870, relating to the creation of corporations in the District of Columbia by general laws, as amended by the Act of June 17, 1870, and formed a corporation by the name of the German-American Savings Bank of the City of Washington. 16 Stat. 98, 102, chap. 80; Id. 153, chap. 181.

There appears, under date of January 21, 1876, upon the books of that Bank, labeled "Stock Transfers and Ledger, German-American Savings Bank," entries showing the assignment and transfer to James C. Hitz of shares of stock, as follows: 178 shares by John Hitz, 10 shares by William F. Mattingly (the latter acting by Samuel L. Mattingly, attorney); 10 shares by R. B. Donaldson; and 7 shares by C. E. Prentiss,—in all, 200 shares. At the time these transfers purport to have been made, John Hitz was president of the Bank, Donaldson vice-president, and Prentiss cashier; and they, with Mattingly and others, were its trustees. The stubs in the book of transfers state that new certificates for all the above stock were issued to Mrs. Hitz; but it was not distinctly shown that they were delivered to her, or were ever in her possession. It was, however, proven that the fourth dividend upon these shares, amounting to \$800, was paid by the check of Prentiss, the cashier of the Savings Bank, dated May 1, 1876, which was in these words: "Pay to Jane C. Hitz, or order, \$800, fourth dividend, payable this day on stock standing in her name on the books of this Bank, and charge to dividend account, No. 3900." That check was indorsed: "Pay to the order of John Hitz. Jane C. Hitz." Then follows this indorsement: "John Hitz, Consul-General;" showing, as stated by Prentiss, that the proceeds of the check were deposited by John Hitz to his account in the bank as consul-general. Similar checks were made for the fifth and sixth dividends on the same stock. They were payable, respectively, November 1, 1876, and November 1, 1877, and were indorsed in the same way as was the first check. As in the case of the first check, their proceeds were placed to the credit of John Hitz as consul-general.

Among the original papers on file in the office of the comptroller of the currency were the following:

1. A document dated May 7, 1877, purporting to be signed by the stockholders of the German-American Savings Bank of Washington, then having a capital of \$127,100, and to authorize the trustees thereof—John Hitz and others named—to convert that Bank into a national banking association, by the name of the German-American National Bank of Washington, and make the articles of association and the organization certificate required by the statutes of the United States. Under the headings in that document of "Names of Stockholders" and "No. of Shares Owned by Each," appear among other names those of John Hitz, 130 shares; R. B. Donaldson, 90 shares; W. F. Mattingly, 190 shares; C. E. Prentiss, 61 shares; John Hitz, trustee, 25 shares; John Hitz and C. E. Prentiss, trustees, 81 shares; and Jane C. Hitz, 200 shares.

2. The organization certificate, signed by the trustees, and verified by their oath, stating that they have been authorized by the stockholders of the German-American Savings Bank to change it into a national banking association, the stock of which shall be divided as it was then divided in the Savings Bank. That certificate contains a statement of the names, residence and number of shares held by each stockholder of the Savings Bank, and in the list appears the name of Jane C. Hitz, as holding 200 shares. It bears date May 7, 1877, and was filed with the comptroller of the currency May 18, 1877.

3. The articles of association of the German-American National Bank of Washington, which is accompanied by the certificate of J. S. Langworthy, as acting comptroller of the currency, under date of May 14, 1877, stating that that Bank had complied with all the provisions of the Revised Statutes, relating to national banking associations, and was authorized to commence business as provided in section 5169 of the Revised Statutes. The National Bank had the same officers and trustees as the Savings Bank.

No direct proof was made by the plaintiff that the signature purporting to be that of the defendant, on the above checks for dividends, was her genuine signature.

In reference to the stock of the German-American Savings Bank which, according to the entries in its books, was transferred by Mr. Mattingly, the latter, as a witness for the defendant, testified that he owned stock in that Bank, but that he had never transferred any of it; that he never owned and did not himself transfer ten shares of stock to Mrs. Hitz; and that he did not purchase those shares, and did not know how they happened to stand in his name, although he supposed his brother, who executed the transfer in the witness' name, understood how it all occurred.

Mr. Donaldson testified for the defendant that, while he signed a transfer of ten shares of stock to Mrs. Hitz, he had no recollection whatever of the transaction; that he never owned the stock so transferred; and was never paid for it by anyone.

Mrs. Hitz testified in her own behalf. The substance of her testimony was that she never bought, owned or voted any stock in the German-American Savings Bank or in the German-American National Bank; never knew until

after the failure of the National Bank that her name appeared among the stockholders on the books of either Bank; never received any dividend declared or paid by either; and never received or held any certificates of stock in either Bank. Being asked as to whether the signature of Jane C. Hitz to the paper purporting to be signed by the stockholders of the German-American Savings Bank, and authorizing its conversion into a national banking association, was her signature, she answered, in substance, that she knew nothing of that paper; did not remember to have signed it, although the signature resembled hers; was not aware of the conversion of the Savings Bank into a National Bank until after the failure of the latter; and as she never owned any of this stock, she would not have signed any paper for such change, if she had been asked to do so. Being shown the checks for dividends on the stock standing in her name, she stated that she had no recollection of seeing them until after the failure of the German-American National Bank. Again: "Q. What do you say as to the signature—did you write it? A. I cannot say. Q. Did you ever get any money on account of those checks? A. I never did. Q. Those checks appear to have been paid. Do you remember whether you ever had them in your possession or not? A. No, sir; I never had them in my possession. Q. What do you say? A. I am certain I never had them in my possession. Q. Can you account to the jury for the similarity of that signature to your own? A. I cannot. Q. Do you say you never wrote your name on the back of those checks? A. No, sir; I cannot say that. I have no recollection of having done so. I never did so knowing the nature of the checks; never did so at all, so far as I can recollect."

Upon cross-examination: "Q. You are unable to deny that that is your signature? A. I cannot positively deny that it is. Q. Can you deny at all that that is your signature? A. I can deny having any recollection of having signed them. Q. Can you deny that it is your signature? A. I cannot deny it. Q. Now, I will ask you whether, when you were in Europe, the salary of your husband as consul-general was not paid to you? A. It was during part of the time that I was there. Q. To what did that salary amount? A. I think \$3,000."

Upon re-examination the defendant was permitted, against the objection of the plaintiff, to state that she thought it would be impossible for her to have owned \$20,000 of stock in the German Savings Bank and not have remembered it. Being asked whether, if she had seen the checks, she could have forgotten them, she said: "Had I seen them, knowing what they were, I should not have forgotten them—could not have forgotten them."

The foregoing is substantially the case made before the jury.

Before entering upon the examination of the questions raised by the plaintiff's assignments of error, it is necessary to consider certain propositions advanced by the defendant, which, if sound, might be sufficient to dispose of the case.

It is contended that the conversion of the German-American Savings Bank into a national banking association was unauthorized by any statute of the United States, and, conse-

quently, that the appointment by the comptroller of the currency of the plaintiff as receiver, and the assessment made by that officer upon the stockholders of the Bank—which assessment is the foundation of the present suit—were absolute nullities.

The privilege of becoming a national banking association is given by section 5154 of the Revised Statutes to "any bank incorporated by special law, or any banking institution organized under a general law of any State." These words, it is argued, do not embrace savings banks organized in the District of Columbia, and only refer to banks or banking institutions created under the authority of some State, either by a special or general law. But all difficulty upon the subject is removed by the Act of Congress, entitled "An Act Authorizing the Appointment of Receivers of National Banks, and for Other Purposes," approved June 30, 1876, the sixth section of which is as follows:

"That all savings banks or savings and trust companies organized under authority of any Act of Congress, shall be, and are hereby, required to make, to the comptroller of the currency, and publish, all the reports which national banking associations are required to make and publish under the provisions of sections fifty-two hundred and eleven, fifty-two hundred and twelve and fifty-two hundred and thirteen of the Revised Statutes, and shall be subject to the same penalties for failure to make or publish such reports as are therein provided, which penalties may be collected by suit before any court of the United States in the district in which said savings banks or savings and trust companies may be located. And all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, under any Act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all Acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks: *Provided*, That such savings banks now established shall not be required to have a paid-in capital exceeding one hundred thousand dollars." 19 Stat. 64; R. S. Supp. 216, 218.

Under that Act the German-American Savings Bank was required to make to the comptroller of the currency the reports which by sections 5211, 5212 and 5213 of the Revised Statutes were required from national banking associations. It also became subject to all the provisions of the Revised Statutes and of the Acts of Congress relating to national banking associations, so far as those provisions were applicable to a savings bank organized in this District. It is too clear for dispute that after the passage of the Act of 1876 savings banks organized in this District under an Act of Congress, and having a capital stock paid up in whole or in part, were entitled to become national banking associations in the mode, and subject to the conditions, prescribed by section 5154. Surely that section cannot be deemed inapplicable to savings banks of that class.

Another contention of the defendant is, that the German-American National Bank could not acquire the powers and privileges of a national

banking association before receiving from the comptroller of the currency a certificate that the provisions of the Statute relating to such associations had been complied with, and that it was authorized to commence the business of banking; that the certificate given under date of May 14, 1877, by J. S. Langworthy, as "acting" comptroller of the currency, did not meet the requirements of the Statute, because, it is argued, there was no such officer known to the law. R. S. § 5154. This point was not specifically made in the court below. But there is nothing of substance in it, even if it could properly be raised in this collateral proceeding. There is an officer designated a deputy comptroller of the currency, who may exercise the powers and discharge the duties attached to the office of comptroller, during a vacancy in that office, or during the absence or inability of the comptroller. R. S. §§ 178, 327. The certificate alluded to was from the office of the comptroller, and was under the seal of that office. Besides, this court takes judicial notice of the fact that Mr. Langworthy was, at the date of his certificate, deputy comptroller of the currency. And it will be assumed that at the date of his certificate he was authorized to exercise the powers and discharge the duties of the comptroller, and was, therefore, at the time, acting comptroller.

It is further insisted that Langworthy's certificate is no part of the transcript. And the defendant has made a motion in this court to strike it from the record. It is clear from the affidavits submitted that the certificate was used at the trial in special term, and that it was accidentally omitted from the bill of exceptions taken by the plaintiff. This omission being discovered before the case was heard in general term, application was made to the trial justice, after the special term had adjourned without day, to amend the bill of exceptions so as to make this certificate a part of it. The application was granted—whether upon notice to the defendant or her counsel is not clearly shown—and the case was heard in the general term without any suggestion, so far as the record shows, that the certificate had been improperly made a part of the record after the bill of exceptions had been completed and signed. An objection of that character will not be considered where it was not presented to the court whose judgment is here for review. The record must be taken as it was presented to the general term.

We now proceed to consider the principal questions arising upon the requests for instructions and upon the charge of the court to the jury.

At the instance of the defendant the jury were instructed substantially as follows:

That if the stock in controversy was transferred upon the books of the German-American Savings Bank to and in the name of the defendant without her knowledge and consent, she was entitled to a verdict, unless she subsequently ratified and confirmed such transfer;

That if the defendant was procured to sign the application to the comptroller of the currency for the organization of the German-American National Bank by fraudulent means and representations, such application must not

be taken as confirming the transfer of the stock to her on the books of the Savings Bank;

That if the defendant was induced to indorse the three checks for dividends by means of fraud or misrepresentation, or by concealing from her the facts concerning them, such checks cannot be regarded as a confirmation of the transfer of the stock to her name, nor as evidence against her;

That if the stock was transferred to the defendant for fraudulent purposes, by or at the instigation of her husband, and without her knowledge or consent, such transfer was void, and she was entitled to a verdict; and,

That if, at or before the time of the transfer of the stock to the defendant on the books of the company, she had not purchased the stock or authorized it to be purchased, either directly or indirectly, and knew nothing about it, she was not liable, as a shareholder, to the assessment in question.

These instructions were, in effect, repeated in the elaborate charge to the jury.

The testimony of the defendant tended to show that the stock was originally transferred to her on the books of the German-American Savings Bank, without her knowledge or consent; and the issue upon that point was fairly submitted to the jury by the first instruction given at her instance. But some of the instructions given upon her motion, as well as the charge to the jury, erroneously assumed that there was evidence tending to show that she was procured, by fraudulent means and representations, to sign the application for the conversion of the Savings Bank into a National Bank; that, by like means, or by concealment of the facts, she was induced to sign the checks for dividends; and that the transfer of the stock to her name was for fraudulent purposes by or at the instigation of her husband. There was, however, no evidence as to the circumstances under which her name was signed to the application addressed to the comptroller, or under which the checks were indorsed in her name; absolutely none upon which to base the theory of fraud or false representations. It is true, as already suggested, there was evidence tending to show that the transfers of stock were made originally without defendant's knowledge; and the jury might reasonably have concluded, under all the evidence, that the transfers were made, and caused to be made, by her husband. But these facts neither proved, nor tended to prove, fraud upon the part of the husband. There was no proof that he was insolvent, and, therefore, it could not be presumed that the transfers were made with any intent to defraud his creditors. Besides, the intent with which the husband caused the transfers to be made to his wife was wholly immaterial. Even if the object was to conceal his property from creditors, the vital question remained whether the defendant became the owner of the stock within the meaning of the Statute regulating the individual liability of the shareholders of national banking associations. In other words, the husband may have intended to commit a fraud upon his creditors, and the transfers of stock may have been made to the wife without first obtaining her consent; and yet she may have been, at the time of the Bank's failure, liable to be assessed as a shareholder. There

was no connection between her liability to be so assessed, and the alleged fraudulent intent with which the husband caused the transfers of stock to be made.

Whether she signed the application for the conversion of the Savings Bank into a National Bank in the capacity of shareholder to the extent of two hundred shares, was wholly apart from any question of her knowledge, at the time of the transfers, of the motive which induced her husband in making or causing them to be made. If she became aware of the transfers, after they were made, and thereafter received the dividends, she became a shareholder for all purposes of individual liability in respect to the contracts, debts and engagements of the Bank, as fully as if the transfers had been made originally with her knowledge and consent. Whether she received the dividends or not depended upon the inquiry as to whether the checks for them were indorsed by her. If she indorsed them, or either of them, she is estopped to say that she did not know their contents, and was not the owner of the shares of stock upon which the dividends were declared; for each check discloses upon its face that it was payable to her order, and was for dividends on stock standing in her name on the books of the Bank. This result is not at all affected by the fact that the proceeds of the checks went to the credit of John Hitz's account as consul-general. If the defendant indorsed the checks in blank or to the order of her husband, and delivered them to him, the mode in which he disposed of the proceeds is of no consequence in the present suit.

We must not be understood as saying that the mere transfer of the stocks on the books of the Bank, to the name of the defendant, imposed upon her the individual liability attached by law to the position of shareholder in a national banking association. If the transfers were, in fact, without her knowledge and consent, and she was not informed of what was so done—nothing more appearing—she would not be held to have assumed or incurred liability for the debts, contracts and engagements of the Bank. But if, after the transfers, she joined in the application to convert the Savings Bank into a National Bank, or in any other mode approved, ratified or acquiesced in such transfers, or accepted any of the benefits arising from the ownership of the stock thus put in her name on the books of the Bank, she was liable to be treated as a shareholder, with such responsibility as the law imposes upon the shareholders of national banks.

The arguments of counsel were partly directed to the question whether new certificates of stock were issued by the Savings Bank, and delivered to the defendant, after the transfers were made on the books of that Bank. It is sufficient, on this point, to say that the record made of the transfers upon the books of the Bank was sufficient, as between her and the Bank, to work a change of ownership, and new certificates were not necessary to her becoming the owner of the stock so transferred. Nor can she escape liability by reason of the fact, if such be the fact, that no certificates were issued to her by the German-American National Bank. The Statute expressly declares that the shares of the old Bank may con-

tinue to be for the same amount each as they were before the conversion.

One other question raised by the defendant requires consideration. She contends that her coverture, at the time of the transfers, as well as when the Bank failed, protected her against assessment upon the stock put in her name upon the books of the Bank. The plaintiff's requests for instructions upon this point having all been granted by the court below, it is suggested that no question can arise upon the assignments of error in reference to the individual liability of married women for the debts, contracts and assessments of national banking associations of which they are shareholders. But if the defendant's position is correct, the judgment might be affirmed upon the ground that she was not, under any circumstances, liable to an assessment by the comptroller. For this reason, and because this question will necessarily arise upon another trial, it is proper to give it some attention.

We do not understand the defendant to say that she was incapacitated by the laws in force in the District of Columbia from becoming the owner of bank stock. It was well said by *Mr. Justice Cox*, when the present case was first before the general term (*Keyser v. Hitz*, 2 Mackey, 478, 493), that a married woman "has the legal capacity to receive gifts, may be the obligee of a bond, or receive a transfer of stock in moneyed corporations, and this though the consideration may have proceeded wholly from the husband; and in such case she may hold against the legatees and heirs, but not against the creditors, of the husband. *Fiak v. Cushman*, 6 Cush. 20." We speak of gifts, because the reasonable inference from all the evidence is that the defendant's husband made and caused to be made the transfers in question as a gift, though not, so far as the record shows, to her sole and separate use.

Assuming, then, that she was not incapacitated from becoming the owner of stock in a bank, and that she was a shareholder in the Savings Bank, she became, upon the conversion of that Bank into a National Bank, a shareholder in the latter. Rev. Stat. § 5154. In that event she became, by force of the Statute, individually responsible to the amount of her stock, at the par value thereof, for the contracts, debts and engagements of the National Bank, equally and ratably with other shareholders. Section 5151, which imposes such individual responsibility upon the shareholders of national banks, makes no exception in favor of married women. The only persons holding shares of national bank stock whom the Statute exempts from this personal responsibility are executors, administrators, guardians or trustees. § 5152. It is not for the courts, by mere construction, to recognize an exemption which Congress has not given. The hardship that may result where the ownership of national bank stock by a married woman is subject to the common-law rights of the husband, in respect to its alienation, cannot control the interpretation of the Statute. Such considerations are more properly for the legislative department. Upon this point, the case of the *Reciprocity Bank*, 22 N. Y. 9, 15, which involved the liability of a married woman as a shareholder in a state bank is instructive.

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The Constitution and Statutes of New York made the shareholders in corporations and joint-stock associations, for banking purposes, issuing bank notes, "individually responsible," etc. The Court of Appeals of that State, speaking by *Chief Judge Comstock*, said: "It is also said that *femes covert* are not liable to suit or judgment at the common law; and, in general, this is true. It is also true that the apportionment of liability among stockholders in banks, when duly confirmed, becomes a judgment against each stockholder, to be enforced by execution as in other cases. But it was competent for the Legislature to depart from the rules and analogies of the common law, and to make married women and their estates liable in this proceeding, as other stockholders in banks are made liable. This, we think, has been done, and it seems to us proper to add that we see no reason why it ought not to be done, in order to effectuate the policy on which the constitutional provision and the Statute are founded. It might go far to defeat that policy, if married women could take and hold stock without liability to the creditors." See also *Sayles v. Bates*, 15 R. I. 845.

This question arose in *Anderson v. Line*, in the Circuit Court of the United States for the Eastern District of Pennsylvania, where it was held by *Judge McKennan* that a married woman was not exempted by reason of her coverture from the liability imposed by Congress upon shareholders in national banks. 14 Fed. Rep. 405. To the same effect is the decision of *Judge Wheeler* in *Witters v. Soules*, 82 Fed. Rep. 767.

We are of opinion that the coverture of the defendant did not prevent the plaintiff from recovering a judgment against her for the amount of the assessment in question, if she was, within the meaning of the Statute, a shareholder in the Bank at the time of its suspension. But the question as to what property may be reached in the enforcement of such judgment is not before us, and we express no opinion upon it.

For the above errors committed by the court below in its instructions to the jury, the judgment is reversed, with directions to grant a new trial, and for further proceedings consistent with this opinion.

Mr. Justice Miller dissented.

BENJAMIN E. COLE ET AL., Executors,
Plffs. in Err.,

v.
RICHARD CUNNINGHAM ET AL., Assignees.

(See S. C. Reporter's ed. 107-188.)

Massachusetts decree—attachments in New York, when can be enjoined in Massachusetts—U. S.

NOTE.—As to effect of judgments beyond territorial limits of jurisdiction, see note to *Darby v. Mayer*, Bk. 6, p. 367.

As to judgments of state court, when conclusive, and when not, in another State, see note to *Mills v. Duryee*, Bk. 3, p. 411.

As to conclusiveness of record on the question of jurisdiction, in suit on judgment of another State; and fraud as a plea to judgment of another State, see note to *Christmas v. Russell*, Bk. 18, p. 475.

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Constitution—judgments of other States, effect of—rights of citizens of other States—state courts can enjoin citizens from prosecuting suits in other States.

1. A decree of the Supreme Judicial Court of Massachusetts restraining citizens of that Commonwealth from the prosecution of attachment suits in New York, brought by them for the purpose of evading the laws of their domicile, is not void as being in violation of art. IV., secs. 1 and 2, of the Constitution of the United States.
2. Where a Massachusetts creditor of an insolvent citizen of that State attached in New York a debt due from a citizen of New York to the insolvent debtor, so as to obtain a preference over other creditors, contrary to the Insolvent Laws of Massachusetts forbidding preferences, a Massachusetts court can restrain the attaching creditor from the prosecution of such attachment suit, in an action in equity brought by the assignees in insolvency in Massachusetts.
3. The provision of the U. S. Constitution, art. IV., sec. 1, that full faith and credit shall be given in each State to the judgments of another State, does not prevent an inquiry into the jurisdiction of the court rendering the judgment, over the parties and subject matter, nor as to whether the judgment is impeachable for fraud.
4. Such constitutional provision does not make the judgments of the States domestic judgments to all intents and purposes, but only gives a general validity, faith and credit to them as evidence.
5. No execution can be issued upon such judgments without a new suit in the tribunals of other States; and they enjoy, not the right of priority or privilege or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws, in their character of foreign judgments.
6. The intention of section 2 of art. IV., U. S. Constitution, was to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions.
7. In a proper case, the equity courts of one State can control persons within their jurisdiction from the prosecution of suits in another.

[No. 74.]

Submitted Nov. 6, 1889. Decided Jan. 20, 1890.

IN ERROR to the Supreme Judicial Court of the State of Massachusetts to review a decree restraining defendants, citizens of that Commonwealth, from the prosecution of attachment suits in the State of New York. *Affirmed.*

Opinion below, 142 Mass. 47, 2 New Eng. Rep. 838.

Statement by Mr. Chief Justice Fuller:

Daniel C. Bird, a citizen and inhabitant of Massachusetts, unable to meet his bills at maturity, suspended payment March 2, 1885, being at the time indebted to Butler, Hayden & Co., a copartnership composed of Charles S. Butler and N. F. T. Hayden, citizens and residents of Massachusetts, doing business in that State. On the night of the 4th or 5th of March, 1885, Butler, Hayden & Co. were informed by Bird that he had stopped payment, and that the firm of Aaron Claffin & Co., of New York, were indebted to him in a considerable sum for

goods consigned by him to that firm to be sold on his account, and upon which Claffin & Co. had made advances, but not to their full value. March 6th, Butler, Hayden & Co. executed an assignment of their claims against Bird to one Fayerweather, a resident of the State of New York, which assignment was made without consideration, and without previous communication with Fayerweather. March 11th and March 25th two actions were commenced in New York in the name of Fayerweather on the claims of Butler, Hayden & Co. against Bird as defendant, and the firm of Claffin & Co. were summoned as garnishees. March 18th, 1885, a meeting of Bird's creditors was held, and a committee appointed to investigate his affairs and make a report. On the 20th of March a second meeting of Bird's creditors was held, at which a report was submitted by the committee. April 23d, 1885, a proposal for composition under the statutes of Massachusetts in that behalf was filed by Bird, returnable May 4th. May 20th, the composition proposal having been withdrawn, regular proceedings in insolvency were continued therein, and June 1, 1885, Richard Cunningham and Henry Tolman, Jr., were duly appointed assignees in insolvency of the estate of said Bird by the Court of Insolvency for the County of Plymouth, Massachusetts. Hayden of Butler, Hayden & Co. was present at one of these creditors' meetings. The suits in New York were brought in a court of competent jurisdiction, and the attachments and proceedings were regular and in conformity with the laws of New York; they are still pending, and no judgment has yet been obtained therein.

On the 19th of June the assignees in insolvency brought a bill in equity in the Supreme Judicial Court for the County of Suffolk, in the State of Massachusetts, against Butler and Hayden, copartners as Butler, Hayden & Co., praying that Butler, Hayden & Co., their agents, servants, attorneys and solicitors, might be enjoined and restrained from proceeding to further continue the suits against Bird, begun by them in the name of Fayerweather, and from attempting to collect by suit or otherwise, in the name of Fayerweather or any other person, for their own benefit, from Claffin & Co., any money or other thing on account of the claim against Bird; that they be ordered to refrain from further prosecuting the suits in New York, in which Claffin & Co. were summoned as garnishees; or that they be ordered to transfer to the assignees all their right, title and interest by, or under or on account of their claim pretended to have been assigned to Fayerweather, so that the assignees may have, as the effect of said order, full right to receive all money due from Claffin & Co. without any hindrance or interference upon the part of Butler, Hayden & Co. therewith; and a prayer for general relief.

Butler, Hayden & Co. answered the bill, denying any knowledge of Bird's insolvency, and claiming that the assignment to Fayerweather was made in good faith, and that the rights of Fayerweather, as a citizen of New York, under said assignment cannot be in any way affected by the insolvency of Bird; and afterwards amended the answer, and claimed that even if the assignment to Fayerweather was invalid,

the attachment proceedings in New York were regular, and gave a valid lien on the property attached; and that, by the Constitution of the United States, the rights and interests gained by the attachments in New York cannot be taken away by the courts of Massachusetts without violating the provision that full faith and credit must be given in each State to the judicial proceedings of every other State.

The case was heard by a single judge upon certain agreed facts and additional evidence, and reserved by him for the consideration of the full court. It was stipulated "that either party may refer to the statutes of the United States, the statutes of the State of New York, and the several decisions of the State of New York, with the same effect as if the same were regularly introduced in evidence." The supreme judicial court found, in addition to the matters hereinbefore stated, that it was fairly proven from the evidence "that the defendants, with full knowledge that Bird was insolvent, anticipating that there might be proceedings in insolvency in this State, and intending to secure to themselves, to the exclusion of other creditors, the avails of the debt owing to Bird by Claflin & Co., made the transfer of their claims to Fayerweather, and that the suits in New York now carried on in his name are subject to their control and conducted for their benefit. The attachments made in New York by process of garnishment are to be treated, so far as the defendants are concerned, as made by them." The court concluded its opinion, which is certified as a part of this record, and is reported in 142 Mass. 47 [2 New Eng. Rep. 888], thus:

"In the case at bar it is true that the defendants had made their attachment through Fayerweather in New York before there had been an assignment in insolvency in this State actually executed, but this was done with full knowledge on their part that the debtor, Bird, was embarrassed and had suspended payment, and necessarily with intent to avoid the effect of the assignment, so far as the property attached was concerned. As residents of this State, they cannot be allowed to this extent to defeat the operation of the assignment, and thus to obtain a preference over other creditors resident here. They are within the limits of the jurisdiction of this court, and amenable to its process, and should be enjoined from prosecuting a suit the effect of which, if successful, will be to work a wrong and injury to other residents of the State."

The court thereupon entered a decree for the injunction prayed for, and Butler, Hayden & Co. sued out a writ of error from this court.

Messrs. Henry D. Hyde, M. F. Dickenson, Jr., and Hollis R. Bailey, for plaintiffs in error:

The meaning of the words "full faith and credit" is well established.

Mills v. Duryee, 11 U. S. 7 Cranch, 488 (8: 411); *Christmas v. Russell*, 72 U. S. 5 Wall. 800 (18: 478); *Green v. Van Buskirk*, 74 U. S. 7 Wall. 145 (19: 111); *Crapo v. Kelly*, 88 U. S. 16 Wall. 610, 642 (21: 480, 442).

Rights gained by attachment are entitled to

protection equally with those gained by judgment.

Green v. Van Buskirk, 74 U. S. 7 Wall. 145 (19: 111); *Warner v. Jaffray*, 96 N. Y. 259; *Jenks v. Ludden*, 84 Minn. 482.

The force and effect which the attachment proceedings have in New York is shown by the following statutes and cases:

Rev. Stat. of N. Y. 7th ed. vol. IV.; Code Civ. Proc. chap. 7, title III. §§ 635, 636, 638-641, 644, 648-651, 654-656, 674-681, 706-708; *Sartwell v. Field*, 68 N. Y. 841; *Dunlop v. Patterson Fire Ins. Co.* 74 N. Y. 145; *Anthony v. Wood*, 29 Hun, 239; *McGinn v. Ross*, 11 Abb. Pr. N. S. 20; *Hibernia Nat. Bank v. La Combe*, 84 N. Y. 885.

Citizens of other States have equal rights with the citizens of New York to sue and attach in the courts of New York, and the courts of New York will not make any distinction between them.

Hibernia Nat. Bank v. La Combe, 84 N. Y. 885.

The law is the same in Minnesota, New Hampshire, Connecticut and Illinois.

Jenks v. Ludden, 84 Minn. 486; *Kidder v. Tufts*, 48 N. H. 121, 126; *Paine v. Lester*, 44 Conn. 204; *Rhawn v. Pearce*, 110 Ill. 850.

The equity of the bill brought by the assignees of Bird depends upon the fact that they have no standing in the courts of New York to dispute the validity of these attachments.

Fuller v. Caldwell, 6 Allen, 508.

The title of the attaching creditors is superior in New York to that of the assignees appointed in Massachusetts.

Kelly v. Crapo, 45 N. Y. 86; *Re Waite*, 99 N. Y. 483.

Kelly v. Crapo was reversed in this court, 88 U. S. 16 Wall. 610 (21: 480), but only on the ground that the property attached, being upon the high sea, was constructively in Massachusetts.

The question whether property situated in New York is subject to attachment by creditors, notwithstanding any assignment made in another State, is to be determined exclusively by the law of New York, the *situs* of the property.

Green v. Van Buskirk, 72 U. S. 5 Wall. 907 (18: 599); *Hervey v. R. I. Locomotive Works*, 93 U. S. 664 (23: 1008); *Jenks v. Ludden*, 84 Minn. 486.

Attachments are proceedings *in rem*.

Taylor v. Carryl, 61 U. S. 20 How. 583 (15: 1028); *Cooper v. Reynolds*, 77 U. S. 10 Wall. 309 (19: 981); *Pennoyer v. Neff*, 95 U. S. 714 (24: 565); *Green v. Van Buskirk*, 74 U. S. 7 Wall. 189 (19: 109).

This is equally true of attachments made by trustee or garnishee process.

Whipple v. Robbins, 97 Mass. 108; *American Bank v. Rollins*, 99 Mass. 814; *Garity v. Gigie*, 130 Mass. 184; *Wallace v. McConnell*, 38 U. S. 13 Pet. 151 (10: 102).

Courts of equity are bound by the Constitution to give full faith and credit to the judicial proceedings of other States.

Christmas v. Russell, 72 U. S. 5 Wall. 800-802 (18: 478); *Warner v. Jaffray*, 96 N. Y. 248; *Nicoll v. Spowers*, 105 N. Y. 4, 5, 7 Cent. Rep. 95; *Keller v. Paine*, 107 N. Y. 90, 9 Cent. Rep. 429; *Bicknell v. Field*, 8 Paige, 440; *Jenks v.*

Ludden, 84 Minn. 488; *Harrie v. Pullman*, 84 Ill. 20; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 148 (19: 112).

Citizenship and its effect.

Moore v. Church, 70 Iowa, 211.

Review of Massachusetts cases:—

The case of *Dehon v. Foster*, 4 Allen, 545, 7 Allen, 57, cannot be reconciled with *Lawrence v. Batcheller*, 181 Mass. 506. *Lawrence v. Batcheller* was the latest statement of the Massachusetts Law at the time the attachments were made.

The assignees have no standing in the courts of New York as against the prior attaching creditors.

Re Waite, 99 N. Y. 488.

The law is the same in other States.

Kidder v. Tufts, 48 N.H. 125; *Paine v. Lester*, 44 Conn. 198; *Rhawn v. Pearce*, 110 Ill. 850.

Mr. Eugene M. Johnson, for defendants in error:

The Supreme Judicial Court of Massachusetts has the right to restrain the citizens of that State, who are within its jurisdiction, from doing any act which shall result in wrong and injury to other citizens of the State, by a decree *in personam*.

Dehon v. Foster, 4 Allen, 545; *Keyser v. Rice*, 47 Md. 208; *Quidnick Co. v. Chafes*, 18 R. I. 367; *Snook v. Snetser*, 25 Ohio St. 516; *Vermont & C. R. Co. v. Vermont Cent. R. Co.* 43 Vt. 792, 797; *Clafin v. Hamlin*, 62 How. Pr. 286; 2 Story, Eq. Jur. § 900; *Bispham*, Eq. 4th ed. § 424; 1 High, Injunctions, 2d ed. § 106; *Whart. Conflict of Laws*, § 711, note a; *Bigelow*, Estoppel, 4th ed. 246; *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462; *Bushby v. Munday*, 5 Madd. 307; *Beckford v. Kemble*, 1 Sim. & Stu. 7; *Attwood v. Banks*, 2 Beav. 192; *Hill v. Turner*, 1 Atk. 515; *Glascott v. Lang*, 8 Myl. & C. 451; *Hops v. Carnegie*, L. R. 1 Ch. 320; *Ex parte Tait*, L. R. 18 Eq. 811; *Re Chapman*, L. R. 15 Eq. 75; *Massie v. Watts*, 10 U. S. 6 Cranch, 148 (8: 181); *Phelps v. McDonald*, 99 U. S. 298 (25: 478); *Corbett v. Nutt*, 77 U. S. 10 Wall. 464 (19: 976).

An attachment lien is not a final decree of the court.

Sartwell v. Field, 68 N. Y. 841.

The plaintiffs in error have not the same rights as a creditor resident in New York.

Pennoyer v. Neff, 95 U. S. 714 (24: 565).

The court of Massachusetts may compel citizens of Massachusetts to transfer rights and property elsewhere situated.

Penn v. Lord Baltimore, 1 Ves. Sr. 444; *Watkins v. Holman*, 41 U. S. 16 Pet. 25 (10: 878); *Corbett v. Nutt*, 77 U. S. 10 Wall. 464 (19: 976).

Mr. Chief Justice Fuller delivered the opinion of the court:

The question to be determined is, whether a decree of the Supreme Judicial Court of Massachusetts, restraining citizens of that Commonwealth from the prosecution of attachment suits in New York, brought by them for the purpose of evading the laws of their domicile, should be reversed upon the ground that such judicial action in Massachusetts was in violation of article IV., sections 1 and 2, of the Constitution of the United States, which read as follows:

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"Sec. 1. Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

"Sec. 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The Act of May 26, 1790 (1 Stat. 122), now embodied in § 905 of the Revised Statutes, after providing the mode of authenticating the acts, records and judicial proceedings of the States, declares:

"And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken."

This does not prevent an inquiry into the jurisdiction of the court, in which a judgment is rendered, to pronounce the judgment, nor into the right of the State to exercise authority over the parties or the subject matter, nor whether the judgment is founded in, and impeachable for, a manifest fraud. The Constitution did not mean to confer any new power on the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of the States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can be issued upon such judgments without a new suit in the tribunals of other States, and they enjoy, not the right of priority or privilege or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws, in their character of foreign judgments. *McElmoyle v. Cohen*, 38 U. S. 18 Pet. 812, 328, 329 [10: 177, 185]; *D'Arcy v. Ketchum*, 52 U. S. 11 How. 165 [13: 648]; *Thompson v. Whitman*, 85 U. S. 18 Wall. 457 [21: 587]; *Pennoyer v. Neff*, 95 U. S. 714 [24: 565]; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 292 [32: 239, 244]; *Christmas v. Russell*, 72 U. S. 5 Wall. 290 [18: 475]; *Story*, Constitution, § 1808 *et seq.*, and *Story*, Conflict of Laws, § 609. And other judicial proceedings can rest on no higher ground.

These well settled principles find pertinent illustration in the decisions of the highest tribunal of the State of New York, to one of which we refer, as the contention is that the decree under review was in some way an unconstitutional invasion of the jurisdiction of that State.

In *Dobson v. Pearce*, 12 N. Y. 156, the plaintiff in a judgment, recovered in New York, brought an action upon it in the Superior Court of Connecticut, whereupon the defendant in the judgment filed a bill against the plaintiff on the equity side of the same court, alleging that the judgment was procured by fraud, and praying relief. The plaintiff in the judgment appeared in and litigated the equity suit, and the court adjudged that the allegations of fraud in obtaining the judgment were true, and enjoined him from prosecuting an action upon it.

He assigned the judgment, and it was held in a suit in New York, brought thereon by the assignee, that a duly authenticated copy of the record of the decree in the Connecticut court was conclusive evidence that the judgment was obtained by fraud.

The Court of Appeals held that while a judgment rendered by a court of competent jurisdiction could not be impeached collaterally for error or irregularity, yet it could be attacked upon the ground of want of jurisdiction, or of fraud or imposition; that the right of the plaintiff in the judgment was a personal right, and followed his person; that when the courts of Connecticut obtained jurisdiction of his person by the due service of process within the State, these courts had full power to pronounce upon the rights of the parties in respect to the judgment, and to decree concerning it; that the jurisdiction of a court of equity anywhere, to restrain suit upon a judgment at law, upon sufficient grounds, was one of the firmly established parts of the authority of courts of equity; and that it could not be held that a court of equity in one State had no jurisdiction to restrain such a suit upon a judgment of a court of law of another State. If the objection to so doing was founded upon an assumed violation of the comity existing between the several States of the United States, that did not reach to the jurisdiction of the court, a rule of comity being a self-imposed restraint upon an authority actually possessed; and as to the objection that the Constitution of the United States and the laws made in pursuance of it inhibited the action of the Connecticut courts, this could not prevail, since full faith and credit are given to the judgment of a state court when in the courts of another State it receives the same faith and credit to which it was entitled in the State where it was pronounced. *Pearce v. Olney*, 20 Conn. 544; *Engel v. Scheuerman*, 40 Ga. 206; *Cage v. Cassidy*, 64 U. S. 28 How. 109 [16:480].

The intention of section 2 of article IV. was to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions. The fact of the citizenship of Butler and Hayden did not affect their privilege to sue in New York and have the full use and benefit of the courts of that State in the assertion of their legal rights; but as that fact might affect the right of action as between them and the citizens of their own State, the courts of New York might have held that its existence put an end to the seizure of their debtor's property by Butler & Hayden in New York. If, however, those courts declined to take that view, it would not follow that the courts of Massachusetts violated any privilege or immunity of Massachusetts' own citizens in exercising their undoubted jurisdiction over them.

Discharges under State Insolvent Laws exemplify the principle. Where the effect of the Insolvent Law is to relieve the debtor from liability on his contracts, such discharge, if the creditor and debtor have a common domicile, or the creditor, though nonresident, has volun-

tarily become a party to the proceedings, avails the defendant in all courts and places.

It was decided in *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 122 [4:529], that State Legislatures have authority to pass a Bankrupt or Insolvent Law, provided there be no Act of Congress in force, establishing a uniform system of bankruptcy, conflicting with such laws; and provided the law itself be so framed that it does not impair the obligation of contracts. Eight years later, in *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213 [6:806], the court held that the power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States did not exclude the right of the States to legislate on the same subject, except when the power had actually been exercised by Congress, and the state laws conflicted with those of Congress; that a Bankrupt or Insolvent Law of any State which discharged both the person of the debtor and his future acquisitions of property was not a law impairing the obligation of contracts, so far as respected debts contracted subsequent to the passage of the law; that a certificate of discharge under such law could not be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained. The Insolvent Law could have no extraterritorial operation, and the tribunal administering it would have no jurisdiction over citizens of other States. But this objection would not lie where such citizens had become parties to the proceedings. Hence, in *Clay v. Smith*, 28 U. S. 3 Pet. 411 [7:723], it was held, where a citizen of Kentucky sued a citizen of Louisiana, and the defendant pleaded his discharge by the Bankrupt Law of Louisiana, that the plaintiff, who had received a dividend on his debt declared by the assignees of the defendant in Louisiana, had voluntarily made himself a party to those proceedings, abandoned his extraterritorial immunity from the Bankrupt Law of Louisiana, and was bound by that law to the same extent to which the citizens of Louisiana were bound. And it may be considered as settled that State Insolvent Laws are not only binding upon such persons as were citizens of the State at the time the debt was contracted, but also upon foreign creditors if they make themselves parties to proceedings under these Insolvent Laws by accepting dividends, becoming petitioning creditors or in some other way appearing and assenting to the jurisdiction. *Baldwin v. Hale*, 68 U. S. 1 Wall. 223 [17:531]; *Gilman v. Lockwood*, 71 U. S. 4 Wall. 409 [18:432].

In New York an attachment is obtained on application to a judge of the supreme court, or a county judge, affidavit being made as to the validity of the claim and the grounds of the attachment, and a bond furnished with sufficient sureties. The judge in his discretion makes an order that a warrant of attachment be granted. The warrant is directed to the sheriff, and is subscribed by the judge, and requires the sheriff to attach and safely keep so much of the property as will satisfy the plaintiff's demand, with costs and expenses. This is served by the sheriff taking the property into his actual custody, or, in the case of a demand trustee, by leaving a

copy with the trustee or garnishee. The sheriff, under the direction of the court, must collect any debt or chose in action attached by him, and, if necessary, may bring an action in his own name, or in that of the defendant, against the garnishee. Code of Civil Procedure, title III., § 1 Bliss, New York Annotated Code, 545 *et seq.*

An attachment is in the nature of, but not, strictly speaking, a proceeding *in rem*, since that only is a proceeding *in rem* in which the process is to be served on the thing itself. If in an attachment suit "the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer any demand which may be established against defendant by the final judgment of the court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff." *Cooper v. Reynolds*, 77 U. S. 10 Wall. 308, 318 [19: 981, 983]. The lien is inchoate, and the property attached held to await the result of the suit. If a judgment for the plaintiff is obtained, the lien becomes perfected and the property is applied to satisfy the judgment. If plaintiff fails in his action, the lien falls with it. And he may so fail by reason of the discharge of the defendant in insolvency, when he is a citizen of the same State, or has made himself a party to the proceedings in insolvency, or by the action of other courts of the State where the suit is pending, or elsewhere, if jurisdiction *in personam* be obtained. So that, after all, the inquiry is, whether, in a proper case, the equity courts of one State can control persons within their jurisdiction from the prosecution of suits in another. If they can, in accordance with the principles of equity jurisprudence and practice, no reason is perceived for contending that the Constitution of the United States prescribes any different rule. And the determination of what is a proper case for equity interposition would seem to be reposed in the court whose authority is invoked, though some remarks in that regard may not improperly be made.

The jurisdiction of the English Court of Chancery to restrain persons within its territorial limits and under its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the institution or the prosecution of an action in a foreign court, is well settled.

In *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, Lord Hardwicke recognized the principle that equity, as it acts primarily *in personam* and not merely *in rem*, may, where a person against whom relief is sought is within the jurisdiction, make a decree, upon the ground of a contract, or any equity subsisting between the parties, respecting property situated out of the jurisdiction. 2 Lead. Cas. in Eq. 4th Am. ed. 1806, and cases.

In *McIntosh v. Ogilvie*, 4 Term Rep. 193, note; S. C., 3 Swanst. 865, note, Lord Hardwicke lays down the same doctrine as to restraining prosecution of suit. This case bears 183 U. S.

so close an analogy to that at bar that we give it in full, as follows:

"The plaintiff was the assignee of a bankrupt, the defendant a creditor who, before the bankruptcy, went into Scotland and made arrestments on debts due to the bankrupt from persons there. Upon an affidavit of the defendant's having got this money into his hands, a *ne exeat* was granted; and a motion was now made on the behalf of the defendant to discharge it, upon a supposition that he had a right to the goods as creditor by his arrestments.

"The Lord Chancellor asked whether he had sentence before the bankruptcy; and, being answered in the negative, he said, 'Then it is like a foreign attachment, by which this court will not suffer a creditor to gain priority, if no sentence were pronounced before the bankruptcy. I cannot grant a prohibition to the court of sessions; but I will certainly make an order on the party here to restrain him from getting a priority, and evading the laws of bankruptcy here. If the gentleman were not going abroad, I would do nothing; but as he is, I will not discharge the writ without his giving security to abide the event of the cause.'"

Penn v. Lord Baltimore is cited with approval by Chief Justice Marshall in *Massie v. Watts*, 10 U. S. 6 Cranch, 148 [8: 181], where a suit was instituted in the Circuit Court of Kentucky to compel the conveyance by the defendant of the legal title of land in Ohio, on the ground that he had notice, when it was purchased, of the prior equity of the complainant. The defense was that the land was beyond the jurisdiction of the court and within the State of Ohio. This defense was overruled by the court below, and its decision affirmed by this court. "This court is of opinion," said the chief justice, "that in a case of fraud, of trust or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."

And in *Pennoyer v. Neff*, 95 U. S. 714, 728 [24: 565, 569], it is said in the opinion of the court by Mr. Justice Field: "The State, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the State within which it is situated. *Penn v. Lord Baltimore*, 1 Ves. Sr. 444; *Massie v. Watts*, 10 U. S. 6 Cranch, 148 [8: 181]; *Watkins v. Holman*, 41 U. S. 16 Pet. 25 [10: 878]; *Corbett v. Nutt*, 77 U. S. 10 Wall. 464 [19: 976]."

In *Lord Portarlington v. Southby*, 3 Myl. & K. 104, 106, Lord Chancellor Brougham reviews the history of the jurisdiction to restrain parties from commencing or prosecuting actions in foreign countries, and concludes: "Nothing can be more unfounded than the doubts of the jurisdiction. That is grounded like all other jurisdiction of the court, not upon any pretention to the exercise of judicial and administrative rights abroad,

but on the circumstance of the person of the party, on whom this order is made, being within the power of the court." *Earl of Oxford's Case*, 2 Lead. Cas. in Eq. 1316, 1 Ch. Rep. 1.

Mr. Justice Story states the principle thus:

"But although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them by injunction to proceed no further in such suit. In such a case, these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject matter of the dispute, they consider the equities between the parties, and decree *in personam* according to those equities; and enforce obedience to their decrees by process *in personam*. . . . It is now held that whenever the parties are resident within a country, the courts of that country have full authority to act upon them personally with respect to the subject of suits in a foreign country, as the ends of justice may require; and with that view to order them to take, or to omit to take, any steps and proceedings in any other court of justice, whether in the same country, or in any foreign country." *Story*, Eq. Jur. sections 899, 900.

In *Phelps v. McDonald*, 99 U. S. 298, 308 [25:478,476], *Mr. Justice Swayne* uses this language:

"Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him. Without regard to the situation of the subject matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decree by process *in personam*."

Such is undoubtedly the result of the clear weight of authority, and the rule has been often applied by the courts of the domicile against the attempts of some of its citizens to defeat the operation of its laws to the wrong and injury of others.

Thus it was held by the Supreme Court of Ohio, *Snook v. Snetzer*, 25 Ohio St. 516, that where the statutes of that State exempted the earnings for personal service of a debtor, who was the head of a family and a citizen of the State, the Ohio courts had authority to restrain a citizen of the county in which the equity action was commenced, from proceeding in another State to attach the earnings of such head of a family, with a view to evade the Exemption Laws of Ohio, and to prevent him from availing himself of the benefit of such law.

To the same effect is *Keyser v. Rice*, 47 Md.

208. The Court of Appeals of Maryland declared the power of the State to compel its own citizens to respect its laws, even beyond its own territorial limits, to be supported by the great preponderance of precedent and authority; and sustained an injunction to restrain the further prosecution in another State of an attachment by which the defendant sought to recover wages due the complainant in Maryland and there exempt from attachment.

So in *Burlington & M. R. R. Co. v. Thompson*, 81 Kan. 180, though it was held that a foreign corporation doing business in Kansas might be garnished for a debt due to a non-resident employé, contracted outside of the State and exempt from garnishment in the State where the defendant and garnishee resided, yet it was conceded by *Judge Brewer*, in delivering the opinion, "that in the courts of a State any citizen of that State may be enjoined from resorting to the courts of any other State for the purpose of evading the Exemption Laws of his own State;" and this was so decided in *Zimmerman v. Franke*, 34 Kan. 650.

In *Wilson v. Joseph*, 107 Ind. 490, 5 West. Rep. 681, the Supreme Court of Indiana ruled an injunction would lie to restrain a resident of Indiana from prosecuting an attachment proceeding against another resident in the courts of another State, in violation of a statute which made it an offense to send a claim against a debtor out of the State for collection, in order to evade the Exemption Law. And see *Chafee v. Quidnick Co.* 13 R. I. 442, 449; *Great Falls Manufacturing Co. v. Worster*, 23 N. H. 462; *Pickett v. Ferguson*, 45 Ark. 177.

The rule is not otherwise in New York. It is true that in *Mead v. Merritt*, 2 Paige, Ch. 402, the chancellor said: "I am not aware that any court of equity in the Union has deliberately decided that it will exercise the power by process of injunction to restrain proceedings which have been previously commenced in the courts of another State." And the reason urged against the exercise of the power was that if the courts of one State should see fit to enjoin proceedings in another, the latter might retaliate in like manner in enjoining proceedings in the first, and thus give rise to an endless conflict of jurisdiction. But this reasoning has not commended itself to the judicial mind, for the injunction is not directed to the courts of the other State, but simply to the parties litigant; and although the power should be exercised with care, and with a just regard to the comity which ought to prevail among co-ordinate sovereignties, yet its existence cannot at this day be denied.

In *Vail v. Knapp*, 49 Barb. 299, 305, an injunction was continued against citizens of New York, plaintiffs in attachment suits in Vermont, upon the ground that they were proceeding in Vermont in evasion of the laws of New York; and the court points out that, though as a general rule the courts of New York decline to interfere by injunction to restrain its citizens from proceeding in an action which has been commenced in a sister State, citing *Mead v. Merritt*, 2 Paige, Ch. 402; *Burgess v. Smith*, 2 Barb. Ch. 276, and other cases, yet "there are exceptions to this rule, and, when a case is presented fairly constituting such exception, extreme delicacy should not deter the

court from controlling the conduct of a party within its jurisdiction to prevent oppression or fraud. No rule of comity or policy forbids it."

The same result was announced in *Dinmore v. Neresheimer*, 82 Hun, 204, where the Supreme Court of New York held that an express company could maintain an action in New York to restrain the defendant, a resident of the State of New York, from prosecuting actions against the company in the District of Columbia, brought to avoid a decision of the Court of Appeals of New York, differing from the rule upon the same subject in the District of Columbia.

In *Erie R. Co. v. Ramsey*, 45 N. Y. 397, the Court of Appeals, speaking through Folger, J., treats the general question as not admitting of doubt.

At the time of these proceedings, as for many years before, the Commonwealth of Massachusetts had an elaborate system of Insolvent Laws, designed to secure the equal distribution of the property of its debtors among their creditors. Under these Insolvent Laws all preferences were avoided, and all attachments in favor of particular creditors dissolved. The transfer of the debtor's property to his assignees in insolvency extended to all his property and assets, wherever situated. This was expressly provided as to such as might be outside of the State. By one of the sections of the chapter of the Public Statutes of Massachusetts treating of this subject, the debtor was required to do all acts necessary to give the assignees power to "demand, recover and receive all the estate and effects so assigned, especially any part thereof which is without this State." (Mass. Pub. Stat. 1862, chap. 157, § 74.) Whenever the debtor had made, to the satisfaction of the judge in insolvency, a full transfer and delivery of all his estate, and conformed to the directions and requirements of the law, he was entitled to be absolutely and wholly discharged from his debts, with certain exceptions; but it was provided that a discharge should not be granted to a debtor whose assets did not pay fifty per cent of the claims proved against his estate, unless upon the assent in writing of a majority in number and value of his creditors who had proved their claims. (§§ 80, 86.)

Nothing can be plainer than that the act of Butler, Hayden & Co., in causing the property of the insolvent debtors to be attached in a foreign jurisdiction, tended directly to defeat the operation of the Insolvent Law in its most essential features, and it is not easy to understand why such acts could not be restrained, within the practice to which we have referred.

But for the attachment suits the assignees in insolvency could have collected the claim of Bird against Claflin & Co., but could not have intervened in those suits and asked of the courts of New York the enforcement of their title. The rule in that State is that, by the comity of nations, the statutory title of foreign assignees in bankruptcy is recognized and enforced when it can be done without injustice to the citizens of the State, and without prejudice to creditors pursuing their remedies under the New York statutes, provided also that such title is not in conflict with the laws or public policy of the State, and that the for-

eign court had jurisdiction of the bankrupt. *Re Waite*, 99 N. Y. 433.

Under such a rule it is evident that the remedy of the assignees was in equity and in the courts of their domicile.

This is the conclusion reached in *Kidder v. Tufts*, 48 N. H. 121, 126, referred to by counsel for appellant. That was a case where citizens of Massachusetts commenced in New Hampshire an attachment against certain other citizens of the former State; proceedings in insolvency against the defendants were afterwards instituted in Massachusetts; and, subsequently to this, certain New Hampshire creditors attached the same property and then moved for a continuance to await the proceedings in insolvency, for the purpose of pleading the insolvent's discharge in bar of the first attachment. But the court denied the motion, holding that the Massachusetts creditors had availed themselves of their strict legal rights as established and allowed by the Statute Law of New Hampshire, and, for the purpose of an attachment, might properly be considered subjects of that state government; but the court added: "If the subsequent attaching creditors have a remedy, and can in any way prevent the plaintiffs from obtaining a preference, their appeal should be made, as creditors of the defendants, to the Massachusetts courts, which may exercise their jurisdiction over their own citizens if they have violated any of their laws by their experiment here." *Hibernia Nat. Bank v. LaCombe*, 84 N. Y. 367, 386.

So in the case of *Paine v. Lester*, 44 Conn. 196, where a citizen of Rhode Island attached in Connecticut a debt due from a citizen of Connecticut to a corporation of Pennsylvania, which had made an assignment for the benefit of creditors, the lien of the attachment was held valid against the claim of the trustee in the assignment, because the right of the trustee in insolvency in Connecticut rested only on the comity which the court there could exercise or refuse to exercise at its discretion, while the plaintiff had a legal right, under the laws of Connecticut, to prosecute his suit.

In *Rhawn v. Pearce*, 110 Ill. 850, the Supreme Court of Illinois declined to recognize at law the Insolvent Laws of Pennsylvania, by giving effect to a statutory assignment in that State, even as against an attaching creditor of the same State with the debtor. But the same tribunal found no difficulty in holding, in *Sercomb v. Catlin*, 128 Ill. 556, that the courts of Illinois, on the application of a receiver appointed by them, could enjoin a person within the jurisdiction of the court from interfering in respect to property belonging to an insolvent copartnership for which the receiver had been appointed, although that property was outside of the jurisdiction; and *Chafee v. Quisnick Co.*, 18 R. I. 442; *Dehon v. Foster*, 4 Allen, 545, and *Vermont & C. R. Co. v. Vermont Central R. Co.*, 46 Vt. 792, were cited.

Dehon v. Foster, 4 Allen, 545, is the leading case upon the subject, argued by eminent counsel on both sides, and decided upon great consideration. The Supreme Judicial Court of Massachusetts, speaking through Bigelow, Ch. J., points out that the jurisdiction of a court, as a court of chancery, to restrain persons within its jurisdiction from prosecuting suits, upon

a proper case made, either in the courts of Massachusetts or in other States or foreign countries, rests on the clear authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process, to stay acts contrary to equity and good conscience; and that, as the decree of the court in such cases is directed solely at the party, it is wholly immaterial that such party is prosecuting his action in the courts of another State or country.

The action was a bill in equity to enjoin a citizen of Massachusetts from availing himself of an attachment of personal property in Pennsylvania, as against a debtor put into insolvency under the laws of Massachusetts, and thus preventing the same from coming to the hands of the assignee. The court held that it was obvious that the controversy was simply as to the relative rights of citizens of Massachusetts to personal property belonging to insolvent debtors, domiciled in that State, and raised no question involving a conflict of rights between citizens of Massachusetts and another State, nor as to the validity of a foreign law, or of liens acquired under it. On the contrary, the case rested on the ground that the defendants, if allowed to proceed with their action, would perfect a lien then only inchoate under their attachment, and might thereby establish a valid title to the property of the insolvent debtors under the laws of Pennsylvania.

"Looking, then, at our own laws," said the court, "to ascertain which of the two parties to this suit has a paramount right or superior equity to the debts due to the insolvents from persons residing out of the State, there would seem to be but little, if any, room open for doubt or controversy." The fundamental principle of the Insolvent Laws of the Commonwealth, that all the property of the debtor should be taken and equally distributed among his creditors, was remarked on, and the provisions of the statute intended to secure that end recapitulated. The inevitable conclusion was announced that as the act of the defendants in causing the property of the insolvent debtors to be attached in a foreign jurisdiction tended directly to defeat the operation of the law by preventing a portion of the property of the debtors from coming to their assignees to be equally distributed among their creditors, and giving a preference to certain of their debtors, so that they would obtain payment of their debt in full, it was therefore an attempt by those creditors, citizens of Massachusetts, to defeat the operation of their own laws, to the injury of other creditors of the insolvents. And the court proceeded: "This is manifestly contrary to equity. The defendants, being citizens of this State, are bound by its laws. They cannot be permitted to do any acts to evade or counteract their operation, the effect of which is to deprive other citizens of rights which those laws are intended to secure. Certain it is that they could not in any manner or by any process take from the assignees of an insolvent debtor property belonging to him within this State, and appropriate it to the payment of their debt in full. To prevent such appropriation, if the law furnished no adequate and complete remedy, this court would interfere by suitable process in equity. We are

unable to see any reason for withholding such interference, merely because our citizens seek to accomplish the same purpose by resorting to a foreign jurisdiction, and with the aid of the laws of another State or country. An act which is unlawful and contrary to equity gains no sanction or validity by the mere form or manner in which it is done. It is none the less a violation of our laws, because it is effected through the instrumentality of a process which is lawful in a foreign tribunal. By interposing to prevent it, we do not interfere with the jurisdiction of courts in other States, or control the operation of foreign laws. We only assert and enforce our own authority over persons within our jurisdiction, to prevent them from making use of means by which they seek to countervail and escape the operation of our laws, in derogation of the rights and to the wrong and injury of our own citizens."

To the argument that the bill could not be maintained, because the statutes of Massachusetts regulating the assignment and distribution of insolvent estates could have no extraterritorial effect or operation, the court answered that while it was true that the statutes of Massachusetts *ex proprio vigore* had no effect or operation in other States, it was also true that, by the comity of States and nations, the laws of one country are allowed to a certain extent to control the rights of persons and property in other countries, though not allowed to have any effect to the injury of the citizens of such other country. From this principle it followed, as a necessary consequence, that personal property of a Massachusetts insolvent debtor, situated in Pennsylvania, would vest in the Massachusetts insolvent's assignees, with power to take possession of and collect them either in their own names or in the name of the insolvent, if they were not held or attached by virtue of a process or lien in favor of a creditor, which would be valid under the laws of Pennsylvania. Hence, if the attachment in Pennsylvania were valid and binding, the Massachusetts creditors would obtain a right, superior to that conferred under the Massachusetts laws on the assignees in insolvency, by the act of such creditors, in defeat of the operation of the laws of their own State; so that a proceeding in equity might properly be resorted to to compel the defendants to desist from the prosecution of a suit which would have such an effect.

Nor did the court regard the fact as controlling to the contrary, that the attachment was made prior to the institution of the proceedings in insolvency, because the attachment tended to contravene the clear intent of the statutes, which aim to vest in the assignee all the property of the debtor which could have been assigned by him or taken on execution against him at the time of the commencement of the insolvent proceedings, "although the same is then attached on mesne process as the property of the debtor;" and because, aside from that, it appeared that the defendants, when they instituted process in Pennsylvania, and made their attachment, knew that the debtors were insolvent, and had reason to believe that proceedings in insolvency were about to be instituted against them, and caused the attachment to be made with an intent to obtain a preference

over other creditors, and to avoid the operation of the Insolvent Laws of the Commonwealth. Under such circumstances, priority gave no equity to the defendants. The purpose to interfere with and prevent the proper distribution of the insolvent's estate took away all claim to equitable consideration which might exist when priority was obtained in good faith. The decree accordingly went enjoining the defendants from prosecuting their attachments.

The objection was urged that the effect of the restraint might be to enable all nonresident creditors to appropriate property by attachment to the payment of their debts, and thereby to gain a preference over attaching creditors residing in Massachusetts as well as to prevent the property from passing to the assignees. This was of course a matter to be considered by the court in arriving at a conclusion as to granting the relief prayed. It may be remarked, however, that while as between citizens of the State of the forum, and the assignee appointed under the laws of another State, the claim of the former will be held superior to that of the latter by the courts of the former, yet this has not been so ruled in many of the States, as between an assignee appointed in another State and citizens of other States than that of his appointment, and of the forum. Undoubtedly the fiction of law that the domicil draws to it the personal estate of the owner wherever it may happen to be, yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined, and always yields when the laws and policy of the State where the property is located invalidate a transfer, even though valid by the law of the assignor's domicil, in which State it was made, subject to the qualifications, that property once vested in the assignee and in his possession will not be disturbed, and that, in some jurisdictions, when the attaching creditor is domiciled in the same State with the assignor, he may be precluded from disputing the assignment in a foreign court.

Whether the law of the common domicil of two or more litigants determines their title to property in another territory, so that an attaching creditor, whose domicil is the same as that of the assignor, cannot set up against an assignment the law of a foreign country where the property is actually situated, has been much discussed. It is certain that the law of the common domicil cannot overcome such registry and other positive laws of the other country as are distinctly politic and coercive. (Wharton on Conf. Laws, §§ 369, 371.) If a State provides that no title shall pass to property within its borders, except on certain conditions, such provision cannot be overridden by the law of any other State, which parties domiciled there may be held to have adopted. It was in this view that *Mr. Justice Miller*, referring to a voluntary conveyance, in *Green v. Van Buskirk*, 72 U. S. 5 Wall. 307, 311, 312 [18: 599, 600], said:

"There is no little conflict of authority on the general question as to how far the transfer of personal property by assignment or sale, made in the country of the domicil of the owner, will be held to be valid in the courts of the country where the property is situated, 133 U. S.

where these are in different sovereignties. The learned author of the Commentaries on the Conflict of Laws has discussed the subject with his usual exhaustive research. And it may be conceded that, as a question of comity, the weight of his authority is in favor of the proposition that such transfers will generally be respected by the courts of the country where the property is located, although the mode of transfer may be different from that prescribed by the local law. . . .

"But, after all, this is a mere principle of comity between the courts, which must give way when the statutes of the country where property is situated, or the established policy of its laws, prescribe to its courts a different rule."

Great contrariety of state decision exists upon this general topic, and it may be fairly stated that, as between citizens of the State of the forum and the assignee appointed under the laws of another State, the claim of the former will be held superior to that of the latter by the courts of the former; while, as between the assignee and citizens of his own State and the State of the debtor, the laws of such State will ordinarily be applied in the State of the litigation, unless forbidden by, or inconsistent with, the laws or policy of the latter. Again, although, in some of the States, the fact that the assignee claims under a decree of a court or by virtue of the law of the State of the domicil of the debtor and the attaching creditor, and not under a conveyance by the insolvent, is regarded as immaterial, yet, in most, the distinction between involuntary transfers of property, such as work by operation of law, as Foreign Bankrupt and Insolvent Laws, and a voluntary conveyance, is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation out of the State in which the law was passed. This is a reason which applies to citizens of the actual *situs* of the property when that is elsewhere than at the domicil of the insolvent, and the controversy has chiefly been as to whether property so situated can pass even by a voluntary conveyance.

In *Warner v. Jaffray*, 96 N. Y. 248, the debtor, residing in New York, made a general assignment for the benefit of creditors to the plaintiff. He owned personal property situated in Pennsylvania, which was attached by New York creditors, having no actual notice of the assignment, before the assignment had been recorded in Pennsylvania. A statute of that State provided that assignments of property situated there, made by a person not a resident therein, might be recorded in any county where the property was, and would take effect from its date, "provided that no bona fide purchaser, mortgagee or creditor, having a lien thereon before the recording in the same county, and not having previous actual notice thereof, shall be affected or prejudiced." It was held that an injunction should not be granted against the New York creditors from prosecuting their attachment suits in Pennsylvania. The assignment, said

the court, was a mere voluntary conveyance, and "did not operate upon the creditors of the assignor, nor place them under any obligations. It left them entirely free to act. They could utterly refuse to have anything to do with it, and retain their claims and enforce them in their own time, as best they could, against their debtor. The assignee became a trustee for such creditors of the assignor only as chose to accept him as such, and without their assent the assignment did not bring the creditors into any relation with the assignee, or with each other. The law did not take this insolvent's property for distribution among his creditors, but its distribution was his own act. Any one of his creditors could, notwithstanding the assignment, enforce his claim against any property of the assignor not conveyed by the assignment, without violating any rights or equities of the other creditors." The law of Pennsylvania was then referred to, and it was shown, as the fact was, that such an assignment was recognized in Pennsylvania, but that to give it effect before it had been recorded where the property was, would have been in contravention of the law of the State. Upon this ground the court distinguished *Ockerman v. Cross*, 54 N. Y. 29, where "it was held that a voluntary assignment by a debtor residing in Canada, valid by the laws of his domicile, and not invalidated by any law of this State, was valid here and operated to transfer the assignor's property situated here. That the decision would have been different if the assignment had been in contravention of our laws or policy, is fully recognized in the opinion of the court." And so also the court distinguished the case of *Bagby v. Atlantic, Mississippi & Ohio Railroad Co.* 86 Pa. 291. There a receiver had been appointed in the State of Virginia of the property of the railroad company, and at the time of such appointment there was due to it, from a debtor in Pennsylvania, a certain sum of money which the receiver claimed. But after his appointment a creditor residing in Virginia went to the State of Pennsylvania and there commenced suit against the railroad company and attached the debt due it, and it was held that the receiver was entitled to the debt. And the Court of Appeals said: "The transfer of the title to the receiver was not in contravention of any law of Pennsylvania, and hence it was held that as against a citizen of Virginia, bound by its laws, the appointment of a receiver, binding upon him there, would, by comity, be held to be binding upon him in Pennsylvania."

In the case in hand, the Supreme Judicial Court of Massachusetts thought it proper to grant the injunction, since it was a case of the taking by the law of the insolvent's property for distribution among his creditors, who, so far as resident in the State of Massachusetts, were brought into relations with the assignee and with each other, which precluded them from enforcing their claim against the property of the assignor conveyed by the assignment, and rendered the effort to do so a violation of the rights and equities of the other creditors, and an absolute infraction of the law of their own domicile. Nor was there any law or policy of the State of New York contravened

by the insolvent proceedings in question, or in itself inimical to the title of the assignees.

In *Lawrence v. Batcheller*, 181 Mass. 504, the defendant, Batcheller, a citizen of Massachusetts, had brought suits by attachment in other States against one Paige, also a citizen of Massachusetts, indebted to defendant, and in embarrassed circumstances, and garnisheed and ultimately collected various amounts due to Paige. Paige subsequently went into insolvency, and his assignees sued Batcheller at law to recover the money. The Supreme Judicial Court of Massachusetts held that the assignees could not recover because, as the attachments were made prior to the time when the assignment in insolvency took effect, and, having been made in other States, were not dissolved by the proceedings in insolvency, and were valid by the laws of the States where they were instituted, they prevailed over the insolvency assignment, the statutes of Massachusetts not making a title so acquired void or voidable at the election of the assignees in insolvency. And the court, holding that courts of law will not always afford a remedy in damages for all wrongs which courts of equity might prevent, said: "Courts of equity recognize and enforce rights which courts of law do not recognize at all; and it is often on this ground that defendants in equity are enjoined from prosecuting actions at law." The distinction between the action as brought and *Dehon v. Foster* was treated as obvious.

What has been said is in harmony with the rule announced in *Green v. Van Buskirk*, 72 U. S. 5 Wall. 307 [18: 599]; *S. C.* 74 U. S. 7 Wall. 189 [19: 109]. In that case, Bates, who lived in New York, executed and delivered to Van Buskirk, who lived in the same State, a chattel mortgage on certain iron safes which were then in the City of Chicago. Two days after this, Green, who was also a citizen of New York, being ignorant of the existence of the mortgage, sued out a writ of attachment in the courts of Illinois, levied on the safes, and subsequently had them sold in satisfaction of the judgment obtained in the attachment suit. There was no appearance or contest in this attachment suit, and Van Buskirk was not a party to it, although he could have made himself such party and contested the right of Green to levy on the safes, being expressly authorized by the laws of Illinois so to do. It was conceded that by the law of Illinois mortgages of personal property, until acknowledged and recorded, were void as against third persons. Subsequently Van Buskirk sued Green in New York for the value of the safes mortgaged to him by Bates, of which Green had thus received the proceeds. The courts of New York gave judgment in favor of Van Buskirk, holding that the law of New York was to govern and not the law of Illinois, although the property was situated in the latter State, and that the title passed to Van Buskirk by the execution of the mortgage. The cause was then brought to this court and first considered upon a motion to dismiss for want of jurisdiction. Mr. Justice Miller delivered the opinion overruling that motion. The cause then came on to be heard upon the merits, and the judgment of the Court of Appeals of New

York was reversed. This court held that as, by the laws of Illinois, an attachment on personal property would take precedence of an unrecorded mortgage, executed in another State where recording was not necessary, the judgment in attachment would be binding though the owner of the chattels, the attaching creditor and the mortgage creditor might all be residents of such other State; and *Mr. Justice Davis*, speaking for the court, said:

"It should be borne in mind, in the discussion of this case, that the record in the attachment suit was not used as the foundation of an action, but for purposes of defense. Of course, Green could not sue Bates on it, because the court had no jurisdiction of his person; nor could it operate on any other property belonging to Bates than that which was attached. But as, by the law of Illinois, Bates was the owner of the iron safes when the writ of attachment was levied, and as Green could and did lawfully attach them to satisfy his debt in a court which had jurisdiction to render the judgment, and as the safes were lawfully sold to satisfy that judgment, it follows that when thus sold the right of property in them was changed, and the title to them became vested in the purchasers at the sale. And as the effect of the levy, judgment and sale is to protect Green if sued in the courts of Illinois, and these proceedings are produced for his own justification, it ought to require no argument to show that when sued in the court of another State for the same transaction, and he justifies in the same manner, that he is also protected. Any other rule would destroy all safety in derivative titles, and deny to a State the power to regulate the transfer of personal property within its limits, and to subject such property to legal proceedings."

It will be perceived that it was manifestly inadmissible to hold that after Van Buskirk had permitted Green to go to judgment in a proceeding *in rem*, which appropriated the property as belonging to Bates, he could then get judgment against Green for the conversion of what had so been adjudged to him, an adjudication which Van Buskirk had voluntarily declined to litigate in the proper forum, and had not sought in his own State to prevent. It was a contest between two individuals claiming the same property, and that property capable of an actual *situs*, and actually situated in Illinois. The attachment was not only levied in accordance with the laws of Illinois, but the laws of that State affirmatively invalidated the instrument under which Van Buskirk claimed. Clearly, then, the law of the domicile of Van Buskirk, Green and Bates could not overcome such registry and other positive laws of Illinois as were distinctively coercive. *Hervey v. R. I. Locomotive Works*, 98 U. S. 664 [28: 1008]; *Wahworth v. Harris*, 129 U. S. 855 [32: 712].

In the case at bar, the attachment suits have not gone to judgment, and the assignees in insolvency have proceeded with due diligence as against these creditors, citizens of Massachusetts, who are seeking to evade the laws of their own State; nor is there anything in the law or policy of New York opposed to the law or policy of Massachusetts in the premises.

We find no infringement of the Constitution

in the rendition of the decree, and it is accordingly affirmed.

Mr. Justice Brewer, not having been a member of the court when this case was considered, took no part in its decision.

Mr. Justice Miller, dissenting:

I dissent from the judgment and opinion of the court in this case. I am of opinion that the proceedings in the state court of New York, whether they be considered as the bona fide action of Fayerweather for his own benefit, or as merely representing the interests of Butler, Hayden & Co., were efficient in establishing a lien on the indebtedness of Aaron Clafin & Co., of New York, which by the laws of that State was superior to any right then held, or which could be acquired afterwards, by the assignees in insolvency of Daniel C. Bird. Indeed, it is not questioned in the very learned opinion of the court in this case that if Butler, Hayden & Co. had been permitted to go on with their proceeding in New York, they would have secured an order in the court in which the proceedings were pending, that the garnishees, Aaron Clafin & Co., should pay the amount of their indebtedness to the plaintiff in that action. But the whole argument of the court is that, because Butler, Hayden & Co. were citizens of Massachusetts, they were under some superior obligation to the law of Massachusetts, and to be governed by the rights that law conferred, which prevented them from availing themselves of the law of New York that gave them this superior right.

I do not deny the general principle that a party found within the jurisdiction of a court and subject to its process may be restrained and enjoined from doing certain things in some other jurisdiction, because the thing which he might attempt to do is opposed to the principles of equity or to the law of the place where he is found. And such might be the law in this case but for the provision of the Constitution of the United States and the Act of Congress, both of which are recited in the opinion of the court, which require that the "records and judicial proceedings of a State authenticated as aforesaid shall have such faith and credit given to them in every court in the United States as they would have by law or usage in the courts of the State from whence such records are or shall be taken." The record introduced from the court of New York in this case had the effect in that State to give Butler, Hayden & Co. a lien on the indebtedness of Aaron Clafin & Co. to their creditor Bird, which in that court would have ripened into a judgment and been enforced. That was the faith and credit which the laws of New York gave to that proceeding. It initiated a right. It established a lien, and there was no power in the courts of Massachusetts to interrupt the course of these proceedings to the final result. That is to say, there was no power to do this directly. Had it the right to do it by seizing the persons of Butler, Hayden & Co. in Massachusetts, and compelling them there to forego the advantage which they had secured in the state courts of New York? When, therefore, Butler, Hayden & Co. were sued in equity in the courts of Massachusetts and there was produced the record of these proceedings in the court of New York, the

question was presented to the courts of Massachusetts what effect they would give to those proceedings. Now they did not give the effect which the laws of New York gave to them. Neither the law nor the usage in the courts of New York admitted of such proceeding as that taken in the courts of Massachusetts.

If there was any error in proceedings in the court of New York, that error was subject to correction in due course of law in courts of justice of the State of New York, and Butler, Hayden & Co. had a right to insist on the validity of their proceedings being tested by the courts and governed by the laws of the State of New York, and not by those of Massachusetts.

It is no answer to this to say that Butler, Hayden & Co. were citizens of Massachusetts and were found within its jurisdiction. The higher law of the Constitution of the United States places this restraint upon the courts of Massachusetts in dealing even with her own citizens, and if her citizens have obtained rights in the courts of New York which have become a part of the records and judicial proceedings of those courts, no difference how the law under which those rights are established may be opposed to the law of the State of Massachusetts, they are to be respected by the courts of Massachusetts, because they are effectual over the parties and subject matter in New York, and because the Constitution of the United States and the Act of Congress of May 26, 1790, assert the principle that the courts of Massachusetts must give full credit, by which is meant the same effect to the proceedings in New York which that State gives to them. The constitutional provision which makes this declaration is part of article IV., and it is in immediate connection with its second section, which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The meaning of this is to prevent conflicts between courts of the different States over the same matters, by establishing the rule that whatever is done or decided in one State shall be respected in every other State when properly proved before it. It is one feature of the general idea which is found all through the Constitution.

These are the principles established after a most vigorous contest by the case of *Green v. Van Buskirk*, twice before this court, and reported in 72 U. S. 5 Wall. 307 [18:599], and 74 U. S. 7 Wall. 139 [19:109]. In that case both the contesting parties lived in the State of New York and were citizens of that State. Each asserted a paramount title to certain safes which were in the City of Chicago. Green, although a citizen of New York with Van Buskirk, levied in the State of Illinois an attachment on these safes, on which Van Buskirk had a chattel mortgage executed in the State of New York but not recorded in Illinois. Green proceeded with his attachment and bought the safes under it, which he converted to his own use in Illinois. Afterwards he was sued by Van Buskirk in the State of New York for this conversion, and he set up and relied on the proceedings in the attachment suit in Illinois as a defense. The Supreme Court of New York held that as between its own citizens, its law upon the subject of chattel mortgages, which was the claim Van Buskirk had on the safes,

should prevail, while Green insisted that the law of Illinois, where the proceedings in the attachment took place, and where the safes were, should govern. In the case as it first presented itself in this court a motion to dismiss for want of jurisdiction was made, which the court overruled on the ground that the case was to be governed by the law of Illinois under the Constitution of the United States and the Act of Congress already referred to.

The case afterwards came on in 7 Wallace, upon the further question whether the laws of Illinois were such as to give Green a right to that proceeding, and the court held that they were; that the attachment, judgment and sale in Illinois were valid, and that the state courts of New York were bound to give them effect in the proceeding of *Van Buskirk v. Green*.

The only difference between that case and the one now under consideration is, that at the time the court in Massachusetts intervened and undertook to prevent Butler, Hayden & Co. from pursuing their case in the courts of New York, there had been no judgment in favor of that company. But I am at a loss to see why the right established by Butler, Hayden & Co. in the courts of New York is not as much to be respected and the same effect given to it according to its nature, as if the judicial proceeding had ripened into a judgment. It is very clear that, but for the injunction against Butler, Hayden & Co., they would have got such a judgment and would have obtained their money; and if they had been sued in Massachusetts for violating the laws of Massachusetts on that subject, it is equally clear, according to *Green v. Van Buskirk*, that the proceedings in the New York court would have been a good defense. I think, therefore, that the judgment of the court and the principles of the opinion are erroneous, and are opposed to the former decisions of this court.

Justices Field and Harlan concur in this dissent.

THE ILLINOIS CENTRAL RAILROAD COMPANY ET AL., *Piffs. in Err.*,

v.

MILLARD BOSWORTH ET AL.

(See S. C. Reporter's ed. 92-106.)

Confiscation Act—rights of owner of land after pardon—life interest forfeited—residuary estate restored by pardon—effect of his deed, after pardon.

1. Where land of one who bore arms in the Confederate army, against the United States, in the late war, was, under the Confiscation Act, condemned and sold, he was, by the special pardon and by the amnesty proclamation of the President, restored to the control and power of disposition over the fee simple in reversion of the land expectant upon the termination of the confiscated estate therein.
2. Nothing but his life interest in the land was forfeited under the Confiscation Act; his power to dispose of the land was suspended by his disability as an offender against the United States.
3. On being restored to all his rights, he was restored to the residuary ownership of the land

subject to the usufruct of the purchaser under the confiscation proceedings.

4. A subsequent conveyance by him and his wife of all their right and title in and to said land, transferred the land, as against his heirs.

[No. 79.]

Argued Nov. 11, 12, 1889. Decided Jan. 20, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana to review a judgment in favor of plaintiff in an action to recover the possession of land. *Reversed.*

The facts are stated in the opinion.

Messrs. Girault Farrar, Thomas J. Semmes and James Fentress, for plaintiffs in error:

Upon the death of the owner of real property which had been confiscated and sold, his heirs take *qua* heirs under the *lex rei sita*, and not by donation from the generosity of the government,—that is, by purchase.

Avegno v. Schmidt, 118 U. S. 298 (28: 976); *Shields v. Shiff*, 124 U. S. 851 (31: 445).

It was decided by this court in *The Protector*, 79 U. S. 12 Wall. 700 (20: 468); *Hiatt v. Brown*, 82 U. S. 15 Wall. 177 (21: 128); *U. S. v. Thomas*, 82 U. S. 15 Wall. 887 (21: 89); *Adger v. Alston*, 82 U. S. 15 Wall. 557 (21: 284),—that the war legally ended on April 2, 1866.

The President has the constitutional power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

Young v. U. S. 97 U. S. 89, 66, 68 (24: 992, 999, 1000).

The law makes the proof of pardon a complete substitute for proof that he gave no aid or comfort to the rebellion.

Ex parte Garland, 71 U. S. 4 Wall. 380 (18: 370); *Armstrong's Foundry*, 78 U. S. 6 Wall. 766 (18: 882); *Pudelford's Case*, 76 U. S. 9 Wall. 581 (19: 788); *Klein's Case*, 80 U. S. 13 Wall. 150 (20: 527); *Pargoud's Case*, 80 U. S. 13 Wall. 156 (20: 646); *Mrs. Armstrong's Case*, 80 U. S. 18 Wall. 154 (20: 614); *Carlisle v. U. S.* 88 U. S. 16 Wall. 147 (21: 426); *Opinions of Attys-Genl.* vol. 8, p. 201; *Osborn v. U. S.* 91 U. S. 474 (23: 888); *Knute v. U. S.* 95 U. S. 149 (24: 442); *Hart v. U. S.* 118 U. S. 62 (30: 96).

After condemnation the fee remains in the offender.

Hancock v. Beverly, 6 B. Mon. (Ky.) 531; *Borland's Case*, 4 Mason, 174; *Windsor v. McVeigh*, 98 U. S. 283 (23: 917); *Burbank v. Conrad*, 96 U. S. 298 (24: 781); *Kirk v. Lynd*, 106 U. S. 315 (27: 193); *Waples v. Hays*, 108 U. S. 6 (27: 632); *Ex parte Lange*, 85 U. S. 18 Wall. 177, 178 (21: 879); *Day v. Micou*, 85 U. S. 18 Wall. 156 (21: 860); *Bigelow v. Forrest*, 76 U. S. 9 Wall. 339 (19: 696).

If his creditors had rights upon the property they could enforce those rights in the courts by compulsory process after the confiscation.

Claims of Marcuard, 87 U. S. 20 Wall. 114 (22: 327); *Waples v. Hays*, 108 U. S. 6 (27: 632).

Messrs. Edgar H. Farrar and Ernest B. Kruttschnitt, for defendants in error:

The heirs of one whose property was confiscated take the property at his death by inheritance, though their ancestor was not seised thereof at the time of his death.

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Wallach v. Van Rinswick, 92 U. S. 202 (23: 473); *Chaffraiz v. Shiff*, 92 U. S. 214 (23: 478); *Semmes v. U. S.* 91 U. S. 21 (23: 193); *Pike v. Wassell*, 94 U. S. 711 (24: 307); *French v. Wade*, 103 U. S. 182 (26: 44); *Avegno v. Schmidt*, 118 U. S. 298 (28: 976); *Shields v. Shiff*, 124 U. S. 851 (31: 445).

He was entirely disseised by the confiscation of the whole estate, and they were authorized to take this whole estate, at his death, as his heirs, by descent, although there was no seisin in him at the time of his death.

Knute v. U. S. 95 U. S. 153 (24: 443); *Osborn v. U. S.* 91 U. S. 474 (23: 888).

Mr. Justice Bradley delivered the opinion of the court:

This was an action brought by Millard Bosworth and Charles H. Bosworth, only surviving children of A. W. Bosworth, deceased, to recover possession of one undivided sixth part of a certain tract of land in New Orleans, which formerly belonged to their said father. The petition states that the latter having taken part in the war of the rebellion, and done acts which made him liable to the penalties of the Confiscation Act of July 17th, 1862, the said one-sixth part of said land was seized, condemned and sold under said Act, and purchased by one Burbank in May, 1865; that the said A. W. Bosworth died on the 11th day of October, 1865; and that the plaintiffs, upon his death, became the owners in fee simple of the said one-sixth part of said property, of which the defendants, The Illinois Central Railroad Company, were in possession.

The Company filed an answer, setting up various defenses; amongst other things tracing title to themselves from the said A. W. Bosworth, by virtue of an act of sale executed by him and his wife, before a notary public, on the 28d day of September, 1871, disposing of all their interest in the premises, with full covenant of warranty. They further allege that said Bosworth had, before said act of sale, not only been included in the general amnesty proclamation of the President, issued on the 25th of December, 1868, but had received a special pardon on the 2d of October, 1865, and had taken the oath of allegiance, and complied with all the terms and conditions necessary to be restored to, and reinvested with, all the rights, franchises and privileges of citizenship.

The parties, having waived a trial by jury, submitted to the court an agreed statement of facts in the nature of a special verdict, upon which the court gave judgment in favor of the plaintiffs. To that judgment the present writ of error is brought.

Those portions of the statement of facts which are deemed material to the decision of the case are as follows, to wit:

1st. The plaintiffs, Millard Bosworth and Charles H. Bosworth, are the only surviving legitimate children of Abel Ware Bosworth, who died intestate in the City of New Orleans on the eleventh day of October, 1865, and have accepted his succession with benefit of inventory.

2d. By act before Edward Barnett, notary, on the 25th day of April, 1860, Abel Ware Bosworth purchased from H. W. Palfrey and

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others a one-third undivided interest in fee-simple title and full ownership in and to the property described in the petition of the plaintiffs in this cause.

8d. On the breaking out of the war between the States Abel W. Bosworth entered the Confederate army and bore arms against the government of the United States from about March, 1861, until April, 1865.

4th. Under and by virtue of the Confiscation Act of the United States, approved July 17th, 1862, and the joint resolution contemporary therewith, the said property was seized by the proper officer of the United States, and on the 20th day of January, 1865, a libel of information was filed against the said property as the property of A. W. Bosworth, in the District Court of the United States for the Eastern District of Louisiana.

Into these proceedings intervened Mrs. Rachel Matilda Bosworth, wife of said Abel Ware Bosworth, to protect her community interests in said property, and, after due proceedings had, the said court entered a decree of condemnation as to A. W. Bosworth and a decree in favor of Mrs. Rachel Matilda Bosworth, recognizing her as the owner of one half of said one-third undivided interest in and to said property.

A *venditione exponas* in due form of law issued to the marshal for the sale of said property under said decree, and at said sale "all the right, title and interest of A. W. Bosworth in and to the one undivided third part of said property" (reserving to Mrs. Rachel M. Bosworth her rights therein, as per order of the court) was adjudicated on the—day of the month of May, 1865, to E. W. Burbank for the price and sum of \$1,700, and the marshal executed a deed in due form of law to said Burbank for the same.

6th. That on the second day of October, 1865, Andrew Johnson, President of the United States, granted to said A. W. Bosworth a special pardon, a duly certified copy of which, together with the written acceptance by said Bosworth thereof, is hereto annexed, made part of this statement of facts, and marked "Document 'A.'"

7th. That on the 28d day of September, 1871, by act before Andrew Hero, Jr., notary public, the said A. W. Bosworth and Mrs. Rachel Matilda Bosworth, his wife, sold, assigned and transferred to Samuel H. Edgar, with full warranty under the laws of Louisiana, all their right, title and interest in and to the said property, including the one-sixth undivided interest claimed in this suit by the plaintiffs and described in the petition, for the price and sum of eleven thousand six hundred and sixty-six ²¹/₁₀₀ dollars.

8th. That on the 18th day of December, 1872, the said E. W. Burbank, by act before the same notary, transferred all his right, title and interests in the nature of a quit-claim to S. H. Edgar aforesaid for the price and sum of five thousand one hundred dollars.

9th. That the said S. H. Edgar, by act executed before Charles Nettleton, a duly authorized commissioner for Louisiana in New York City, on the 10th day of October, 1872, and duly recorded in the office of the register of conveyances for the Parish of Orleans on the

30th day of October, 1872, sold and transferred the same property, with full warranty under the laws of Louisiana, unto the New Orleans, Jackson and Great Northern Railroad Company.

10th. That by various transfers made since said date, as set forth in the answers filed in this suit, the said property has come into the possession of the Chicago, St. Louis and New Orleans Railroad Company, who has leased the same to the Illinois Central Railroad Company, which said Company holds said property under said lease.

14th. It is further agreed as a part of this statement of facts that the President of the United States on the 25th day of December, 1868, issued a general amnesty proclamation, and the terms of said proclamation as found in the Statutes at Large of the United States are made part of this statement of facts.

The following is a copy of the special pardon (Document A), referred to in the statement of facts, and of the written acceptance thereof, to wit:

Andrew Johnson, President of the United States of America, to all to whom these presents shall come, greeting:

Whereas A. W. Bosworth, of New Orleans, Louisiana, by taking part in the late rebellion against the government of the United States, has made himself liable to heavy pains and penalties;

And whereas the circumstances of his case render him a proper object of executive clemency:

Now, therefore, be it known that I, Andrew Johnson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons to me thereunto moving, do hereby grant to the said A. W. Bosworth a full pardon and amnesty for all offenses by him committed, arising from participation, direct or implied, in the said rebellion, conditioned as follows:

1st. This pardon to be of no effect until the said A. W. Bosworth shall take the oath prescribed in the proclamation of the President, dated May 29th, 1865.

2d. To be void and of no effect if the said A. W. Bosworth shall hereafter at any time acquire any property whatever in slaves or make use of slave labor.

3d. That the said A. W. Bosworth first pay all costs which may have accrued in any proceedings instituted or pending against his person or property before the date of the acceptance of this warrant.

4th. That the said A. W. Bosworth shall not, by virtue of this warrant, claim any property or the proceeds of any property that has been sold by the order, judgment or decree of a court under the Confiscation Laws of the United States.

5th. That the said A. W. Bosworth shall notify the Secretary of State, in writing, that he has received and accepted the foregoing pardon.

In testimony whereof I have hereunto signed my name and caused the seal of the United States to be affixed.

Done at the City of Washington this second

day of October, A. D. 1865, and of the Independence of the United States the ninetyeth.

Andrew Johnson.
By the President: William H. Seward,
[Seal.] Secretary of State.

Washington, D. C., October 5th, 1865.
Honorable William H. Seward, Secretary of State.

Sir: I have the honor to acknowledge the receipt of the President's warrant of pardon, bearing date October 2d, 1865, and hereby signify my acceptance of the same with all the conditions therein specified.

I am, sir, your obedient servant,
A. W. Bosworth.

The proclamation of general amnesty and pardon issued on the 25th day of December, 1868, referred to in the last article of the statement of facts, is found in volume 15, pp. 711, 712, of the Statutes at Large. After referring to several previous proclamations, it proceeds as follows, to wit: "And whereas, the authority of the federal government having been re-established in all the States and Territories within the jurisdiction of the United States, it is believed that such prudential reservations and exceptions as at the dates of said several proclamations were deemed necessary and proper may now be wisely and justly relinquished, and that a universal amnesty and pardon for participation in said rebellion extended to all who have borne any part therein will tend to secure permanent peace, order and prosperity throughout the land, and to renew and fully restore confidence and fraternal feeling among the whole people, and their respect for and attachment to the national government, designed by its patriotic founders for the general good:—Now, therefore, be it known that I, Andrew Johnson, President of the United States, by virtue of the power and authority in me vested by the Constitution, and in the name of the sovereign people of the United States, do hereby proclaim and declare unconditionally, and without reservation, to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges and immunities under the Constitution and the laws which have been made in pursuance thereof."

The principal question raised in the present case is, whether, by the effect of the pardon and amnesty granted to A. W. Bosworth by the special pardon of October, 1865, and the general proclamation of amnesty and pardon of December 25th, 1868, he was restored to the control and power of disposition over the fee-simple or naked property in reversion expectant upon the termination of the confiscated estate in the property in dispute. The question of the effect of pardon and amnesty on the destination of the remaining estate of the offender, still outstanding after a confiscation of the property during his natural life, has never been settled by this court. That the guilty party had no control over it in the absence of such pardon or amnesty, has been frequently decided. *Wallach v. Van Rievick*, 92 U. S.

202 [28: 478]; *Chaffraiz v. Shiff*, 92 U. S. 214 [28: 478]; *Pike v. Wassell*, 94 U. S. 711 [24: 307]; *French v. Wade*, 102 U. S. 182 [26: 44]; and see *Aeegno v. Schmidt*, 113 U. S. 298 [28: 976]; *Shields v. Shiff*, 124 U. S. 851 [31: 445]. But it has been regarded as a doubtful question, what became of the fee, or ultimate estate, after the confiscation for life. "We are not called upon," said Justice Strong, in *Wallach v. Van Rievick*, "to determine where the fee dwells during the continuance of the interest of a purchaser at a confiscation sale, whether in the United States, or in the purchaser, subject to be defeated by the death of the offender." (92 U. S. 212 [28: 477].) It has also been suggested that the fee remained in the person whose estate was confiscated, but without any power in him to dispose of or control it.

Perhaps it is not of much consequence which of these theories, if either of them, is the true one; the important point being, that the remnant of the estate, whatever its nature, and wherever it went, was never beneficially disposed of, but remained (so to speak) in a state of suspended animation. Both the common and the civil laws furnish analogies of suspended ownership of estates which may help us to a proper conception of that now under consideration. Blackstone says: "Sometimes the fee may be in abeyance, that is (as the word signifies) in expectation, remembrance and contemplation of law, there being no person *in esse* in whom it can vest and abide; though the law considers it as always potentially existing, and ready to vest when a proper owner appears. Thus in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est hæres viventis*; it remains, therefore, in waiting or abeyance during the life of Richard." 2 Black. Com. 107. In the civil law, the legal conception is a little different. Pothier says: "The dominion of property (or ownership), the same as all other rights, as well *in re* as *ad rem*, necessarily supposes a person in whom the right subsists and to whom it belongs. It need not be a natural person; it may belong to corporations or communities, which have only a civil and intellectual existence or personality. When an owner dies, and no one will accept the succession, this dormant succession (*succession jacente*) is considered as being a civil person and as the continuation of that of the deceased; and in this fictitious person subsists the dominion or ownership of whatever belonged to the deceased, the same as all other active and passive rights of the deceased; *hæreditas faciens personam defuncti locum obtinet*." *Droit de Domaine de Propriété*, chap. I. 15.

But, as already intimated, it is not necessary to be over curious about the intermediate state in which the disembodied shade of naked ownership may have wandered during the period of its ambiguous existence. It is enough to know that it was neither annihilated, nor confiscated, nor appropriated to any third party. The owner, as a punishment for his offenses, was disabled from exercising any acts of ownership over it, and no power to exercise such acts was given to any other person. At his death, if not before, the period of suspen-

sion comes to an end, and the estate revives and devolves to his heirs at law. In *Aegno v. Schmidt et al.* 118 U. S. 293 [28: 976], and in *Shields v. Shiff*, 124 U. S. 351 [31: 445], this court held that the heirs of the offender, at his death, take by descent from him, and not by gift or grant from the government. They are not named in the Confiscation Act, it is true, nor in the joint resolution limiting its operation. The latter merely says, "nor shall any punishment or proceedings under said Act be so construed as to work a forfeiture of the real estate of the offender, beyond his natural life." The court has construed the effect of this language to be, to leave the property free to descend to the heirs of the guilty party. *Bigelow v. Forrest*, 76 U. S. 9 Wall. 889 [19: 696]; *Wallach v. Van Renswick*, 92 U. S. 302, 210 [23: 478]. Mr. Justice Strong, in the latter case, speaking of the constitutional provision that no attainer of treason should work corruption of blood or forfeiture, except during the life of the person attainted (which provision was the ground and cause for passing the joint resolution referred to), said: "No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers."

But, although the effect of the law was to hold the estate, or naked ownership, in a state of suspension for the benefit of the heirs, yet they acquired no vested interest in it; for, until the death of the ancestor, there is no heir. During his life it does not appear who the heirs will be. Heirs apparent have, in a special case, been received to intervene for the protection of the property from spoliation. *Pike v. Wassell*, 94 U. S. 711 [24: 307]. This was allowed from the necessity of the case, arising from the fact that the ancestor's disability prevented him from exercising any power over the property for its protection or otherwise, and no other persons but the heirs apparent had even a contingent interest to be protected.

It would seem to follow as a logical consequence from the decisions in *Aegno v. Schmidt* and *Shields v. Shiff*, that after the confiscation of the property the naked fee (or the naked ownership, as denominated in the civil law), subject, for the lifetime of the offender, to the interest or usufruct of the purchaser at the confiscation sale, remained in the offender himself; otherwise how could his heirs take it from him by inheritance? But, by reason of his disability to dispose of or touch it, or affect it in any manner whatsoever, it remained, as before stated, a mere dead estate, or in a condition of suspended animation. We think that this is, on the whole, the most reasonable view. There is no corruption of blood; the offender can transmit by descent; his heirs take from him by descent: why, then, is it not most rational to conclude that the dormant and suspended fee has continued in him?

Now, if the disabilities which prevented such person from exercising any power over this suspended fee, or naked property, be removed by a pardon or amnesty,—so removed as to restore him to all his rights, privileges and immunities, as if he had never offended, except as to those things which have become vested in other persons,—why does it not restore him to

the control of his property so far as the same has never been forfeited, or has never become vested in another person? In our judgment it does restore him to such control. In the opinion of the court in the case of *Ex parte Garland*, 71 U. S. 4 Wall. 338, 880 [18: 866, 870], the effect of a pardon is stated as follows, to wit: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment."

The qualification in the last sentence of this extract, that a pardon does not affect vested interests, was exemplified in the case of *Semmes v. United States*, 91 U. S. 21 [23: 193], where a pardon was held not to interfere with the right of a purchaser of the forfeited estate. The same doctrine had been laid down in *The Confiscation Cases*, 87 U. S. 20 Wall. 92, 113 [22: 320, 324, 325]. It was distinctly repeated and explained in *Knote v. United States*, 95 U. S. 149 [24: 442]. In that case property of the claimant had been seized by the authorities of the United States on the ground of treason and rebellion; a decree of condemnation and forfeiture had been passed, the property sold, and the proceeds paid into the treasury. The court decided that subsequent pardon and amnesty did not have the effect of restoring to the offender the right to these proceeds. They had become absolutely vested in the United States, and could not be divested by the pardon. The effect of a pardon was so fully discussed in that case that an extract from the opinion of the court will not be out of place here. The court say: "A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offense that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offense being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it

can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offense, or which have been acquired by others whilst that judgment was in force. If, for example, by the judgment, a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. . . . So also if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an Act of Congress. . . . Where, however, property condemned, or its proceeds, have not thus vested, but remain under control of the executive, or of officers subject to his orders, or are in custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner, upon his full pardon."

The last portion of the above extract was justified by the decision in the case of *Armstrong's Foundry*, 73 U. S. 6 Wall. 766 [18:882], where a pardon was received by Armstrong after his foundry had been seized, and whilst proceedings were pending for its confiscation. He was even allowed to plead the full pardon as new matter in this court whilst the case was pending on appeal; and the court held, and decided, that this pardon relieved him of so much of the penalty as accrued to the United States, without any expression of opinion as to the rights of the informer.

The citations now made are sufficient to show the true bearing and effect of the pardon granted to Bosworth, and of the general proclamation of amnesty as applied to him. The property in question had never vested in any person when these acts of grace were performed. It had not even been forfeited. Nothing but the life interest had been forfeited. His power to enjoy or dispose of it was simply suspended by his disability as an offender against the government of the United States. This disability was a part of his punishment. It seems to be perfectly clear, therefore, in the light of the authorities referred to, that when his guilt and the punishment therefor were expunged by his pardon this disability was removed; in being restored to all his rights, privileges and immunities, he was restored to the control of so much of his property and estate as had not become vested either in the government or in any other person—especially that part or quality of his estate which had never been forfeited, namely, the naked residuary ownership of the property, subject to the usufruct of the purchaser under the confiscation proceedings.

This result, however, does not depend upon the hypothesis that the dead fee remained in Bosworth after the confiscation proceedings took place; it is equally attained if we suppose that the fee was *in nubibus*, or that it devolved to the government for the benefit of whom it might concern. We are not trammelled by any technical rule of the common or the civil law on the subject. The statute and the inferences derivable therefrom make the law that

controls it. Regarding the substance of things and not their form, the truth is simply this: a portion of the estate, limited in time, was forfeited; the residue, expectant upon the expiration of that time, remained untouched, undisposed of—out of the owner's power and control, it is true, but not subject to any other person's power or control. It was somewhere, or possibly nowhere. But if it had not an actual, it had a potential, existence, ready to devolve to the heirs of the owner upon his death, or to be revived by any other cause that should call it into renewed vitality or enjoyment. The removal of the guilty party's disabilities, the restoration of all his rights, powers and privileges, not absolutely lost or vested in another, was such a cause. Those disabilities were all that stood in the way of his control and disposition of the naked ownership of the property. Being removed, it necessarily follows that he was restored to that control and power of disposition.

It follows from these views, that the act of sale executed by A. W. Bosworth and his wife in September, 1871, was effectual to transfer and convey the property in dispute, and that the judgment of the circuit court in favor of the plaintiffs below (the defendants in error) was erroneous. *That judgment is therefore reversed and the cause remanded, with instructions to enter judgment for the defendants below, the now plaintiffs in error.*

Mr. Justice Blatchford did not sit in this case, or take any part in its decision.

UNITED STATES, *Ptf in Err.*,

v.
JOSEPH STOWELL ET AL., Claimants,
etc.

(See S. C. Reporter's ed. 1-20.)

*Statutes, construction of—*forfeiture of property by illicit distilling—innocent mortgagees—personal property on premises—*forfeiture of title in land—statutory transfer—intermediate sales—butts, malt, hops, boiler, engine, horses, etc., when forfeited—time of forfeiture—subsequent deed—prior mortgage.*

1. Statutes to prevent frauds on the revenue are to be fairly construed, so as to carry out the intention of the Legislature.
2. By the Act of 1875, the following property is forfeited for illicit distilling:
First, all spirits, wines, stills and apparatus for distilling owned by the illicit distiller, wherever found.
Second, all the above-named articles, and all personal property in the distillery or any inclosure connected therewith, by whomsoever owned.
Third, all right and title in the land on which the distillery is situated, of the illicit distiller, and of every person who has consented to such illicit distilling.
3. The lien of an innocent prior mortgagee or other person on the land is not included in such forfeiture.
4. By section 3258, Rev. Stat., personal property, by whomsoever owned, in the possession of the illicit distiller, or found upon the premises, is forfeited.
5. Section 3306, Rev. Stat., only forfeits the title in

the land of the distiller and of anyone who participates in or consents to the carrying on of the distillery.

6. The forfeiture is consummated immediately upon the commission of the act causing it, and constitutes a statutory transfer, at that time, of the right to the property to the United States; and the judicial condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.
7. Butts sold to a third person before any offense was committed, but on the premises at the time of the commission of the offense and of the seizure, are forfeited.
8. Malt and hops on the premises at the time of the commission of the offense and of the seizure are forfeited, although sold to a third person after the offense was committed.
9. The setting up of a still on mortgaged land, with the mortgagor's knowledge and consent, in violation of the Internal Revenue Laws, operated from the time it was set up, as a statutory conveyance to the United States of the mortgagor's title and interest in the land, which was as valid and effectual as a recorded deed.
10. The right so vested in the United States could not be defeated or impaired by any subsequent act of the mortgagor; and his subsequent deed of the land to the mortgagee passed no title as against the intervening right of the United States; nor did it have the effect of merging the mortgage and the equity of redemption in one estate.
11. Where the illicit distilling was not carried on with the knowledge or permission of the prior mortgagee, the mortgage is valid as against the United States, and the judgment of condemnation must be against the equity of redemption only.
12. Boiler, engine, pump, vat and tanks, annexed to the land, being real estate and covered by the mortgage, and not used with the distillery, are, as against such prior mortgagee, exempt from condemnation; only the mortgagor's interest is liable thereto.
13. Horses, wagons and harnesses, sold after the forfeiture, but found upon the premises at the time of the seizure, were forfeited under said Statutes.

[No. 167.]

Submitted Dec. 2, 1889. Decided Jan. 20, 1890.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment dismissing an information, as to certain property, filed for the forfeiture of property for violation of the Statutes of the United States against illicit distilling. *Reversed.*

Statement by *Mr. Justice Gray*:

This was an information, filed November 18, 1884, under §§ 8258 and 8305 of the Revised Statutes, and § 16 of the Act of February 8, 1875, chap. 86 (the material parts of which are printed in the margin*), for the forfeiture of

property particularly described in the information, and seized by the collector of internal revenue on November 14, 1884, and including: 1st. All the right, title and interest of Thomas Dixon, Eli B. Bellows and William Stone in a lot of land in the City of Lawrence, with the buildings thereon. 2d. A copper still, a boiler and engine, a pump, vats and tanks, and other machinery and fixtures. 8d. A number of butts, a quantity of malt and hops, two horses and wagons and harnesses, and other personal property.

Joseph Stowell filed a claim for the real estate, the machinery and fixtures (except the still), the butts, and the malt and hops; and Thomas Bevington filed a claim for the horses, wagons and harnesses.

A decree was entered against the property not claimed; and upon a trial in the district court between the United States and the claimants the only evidence introduced was an agreement in writing, signed by the counsel of all the parties, that certain facts were true, which was, in substance, as follows:

For some time before and until the seizure, Dixon carried on the business of a brewer on the premises, which consisted of a three-story frame building and adjoining sheds with doors between, and a yard connected therewith. The requirements of the Internal Revenue Laws concerning breweries were complied with. In the latter part of September, 1884, Stone and Bellows, with Dixon's knowledge and consent, set up in the third story of the principal building (which story was not used in the brewing business, except as the large tanks used in brewing reached up into it) a copper still, which remained in position and in proper condition for use until November 9, 1884, and with which, during that time, two hogsheads and one barrel of rum were made from molasses. The still was not registered as required by law; no bond therefor was given; no government book was kept; the still was run with intent to defraud the United States of the tax on the spirits distilled, and the United States were defrauded of that tax. It did not appear that the sheds were in any way used in connection with the distillery. Dixon continued to carry on his business as a brewer while the still was being used, and on November 10 and 11 took down and removed the still.

There were on the premises a large boiler set in brick, a small engine, a small pump and large vats and tanks, which the claimants alleged to be real estate, but which the United States asserted to be fixtures. It was admitted that a part or all of them would be trade fixtures as between landlord and tenant; that part or all of them were apparatus used in the brewery, and such as might properly be in the brewery; and that part or all of them were used as apparatus for the illicit distilling, and were fit to be used in connection with the still.

*By Rev. Stat., § 3358, "every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is." "Still and distilling apparatus shall be registered immediately upon their being set up. Every still or distilling apparatus not so registered, together with all personal property in the possession or custody or under the control of such person, and found in the building, or in any yard or inclosure

connected with the building in which the same may be set up, shall be forfeited," and he shall be punished by fine and imprisonment.

By the Act of February 8, 1875, chap. 36, § 16 (substantially re-enacting Rev. Stat., § 3361), any person "who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part

At the times of the illicit distilling and of the seizure, all these fixtures and the still, as well as all the personal property seized, were in Dixon's possession and custody and under his control, and they were found in the brewery, sheds and yard. Neither of the claimants knew until after the seizure that a still had been set up on the premises.

On June 11, 1883, Dixon conveyed the real estate to Stowell by a mortgage deed, duly recorded, subject to a prior mortgage of \$1,500, to secure a debt of \$2,500. On October 13, 1884, upon a breach of condition of this mortgage, Stowell, instead of foreclosing it, took from Dixon a quitclaim deed of the premises, the consideration named in which was \$8,000.

On June 5, 1884, Stowell took a bill of sale from Dixon of the butts, as security for indorsing a note for \$350, which went to protest and was paid by him on November 10, 1884. At the time of that bill of sale the butts were pointed out by Dixon to Stowell as those which he was to have, but they remained in Dixon's possession.

On November 8, 1884, Stowell took a bill of sale of part of the malt and hops, as security for indorsing a note for \$100 payable in ten days, and paid that note also after it had been duly protested. No delivery was ever made of the malt and hops. Neither of those bills of sale was ever recorded.

On November 11, 1884, a bill of sale of the horses, wagons and harness was executed and delivered by Dixon to Bevington, as security for a loan of \$700, which was never paid. This bill of sale was recorded in the city clerk's office on November 18, 1884. The property so conveyed to Bevington was kept on a farm of Dixon's at North Andover, and was used in the business of the brewery, and seized at the brewery. At the time of the sale Dixon pointed it out to Bevington, and said that he delivered it, and Bevington appointed Dixon's son as nominal keeper, but never otherwise took possession of it, and it remained under the control of Dixon, and was used by him.

Upon these facts the district court ruled that the information could not be maintained against the property claimed by Stowell and Bevington, and adjudged that it be dismissed as to that property. The United States alleged exceptions, and, upon the affirmance by the circuit court of the judgment of the district court, sued out this writ of error.

Mr. O. W. Chapman, Solicitor-Genl., for plaintiff in error:

The land upon which the distillery is situate, the personal property used in and about the premises, and all the personal property of the distiller, wherever found, are tainted, and become forfeited to the government.

thereof," shall be fined and imprisoned. "And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found; and all distilled spirits or wines and personal property, found in the distillery or rectifying establishment, or in any building, room, yard or inclosure connected therewith, and used with or constituting a part of the premises; and all the right, title and interest of such person in the lot or tract of land on which such distillery is situated; and all right, title and interest therein of every person

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Dobbins v. U. S. 96 U. S. 395 (24: 637).

The forfeiture took place at the time of the commission of the offense, and not at the time of seizure.

U. S. v. 1,960 Bags of Coffee, 12 U. S. 8 Cranch, 398 (8: 602); *U. S. v. The Brigantine Mars*, 12 U. S. 8 Cranch, 417 (8: 609); *Gelston v. Hoyt*, 16 U. S. 3 Wheat. 311 (4: 397); *Wood v. U. S.* 41 U. S. 16 Pet. 342 (10: 987); *Caldwell v. U. S.* 49 U. S. 8 How. 866 (12: 1116); *Henderson's Distilled Spirits*, 81 U. S. 14 Wall. 44 (20: 815); *Thacher's Distilled Spirits*, 103 U. S. 679 (26: 535).

The title and ownership pass from the wrong-doer to the government, and no act of seizure is required to effect the change.

U. S. v. 7 Barrels Distilled Oil, 6 Blatchf. 174; *U. S. v. 66 Barrels of Whiskey*, 1 Abb. U. S. 93, 4 Int. Rev. Rec. 106; *U. S. v. Whiskey*, 11 Int. Rev. Rec. 109; *U. S. v. 100 Barrels of Spirits*, 1 Dillon, 57, 12 Int. Rev. Rec. 153; *U. S. v. 21 Barrels of High Wines*, 6 Int. Rev. Rec. 213; *U. S. v. Distillery at Spring Valley*, 11 Blatchf. 255; *U. S. v. 76,125 Ogars*, 18 Fed. Rep. 147.

Messrs. Edgar J. Sherman and Charles U. Bell, for defendants in error:

Penal laws are to be construed strictly.

1 Black. Com. 91; *Margate Pier Co. v. Hannam*, 3 Barn. & Ald. 266; *Edwards v. Dick*, 4 Barn. & Ald. 212; *Green v. Kemp*, 18 Mass. 518; *Reed v. Davis*, 8 Pick. 514; *Caledonian R. Co. v. North British R. Co.* L. R. 6 App. Cas. 123; *Ex parte Walton*, L. R. 17 Ch. Div. 756; *Jackson v. Collins*, 3 Cow. 89, 96; *People v. Utica Ins. Co.* 15 Johns. 358, 380.

Especially forfeitures are not favored.

Hubbard v. Johnstone, 8 Taunt. 177; *Adams v. Bancroft*, 8 Sumn. 386.

If the owner is absolutely innocent the property cannot be forfeited. The mere accident of its situation cannot give it a criminal character independent of its owner's fault.

U. S. v. 33 Barrels of Spirits, 1 Low. 289; *Dobbins v. U. S.* 96 U. S. 395 (24: 637); *The Bello Corrunes*, 19 U. S. 6 Wheat. 152 (5: 229); *Peisch v. Ware*, 8 U. S. 4 Cranch, 347, 363 (2: 643, 647).

Mr. Justice Gray delivered the opinion of the court:

The property sought to be forfeited consisted of real estate, and of machinery and fixtures and personal property found thereon.

The real estate was a single lot of land, part of which was covered by a building and sheds opening by doors into one another, and the rest of which was a yard connected with the buildings. Dixon owned the premises, and used them for a lawful brewery. Stone and Belows, with Dixon's knowledge and consent, set up and used a still in the principal building,

who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same," shall be forfeited to the United States. 18 Stat. 310.

By Rev. Stat. § 2306, every distiller who omits to keep books in the form prescribed by the commissioner of internal revenue shall be punished by fine and imprisonment, and "the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property on said premises used in the business there carried on, shall be forfeited to the United States."

and there carried on the business of distillers, without the still having been registered, and without giving bond, or keeping books, as required by the Internal Revenue Laws, and with intent to defraud the United States of the tax on the spirits which they distilled.

The omission to register the still was a cause of forfeiture under § 3258 of the Revised Statutes; the carrying on of the business of a distiller, without having given bond, or with intent to defraud the United States of the tax on the spirits distilled, was a cause of forfeiture under § 3281, as re-enacted in § 16 of the Act of February 8, 1875, chap. 36; and the omission to keep books was a cause of forfeiture under § 3305 of the Revised Statutes. The questions presented are of the extent of the forfeiture.

By the now settled doctrine of this court (notwithstanding the opposing dictum of *Mr. Justice McLean*, in *United States v. 84 Boxes of Sugar*, 32 U. S. 7 Pet. 453, 462, 463 [8:745, 748]), statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they impose penalties or forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the Legislature. *Taylor v. United States*, 44 U. S. 3 How. 197, 210 [11:559, 564]; *Cluquot's Champagne*, 70 U. S. 3 Wall. 114, 145 [18:116, 121]; *United States v. Hodson*, 77 U. S. 10 Wall. 895, 406 [19:937, 939]; *Smythe v. Hake*, 90 U. S. 23 Wall. 374, 380 [23:47, 49].

It will be convenient, in the first place, to ascertain the construction and effect of the provisions of § 16 of the Act of 1875, by which if any person carries on the business of a distiller, without having given bond, or with intent to defraud the United States of the tax on the spirits distilled by him, he shall be punished by fine and imprisonment, and there shall be forfeited to the United States: 1st. "All distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation of spirits, owned by such person, wherever found." 2d. "All distilled spirits or wines and personal property, found in the distillery, or in any building, room, yard or inclosure connected therewith, and used with or constituting a part of the premises." 3d. "All the right, title and interest of such person in the lot or tract of land on which such distillery is situated." 4th. "All right, title and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same." 18 Stat. 810.

By the first of these provisions, all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation of spirits, owned by the illicit distiller, and found on the premises or elsewhere, are forfeited without regard to the question whether the apparatus, by reason of the manner in which and the purpose for which it is placed on or affixed to the land, is technically personal property or real estate. But this provision does not extend to property owned by any other person than the distiller.

The second provision forfeits "all distilled

spirits or wines and personal property, found in the distillery, or in any building, room, yard or inclosure connected therewith, and used with or constituting part of the premises." The last words, "and used with or constituting part of the premises," like the words next preceding, "connected therewith," aptly designate real estate, and naturally and grammatically relate to and qualify "any building, room, yard or inclosure," and not "all distilled spirits or wines and personal property." The provision is clearly not limited to personal property owned by the illicit distiller. To hold it to be so limited would give no effect to that part of this provision which forfeits distilled spirits or wines; for all distilled spirits or wines owned by the distiller, wherever found, have been already forfeited by the first provision. The first provision is restricted in point of ownership, and not in point of place. The second provision is restricted in point of place, and not in point of ownership. Nor can the second provision be restricted to property fit or intended to be used for the distillation of spirits; for, while the first provision contains such a restriction as regards apparatus, the second provision omits all requirement of fitness or intention for the unlawful use. Each of the two provisions clearly defines its own restrictions, and the restrictions inserted in the one cannot be imported into the other. The second provision must therefore extend to some property not owned by the distiller, and to some property not fit or intended to be used in distilling spirits. In order to give it such effect as will show any reason for its insertion in the Statute, it must be construed to intend, at least, that all personal property which is knowingly and voluntarily permitted by its owner to remain on any part of the premises, and which is actually used, either in the unlawful business, or in any other business openly carried on upon the premises, shall be forfeited, even if he has no participation in or knowledge of the unlawful acts or intentions of the person carrying on business there; and that persons who intrust their personal property to the custody and control of another at his place of business shall take the risk of its being subject to forfeiture if he conducts, or consents to the conducting of, any business there in violation of the Revenue Laws, without regard to the question whether the owner of any particular article of such property is proved to have participated in or connived at any violation of those laws. The present case does not require us to go beyond this, or to consider whether the sweeping words "all personal property" must be restricted by implication in any other respect; for instance, as to personal effects having no connection with any business, or as to property stolen or otherwise brought upon the premises without the consent of its owner.

The significance of the omission of all restrictions in point of ownership, and in point of fitness or intention for the unlawful use, in the second provision concerning personal property, is clearly brought out by contrasting that provision with the provisions immediately following it, concerning real estate.

The third provision forfeits only "all the right, title or interest of" the distiller "in the lot or tract of land on which the distillery is situated." And the fourth provision forfeits

only "all right, title and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same."

Congress has thus clearly manifested its intention that the forfeiture of land and buildings shall not reach beyond the right, title and interest of the distiller, or of such other persons as have consented to the carrying on of the business of a distiller upon the premises.

In the case, on which the attorney for the United States much relied, of *Dobbins v. United States*, 96 U. S. 395 [24: 637], the jury, under the instructions given them at the trial, had found that the owner of the distillery, whose title was held to be included in the forfeiture for unlawful acts of his lessee, had leased the property for the purpose of a distillery, which brought the case within the provision of the Act under which the condemnation was sought, corresponding to the fourth provision now under consideration. Act of July 20, 1868, chap. 186, § 44 (15 Stat. 143).

The intention of Congress, that no interest in land and buildings shall be forfeited, which does not belong to someone who has participated in or consented to the carrying on of the business of distilling therein, is further manifested in the provision of § 3262 of the Revised Statutes, which directs that "no bond of a distiller shall be approved, unless he is the owner in fee, unincumbered by any mortgage, judgment or other lien, of the lot or tract of land on which the distillery is situated, or unless he files with the collector, in connection with his notice, the written consent of the owner of the fee, and of any mortgagee, judgment creditor or other person having a lien thereon, duly acknowledged, that the premises may be used for the purpose of distilling spirits, subject to the provisions of law, and expressly stipulating that the lien of the United States for taxes and penalties shall have priority of such mortgage, judgment or other incumbrance, and that in case of the forfeiture of the distillery premises, or of any part thereof, the title of the same shall vest in the United States, discharged from such mortgage, judgment or other incumbrance."

That section clearly indicates that the interest of an innocent mortgagee or other person having a lien on the lot or tract of land on which the distillery is situated would not otherwise be included in a forfeiture for acts of the owner only.

The provisions of the other sections of the Revised Statutes, relied on to support this information, may be more briefly treated.

Section 3258 does not forfeit any land or buildings. But it does forfeit every still or distilling apparatus not registered by the person having it in his possession or custody, or under his control; as well as "all personal property in the possession or custody or under the control of such person, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up." Personal property, by whomsoever owned, is thus included in the forfeiture, provided that it is in the possession, custody or control of the distiller, as well as found upon the premises. There is no reason for giving a narrower construction to this enactment than to the second

provision of § 16 of the Act of 1875, above considered.

Section 3305 provides that in case of omission to keep the books required by law, "the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property on said premises used in the business there carried on," shall be forfeited. This description, taken by itself and literally construed, would include not only the distillery and distilling apparatus, but "the lot or tract of land on which it stands," by whomsoever owned, as well as all personal property on the premises and used in the business there carried on. But it is hard to believe that Congress intended that a forfeiture of real estate, under this section, for not keeping books, should be more comprehensive than the like forfeiture, under the leading section already considered, for the graver offense of carrying on the business of a distiller without having given bond, or with intent to defraud the United States of the tax upon the spirits distilled. The more reasonable construction is that the brief summary of § 3305 was intended to conform substantially, in scope and effect, to the fuller definitions in § 3281 (re-enacted in § 16 of the Act of 1875), and to forfeit, without regard to the question of ownership, the distillery and distilling apparatus, and all personal property found on the premises and used in the business there carried on; but, as to the real estate, to forfeit only the right, title and interest of the distiller, and of any persons who participate in or consent to the carrying on of the distillery.

The next question to be determined is from what time the forfeiture takes effect.

By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed, and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

The rule was early applied under statutes enacting that whenever goods, the importation of which was prohibited, should be imported, they should be forfeited; and that if any ship should leave port without clearance or giving bond as required by law, the ship and the cargo should be forfeited. *United States v. 1,960 Bags of Coffee*, 12 U. S. 8 Cranch, 398 [8: 602]; *The Mars*, 12 U. S. 8 Cranch, 417 [8: 609]. It has been recognized and acted on in cases of goods imported in fraud of the Customs Laws. *Gelston v. Hoyt*, 16 U. S. 8 Wheat. 246, 311 [4: 381, 397]; *Wood v. United States*, 41 U. S. 16 Pet. 342, 362 [10: 987, 995]; *Caldwell v. United States*, 49 U. S. 8 How. 366 [12: 1115]. And it has been steadfastly upheld under the Internal Revenue Laws; in one case, under an enactment punishing by fine and imprisonment any person removing distilled spirits from the distillery contrary to law, with intent to evade the payment of the tax thereon, and providing

that spirits so removed should be forfeited; and in another case under an enactment that any person fraudulently executing an instrument required by the Internal Revenue Laws should be punished by fine and imprisonment and the property to which the instrument related should be forfeited. *Henderson's Distilled Spirits*, 81 U. S. 14 Wall. 44 [20: 815]; *Thacher's Distilled Spirits*, 103 U. S. 679 [26: 885].

The rule is equally applicable to the Statutes now in question. In the Act of February 8, 1875, chap. 86, § 16, the four provisions, before quoted, relating to forfeiture, follow immediately after the clause prescribing the punishment by fine and imprisonment of the offender, and contain nothing to imply that the forfeiture of all the kinds of property mentioned is not to take effect at one and the same time. The forfeiture, under the first of those provisions, of spirits and wines, stills and apparatus, owned by the offender, is evidently intended to take effect immediately upon the commission of the offense, so as to prevent any subsequent alienation by him before seizure and condemnation; and the words "wherever found" merely preclude all limit of place, and have no tendency to postpone the time when the forfeiture shall take effect. In the second provision, the restriction to personal property "found in the distillery" or upon the premises of which it is part, is a limit of place only, and does not postpone the forfeiture of such property which is on the premises when the offense is committed; and from what date a forfeiture of personal property not on the premises at the time of the commission of the offense, but brought there afterwards, should take effect, this case does not require us to consider. That the forfeiture of real estate, under the third and fourth provisions, must take effect as soon as the offense is committed, is yet clearer; for those provisions contain nothing which by any possible construction could be supposed to postpone the forfeiture; and by the common law of England, even in the case of the forfeiture of all the real and personal estate of an offender, while the forfeiture of his goods and chattels was only upon conviction and had no relation backwards, the forfeiture of his lands had relation to the time of the offense committed, so as to avoid all subsequent sales and incumbrances. 4 Bl. Com. 887. The forfeitures under §§ 3258 and 3805 of the Revised Statutes are governed by the same considerations.

It remains to apply the provisions of the Statutes to the admitted facts of this case.

Stowell claims the real estate and certain machinery and fixtures, as well as a number of butts and a quantity of malt and hops.

The butts were personal property, used in the business of the brewery. Assuming them to have been sold and delivered by Dixon to Stowell before any offense was committed by which a forfeiture was incurred, yet they were suffered by Stowell to remain in Dixon's possession, custody and control, and were upon the premises at the time of the commission of the offense, and found there at the time of the seizure. They were therefore forfeited under each of the sections relied on.

As to the malt and hops, the case is even clearer in favor of the United States; for not only were they intended to be used in the

brewery and were in the possession, custody and control of Dixon, and upon the premises, both at the time of the commission of the criminal acts and of the seizure, but Stowell acquired no right whatever in them until after such acts had been committed.

Of the real estate, Stowell, more than a year before the unlawful acts began to be committed by which a forfeiture was incurred, took a mortgage from Dixon, subject to a prior mortgage for \$1,500, and to secure a debt of \$2,500. This mortgage conveyed a distinct interest in the real estate to the mortgagee; and, by the law of Massachusetts, as between the mortgagor and the mortgagee, vested the fee in the latter, but subject to the mortgage, and, as regarded third persons, left the legal title in the mortgagor. *Conard v. Atlantic Ins. Co.* 26 U. S. 1 Pet. 886, 441 [7: 189, 213]; *Esner v. Hobbs*, 5 Met. 1, 8; *Howard v. Robinson*, 5 Cush. 119, 128. As soon as a still was set up on the land, with the mortgagor's knowledge and consent, in violation of the Internal Revenue Laws, the forfeiture under those laws took effect, and (though needing judicial condemnation to perfect it) operated from that time as a statutory conveyance to the United States of all the right, title and interest then remaining in the mortgagor; and was as valid and effectual, against all the world, as a recorded deed. The right so vested in the United States could not be defeated or impaired by any subsequent dealings of the mortgagee with the mortgagor. *Upton v. South Reading National Bank*, 120 Mass. 153, 156. The mortgagor's subsequent conveyance of the land by quitclaim deed to the mortgagee, therefore, passed no title as against the intervening right of the United States. But this deed did not have the effect of merging or uniting the mortgage and the equity of redemption in one estate, because, by reason of that intervening right, it was for the interest of the mortgagee that the mortgage should be kept on foot. The quitclaim deed, being void or voidable, left the mortgaged estate exactly where it found it. *Factors & Traders Ins. Co. v. Murphy*, 111 U. S. 788, 744 [28: 583, 584]; *Dexter v. Harris*, 2 Mason, 531, 539; *New England Jewelry Co. v. Merriam*, 2 Allen, 390; *Stantons v. Thompson*, 49 N. H. 272. It being admitted that the business of a distiller was not carried on with the mortgagee's permission or connivance, and that he did not even know, until after the seizure, that a still had been set up on the premises, it follows, for the reasons already stated in discussing the construction and effect of the Statutes in question, that the mortgage is valid as against the United States, and that, so far as concerns the real estate, the judgment of condemnation must be against the equity of redemption only.

As to the boiler, engine, pump, vats and tanks, the forfeiture must be equally limited. As we understand the somewhat ambiguous statement of the facts regarding them, they were upon the premises before the still was set up, and were owned by Dixon, and not by the distillers; and it is not shown that any of them were used or fit to be used in connection with the distillery, which were not already in lawful use in the brewery. In that view, even if they, or some of them, would be trade fixtures as between landlord and tenant, yet while annexed to the land

they were real estate and covered by the mortgage. *Kutter v. Smith*, 69 U. S. 2 Wall. 491 [17: 880]; *Freeman v. Dawson*, 110 U. S. 261, 370 [28: 141, 148]. *Winslow v. Merchants Ins. Co.* 4 Met. 806; *Bliss v. Whitney*, 9 Allen, 114.

The horses, wagons and harnesses claimed by Bevington were personal property, used in the business of the brewery, and were sold and a formal delivery of them made to Bevington by Dixon after the acts had been committed by which a forfeiture was incurred; they were afterwards suffered by Bevington to remain under Dixon's control and in his use, and they were found upon the premises at the time of the seizure. They were therefore forfeited under each of the sections relied on by the United States.

Judgment reversed, and case remanded for further proceedings in conformity with this opinion.

THE OHIO CENTRAL RAILROAD COMPANY, *Appt.*,

v.

THE CENTRAL TRUST COMPANY OF NEW YORK.

(See S. C. Reporter's ed. 88-92.)

Decree pro confesso—proper relief under—extent of the decree—appeal from—mortgage foreclosure—deficiency—amount not due.

1. A decree *pro confesso* is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it; but it should be made by the court, according to what is proper to be decreed upon the statements of the bill, assumed to be true.
2. If the allegations are distinct and positive, they may be taken as true without proof; but if they are indefinite, or the demand of the complainant is in its nature uncertain, the requisite certainty must be afforded by proof.
3. But in either event, although the defendant may not be allowed on appeal to question the want of testimony or the insufficiency or amount of the evidence, he is not precluded from contesting the sufficiency of the bill, or from insisting that the averments contained in it do not justify the decree.
4. Where the bill is taken *pro confesso*, if a decree be passed not confined to the matter of the bill, it may be attacked on appeal for that reason.
5. In suits in equity for the foreclosure of mortgages, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale; but the case made by the bill must show that the amount is due, for otherwise it cannot properly be found so. The circuit court cannot find a balance due because partial extinguishment has been effected by a sale, if, as matter of fact, the indebtedness is not then payable.
6. Where the bill here did not seek relief as to the second mortgage, but only the enforcement of the first mortgage lien and the foreclosure of the equity of redemption, and the amount realized paid the outstanding interest and a part of the principal, a deficiency decree, which is a judgment for the recovery of so much money, with execution, was improvidently entered, when it appears in the bill that the principal had not become due.

[No. 1288.]

Submitted Dec. 23, 1889. Decided Jan. 20, 1890.

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A PPEAL from a decree of the Circuit Court of the United States for the Northern District of Ohio to review a decree in a mortgage-foreclosure case for a deficiency after a sale, and declaring a certain amount due, and that the complainant recover the same. *Reversed.*

Statement by *Mr. Chief Justice Fuller*:

The Central Trust Company of New York filed its bill on the 7th day of January, A. D. 1884, in the Circuit Court of the United States for the Northern District of Ohio, against The Ohio Central Railroad Company, alleging the creation prior to January 1, 1880, of a corporation by that name, and its execution on January 1, 1880, of three thousand bonds for one thousand dollars each, bearing that date and payable to bearer on January 1, 1920, at 6 per cent interest, payable semi-annually on the first days of January and July, to secure which it executed and delivered to the Central Trust Company a deed of trust and mortgage covering the main line of said Ohio Central Railroad, which mortgage was duly recorded. The bill also alleged that the original Ohio Central Railroad Company, subsequently to the first day of January, 1880, and to the execution and delivery of the bonds and mortgage thereinbefore described, made and entered into an agreement of consolidation with a corporation known as the Atlantic and Northwestern Railroad Company, under the name of The Ohio Central Railroad Company. It further alleged default in the payment of interest on the said bonds, January 1, 1884; that the coupons were duly presented and payment was demanded, but refused; and that about the first of January, 1880, the defendant executed and delivered a second mortgage on the same property, to the same trustee, to secure three thousand income bonds for one thousand dollars each, payable to bearer, which was duly recorded; that the holders of these income bonds were very numerous and unknown to complainant; and that their interest and lien and that of complainant as their trustee accrued subsequently to and subject to the lien of the first mortgage. The bill set forth the insufficiency of the mortgaged property to pay the mortgage debts; that there was a large floating indebtedness; that creditors had commenced legal or equitable proceedings for the enforcement of their claims; that complainant had commenced a suit for the foreclosure of a certain other mortgage upon a portion of the property not embraced or covered by the two mortgages first mentioned, in which a receiver had been appointed; and that a multiplicity of suits, judgments and liens would obstruct the operation of the road and cause great loss to the holders of the bonds, and sacrifice of property, etc.

The bill prayed for an answer; that an account be had of the bonds secured by said several mortgages, "and of the amount due on said first-mortgage bonds for principal and interest or either;" that the names of the holders of said bonds might be ascertained and an account taken of all the liens and incumbrances according to their priorities; that said first mortgage be decreed to be a first lien upon all the property described therein; that the property be sold free from the claims of all parties or all who were in any manner represented; that

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the defendant and others claiming under it be barred and foreclosed; "that the said judgment or decree may contain such provisions for the ascertainment of the priorities of the said incumbrances and of the due application of the proceeds of such sale according to the rights of the parties as may be just and equitable;" that a receiver might be appointed, and an injunction issue *pendente lite*; and a prayer for general relief. A copy of the first mortgage, including bond and coupon, was attached to the bill.

The defendant, The Ohio Central Railroad Company, having entered its appearance, and having failed to plead, answer or demur, the bill was taken as confessed, and on the 10th day of December, 1884, a decree for sale was duly entered in the cause. The decree accorded with the averments of the bill, and adjudged that the default continued after the commencement of the suit, and that two installments of interest on the first-mortgage bonds were due and unpaid, by reason of the default as to the first of which the mortgage or deed of trust had become absolute, and the complainant entitled to a decree for the sale of all the mortgaged property "to satisfy the principal and interest of said bonds secured by said main-line first mortgage." The decree directed payment within thirty days of the amount of the two installments of interest due, with interest and costs, and in default of such payment ordered the sale of the mortgaged property and the application of the proceeds to costs of suit, expenses of sale, trustees' compensation and expenses; claims having priority over the main-line first mortgage; coupons due, and to become due before distribution, upon said first-mortgage bonds; the principal of the first-mortgage bonds; and the surplus, if any, to be paid into court subject to its further order. The sale took place on April 15, 1885, and the mortgaged property was sold to Canda, Opdyke and Burt, as purchasing trustees, for one million dollars, which sale was confirmed June 25, 1885, and the mortgaged property was conveyed to the said purchasers. Prior to the confirmation of sale, but after the sale had been reported, a reference was had to ascertain the distributive share of the proceeds of sale due on the principal of each bond secured by the first mortgage, and what sum the purchasers should bring into court to pay the distributive share of whatever bonds might be found outstanding. A report was made that after the payment of interest there would be \$197.31½ to apply on the principal of each first-mortgage bond; and in the order confirming the sale the report of the special master was confirmed, payment of compensation and expenses directed, and the balance ordered to be applied on the principal of said main-line first-mortgage bonds. The last clause of this order of June 25, 1885, was as follows:

"And all further questions in respect to the accounts of said receiver and to judgment for any deficiency herein, and all other questions arising in this cause, are reserved until the coming in of the report of said special master commissioner of his acts and doings under this order, and the filing of said receiver's account."

On the 22d of June, 1887, the following decree and judgment was entered by the court:

"This day this cause came on for further hearing, and it appearing to the court that from the proceeds of the sale of the property of said defendant Company in this cause heretofore made there had been paid upon each of the three thousand bonds secured by the first main-line mortgage in the bill of complaint set forth the interest coupons thereon up to and including June 30th, 1885, and the sum of one hundred and ninety-seven and thirty-one and two-thirds one-hundredths dollars (\$197.31½) to be applied upon the payment of the principal of each of said bonds, said payment to bear date of June 30th, 1885, and no other payments of either principal or interest have been made upon any of said bonds than as aforesaid, the court therefore finds that there is due from said defendant, The Ohio Central Railroad Company, to the complainant, as trustee for the holders of said bonds secured by said first main-line mortgage, upon each of said bonds, the sum of eight hundred and two and sixty-eight and one third one-hundredths dollars (\$802.68½), which sum should bear interest at the rate of six per cent per annum until paid.

"And the court further finds that no fund has come under the control of this court from which any payment can be made upon the three thousand main-line income bonds in the bill of complaint set forth, and that no payments of any kind have been made upon any of said income bonds. Wherefore the court find that there is due from the defendant, The Ohio Central Railroad Company, to the complainant, as trustee of the holders of said income bonds, upon each of said bonds, the sum of one thousand (\$1,000) dollars.

"Wherefore it is ordered, adjudged and decreed that the complainant, The Central Trust Company of New York, as trustee for the holders of said three thousand bonds secured by said first main-line mortgage, have and recover from the defendant, The Ohio Central Railroad Company, the sum of eight hundred and two and sixty-eight and one third one-hundredths dollars (\$802.68½) on each of said bonds, to wit, the sum of \$2,408,050, with six per cent interest per annum from July 1, 1885, and that the said complainant, as trustee for the holders of said three thousand main-line income bonds, have and recover from said defendant, The Ohio Central Railroad Company, the sum of one thousand dollars (\$1,000) on each of said bonds, to wit, the sum of three million dollars, and that execution issue therefor."

From this decree the pending appeal was prosecuted.

Messrs. Ashbel Green, H. L. Terrell and Thomas Thacher, for appellant:

It is no objection to this appeal that the appellant allowed the cases, as presented by the bill, to go by default, and that order *pro confesso* was entered.

Masterson v. Howard, 85 U. S. 18 Wall. 99 (21: 764); *Pacific R. Co. v. Ketchum*, 101 U. S. 289 (25: 932).

The court had no power to make such judgment for deficiency.

Noonan v. Braley, 67 U. S. 2 Black, 499 (17: 278); *Windsor v. McVeigh*, 93 U. S. 274 (28: 914); *Crocket v. Lee*, 20 U. S. 7 Wheat. 523

(5: 518); *Simms v. Guthrie*, 13 U. S. 9 Cranch, 19 (3: 642).

The Ohio Central Railroad Company having failed to answer, and an order for decree *pro confesso* having been entered, the court could not legally find, as the foundation of any judgment or decree against it, any fact not within the allegations of the bill.

Terrett v. Taylor, 18 U. S. 9 Cranch, 48 (3: 650); *Thompson v. Wooster*, 114 U. S. 104 (29: 105).

The said bill contained no allegations upon which any of the principal of any of the bonds, first-mortgage or income bonds, could be found due to anyone.

Howell v. Western R. Co. 94 U. S. 468 (24: 254); *Holden v. Gilbert*, 7 Paige, Ch. 208; *Wilmer v. Atlanta & R. Air Line R. Co.* 2 Woods, 453.

The relief granted by the judgment for deficiency was not within the prayer of the bill.

Windsor v. McVeigh, 93 U. S. 274 (23: 914).
Mr. Stevenson Burke for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court:

These first-mortgage bonds matured January 1, 1920, and there was no provision in them nor in the mortgage that they should become due or could be declared due before that date, nor were there any allegations in the bill upon which to predicate a finding or decree to that effect.

The mortgage provided that in case of entry by the trustee for nonpayment of interest, or of principal at maturity, the income and revenue should be applied to the payment of such interest and the residue to the payment of the principal; and that, if the property went to sale, the net proceeds should be applied "to the ratable payment of principal and the then accrued interest of all the said bonds, whether the principal be then due or not;" but if, in case of entry or of proceedings to sell for default in payment of interest before the bonds should become due, and before the sale should be made, the interest in arrears should be paid and satisfied, together with all costs, expenses, etc., that then the proceedings should be discontinued and possession of the mortgaged premises restored as if default or entry had not occurred. While, therefore, the intention is clear that the bonds were not to become due before the specified date of maturity, the proceeds of sale, after the satisfaction of the accrued amount, were properly applied upon the outstanding liability. *Chicago, D. & V. R. Co. v. Foodick*, 106 U. S. 47, 68 [27: 47, 54].

Neither in the pleadings nor in the reports of the special master, nor in any part of the record, can we discover the basis for the statement: "The court therefore finds that there is due from said defendant, The Ohio Central Railroad Company, to the complainant as trustee for the holders of said bonds secured by said first main-line mortgage, upon each of said bonds, the sum of eight hundred and two and sixty-eight and one third one-hundredths dollars (\$802.68 $\frac{1}{3}$)." Certainly, as \$197.81 $\frac{1}{3}$ had been realized on each bond, \$802.68 $\frac{1}{3}$ remained to be paid, but only according to the tenor of the bond.

There are no allegations in the bill as to when the income bonds matured, nor is a copy of the second mortgage given.

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The deficiency decree says that "the court further finds that no fund has come under the control of this court from which any payment can be made upon the three thousand main-line income bonds in the bill of complaint set forth, and that no payments of any kind have been made upon any of said income bonds. Wherefore the court finds that there is due from the defendant, The Ohio Central Railroad Company, to the complainant, as trustees of the holders of said income bonds, upon each of said bonds, the sum of one thousand (\$1,000) dollars."

But the conclusion does not follow that because no payment had been made on the income bonds, therefore they had matured; and unless they had matured by lapse of time, or otherwise as provided, the amount could not be decreed to be due.

The bill was taken as confessed, but that fact did not in itself justify giving complainant more than it claimed. In *Thomson v. Wooster*, 114 U. S. 104 [29: 105], the general nature and effect of an order taken on a bill *pro confesso*, and of a decree *pro confesso* regularly made thereon, and of our rules of practice on the subject, are discussed in the opinion of the court by *Mr. Justice Bradley*, and it is there held that under the rules and practice of this court in equity "a decree *pro confesso* is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it; but that it is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill, assumed to be true." If the allegations are distinct and positive, they may be taken as true without proof; but if they are indefinite, or the demand of the complainant is in its nature uncertain, the requisite certainty must be afforded by proof. But in either event, although the defendant may not be allowed, on appeal, to question the want of testimony or the insufficiency or amount of the evidence, he is not precluded from contesting the sufficiency of the bill, or from insisting that the averments contained in it do not justify the decree.

Under the 18th Rule in Equity, where the bill is taken *pro confesso*, the cause is proceeded in *ex parte*, "and the matter of the bill may be decreed by the court;" and hence if a decree be passed not confined to the matter of the bill, it may be attacked on appeal for that reason.

By the 92d Rule it is provided that in suits in equity for the foreclosure of mortgages, "a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales." Assuming that a deficiency decree might be rendered in the absence of a specific prayer for that relief, nevertheless the case made by the bill must show that the amount is due, for otherwise it cannot properly be found so. This rule does not authorize the circuit courts to find a balance due because partial extinguishment has been effected by a sale, if, as matter of fact, the indebtedness is not then payable.

The bill here did not seek relief as to the second mortgage, which is only referred to as a subordinate lien, nor did it claim that anything except interest was due upon the first mortgage. It sought the establishment and enforcement of the first-mortgage lien and the fore-

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closure of the equity of redemption. The amount realized paid the outstanding interest and a part of the principal. Under such circumstances, and upon these pleadings, this deficiency decree, which is a judgment for the recovery of so much money, with execution, was improvidently entered.

Without discussing the extent of the franchises authorized to be sold under the mortgage, we are of opinion that this appeal was properly taken in the name of the defendant Company. *Willamette Mfg. Co. v. Bank of British Columbia*, 119 U. S. 191, 197 [80: 884, 887]; *Memphis & Little Rock R. Co. v. Railroad Comrs.* 112 U. S. 609, 619 [28: 887, 841].

The deficiency decree of June 22, 1857, is reversed at appellee's costs, and the cause remanded with directions to proceed therein as may be just and equitable.

HENRY E. SCHRADER, Assignee, *Appt.*,
v.
THE MANUFACTURERS' NATIONAL
BANK OF CHICAGO ET AL.

(See S. C. Reporter's ed. 67-78.)

Individual liability of stockholders of bank—settlements made after bank went into liquidation—power of president and other officers—indorsement, how far binding on bank—when does not make shareholders liable—prolonging obligation—judgment against bank in liquidation, when does not bind stockholders—agreement to prolong liability.

1. The individual liability of the stockholders of national banks, as imposed by and expressed in the statute, is for all the contracts, debts and engagements of such banks, but is restricted to such contracts, debts and engagements as have been duly contracted in the ordinary course of its business.
2. Those creditors who made settlements after the Bank was put into liquidation and received from the president in that settlement paper of the Bank, or the individual notes of the president himself, indorsed or guaranteed in the name of the Bank, are not such creditors of the Bank as can subject the stockholders to individual liability.
3. The power of the president or other officer of the bank to bind it by transactions after it is put into liquidation, is that resulting from his duty, which consists in the collection and reduction to money of the assets of the Bank, and the payment of creditors equally and ratably so far as the assets prove sufficient.
4. Payments may be made in the bills receivable and other assets of the Bank *in specie*, and the title to such paper may be transferred by the president or cashier by an indorsement suitable to the purpose in the name of the Bank; but such indorsement and use of the name of the Bank is in liquidation and merely for the purpose of transferring title.

5. It can have no other effect as against the shareholders by creating a new obligation. It does not constitute a liability, contract or engagement of the Bank for which they can be held to be individually responsible.

6. It is not within the power of the officers of the Bank, without express authority, to prolong indefinitely an obligation on the part of the shareholders, which is imposed by the statute only as a means of securing the payment of debts by an insolvent bank.

7. When the suit in which judgment was recovered was not commenced until after the Bank went into liquidation, the judgment against the corporation is not binding on the stockholders in the sense that it cannot be re-examined, where the facts of the case were not known to the stockholders of the Bank when the judgment was rendered.

8. An agreement made by the president of the Bank, after the Bank went into liquidation, to continue its guarantee upon certain notes, is not binding upon the stockholders.

[No. 1870.]

Submitted Jan. 9, 1890. Decided Jan. 20, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, establishing claims against a Bank which had been put into liquidation and disallowing the claim of the People's Bank of Belleville. *Affirmed.*

The facts are stated in the opinion.

Reported below, 36 Fed. Rep. 843.

Mr. Franklin A. McCaughy, for appellant:

The undertaking of the Manufacturers' National Bank was the obligation of a principal. *Kirkpatrick v. Hawk*, 80 Ill. 122.

The guarantor has no right to demand the sureties which the creditor may hold.

Dorst v. Bates, 51 Ill. 489.

An agreement which preserves the rights of the creditor to proceed against the surety, or the right of the surety to proceed against the principal, will not discharge the surety.

Mueller v. Dobschuets, 89 Ill. 182; *Rucker v. Robinson*, 88 Mo. 154; *Morse v. Huntington*, 40 Vt. 488-496; *Price v. Barker*, 4 El. & Bl. 760; *Kearsley v. Cole*, 16 Mees. & W. 128; *Viele v. Hoag*, 24 Vt. 46; *Hubbell v. Carpenter*, 5 N. Y. 171.

The mere inadequacy of price would not be sufficient to set aside a sale, even in a direct proceeding for such a purpose.

Davis v. Pickett, 72 Ill. 485.

This judgment is as binding on the stockholders of the Bank, as an adjudication, as it is against the Bank itself, unless it can be shown that it was obtained by fraud, of which there can be no pretense.

Milliken v. Whitehouse, 49 Me. 529; *Slee v. Bloom*, 20 Johns. 669; *Moss v. Oakley*, 2 Hill, 265; *Belmont v. Coleman*, 1 Bosw. 188; *Donworth v. Coolbaugh*, 5 Iowa, 800; *Wilson v.*

NOTE.—As to conclusiveness of judgment, see note to Bank of U. S. v. Beverly, Bk. 11, p. 75.

As to estoppel by judgment, see note to Aspden v. Nixon, Bk. 11, p. 1059.

As to individual liability of stockholders for corporate debts, see note to Hatch v. Dana, Bk. 26, p. 885.

As to dissolution of corporations and effect on debts owned by and on their property, see note to Mumma v. The Potomac Company, Bk. 8, p. 945.

As to when promissory notes, executed by an officer, bind the corporation; when the officer, see note to Hitchcock v. Buchanan, Bk. 26, p. 1078.

As to parol contracts of officers and agents, see note to Mechanics' Bank of Alexandria v. Bank of Columbia, Bk. 5, p. 100, and note to Bank of Metropolis v. Gutschlick, Bk. 10, p. 835.

Pittsburgh, 43 Pa. 424; *Grund v. Tucker*, 5 Kan. 70.

Mr. Henry G. Miller, for appellees:

A judgment against a corporation is not binding upon the stockholders; it is not even prima facie evidence of the indebtedness of the corporation as to them. They are never parties or privies to it. Whether they are considered as sureties for the company, or as principal debtors, the rule is the same.

Moss v. McCullough, 5 Hill, 181; *McMahon v. Macy*, 51 N. Y. 155; *Miller v. White*, 50 N. Y. 187; *Laidley v. Kline*, 8 W. Va. 218; *Trippe v. Huncheson*, 82 Ind. 307.

The surety has an interest that the security taken from the principal debtor should be dealt with in good faith, and held in trust, not only for the creditor's security but for the surety's indemnity. The creditor must do no willful act to discharge or cancel it.

Hayes v. Ward, 4 Johns. Ch. 180; *Kirkpatrick v. Hawk*, 80 Ill. 122; *Rogers v. School Trustees*, 46 Ill. 428; *Baker v. Briggs*, 8 Pick. 122; *People v. Jansen*, 7 Johns. 332; *Neff's App.* 9 Watts & S. 36; *Schroeppel v. Shaw*, 3 N. Y. 450; *Phares v. Barbour*, 49 Ill. 870.

Mr. Justice Blatchford delivered the opinion of the court:

This is a case growing out of that of *Richmond v. Irons*, 121 U. S. 27 [80: 864], and involves a claim against the assets of the Manufacturers' National Bank of Chicago. In the suit of Irons against that Bank, by an order of the Circuit Court of the United States for the Northern District of Illinois, one Harvey was appointed receiver of the Bank. That court, on July 28, 1888, referred it to a master, to report the amount of the debts of the Bank, the value of its assets, and the amount of assessment necessary to be made on each share of its capital stock in order to pay its debts. Among the claims presented before the master was that of the assignee of the People's Bank of Belleville, Illinois, who claimed to be a creditor in the sum of \$84,108.48; and the master reported in favor of the claim. It was based on a judgment for \$67,277 obtained in the same circuit court, May 31, 1880, by the People's Bank against the Manufacturers' Bank. The judgment was founded on eight promissory notes for \$5,000 each, dated August 5, 1873, made by Henry E. Picket, payable one year after date, to the order of Picket, at the Manufacturers' Bank, with interest at 10 per cent per annum, payable semi-annually, and with 10 per cent per annum interest after maturity, indorsed by Picket, the payment of each note, principal and interest, at maturity being guaranteed by the Manufacturers' Bank. The notes were secured by a trust deed on real estate, made by Picket to one Joseph A. Holmes.

On the 1st of June, 1886, the circuit court made a decree directing various shareholders to pay to the receiver, for the benefit of the creditors of the Bank, certain sums of money. An appeal was taken to this court by several of the stockholders and was heard, and is the case reported as *Richmond v. Irons*, 121 U. S. 27 [80: 864]. The decision was announced March 28, 1887, the decree of the circuit court was reversed, and the cause was remanded with directions to proceed in conformity with the

opinion of this court. After that decision, and before the mandate was presented to the circuit court, and on the 20th of June, 1887, on the application of several of the stockholders, the case was referred back to the master, to report again upon the amount of the debts due by the Bank, and upon the amount of the assessment necessary to be made on each share of its capital stock, to pay its debts, and upon the amount payable by each shareholder on such assessment, and also to take further proofs in regard to the validity of the claim of the People's Bank, as against the stockholders of the Manufacturers' Bank, and as to whether that claim had been in whole or in part released, discharged or defeated, by reason of any new matters stated in such application.

On the 16th of June, 1888, the master reported that the claim of the People's Bank ought to be disallowed upon the new proofs taken. Those proofs accompanied his report. The assignee of the People's Bank excepted to the report, and the matter was heard before Judge Blodgett. His opinion is reported in 86 Fed. Rep. 848. He confirmed the report and overruled the exceptions, and on the 27th of March, 1889, a decree was entered upon the mandate of this court, vacating the decree of June 1, 1886, giving a list of the valid, outstanding claims against the Bank (which did not include the claim of the assignee of the People's Bank), adjudging what sums were to be paid by the various stockholders, and taxing costs to the amount of \$158.60 against the People's Bank and its assignee. The assignee appealed to this court from the decree, because it disallowed his claim, and because of the award of costs against the People's Bank and its assignee.

The Manufacturers' Bank became insolvent and suspended payment on September 23, 1873, and, in pursuance of the National Banking Act, went into voluntary liquidation on September 26, 1873.

In regard to the claim of the assignee of the People's Bank, the master reported as follows: "I find and report that the claim of the assignee of the People's Bank of Belleville is based upon the guaranty of the Manufacturers' National Bank of promissory notes made by Henry E. Picket, and secured by real estate, amounting in the outset to \$50,000; that this guaranty was made by Ira Holmes, who was an officer of said Manufacturers' National Bank, and before the failure of the Bank; that these notes were secured by a trust deed to Joseph A. Holmes upon the undivided half of the northwest quarter of section ten, township thirty-seven north, range fourteen east, being (80) eighty acres, one undivided half of which eighty acres was owned by said Picket (and a five-acre tract and twenty-six lots) and the other undivided half of said eighty acres by said Ira Holmes individually; that after the maturity of these notes and in the month of August, A. D. 1874, Ira Holmes made a written contract with the People's Bank, by which he was to give and did give the bank his promissory notes aggregating the sum of \$87,465, to secure the Picket notes (and other indebtedness for which the bank was not liable), payable in one, two, three and four years, securing the payment thereof by a trust deed upon said property and the southwest quarter of said northwest quarter, con-

taining forty acres additional, and that subsequently foreclosure proceedings were had upon the trust deed made by Picket, resulting in the placing of the title to the entire tract in the name of said Ira Holmes, and the amount for which the property was sold, to wit, the sum of ten thousand dollars, was credited upon the notes of said Picket, leaving due at that time upon the Picket notes the sum of forty thousand dollars, for the payment of which, and the notes of said Ira Holmes, the entire tract remained charged, said Picket having, for the purpose of enabling the parties to carry out the arrangement referred to, executed a quitclaim deed of his interest in said property to said Ira Holmes. I find, as a matter of fact, that the consideration for the conveyance of said Picket was his release from the payment of his notes, which were thereafter held under the terms of the contract between Ira Holmes and the People's Bank, for the purpose of preserving the guaranty of the bank; that said arrangement changed the original contract of guaranty made by the Manufacturers' National Bank, by the taking of the new security and the extension of time resulting therefrom upon the original indebtedness. I find, further, that the deed executed by said Picket, as the result of the agreement referred to, was made under an arrangement between said Holmes and Picket, and assented to by said People's Bank of Belleville, that said Picket was to be released and discharged from any further liability or payment upon the original indebtedness. By reason of which I find that the Manufacturers' National Bank, the original guarantor, became discharged from all further liability on account of such undertaking of guaranty, and recommend that the claim against it be disallowed."

Judge Blodgett, in his opinion in 86 Fed. Rep. 843, said: "This claim of the People's Bank of Belleville is based upon a guaranty of payment made by the Manufacturers' National Bank of eight notes of \$5,000 each, given by Henry E. Picket, dated August 5, 1873, and due in one year from date, which were discounted for the Manufacturers' National Bank, soon after their date, by the People's Bank of Belleville. These notes were secured by a trust deed upon land in the vicinity of the City of Chicago. The Manufacturers' National Bank suspended payment and went into voluntary liquidation on or about the 23d of September, 1873, and, when these notes matured, about a year afterwards, dealings were had between the People's Bank of Belleville and Ira Holmes, then acting as president of the Manufacturers' National Bank, in liquidation, and assuming to act also for his bank, by which the title to the real estate held as security for the payment of these notes was transferred to Holmes, and Holmes thereupon gave his notes for the amount due on the Picket notes, and also for a large amount of other indebtedness held by the People's Bank, on which the Manufacturers' National Bank or Holmes or both were liable; and, as is found by the master, Picket, in consideration of a quitclaim deed from himself and wife to Holmes, of the land covered by the trust deed securing his notes, was released from further liability on these notes. The master found that this release of Picket from the notes

which the Manufacturers' National Bank had guaranteed operated to release the guarantor, and hence the master rejected the claim. I do not intend to go into an analysis or statement of the proof upon which the master made his finding, as it will be sufficient to say that I have examined these proofs, and am of opinion that they fully sustain the master's conclusions. It is urged, however, that, as the proof shows that the People's Bank of Belleville brought suit on this guaranty now in question and obtained judgment thereon, such judgment is conclusive against the defendants in this case, who are stockholders in the Manufacturers' National Bank, against whom an assessment is asked. Aside from the authorities cited, which satisfy me that the stockholders of the Manufacturers' National Bank are not concluded by this judgment which was rendered after the Bank went into liquidation, I think the fact shown in this record, that the dealings between the People's Bank of Belleville and Holmes and Picket, by which Picket was released, were unknown to the defendant stockholders at the time this judgment was rendered, should allow these stockholders to go behind the record of that judgment, and raise the question before the court, in this suit, whether the guaranty was released by the release of Picket, the principal debtor, whose notes were guaranteed. The exceptions to the master's report are therefore overruled and the report confirmed."

The contention of the appellant is that, by the transaction in question, Picket was not released. Reliance for this view is had upon an instrument in writing, made on the 27th of August, 1874, between Ira Holmes as one party and the People's Bank of Belleville as the other. By that paper Holmes agreed with the bank that he would, on the 1st of September, 1874, execute to it his eighteen promissory notes, of that date, each bearing interest at the rate of 10 per cent per annum from its date, payable semi-annually, the total amount of the eighteen notes to be \$87,465.10; and Holmes simultaneously to execute to one Thomas, as trustee, eighteen deeds of trust to secure the eighteen notes, each deed to secure one note, the bank agreeing to foreclose at once the Picket deed of trust, and to procure the trustee therein to sell the land covered thereby, under its provisions, at the expense of Ira Holmes, and to cause said land to be bought in at such sale and conveyed to Ira Holmes. The instrument contained a provision "that the notes mentioned in the incumbrances now existing upon said land shall stand as additional security for said People's Bank, as far as they go, for the indebtedness to be created by the said Holmes as hereinbefore mentioned." Under this agreement, the proceedings took place which are set forth in the report of the master.

On the 2d of September, 1874, a paper was executed by the Manufacturers' National Bank, by Ira Holmes as its president, and accepted in writing by the People's Bank of Belleville, by C. W. Thomas as its attorney, which recited the fact of the making of the ten promissory notes by Picket on the 5th of August, 1873, and the securing of the same by a trust deed, and then proceeded as follows: "And whereas the said Manufacturers' National Bank afterwards, and before said notes matured, de-

livered them to the People's Bank of Belleville, and, for a valuable consideration, guaranteed the prompt payment of said notes and interest to said People's Bank; and whereas the said Picket, before said notes fell due, became insolvent, and the land mentioned in said trust deed was subject to heavy prior incumbrances, which said People's Bank has removed, it is agreed between the said People's Bank of Belleville and the said Manufacturers' National Bank that the guarantee of the said Manufacturer's National Bank upon eight of said notes shall be and remain binding upon said National Bank, and that any agreement which has been or may be made between the People's Bank and said Picket, in regard to said Picket's liability as maker or indorser of said notes, shall never be construed to release or in anywise affect said guarantee upon eight of said notes."

On the same 2d of September, 1874, the Manufacturers' National Bank, by Ira Holmes as its president, executed an instrument whereby it agreed that no release of the Picket deed of trust "shall operate to release said Bank from its guarantee of eight of the notes in said deed named, to be selected and retained by the People's Bank of Belleville, the present legal holder of all of said notes in said deed named, and the said Manufacturers' National Bank further agrees that no release of the maker or indorser of said notes shall operate to relieve said National Bank of its liability upon said guarantee of eight of the same, the said Manufacturers' National Bank hereby continuing its guaranty of eight of said notes, notwithstanding any agreement which may be or may have been made between the holder of the same and the maker or indorser thereof, and notwithstanding any sale which may be made under said deed of trust."

In its opinion in the case of *Richmond v. Irons*, at page 59 [80: 874], this court considered that part of the decree appealed from which directed payment of the claims reported by the master under the denomination of class D, amounting in the aggregate to \$185,119.84, and which were designated by the master as claims "arising before the failure of the Bank, upon which worthless collaterals were subsequently received." These were claims which, after the Bank went into liquidation, were settled between the parties by the acceptance out of the assets of the Bank, by the creditors, of bills receivable, in payment of their claims, and which bills receivable contained guarantees of payment then made in the name of the Bank. Upon that point this court said: "It is averred by the appellees that they are claims arising for the most part, if not in all instances, upon indorsements and guarantees made in the name of the Bank by Holmes, its president, after the suspension of the Bank, and while it was in liquidation. It appears clearly from the evidence that, in many cases, parties having claims against the Bank accepted from Holmes commercial paper held by the Bank, which it had received in the course of its business, and which constituted a part of its assets, running some of it several months and some of it several years, bearing interest, some at the rate of eight and some at the rate of ten per cent per annum, indorsed and guaranteed in

the name of the Bank by Holmes as president. The books of the Bank show that in these cases the paper so received was charged against the account of the party receiving it, thus closing the account as settled. In these cases, it is testified by Holmes that the creditors gave their checks to the Bank for the amount standing to their credit. In some cases, the creditors or their agents testifying to the transactions, without contradicting Holmes in respect to what was in fact done, nevertheless state that the paper accepted by them was received, not in payment, but as security. It is obvious, however, that in most, if not in all, instances, the witnesses are referring to the security which they supposed they had received and were entitled to rely upon, by the means of the indorsement and guaranty of the paper thus received, made by Holmes as president in the name of the Bank. They certainly acted upon this belief, for in many instances they proceeded to obtain judgments against the Bank, after the maturity and dishonor of the paper so received upon these indorsements and guaranties, and in this proceeding proved their claims in that form by transcripts of such judgments. It is true that, in the final decrees, the master was directed to correct his computation of interest so as to equalize the claims of the creditors by allowing interest at a uniform rate from the time of the suspension upon the amounts as they appeared to be due from the books of the Bank, but all the claims in class D, notwithstanding the settlements made, were included in the amounts found due and ordered to be paid. In this respect we are of the opinion that the decree is erroneous. Those creditors who made settlements after the Bank was put into liquidation and received from the president in that settlement paper of the Bank, or as in some cases the individual notes of Holmes himself, indorsed or guaranteed in the name of the Bank, are not to be considered as creditors of the Bank entitled to subject the stockholders to individual liability. The individual liability of the stockholders, as imposed by and expressed in the statute, is indeed for all the contracts, debts and engagements of such association, but that must be restricted in its meaning to such contracts, debts and engagements as have been duly contracted in the ordinary course of its business. That business ceased when the Bank went into liquidation; after that there was no authority on the part of the officers of the Bank to transact any business in the name of the Bank so as to bind its shareholders, except that which is implied in the duty of liquidation, unless such authority had been expressly conferred by the shareholders. No such express authority appears in this case, and the power of the president or other officer of the Bank to bind it by transactions after it was put into liquidation is that which results by implication from the duty to wind up and close its affairs. That duty consists in the collection and reduction to money of the assets of the Bank, and the payment of creditors equally and ratably so far as the assets prove sufficient. Payments, of course, may be made in the bills receivable and other assets of the Bank *in specie*, and the title to such paper may be transferred by the president or cashier by an indorsement suitable to the purpose in the name

of the Bank, but such indorsement and use of the name of the Bank is in liquidation and merely for the purpose of transferring title. It can have no other effect as against the shareholders by creating a new obligation. It does not constitute a liability, contract or engagement of the Bank for which they can be held to be individually responsible. Every creditor of the Bank, receiving its assets under such circumstances, knows the fact of liquidation, and is chargeable with knowledge of its consequences; he takes the assets received at his own peril; he is dealing with officers of the Bank only for the purpose of winding up its affairs. If he accepts something in lieu of an existing obligation looking to future payment it must be from other parties. It is not within the power of the officers of the Bank, without express authority, by such means to prolong indefinitely an obligation on the part of the shareholders, which is imposed by the statute only as a means of securing the payment of debts by an insolvent bank when it is no longer able to continue business, and for the purpose of effectually winding up its affairs. This is the very meaning of the word 'liquidation.'

It was proper for the circuit court, after the decision of this court, to permit the claim of the People's Bank to be re-examined, to ascertain whether it was a valid claim against the stockholders of the Manufacturers' Bank. It is true that, on the 31st of May, 1880, the People's Bank recovered in the circuit court a judgment against the Manufacturers' Bank for \$67,277, in an action brought against the latter as guarantor of the eight notes; but, as the suit in which that judgment was recovered was not commenced until the 20th of October, 1876, more than three years after the Manufacturers' Bank went into liquidation, the judgment against the corporation was not binding on the stockholders in the sense that it could not be re-examined; and the transactions of August and September, 1874, also took place about a year after the Bank went into voluntary liquidation. *Moss v. McCullough*, 5 Hill, 181; *Miller v. White*, 50 N. Y. 187; *McMahon v. Macy*, 51 N. Y. 155; *Tripps v. Huncheon*, 82 Ind. 807.

When this judgment was rendered, on the 31st of May, 1880, the transactions of August and September, 1874, between the People's Bank and Holmes and Picket, were not known to the stockholders of the Manufacturers' Bank; and it is quite clear that they are entitled to go behind the record of that judgment and raise the question whether the guarantee of the Manufacturers' Bank was released as to them by the release of Picket, the principal debtor, whose notes were guaranteed by that Bank.

We are satisfied, on the evidence, that the consideration for the deed from Picket to Ira Holmes was that Picket should be released as maker of the notes held by the People's Bank, which the Manufacturers' National Bank had guaranteed. As to what is contained in the two papers dated September 2, 1874, the meaning of them is that the liability of the Manufacturers' National Bank as guarantor upon the eight notes of Picket should continue notwithstanding the release of the land from the Picket deed of trust by a sale under the power

contained in that deed, in pursuance of the agreement made with Ira Holmes, and notwithstanding the release of Picket, as maker of the notes, from further liability upon them. The sale under the Picket trust deed was made simply to release the security, by placing the title in Holmes, and was not made for the purpose of paying the notes; and the agreement of Holmes, made after the Bank went into liquidation, to continue its guarantee upon the notes, a liability under which the People's Bank is now attempting to enforce against the stockholders, is not binding upon them, in view of what was said by this court in the case of *Richmond v. Irons*, before quoted.

The decree of the Circuit Court is affirmed.

Mr. Chief Justice Fuller, having been of counsel in *Richmond v. Irons*, took no part in the consideration or decision of this case.

WILLIAM A. STUART, *Appt.*,

v.

A. L. BOULWARE ET AL.

(See S. C. Reporter's ed. 73-82.)

Jurisdictional amount—when sufficient—counsel fees—compensation of receiver—discretionary.

1. On an appeal from a decree allowing compensation to a receiver and his counsel, the allowance to his counsel is to be added to the allowance to the receiver in determining the jurisdictional amount necessary to an appeal to this court.
2. Where one prosecutes a suit as a creditor, claiming more than \$5,000 of a fund as applicable to a large amount of debts owned by him, that is sufficient amount to give this court jurisdiction.
3. Counsel fees are proper allowances to a receiver for counsel employed by him in the discharge of his duties.
4. Courts of equity may, in the absence of statutory rule, fix the compensation of their own receivers and that of counsel employed by them.
5. Like all questions of costs in courts of equity, such allowances are largely discretionary, and the action of the court below is, upon appeal, treated as presumptively correct.

[No. 1495.]

Submitted Jan. 6, 1890. Decided Jan. 20, 1890.

APPEAL from a decretal order of the Circuit Court of the United States for the District of West Virginia making an allowance to the receiver of the Greenbrier White Sulphur Springs Company and to counsel employed by him. *Affirmed.*

On motions to dismiss and affirm.

The facts are stated in the opinion.

Mr. W. Hallett Phillips, for motion:

The appeal cannot be entertained as to any of the defendants to whom an allowance less than \$5,000 was made.

Farmers L. & T. Co. v. Waterman, 106 U. S. 270 (27:115); *Hassall v. Wilcox*, 115 U. S. 599 (29:504).

If a decree was several as to them, it was several as to their adversary.

Scheid v. Smith, 106 U. S. 190 (27:157); *Gibson v. Shufeldt*, 122 U. S. 27 (30:1083).

It is not shown in this case by the appellant that any of these allowances are excessive.

132 U. S.

Trustees v. Greenough, 105 U. S. 537 (26: 1163).

Messrs. John E. Kenna and M. F. Morris for appellant, opposed.

Mr. Chief Justice Fuller delivered the opinion of the court:

William A. Stuart filed a bill against the Greenbrier White Sulphur Springs Company and others in the Circuit Court of the United States for the District of West Virginia, praying among other things for the appointment of a receiver, and upon the 18th day of April, 1888, A. L. Boulware of the City of Richmond, Virginia, was appointed by consent "receiver of all the estate, both real and personal, of the defendant company." He was required to give bond in the sum of \$50,000, to make an inventory of the property upon taking possession, and to file it with the clerk of the court, to keep a full, clear and accurate statement of his acts and doings, and to render an account monthly. It was further ordered that "until further orders the defendant company shall be allowed to conduct its business of hotel-keeping as it may deem best for the interest of said company and its creditors, and its leases and contracts for the proper conduct of its business already made shall be allowed by the receiver to stand, but the receiver shall collect and account for the receipts of the company, allowing the said company all expenditures necessary economically to conduct its business, and shall report his receipts and allowances monthly to this court." The receiver gave bond and entered upon the discharge of his duties accordingly. It appears that the property at the time was leased as a hotel, but with the season of 1888 that lease terminated, and thereafter the receiver rented the property from year to year under the authority of the court. The rents for five successive seasons amounted to \$100,000 and upwards, of which this record shows the receipt of more than \$70,000 (including some amounts from sales), the disbursement by the receiver of more than \$67,000, the subsequent receipt of something over \$14,000; and that all of the rents had been received and accounted for except the receipts for the last season, the receipts and disbursements for that year having been reported to the court, but that report not appearing in this record. The record contains various petitions, reports and accounts, by the receiver, and orders thereon, and it is also shown that the receiver sold cattle, horses, wines and liquors belonging to the company, took various journeys with his counsel to Baltimore, New York and Parkersburg, and had litigation. In September, 1887, the Greenbrier White Sulphur Springs property, proper, and some other property of the company, was sold by special commissioners appointed by the court, for \$830,700, to the complainant, Stuart.

On the 26th day of October, 1885, the receiver was "authorized to retain to his own use, out of any funds in his hands as such receiver and on account of his services, the sum of thirty-five hundred (\$35,000) dollars, and he is further authorized to pay Leigh R. Page, esquire, the sum of eighteen hundred (\$1,800) dollars on account of his services as counsel to said receiver."

On the 5th day of February, 1889, the receiver filed his petition, setting forth that during his said receivership, acting under authority from the court, he had rented out the property for five successive seasons for more than \$100,000, all of which had been accounted for except the receipts from the last year's renting, and the receipts and disbursements for that year had been reported to the court, and that as soon as his report, which had been filed, had been acted upon by the court, which he asked might be speedily done, he was ready to submit his accounts to the auditor to examine and settle the same; that his duties as such receiver had terminated; that his services in that capacity had been arduous and exacting; that he had been allowed \$8,500 on account for those services, and desired to settle with his counsel, Mr. Page, for professional services rendered to him with "diligence and fidelity during the whole of said receivership;" that \$1,800 had been allowed said counsel under a special order in the fall of 1885, but he had, however, paid counsel \$2,500. In consideration of the premises the receiver prayed the court to allow him and his counsel such further compensation as the court might deem reasonable and proper. The matter coming on to be heard upon this petition, and having been argued by counsel, the court ordered "that the sum of four thousand five hundred (\$4,500) dollars be, and the same is hereby, allowed to the said Boulware in full compensation for his said services, and the sum of two thousand (\$2,000) dollars be, and the same is hereby, allowed to the said Leigh R. Page in full compensation for his services as counsel to said receiver."

From this decretal order the complainant, Stuart, prayed an appeal to this court, which is now before us on a motion to dismiss or affirm. Counsel for appellees contends that these allowances should be taken separately, and as neither of them amounts to \$5,000, that the appeal should be dismissed. On the other hand it is argued, and in this we concur, that if it were proper for the receiver to employ counsel, the allowance of reasonable counsel fees is to the receiver and not directly to the counsel, and that such fees would constitute only one of the items in the receiver's account; that the counsel had no cause of action, but the allowance was in legal effect to the receiver to enable him to make compensation for professional services. It is also insisted, as a second ground of dismissal, that Stuart prosecuted the suit as a creditor, "on behalf of himself and of other creditors of the company, who may come in and contribute to the costs of the suit, and that the record does not show that Stuart claims an interest sufficient in amount to give the court jurisdiction." But it appears from the record that Stuart claimed to be the holder and owner of a very large amount of the debts, which were first liens upon the property, and to which the surplus of the cash payment which would remain after paying the costs of suit and expenses of sale would be applicable; that the sale was for \$830,700, and of that sum \$88,070 was paid in cash, and that Stuart insisted that after deducting the costs of suit and expenses of sale therefrom, the larger part, if not the whole, of the balance, should be

repaid to him, so that Stuart's interest as claimed might cover more than \$5,000, if the disallowances should be sufficiently large. But while, therefore, we shall overrule the motion to dismiss, it is unquestionable that there was color for it, and that we can consider the motion to affirm in accordance with the rule on that subject.

The receiver is an officer of the court and subject to its directions and orders, and while, in the discharge of his official duties, he is at all times entitled to apply to the court for instruction and advice, he is also permitted to obtain counsel for himself, and counsel fees are considered as within the just allowances that may be made by the court. The order of October 26, 1885, recognizes the employment by the receiver of counsel in this litigation, although no specific original order giving that authority is found in the record. So far as the allowances to counsel are concerned, it is a mere question as to their reasonableness. Nor is there any doubt of the power of courts of equity to fix the compensation of their own receivers. That power results necessarily from the relation which the receiver sustains to the court, and, in the absence of any legislation regulating the receiver's salary or compensation, the matter is left entirely to the determination of the court from which he derives his appointment.

The compensation is usually determined according to the circumstances of the particular case, and corresponds with the degree of responsibility and business ability required in the management of the affairs intrusted to him, and the perplexity and difficulty involved in that management. Like all questions of costs in courts of equity, allowances of this kind are largely discretionary, and the action of the court below is treated as presumptively correct, "since it has far better means of knowing what is just and reasonable than an appellate court can have," as was remarked by Mr. Justice Bradley in *Trustees v. Greenough*, 105 U. S. 527, 537 [26: 1157, 1162], where the subject is considered.

We find nothing in this record justifying us in arriving at the conclusion that these allowances were excessive. Considering the number of years covered by the receivership, the responsibility involved, the evident difficulties surrounding the receiver, and the amounts collected and disbursed, it would be going very far to hold the action of the circuit court to have been an abuse of discretion.

The motion to affirm will therefore be sustained, and it is so ordered.

THE CITY AND COUNTY OF SAN FRANCISCO, *Plff. in Err.*,

v.

ANDREW J. ITSELL ET AL.

(See S. C. Reporter's ed. 65-67.)

Review of state judgment—question of general law.

NOTE.—As to jurisdiction in the United States Supreme Court, where federal question arises or where are drawn in question statutes, treaties or Constitu-

1. This court has no jurisdiction to review a judgment of the highest court of a State, unless a federal question has been, either in express terms or by necessary effect, decided by that court against the plaintiff in error.
2. Where that court did not decide any question against the plaintiff in error, except the issue whether the former judgment rendered against it and in favor of the grantor of the defendants in error was a bar to this action, that was a question of general law only, in no wise depending upon the Constitution, treaties or statutes of the United States.

[No. 1506.]

Submitted Jan. 8, 1890. Decided Jan. 20, 1890.

IN ERROR to the Supreme Court of the State of California to review a judgment of that court affirming a judgment of the Superior Court of San Francisco in favor of defendants in an action of ejectment. *Dismissed for want of jurisdiction.*

Statement by Mr. Justice Gray:

The original action was ejectment, brought in the Superior Court of San Francisco by the City and County of San Francisco to recover a tract of land in San Francisco, of which the plaintiff alleged that it was seised in fee, and entitled to the possession, in trust for the use of the State of California and of the people of the City and County as a public plaza, park, common or square, and commonly known as Hamilton Square or Plaza.

It was duly pleaded in the answer, and found by the court (a trial by jury having been waived by the parties), as follows:

1st. In July, 1869, a compromise was agreed upon between the City and one Tompkins, who claimed this and other land, by which the officers of the City, under an ordinance of the board of supervisors, executed a conveyance of the land to Tompkins, and in consideration thereof Tompkins conveyed to the City the other land claimed by him. On February 19, 1870, the ordinance and conveyances were ratified and confirmed by Act of the Legislature of California. On July 28, 1869, Tompkins conveyed this land to one Palmer.

2d. On September 11, 1869, Palmer brought an action against the City, in a court of the State having jurisdiction of the subject matter and of the parties, alleging that he had the title in fee and the right of possession of this land, and that the City claimed an adverse interest, but had no title, interest or estate therein; the City appeared and denied his allegations, and the issue was decided in his favor, and it was adjudged that he was the lawful owner in fee simple absolute of the land, and that the City had no estate, right, title or interest therein, and be forever restrained and debarred from asserting any. That judgment remained in full force and effect. And on May 21, 1875, Palmer conveyed this land to one Hollis, from whom by mesne conveyances these defendants claimed title.

The superior court gave judgment for the defendants, and the plaintiff appealed to the Supreme Court of California, which affirmed

tion, see notes to *Martin v. Hunter*, Bk. 4, p. 97, to *Matthews v. Zane*, Bk. 2, p. 654, and to *Williams v. Norris*, Bk. 6, p. 571.

the judgment; and the plaintiff sued out this writ of error.

Opinions of the supreme court commissioners and of the Supreme Court of the State were filed in the case and copied in the record. The commissioners were of opinion that under the rule stated in *Hoadley v. San Francisco*, 50 Cal. 265; *Sawyer v. San Francisco*, 50 Cal. 370, and *Hoadley v. San Francisco*, 70 Cal. 330, and 124 U. S. 639 (31:553), the compromise could not be sustained, for want of power in the City to make it; but that the judgment pleaded was a bar, according to the decision in *San Francisco v. Holladay*, 76 Cal. 18. The supreme court was of opinion that the judgment should be affirmed, for the reasons given in the opinion of the commissioners. 22 Pac. Rep. 75.

Messrs. John L. Love, John B. M'Hoon and George Flournoy for plaintiff in error.
Messrs. Jarboe, Harrison & Goodfellow, William & George Leviston and Thos. D. Rior-dan, for defendants in error:

This court has no jurisdiction to review the judgment of the Supreme Court of the State of California rendered herein.

Chouteau v. Gibson, 111 U. S. 200 (28:400); *Detroit R. Co. v. Guthard*, 114 U. S. 136 (29:118); *DeSaussure v. Gaillard*, 127 U. S. 224 (32:129); *Clark v. Penn.*, 128 U. S. 397 (32:487); *Hoadley v. San Francisco*, 94 U. S. 4 (24:34); *Murdock v. Memphis*, 87 U. S. 20 Wall. 635 (22:429); *San Francisco v. Holladay*, 76 Cal. 18.

Upon a writ of error to a state court, which has affirmed several defenses to an action, either one of which, not involving a federal question, is sufficient to sustain its judgment, this court will affirm the judgment without considering a federal question involved in another defense, or expressing any opinion upon it, even though such question was wrongfully decided.

Jenkins v. Lowenthal, 110 U. S. 222 (28:129); *McManus v. O'Sullivan*, 91 U. S. 578 (23:390); *Chouteau v. Gibson*, 111 U. S. 200 (28:400).

It is apparent that no federal question was decided by the state court, and that the decision of such a question was not necessary to the final decree rendered.

Adams Co. v. Burlington & M. R. Co., 112 U. S. 123 (28:678); *Chapman v. Goodnow*, 123 U. S. 548 (31:238); *Marrow v. Brinkley*, 129 U. S. 178 (32:654).

Mr. Justice Gray delivered the opinion of the court:

This court has no jurisdiction to review a judgment of the highest court of a State, unless a federal question has been, either in express terms or by necessary effect, decided by that court against the plaintiff in error. Rev. Stat. § 709; *New Orleans Waterworks v. Louisiana Sugar Refining Co.*, 125 U. S. 18 [31:607]; *DeSaussure v. Gaillard*, 127 U. S. 216 [32:125]; *Hale v. Akers*, 132 U. S. 554 [38:442].

In the present case, the record of the pleadings, findings of fact and judgment shows that it was unnecessary for that court to decide, and its opinion filed in the case and copied in the record shows that it did not decide, any question against the plaintiff in error, except the issue whether the former judgment rendered against it and in favor of the grantor of the de-

pendants in error was a bar to this action. That was a question of general law only, in no wise depending upon the Constitution, treaties or statutes of the United States. *Chouteau v. Gibson*, 111 U. S. 200 [28:400].

Writ of error dismissed for want of jurisdiction.

LEWIS WALLACE, *Appt.*,

UNITED STATES.

(See S. C. Reporter's ed. 180-186.)

Minister to Turkey, salary of—statutes affecting it—construction of statutes.

1. By section 1675, Rev. Stat., as amended by the Act of March 3, 1875, an envoy extraordinary and minister plenipotentiary to Turkey is entitled to \$10,000 a year, unless such salary is otherwise specially provided for.
2. But the President having raised the grade of the legation to Turkey to a plenipotentiary mission by his appointment of claimant to such office in 1882, and Congress having, before the appointment, provided for the office an annual salary of \$7,500, claimant can have no larger salary and cannot recover the difference between that sum and the sum of \$10,000 provided by section 1675.
3. In the present case, the prior Statute, namely, section 1675 of the Revised Statutes, has no application, because a different compensation for the office was prescribed by law, before the President ever appointed, under his constitutional power, any such officer.

[No. 855.]

Submitted Jan. 10, 1890. Decided Jan. 27, 1890.

A PPEAL from a judgment of the Court of Claims dismissing a petition for a balance of moneys claimed to be due him on his salary as Minister Plenipotentiary to Turkey. *Affirmed.*

The facts are stated in the opinion.

Mr. George A. King, for appellant:

The doctrine, as applied to claims against the government, that a receipt in full operates in full satisfaction, applies only to cases of disputed claims subject to compromise, and has no application to the case of a salary fixed by law and insufficiently paid only through lack of the necessary funds owing to reduced appropriations by Congress.

United States v. Bostwick, 94 U. S. 53, 67 (24: 65, 66); *United States v. Langston*, 118 U. S. 389 (30: 164); *Mitchell v. United States*, 18 Ct. Cl. 281, 287, 288, reversed by this court on a different point; *United States v. Mitchell*, 109 U. S. 146 (27: 887).

Messrs. John B. Cotton, Assistant Atty-Genl., and Robert A. Howard, for appellee:

The policy of instituting foreign missions and appointing representatives is within the power of the executive alone; the power of determining the fitness of the person nominated is conjointly with the President and the Senate, and the compensation to be made is a matter for provision by Congress. The Court of Claims has so decided in several well considered cases.

Byers v. United States, 22 Ct. Cl. 59; *Francis v. United States*, 22 Ct. Cl. 408; *Foots v. United States*, 23 Ct. Cl. 443; *United States v. Mitchell*, 109 U. S. 146 (27: 887).

Mr. Justice Blatchford delivered the opinion of the court:

This is an appeal from a judgment of the Court of Claims, dismissing the petition in a suit brought by Lewis Wallace against the United States. The findings of fact were as follows:

"1. The claimant was, on the 13th day of July, in the year 1882, appointed envoy extraordinary and minister plenipotentiary of the United States to Turkey, and held that office continuously from the time of said appointment till and including the 24th day of August, 1885. (Commission of claimant and letter of Secretary of State.)

"2. The Secretary of State, in the estimate of the appropriations for the diplomatic and consular service for the following fiscal years, made the following specific estimate for the salary of the representative in Turkey as follows, to wit:

"Turkey.

"Ministers resident in . . . Turkey at \$7,500 each (for fiscal year ending June 30, 1883).

"Envoys extraordinary and ministers plenipotentiary to . . . and to Turkey, \$7,500 (for the fiscal year ending June 30, 1884).

"Envoys extraordinary and ministers plenipotentiary to . . . and to Turkey, \$7,500 (for the fiscal year ending June 30, 1885).

"Envoys extraordinary and ministers plenipotentiary to Turkey, \$7,500; additional submitted \$2,500 (for fiscal year ending June 30, 1886).

"3. With his appointment or commission claimant also received the following notice from the Secretary of State:

"Department of State,

"Washington, July 21, 1882.

"Lew. Wallace, Esquire, etc., etc., etc.,

"Sir: Congress having recently raised the grade of the legation at Constantinople to a plenipotentiary mission, and the President, by and with the advice and consent of the Senate, having appointed you to be envoy extraordinary and minister plenipotentiary of the United States of America to Turkey, I beg to transmit herewith the following papers:

"The Act of Congress does not increase your compensation or contemplate other changes than as herein mentioned. You are referred to the personal instructions given you as minister resident, June 4, 1882, for the conduct of the business of the mission under your present appointment, and for the necessary expenditures incident to the maintenance of the legation at Constantinople."

"4. Claimant in his first account with the Treasury Department stated the same as follows:

"United States Government in acc't with Lew Wallace, minister plenipotentiary at Constantinople.

"To am't of my salary from July 1st, 1882, to 30th September, 1882, — months, at the rate of \$7,500 per annum."

"The claimant charged and was allowed as said minister plenipotentiary, from July 13, 1882, to June 30, 1885, at the rate of \$7,500 per annum, as shown above, by copy of first account.

"5. The compensation paid to the claimant, from the time of his appointment till and including the 30th of June, 1885, was at the rate stated in his accounts, to wit, at the rate of \$7,500 per annum, and claimant's account stands closed upon the books of the treasury by payment in full.

"6. Claimant was minister resident and consul-general of the United States to Turkey at the date of his appointment as envoy extraordinary and minister plenipotentiary."

On the foregoing findings, the court decided, as matter of law, that the petition should be dismissed, under the decision of that court in the case of *Francis v. United States*, 22 Ct. Cl. 408.

On the 13th of July, 1882, when the claimant entered upon his duties as envoy extraordinary and minister plenipotentiary of the United States to Turkey, section 1675 of the Revised Statutes, as amended by the Act of March 8, 1875, chap. 153 (18 Stat. 483), was in force, reading as follows:

"Sec. 1675. Ambassadors and envoys extraordinary and ministers plenipotentiary shall be entitled to compensation at the rates following, per annum, namely:

"Those to France, Germany, Great Britain and Russia, each, seventeen thousand five hundred dollars.

"Those to Austria, Brazil, China, Italy, Japan, Mexico and Spain, each, twelve thousand dollars.

"Those to all other countries, unless where a different compensation is prescribed by law, each, ten thousand dollars.

"And unless when otherwise provided by law, ministers resident and commissioners shall be entitled to compensation at the rate of seventy-five per centum, *chargés d'affaires* at the rate of fifty per centum, and secretaries of legation at the rate fifteen per centum, of the amounts allowed to ambassadors, envoys extraordinary and ministers plenipotentiary to the said countries respectively; except that the secretary of legation to Japan shall be entitled to compensation at the rate of twenty-five hundred dollars per annum.

"The second secretaries of the legations to France, Germany and Great Britain shall be entitled to compensation at the rate of two thousand dollars each per annum."

Under the provision of that section, an envoy extraordinary and minister plenipotentiary to Turkey would be entitled to an annual compensation of \$10,000, unless a different compensation was prescribed by law. Having received compensation at the rate of \$7,500 per annum, the claimant brought suit for the difference between that sum and \$10,000 per annum, for the time from July 13, 1882, to June 30, 1885.

The office of envoy extraordinary and minister plenipotentiary to Turkey did not exist prior to July 1, 1882. Before that time, the diplomatic representative of the United States to Turkey was of the rank of a minister resident and consul-general, and the claimant held that office, at an annual salary of \$7,500, when he was appointed envoy extraordinary and minister plenipotentiary.

By the Act of July 1, 1882, chap. 262 (22

Stat. 128), entitled "An Act Making Appropriations for the Consular and Diplomatic Service of the Government for the Fiscal Year Ending June Thirtieth, Eighteen Hundred and Eighty-Three, and for Other Purposes," it was provided "that the following sums be, and they are hereby, appropriated for the service of the fiscal year ending June thirtieth, eighteen hundred and eighty-three, out of any money in the treasury not otherwise appropriated, for the objects hereinafter expressed, namely: . . .

"For salaries of envoys extraordinary and ministers plenipotentiary, as follows: To Chili and Peru, at ten thousand dollars each; to Turkey, seven thousand five hundred dollars; in all, twenty-seven thousand five hundred dollars."

By the Act of February 26, 1883, chap. 86 (23 Stat. 424), entitled "An Act Making Appropriations for the Consular and Diplomatic Service of the Government for the Fiscal Year Ending June Thirtieth, Eighteen Hundred, and Eighty-Four, and for Other Purposes," it was provided "that the following sums be, and they are hereby, appropriated for the service of the fiscal year ending June thirtieth, eighteen hundred and eighty-four, out of any money in the treasury not otherwise appropriated, for the objects herein expressed, namely: . . .

"For salaries of envoys extraordinary and ministers plenipotentiary, as follows: To Chili and Peru, at ten thousand dollars each; to Turkey, seven thousand five hundred dollars; in all, twenty-seven thousand five hundred dollars."

By the Act of July 7, 1884, chap. 333 (23 Stat. 227), entitled "An Act Making Appropriations for the Consular and Diplomatic Service of the Government for the Fiscal Year Ending June Thirtieth, Eighteen Hundred and Eighty-Five, and for Other Purposes," it was provided "that the following sums be, and they are hereby, severally appropriated for the consular and diplomatic service of the fiscal year ending June thirtieth, eighteen hundred and eighty-five, out of any money in the treasury not otherwise appropriated, for the objects hereinafter expressed, namely: . . .

"For salaries of envoys extraordinary and ministers plenipotentiary to the United States of Colombia and Turkey, at seven thousand five hundred dollars each, fifteen thousand dollars."

No attempt was made by Congress, by those three Statutes or by any other statute, to create the office of envoy extraordinary and minister plenipotentiary to Turkey; but, as Congress had, by the Act of July 1, 1882, made an appropriation of \$7,500 to pay the salary of an envoy extraordinary and minister plenipotentiary to Turkey, at the sum of \$7,500 for the fiscal year ending June 30, 1883, and had thus left it to the President to fill such office, if he chose to do so, under his constitutional power, the President exercised that power by appointing the claimant on the 13th of July, 1882.

By such provision of the Act of July 1, 1882, continued by the Acts of February 26, 1883, and July 7, 1884, a different compensation per annum from that of \$10,000 was prescribed by law for the envoy extraordinary and minister plenipotentiary to Turkey, within the 183 U. S.

meaning of section 1675 of the Revised Statutes, before quoted. In view of the fact that the office of envoy extraordinary and minister plenipotentiary to Turkey never had existed and never had been filled by any person prior to July 1, 1882, and of the fact that the first provision made by Congress for that office, in regard to its compensation, was for an annual salary of \$7,500, that sum must be considered as then having been prescribed by Congress as the compensation for the officer who might be appointed to fill it. It was, therefore, the compensation prescribed by law as the annual compensation for that officer, and was a different compensation from that prescribed by section 1675 of the Revised Statutes; and, according to that section, the compensation could not be \$10,000 a year.

The President raised the grade of the legation at Constantinople to a plenipotentiary mission by his appointment of the claimant as envoy extraordinary and minister plenipotentiary to Turkey, on the 13th of July, 1882, and Congress provided for the office an annual salary of \$7,500. The claimant could have no larger salary, and can recover nothing in this suit.

His counsel seek to apply to this case the doctrine laid down by this court in *United States v. Langston*, 118 U. S. 389 [30: 164]; but it has no application to the present case. In the *Langston Case* a prior statute had fixed the annual salary of a diplomatic officer at a designated sum, without limitation as to time. A subsequent statute appropriated a less amount for the services of the officer for a particular fiscal year, but contained no words which expressly or by implication modified or repealed the prior statute. In the present case, as has been shown, the prior Statute, namely, section 1675 of the Revised Statutes, has no application, because a different compensation for the office was prescribed by law before the President ever appointed, under his constitutional power, any such officer.

The judgment of the Court of Claims is affirmed.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee, ET AL., *Appts.*,

v.

THE CITY OF GALESBURG, ILLINOIS.

(See S. C. Reporter's ed. 156-179.)

Water-works contract, right of City to rescind— inadequate remedy—danger to health and exposure to fire—right to take possession of water mains—conditional delivery—estoppel by resolution of City, and acts of officers and citizens—letters of officers and citizens—continuing obligation—condition precedent—guaranty.

NOTE.—As to mode of executing powers conferred on corporations, and what powers are not implied, see note to *Beatty v. Knowler*, Bk. 7, p. 813.

As to parol contracts of officers and agents of corporations, see note to *Mechanics' Bank v. Bank of Columbia*, Bk. 5, p. 100, and note to *Bank of the Metropolis v. Guttschlick*, Bk. 10, p. 335.

As to fiduciary position of directors, their contracts and dealings with corporations, see note to *Kpehler v. Black River Falls Iron Co.* Bk. 17, p. 339.

1. Where water furnished by a water company for a City was unfit for use and inadequate for protection from fire, the City had a right, after the Company had had reasonable time to comply with its contract to supply pure and sufficient water, to treat the contract as terminated and to invoke the aid of a court of equity to enforce its rescission.
2. A suit for a specific performance of the contract, or a suit to recover damages for its non-performance, would be a wholly inadequate remedy in such a case.
3. The danger to the health and lives of the inhabitants of the City from impure water, and the continued exposure of the property in the City to destruction by fire from an inadequate supply of water, were public questions peculiarly under the care of the municipality; and it was entitled and bound to act with the highest regard for the public interests, and at the same time with due consideration for the rights of the other parties to the contract.
4. Where the City has contracted to sell the old water mains to the Company to be used in supplying water, the City has the right, upon the failure of the Company to comply with the contract, after ample time given, to retake possession of such mains for the use of the City to protect the City from fire.
5. The delivery of the old water mains being conditional, and made for a special purpose, and the conditions not having been performed, no title to them passed either to the Water Company or to the trustee under the mortgage, and the recaption of them by the City was lawful.
6. Although the purchasers of the bonds of the Water Company were influenced to purchase them by the resolution of the City to accept the water works, and by letters from officers and citizens of the City, yet the City was not thereby estopped from refusing to pay rental for the hydrants, which, by the terms of the mortgage given by the Company to secure the bondholders, was to be applied to pay interest on the bonds, nor from having the contract canceled.
7. The letters of the private citizens could not affect the City; and the letters from the officers of the City could not affect its rights, because they were not written by its authority or within the scope of their powers as its officers.
8. The obligation of the Company being a continuing obligation, the liability of the City to pay in future the hydrant rents depended, to the knowledge of the bondholders, upon the future compliance of the Water Company with its contract; and, in case of its failure, the City would have the right to ask for the rescission of the contract.
9. The continuance of the Water Company to furnish water according to the contract was not a condition subsequent but a condition precedent to its continuing right to use the streets of the City and to furnish water for a period of thirty years; and when, after a reasonable time, it had failed to comply with such condition, the City had a right to treat the contract as terminated, and to its rescission.
10. The City's resolution of acceptance of the works is not a guaranty to the bondholders that the Water Company would thereafter perform its contract for furnishing water in the quantity and of the quality called for by the ordinance.

[No. 887.]

Submitted Jan. 9, 1890. Decided Jan. 27, 1890.

A PPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois annulling a contract made by

the City of Galesburg for the supply of the City with water, and revesting and confirming in the City the property in certain water mains, and ordering the City to pay a reasonable sum for water used by it, and dismissing the supplemental and cross-bill. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 84 Fed. Rep. 675.

Messrs. Herbert B. Turner, David McClure and Arthur Ryerson, for appellants:

The ordinance in question was valid, and wholly within the scope of the City's corporate powers.

East St. Louis v. East St. Louis Gas L. & Co. 98 Ill. 415; *Quincy v. Bull*, 106 Ill. 387; *Foster v. Joliet*, 27 Fed. Rep. 899; *Joliet v. Foster*, *123 U. S. 639 (30:949).

The title of an Act can be referred to as indicating what was in the mind of the legislative power.

Meyer v. Western Car Co. 102 U. S. 1, 12 (26:59, 60); *Hadden v. Barney*, 72 U. S. 5 Wall. 107 (18:518).

This contract is not a mere license, which the City could revoke at its pleasure. It is a grant of a property right.

Quincy v. Bull, 106 Ill. 387; *Chicago v. Chicago & W. I. R. Co.* 105 Ill. 78; *Gallaher v. Herbert*, 117 Ill. 160; *Davis v. Gray*, 88 U. S. 16 Wall. 208 (21:447).

A fact admitted by a municipal corporation through its officer, duly and properly acting within the scope of his authority, is evidence against it.

Curnen v. New York, 79 N. Y. 511; *Coloma v. Eaves*, 92 U. S. 484 (28:579); *Whiting v. Wellington*, 10 Fed. Rep. 810; *Clark v. Washington*, 25 U. S. 12 Wheat. 40 (6:544); *Zabriskie v. Cleveland, C. & C. R. Co.* 64 U. S. 28 How. 400, 401 (16:497, 498); *O'Leary v. New York Board of Education*, 98 N. Y. 1.

In the case of fraud, cancellation will not be decreed as against a bona fide purchaser for a valuable consideration and without notice.

2 Pom. Eq. § 918; *Atlantic Delaine Co. v. James*, 94 U. S. 207 (24:112); *Grymes v. Sanders*, 98 U. S. 55 (28:798); 2 Pom. Eq. §§ 776, 871; *Foster v. Joliet*, 27 Fed. Rep. 899; *Joliet v. Foster*, 123 U. S. 639 (30:942).

Mr. Frederick A. Willoughby, for appellee:

The contract is entire.

Chicago v. Sexton, 3 West. Rep. 455, 115 Ill. 241.

The City is not estopped by the letter of certain officers from insisting on a cancellation of the contract.

Dillon, Mun. Corp. (3d ed.) § 471; *Louisiana State Bank v. New Orleans Nav. Co.* 3 La. Ann. 294; *Davies Co. v. Dickinson*, 117 U. S. 657 (29:1026); *Merchants Exchange Nat. Bank v. Bergen County*, 115 U. S. 884 (29:430); *Dixon County v. Field*, 111 U. S. 83 (28:360); *St. Louis v. Gorman*, 29 Mo. 598.

Nor is it estopped by reason of the passage of the resolution of acceptance.

Pickard v. Sears, 6 Ad. & El. 469; *Freeman v. Cooke*, 2 Exch. 662.

The party to be estopped must have intended the admission to be acted upon.

Howard v. Hudson, 2 El. & Bl. 9; *Copeland v. Copeland*, 28 Me. 540; *Wilmington & B. Bank*

v. *Wollaston*, 3 Harr. (Del.) 95; *Rangeley v. Spring*, 21 Me. 187; *Hicks v. Cram*, 17 Vt. 454; *Kinney v. Farnsworth*, 17 Conn. 360; *Otis v. Still*, 8 Barb. 108; *Morgan v. Spangler*, 14 Ohio St. 102; *Kinney v. Whiton*, 44 Conn. 262; *Meyenborg v. Haynes*, 50 N. Y. 675; *Smith v. Newton*, 88 Ill. 230.

Representations vague, inconclusive or matter of opinion work no estoppel.

Grinnan v. Dean, 62 Tex. 219.

Nor those regarding something in future.

Langdon v. Doud, 10 Allen, 433.

Nor those made in ignorance, unless culpably negligent.

Clinton v. Haddam, 50 Conn. 84; *Jones v. Sasser*, 1 Dev. & Batt. (N. C.) 464.

There must be privity between the party to be estopped and the party setting up the estoppel.

Deery v. Oray, 72 U. S. 5 Wall. 795 (18: 658); *Massure v. Noble*, 11 Ill. 531; *Hobbs v. McLean*, 117 U. S. 567 (29: 940).

There must be fraud, actual or constructive, to constitute an estoppel.

People v. Brown, 67 Ill. 435; *Tillotson v. Mitchell*, 111 Ill. 513.

A conditional sale passes no title even to innocent purchasers, especially where there has been a qualified delivery.

Boerett v. Hall, 67 Me. 497; *Coggill v. Hartford & N. H. R. Co.* 8 Gray, 545; *Brown v. Haynes*, 52 Me. 578; *Smith v. Lynes*, 5 N. Y. 44; *Hughes v. Kelly*, 40 Conn. 153; *Hart v. Carpenter*, 24 Conn. 427; *Forbes v. Marsh*, 15 Conn. 394; *Heath v. Randall*, 4 Cush. 196; *Strong v. Taylor*, 2 Hill, 328; *Mills v. Wooters*, 59 Ill. 234; *Cooley, Torts*, 50, 51.

There was no sale of the mains because there was not a two-thirds vote of the members elect of the council, and because yeas and nays were not entered on the city record.

Hurd's Rev. Stat. Ill. § 41, chap. 24; *Barr v. Auburn*, 89 Ill. 361; *Spangler v. Jacoby*, 14 Ill. 297; *Morrison v. Lawrence*, 98 Mass. 219.

The pretended contract was *ultra vires* and is void, so far as it is yet unexecuted.

Indianapolis v. Indianapolis Gas-Light & C. Co. 66 Ind. 396, and cases cited; *Garrison v. Chicago*, 7 Biss. 480; *Gale v. Kalamazoo*, 28 Mich. 344; *East St. Louis v. East St. Louis G. L. & C. Co.* 98 Ill. 415.

Mr. Justice **Blatchford** delivered the opinion of the court:

The City of Galesburg, Illinois, a municipal corporation, by an ordinance of its city council, passed May 12, 1883, and approved by its mayor May 17, 1883, entitled "An ordinance providing for a supply of water to the City of Galesburg and its inhabitants, authorizing Nathan Shelton or assigns to construct and maintain water works, securing protection to said works, contracting with said Nathan Shelton or assigns for a supply of water for public use, and giving said City an option to purchase said works," granted a franchise to Shelton and his successors or assigns, for thirty years from the passage of the ordinance, to construct and maintain, within and near the City, water works for supplying it and its inhabitants and those of the adjacent territory "with water for public and private uses and to use the streets, alleys, sidewalks, public grounds, streams and

bridges of the City of Galesburg, within its present and future corporate limits, for placing, taking up and repairing mains, hydrants and other structures and devices for the service of water."

Section 2 of the ordinance provided that there should be two pumping engines, having a specified capacity, a stand-pipe, and not less than eight miles of mains for the distribution of water, of a sufficient size to furnish all the water required for the wants of the City and its inhabitants, and limited the range in size of the mains. It also provided for a specified test of the mains at their place of manufacture, and for the character of the fire-hydrants to be rented by the City, and that there should be a test of the capacity of the water works on their completion, when Shelton or his assigns should "cause to be thrown from any six hydrants six simultaneous streams, each through fifty feet of two-and-one-half inch hose and a one-inch nozzle to a height of one hundred feet."

Section 4 provided that "the water supplied by said works shall be good, clear water, and the source of supply shall not be contaminated by the sewerage of said City."

Maximum rates for charges for water to consumers by Shelton or his assigns were specified.

Section 7 reserved to the City the right to purchase the water works, on certain conditions, at any time after the expiration of fifteen years from the passage and approval of the ordinance.

By section 8 it was provided that, in consideration of the benefits which would be derived by the City and its inhabitants from the construction and operation of the water works, and in further consideration of the water supply thereby secured for public uses, and as the inducement to Shelton or his assigns to accept the provisions of the ordinance and contract and to enter upon the construction of the water works, the franchises thereby granted to and vested in Shelton or his assigns should remain in force and effect for thirty years from the passage of the ordinance; and that, for the same consideration and as the same inducement, the City thereby rented of Shelton or his assigns, for the uses thereafter stated, eighty fire-hydrants of the character hereinbefore described, for the term of thirty years from the passage of the ordinance, and agreed to locate them promptly along the lines of the first eight miles of mains within the city limits, under direction of the city council, as soon as Shelton or his assigns should have located the line of the mains under the direction of the city engineer. The City further agreed to pay rent for the eighty hydrants, to Shelton or his assigns, at the rate of \$100 each per year, and to pay rent at the same rate for any additional fire-hydrants, up to one hundred, directed by the city council to be erected, and certain specified rates for additional hydrants over one hundred, such rent to be paid in half-yearly installments, in January and July of each year, beginning from the date when each of the hydrants should be in successful operation, and to continue during the thirty years, unless the City should sooner become the owner of the water works, provided that it should not be liable for any hydrant rents for such time as the

works should not be able to supply the required amount of water.

It was also provided by section 13, that the ordinance should become binding, as a contract, upon the City, on the filing with the mayor of Shelton's written acceptance of its terms and conditions, and that, after such acceptance, the ordinance should constitute a contract, and should be the measure of the rights and liabilities of the City and of Shelton or his assigns.

On the 16th of May, 1888, Shelton and John C. Stewart, then mayor of the City, executed the following contract: "It is agreed that Nathan Shelton shall purchase of the City of Galesburg all the ten and six-inch water mains now laid in the streets of said City that he can use in the water works he proposes to build in said City, at the price that it will cost him to buy and lay new mains, less the depreciation in value of said pipes, which depreciation is to be determined by Mr. Shelton and the finance and water committee of the council of said City, and less the cost of relaying, recaulking and repairing said mains, should they have to be taken up, relaid, recaulked or repaired, and less the cost of recutting for cross-connections, and the City agrees to sell to Mr. Shelton, in case he shall erect his proposed water works as above, and deduct the pay for the same from the first hydrant water-works rent accruing from said City to said Shelton. This agreement for the sale of water mains does not include any mains that are imperfect. It is further agreed that said mains now in use shall not be disturbed further than shall be necessary to cut and make connections with said pipes, until the pipes are laid and ready for use in the adjacent streets."

On the 17th of May, 1888, the mayor signed the ordinance, and on the 19th of May, 1888, at the meeting of the city council, the following communication from Shelton was received and ordered to be filed: "Hon. John C. Stewart, Mayor of the City of Galesburg: I hereby accept the terms and conditions of the ordinance of said City entitled 'An ordinance providing for a supply of water to the City of Galesburg and its inhabitants, authorizing Nathan Shelton or assigns to construct and maintain water works, securing protection to said works, contracting with said Nathan Shelton or assigns for a supply of water for public use, and giving said City the option to purchase said works,' passed by the city council of said City May 12th, 1888, to all intents and for the purposes as by the 13th section of said ordinance I am to do. Nathan Shelton." The contract between Shelton and the mayor for the purchase by Shelton of the water mains from the City was thereupon approved by the city council.

Shelton then organized a joint-stock corporation, under the General Law of the State of Illinois, under the name of the Galesburg Water Company, with a capital stock of \$150,000, of which stock Shelton owned the amount of \$147,500. Shelton became its president, and on the 20th of July, 1888, by an instrument in writing, assigned to it all the franchises, rights, privileges, contracts and agreements granted to or made with him by the City by the aforesaid ordinance, and authorized the Company to re-

ceive all rentals to become due from the City for fire-hydrants pursuant to the ordinance, as well as all other profits which might accrue from the erection of water works thereunder.

On the 20th of June, 1888, the City of Galesburg filed a bill in equity against the Galesburg Water Company in the Circuit Court of Knox County, Illinois, making the following averments: Prior to the 30th of April, 1888, the City had established a system of water works for its protection from fire, and for that purpose had purchased and laid down water mains in certain specified streets, which mains were supplied with water for fire purposes by two manufacturing companies, each of which had its pumps and machinery for furnishing water connected with the mains. Such system was at that date in full operation and able at all times to supply ample protection for the City in case of fire. The ordinance before mentioned was passed and approved, the contract of May 16, 1888, was made, and the acceptance of the ordinance by Shelton was received and filed. The Galesburg Water Company was created and organized, and Shelton assigned to it his rights under the ordinance. The Company erected engine-houses, placed boilers and engines therein, erected a stand-pipe and sunk a well. On the 1st of December, 1888, the City received notice from Shelton of his assignment to the Company of his rights under the ordinance, and also a like notice from the Company, with a further notice that the hydrants were in successful operation and ready for use; and the city council thereupon ordered a test to be made of the water works on the 6th of December, 1888. On that day Shelton caused to be turned on six streams of water simultaneously, each through fifty feet of hose with a nozzle attached thereto, to a considerable height, in the main street of the City. Afterwards, and on the same day, the city council passed the following resolution: "Whereas the water works have been completed according to contract, and the test required by the ordinance concerning water works, passed May 12, 1888, has this day been satisfactorily made by the Galesburg Water Company: Therefore, resolved, that the City accept said water works from said Company." The Company thereafter made various efforts to supply the City with water in the quantity and of the quality called for by the ordinance, but failed to do so, although full opportunity therefor was afforded by the City. The water furnished was filthy in character, polluted by drainage from slaughter-houses and other offal, stagnant and wholly unfit for use, unhealthy and dangerous to life. On the 1st of June, 1889, an ordinance was passed by the city council in the following terms: "Section 1. That the ordinance entitled 'An ordinance providing for a supply of water to the City of Galesburg and its inhabitants, authorizing Nathan Shelton, or assigns, to construct and maintain water works, securing protection to said works, contracting with said Nathan Shelton, or assigns, for a supply of water for public use, and giving said City an option to purchase said works,' passed May 12th, 1888, be, and hereby is, repealed. All rights and privileges therein granted or thereby permitted are null. This ordinance shall take effect and be in force from and after its pas-

sage." That ordinance was approved by the mayor on the 10th of June, 1885, and on the next day a copy of it was served on the Company, with a notice that all privilege of purchasing the water mains belonging to the City was considered by the City to be at an end, and that it claimed the right and title to the mains.

The bill waived an answer on oath, and prayed for a decree that the contract contained in the ordinance of May 12, 1883, and the agreement of May 16, 1888, be set aside; that all rights conferred by the ordinance and contract upon Shelton or his assigns, or the Company, be decreed to be annulled; and that all right to purchase the water mains from the City be canceled.

The Company answered the bill, setting up facts in justification of its acts and denying the right of the City to relief. The answer also set up that, on the 1st of August, 1883, the Company executed to the Farmers' Loan and Trust Company of the City of New York, a New York corporation, a mortgage to that Company, as trustee for the holders of one hundred and twenty-five bonds of the Water Company, each for \$1,000, bearing that date, the principal payable in thirty years, with semi-annual interest at the rate of six per cent per annum, covering all the water works, franchise, contract, machinery, mains and appurtenances belonging to the Water Company; that the mortgage was duly recorded in the proper county; that the bonds were bought by parties on the faith of the mortgage and the acceptance of the works by the City, subsequently to such acceptance; that such mortgage was a valid and subsisting lien on the contract between the City and the Water Company; and that the Farmers' Loan and Trust Company and the bondholders were necessary parties to the suit.

Under a petition filed in the court February 12, 1886, by the Farmers' Loan and Trust Company, an order was made allowing it to be made a party; and on the 24th of February, 1886, it filed a petition for the removal of the cause into the Circuit Court of the United States for the Northern District of Illinois. The cause was removed and thereafter proceeded in the said circuit court.

On the 22d of April, 1886, the Farmers' Loan and Trust Company filed an answer to the bill, setting up, among other things, that the amount found to be due to the City for the water mains sold by it was duly fixed and settled between the City and the Water Company, and the balance found due from the Water Company was credited to the City upon its indebtedness to the Water Company for water rents under the ordinance, and the mains were transferred to and taken possession of by the Water Company, and operated by it as a part of its water system. It also set up that the property mortgaged to it by the Water Company, to secure the bonds, included the franchises and rights granted by the City to the Water Company and covered by the ordinance passed May 12, 1883, and also the water mains which had been bought by the Water Company from the City prior to the execution of the mortgage and the bonds; that the holders of the bonds were ignorant of the nature and quality of the water supply of the water works, except as the same were represented to the

bondholders by the City and the Water Company at the time of the execution of the mortgage and the sale of the bonds, and supposed, from such representations, that the water supply was ample and that the water works were satisfactory and in successful operation; that, before the negotiation and sale of any of the bonds, the purchasers of them were furnished with certified copies of the ordinance and of all the resolutions of the common council regarding the same, and with copies of the contracts and resolutions between the City and Shelton and the Water Company in regard to the purchase of the water mains, and with copies of the acceptance and assignment by Shelton of all his rights in the ordinance and mains to the Water Company; that it was represented to the bondholders by the City and its officials that the ordinance constituted a valid and binding contract between the City and the Water Company, according to its terms, and that the Company had become the owner of all the water mains; that it was further represented to the bondholders, by the City and its officials and by the Water Company, that that Company was in successful operation and furnishing water to the City and its inhabitants under the terms of the ordinance; that, on the faith of such representations and statements, the owners of the bonds up to the amount of \$125,000 purchased the same in good faith and for a valuable consideration, in and about January, 1884; that the bonds were outstanding and unpaid; that the Water Company had failed to pay the interest on the bonds, and it was in default, and the Farmers' Loan and Trust Company had filed a bill in the Circuit Court of the United States for the Northern District of Illinois against the Water Company, to foreclose the mortgage; that the City, in June, 1885, had forcibly taken possession of the water mains; that it had repudiated its liabilities under the ordinance and refused to pay the water rent under the same, whereby the mortgaged property was made almost valueless; that the City, by reason of such statements and representations, was estopped, as against the Farmers' Loan and Trust Company, from denying the validity of the ordinance, or the sale of the water mains; that, by reason of the mortgage and the bonds secured under it, the Farmers' Loan and Trust Company had a valid lien upon the ordinance and franchise, and upon the water mains as well as all other property of the Water Company; and that it denied the right of the City to rescind the ordinance, to repudiate the sale of the water mains, and to have any of the relief claimed in the bill, as against the Farmers' Loan and Trust Company.

A replication was filed to this answer on the 8d of May, 1886, and on a petition filed November 29, 1886, by Hardin Parrish, Ephraim W. Bond and R. Dale Benson, to be made parties defendant, an order was that day entered making them parties and giving leave to them to file a cross-bill. On the same day they filed an answer to the bill, adopting all the statements of the answer of the Farmers' Loan and Trust Company, and also filed a supplemental and cross-bill against the City, two of them being citizens of Pennsylvania and one of them a citizen of Massachusetts.

That bill averred, among other things, as

follows: A foreclosure suit by the Farmers' Loan and Trust Company was brought November 4, 1886, a decree of foreclosure and sale was made in it June 21, 1888, and thereunder all the rights, property and franchises of the Water Company were purchased by the plaintiffs for \$100,000, and, after a confirmation of the sale by the court, a deed of the property was executed by the master to them, November 8, 1888, so that they became its owners. They adopted, as a part of their supplemental and cross-bill, the answer of the Farmers' Loan and Trust Company to the bill filed by the City. Among the property sold to them under the foreclosure sale were the water mains which, when the mortgage was executed, were connected with and a part of the system of the Water Company and operated by it, the same having been before that time sold by the City to the Water Company. In June, 1886, the City took forcible possession of the water mains and cut and destroyed the connection of the same with the other mains of the Water Company, and took up and carried away the hydrants and faucets of the Water Company connected therewith, and entirely deprived that Company of the use of the same, and had ever since retained possession thereof and deprived the Water Company, and the Farmers' Loan and Trust Company, and the plaintiffs, of the use and possession of them. Without such mains the property purchased by the plaintiffs is almost, if not entirely, valueless, and cannot be operated, because the connection of the water mains had been cut and destroyed and the hydrants removed, and thus the plaintiffs were prevented from using and operating any of the property so purchased by them, and from furnishing water to private consumers and also to the City. The plaintiffs are ready and willing to operate the works and furnish water to the City or to private consumers, and would do so were they not prevented by the acts of the City. It is the intention of the plaintiffs, and they have the right, to extend the operation of the water system of the City and the mains thereof so as to cover the entire limits of the City, and also to extend the base of water supply so as to furnish always an abundant supply of good water for the needs of the City and of the private consumers therein, and there is an abundant supply of good water accessible for the water works and procurable by the plaintiffs, which it is their intention and they are ready to procure and supply. There is a large amount of money owing to the plaintiffs from the City for water rents earned by the Water Company or its receiver up to the time of the purchase by the plaintiffs, the claims for which passed to the plaintiffs by virtue of the sale, and also on account of the contract and water rents since the sale, and also on account of the acts of the City in cutting and destroying the water mains and taking possession of the same and preventing the plaintiffs from using them and from operating the water works.

The prayer of the supplemental and cross-bill, which waives an answer on oath, is that an accounting be had between the plaintiffs and the City to ascertain the amount due to the former; that a decree be made for its payment, and that the City restore to the plaintiffs the

water mains, hydrants, faucets and other property, and be enjoined from interfering with the plaintiffs in the possession thereof and in connecting the water mains with any of the other water mains belonging to them, and from violating any of the provisions of the ordinance passed May 12, 1888, and from interfering with the plaintiffs in the use of any of the property so purchased by them, and from collecting the water rents, or extending the water mains through any of the streets of the City, or extending the source of supply for the water works.

The City, on the 21st of December, 1886, answered the supplemental and cross-bill, denying the right of the plaintiffs in it to relief. A replication was filed to the answer of Parrish and others, and the court, on the 2d of April, 1887, made an order referring the case to John I. Bennett, as master, to take proofs and report the evidence, with his findings and conclusions thereon.

Voluminous proofs were taken before a special examiner and also some before the master, and the case was argued before the latter. On the 18th of May, 1887, he filed his report. It stated that some of the water-works bonds were sold at various times from the spring of 1884 to May, 1886, those bonds being represented in the litigation principally by the cross-plaintiffs Parrish, Bond and Benson. The master arrived at the following conclusions:

(1) The City had express authority by its charter to pass the ordinance of May 12, 1888, and to fix the rates of water rents for a period not exceeding thirty years; and it became binding on the City, and on Shelton, and was duly assigned by the latter to the Water Company.

(2) In view of the provisions of the ordinance, that the object for which the franchise was granted was expressed to be "for supplying the said City and the inhabitants thereof and of the adjacent territory with water for public and private uses;" that "the works shall be increased in capacity as the growth of the City and its needs require;" that "there shall be not less than eight miles of mains for the distribution of water in said City, of a sufficient size to furnish all the water required for the wants of said City and its inhabitants;" that "the water supplied by said works shall be good, clear water, and the source of supply shall not be contaminated by the sewerage of said City;" that Shelton or his assigns "shall with due diligence increase the steam and furnish fire pressure so long as needed for the extinguishment of any fire;"—it was manifest that the purpose of the ordinance was to furnish a fire protection to the City and its inhabitants, and to furnish water for other public uses, for the flushing of sewers, for the use of the city hall and its offices, for public schools, churches and public fountains, and also for the use of the inhabitants, upon rates fixed in the ordinance, for mechanical and domestic purposes.

(3) The contract of Shelton as to the quantity and quality of the water was in the nature of a condition precedent to a performance on the part of the City, except as to the opportunity to Shelton and his assigns to construct the works.

(4) The contract on the part of the City was a grant of the right to maintain the works for

thirty years; the right to use the public property of the City in constructing or repairing the works; the right to collect maximum annual rates for water used for private purposes; an agreement to pay for the use of hydrants, of a defined number, a fixed rate per hydrant, as rent for thirty years, and the right to adopt rules for the supply of water and to enforce their conditions when not contrary to law,—such rights acquired by Shelton and his assigns being dependent upon performance by Shelton and his assigns of his agreements. There was added the mutual agreement that after the expiration of fifteen years the City might purchase the water works.

(5) The contract contained in the ordinance was an entire one, and was not executed by a partial performance or by a performance as to one of the several essential undertakings on the part of Shelton and his assigns; and they assumed all the risk of obtaining a water supply sufficient in quantity and quality to comply with their contract.

(6) Although the Water Company constructed the building, machinery for pumping, stand-pipe and water mains and their attachments, within the time limited and in compliance with the terms of the ordinance, prior to December 6, 1888, it failed to furnish a water supply which complied with the requirements of the ordinance either in quantity or quality, either before or after the expiration of the limit prescribed in the contract for the construction and successful completion of the works. The details of this failure, as founded on the evidence, are given at length by the master, his conclusion being that the fact is established that the waters furnished by the Water Company were never pure, clear waters, nor furnished in the required quantity, but were always more or less contaminated by substances injurious to health and comfort, and which would naturally be derived from the sources from which the water supply was shown to have been obtained. Therefore, waiving the legal effect which the resolution of December 6, 1888, might have had as an estoppel upon the City, the Water Company, at no time, either before or after the fifteen months following May 17, 1888, furnished water to the City and its inhabitants in the quantity and of the quality required by the ordinance, and at no time complied with the ordinance and the contract.

(7) The resolutions passed by the common council on the 6th of December, 1888, were an estoppel against the City to deny the facts alleged in those resolutions and the City was bound to know that the Water Company might execute a mortgage upon its property and franchises to secure the bonds; and the council intended by the resolutions, so far as Shelton and the Water Company were concerned, to foreclose the question as to the amount of water mains which the latter had placed in the streets, the character of the structures which they had erected, the machinery which they put in place, and generally the mechanical execution of the contract, and also the question that they had complied with the test provided in the ordinance, so far as related to throwing fire-streams of the number and character required; but the test provided for in the ordinance was merely a test of sufficiency for fire service, and

was designed to determine the time when the water rents for the use of the hydrants should commence, and could not be a test as to the quantity of water capable of being supplied by the works every twenty-four hours, much less a test of the goodness and purity of the water. Whether or not the Water Company was able to furnish the required quantity of water every twenty-four hours, and whether or not its quality as to purity and goodness for domestic and other uses was in compliance with the ordinance, must rest upon facts as proved to exist. Moreover, the estoppel, so far as it did exist, was not a continuing one. The obligation of the Water Company to furnish the quantity and quality of water required by the contract was a continuing obligation, and was not met once for all by a compliance with the fire test of December 6, 1888. The right of the Company to enjoy the consideration of the contract was thereafter to depend upon its continuing to perform it. There was not, and could not be, a final and absolute acceptance of the water works by the City, without regard to a future compliance on the part of the Water Company with the requirements of the contract. The case was not one of works constructed for the City and to become its property upon acceptance; and the acceptance related merely to the sufficiency of the structures for fire service at the time.

(8) The agreement in regard to the purchase from the City of the water mains, and the contract formed by the ordinance and its acceptance, must be considered as one contract and construed together, and the agreement in regard to the water mains did not constitute an absolute sale of them, except on the compliance on the part of Shelton and his assigns with the conditions contained in the agreement itself in regard to the water mains. The City was not at any time to be deprived of the fire service of which the mains were a part, and they were not to be disturbed until Shelton or the Water Company were able to connect their works with those mains and continue the efficiency of the service by the new works when in successful operation; and the successful erection of those works and the accomplishment of the things required by the ordinance were a condition to the sale of the mains. The agreement as to the mains was therefore a conditional contract, and such delivery as was made under it was a conditional delivery. The City's mains were never disturbed in its streets, except to the extent of making connections with the mains subsequently laid by the Water Company and the attachment of some new hydrants. The valuation of the mains and the adoption of such valuation by the council amounted to no more than if their value had been stated at a definite sum in the agreement in regard to them. The letter of the mayor, written, in fact, after his term of office had expired, and antedated, stating that the mains had been delivered by the City to the Water Company, was of no effect; and, even if it had been written by him during his term of office, it was simply the expression of a legal opinion, and was not within the line of his official duty, without especial authority from the council.

(9) After the passage of the ordinance of June 1, 1885, rescinding the contract between

the City and the Water Company, the City forcibly disconnected its mains from the system of mains laid by the Water Company, and restored the system of fire protection which it had enjoyed before the Water Company constructed its works.

(10) The period within which the Water Company was required to complete its works and put them in successful operation expired in August, 1884. It failed to comply with its contract, and acknowledged that failure. It then resorted to the sinking of gang wells, which it completed in November, 1884; but they also failed as a source of supply. The City showed great patience and forbearance, and waited more than eight months after August, 1884, and then passed the repealing ordinance of June 1, 1885.

(11) The recaption of the mains, which were only conditionally in the possession of the Water Company under a conditional sale, and which conditions had not been complied with by Shelton and his assigns, was therefore rightful; and the Water Company can have no right to restitution, nor had it any legal right to a further extension of time for further experiments in respect to a new source of water supply.

(12) As to the question whether the plaintiffs in the cross-suit are entitled to any relief which could not be granted to the Water Company, the effect of the decree, sale and deed in the foreclosure suit was to vest in the purchasers at the sale the equitable interest of the trustee and of the bondholders and all the legal interest of the Water Company. Before the decree, the bill of foreclosure had been dismissed as against the City, and its interests were in no manner affected by the foreclosure. The foreclosure suit, having been initiated and brought to a conclusion while the present suit of the City against the Water Company was pending, was, as to this suit, a proceeding *pendente lite*; but the plaintiffs in the cross-suit stand as the representatives of the bondholders, and the equities of the latter should be considered in fixing the terms of the decree. The bondholders, as between them and the Water Company, were bona fide purchasers of the bonds. The Water Company and its agents holding the bonds for sale in 1884 and 1885, prior to May 20, 1885, represented that the works of the Water Company were in successful operation, and that it had complied, when the bonds were sold, with all the conditions of its contract with the City; and, the bonds being negotiable, there was no proof of any notice to any of their purchasers which would affect their validity. The bonds and the mortgage, however, were in no sense obligations of the City, nor was it a party to their issue; and it did not become in any manner responsible for any part of the debt created by the bonds. The letters written by the city engineer, the city attorney, the chairman of the water committee, the mayor of the City and perhaps other officers cannot operate as an estoppel on the City, because they were not written in pursuance of direct authority and were not within the official duty of those officers. They tend, however, to show the bona fides of the purchases made by the bondholders; and the plaintiffs in the cross-suit cannot have imputed to them the actual bad faith which may be inferred as against Shelton and

the Water Company in regard to the construction of the works, the water supply and the management of the affairs of the Water Company. They can have, however, no greater right than the Water Company would have had to be restored to the possession of the City's mains, and to be permitted by the City to further experiment in regard to securing a supply of water and complying with the contract.

(13) The City never paid any interest upon the bonds. The first payment of interest was made by the Water Company, and the fact of such payment was made known to some of the purchasers before they would purchase the bonds. The mortgage provided for the direct payment of hydrant rents to the trustee, to be applied in payment of interest; but no payment was ever thus made by the City to the trustee. That fact was known to the trustee, and, it being the agent of the bondholders, such knowledge was imputable to them. The Water Company afterwards defaulted in the payment of interest, and the foreclosure proceedings were had upon the basis of a default made in the payment of the interest due February 1, 1885. The bondholders knew or were chargeable with knowledge that there was a default in the payment of interest early in 1885 and a long time before June 1, 1885; and they also had knowledge of the existence of trouble between the City and the Water Company.

(14) There was a clause in the mortgage providing that if the Water Company should fail to perform any of its agreements contained in the mortgage it should be lawful for the trustee to take possession of the mortgaged property and operate it as a mortgagee in possession, for the benefit of the bondholders, and during such possession to make all needful repairs and replacements in the mortgaged property, and to receive the rents and profits therefrom until foreclosure. This could have been done at least as early as February, 1885, when there was a default in the payment of interest. The trustee, and the bondholders for whom it was acting, failed to take such possession; and the plaintiffs in the cross-suit are not entitled to the relief prayed in their cross-bill, while the City is entitled to have the ordinance of May 12, 1883, annulled.

(15) The decree canceling the franchise ought not to be unconditional, however, but should be conditioned that the City, or some person or corporation authorized by it, should pay into court, for the use of the plaintiffs in the cross-suit, the reasonable cash value of the mains constructed by the Water Company, the machinery, the stand-pipe, the engine-house, the land on which the same are located and perhaps other property, to be ascertained by a master, and also an equitable amount in satisfaction of water rents.

The City excepted to this report, and the trustee also excepted to it. The case was heard before Judge Gresham, and his opinion is reported in 34 Fed. Rep. 675. He concurred generally with the master in his views of the case, and said: "The purchasers of the bonds knew that unless water was furnished in quantity and quality as called for by the contract nothing would be due from the City for water rents. A different ruling would be equivalent

to holding that by adopting the resolution of December 6, 1888, the City guaranteed the payment of interest which would thereafter accrue on the bonds. The City did nothing of the kind, nor is it believed that the purchasers of the bonds invested their money believing that this resolution amounted to such guaranty. By the trust deed or mortgage the Farmers' Loan and Trust Company and the bondholders succeeded to the rights of the Water Company. If this were a suit between the City and the Water Works Company I should grant the relief prayed for without allowing anything for water furnished, for none was furnished in compliance with the contract. But the controversy now is between the City and persons representing the bondholders, and I think it equitable that the City should pay them a reasonable compensation for the water which was furnished up to the time it resumed possession of the old mains. I do not think the bondholders' committee is entitled to the old mains. They were not sold to Shelton unconditionally and absolutely. They were sold to him to be used in a particular way and for a particular purpose, and to be paid for by water furnished under the terms of the contract. Shelton and his successor, the Water Company, having failed to comply with the contract, although afforded ample time to do so, the City was authorized to resume possession of its old mains and protect its inhabitants as best it could against fire."

On the 2d of May, 1888, the court entered a decree adjudging that the contracts granting the franchise to Shelton and his assigns and providing for the sale of the water mains, and the ordinance of May 12, 1883, and all rights, franchises and privileges granted thereunder, were annulled and canceled, and the property in the water mains was revested and confirmed in the City; dismissing the supplemental and cross-bill of Parrish, Bond and Benson; ordering the City to pay to them a reasonable sum for water used from December 1, 1883, to June 1, 1885, and referring it to a master to ascertain such sum; and dividing the costs of the suit equally between the City and the plaintiffs in the cross-suit. The Farmers' Loan and Trust Company and the plaintiffs in the cross-suit prayed an appeal to this court from that decree.

The master, on the 13th of June, 1888, reported the sum to be paid, as the value of the use of the water, at \$3,000. The plaintiffs in the cross-suit excepted to this report, and on the 18th of June, 1888, the court overruled their exceptions, confirmed the report, and directed the City to pay into court for the use of the plaintiffs in the cross-suit the sum of \$3,000. From that decree, and from the prior decree of May 2, 1888, the plaintiffs in the cross-suit and the Farmers' Loan and Trust Company prayed an appeal to this court.

The appellants urge that the circuit court erred (1) in not dismissing the bill for want of equity, because the conditions of the contract were conditions subsequent; (2) in not holding that the City was estopped by the resolution of December 6, 1883; (3) in not dismissing the bill on the merits, on the ground that the Water Company was not in default; (4) in holding that the City had a right to repossess itself of the old mains which it had sold to Shelton and

through him to the Water Company; (5) in not granting the prayer of the cross-bill; and (6) in not sustaining the exceptions of the appellants to the first report of the master, and particularly those to his findings respecting the nature and scope of the contract.

It is quite clear, on the proofs, that the water furnished by the Water Company for the period of about nine months during which its works were operated was unfit for domestic purposes; that the course of the City was entirely forbearing and generous towards the Water Company; and that after the gang wells were completed in November, 1884, the supply of water was inadequate for the protection of the City from fire, and its quality was but little better than it was before the construction of the gang wells. After they were constructed the water distributed to the customers of the Company was surface water mixed with water from the gang wells. The Company was at no time able to furnish even bad water in the quantity required by the contract, or needed by the City for fire protection or for flushing the sewers. During the eighteen months which elapsed after the completion of the works, the Company had ample time to comply with the contract, and the City was under no obligation to give it further time to experiment. The taking possession by the City of the old water mains, after the passage of the resolution of June 1, 1885, was necessary for the protection of the City from fire. It could not continue, after annulling the contract, to receive from the Water Company water for fire purposes. The contract for the sale of the old mains was a part of the contract with the City in relation to the water works. The two agreements constituted one contract. The contract for the sale was merely a contract to sell, and not an executed contract of sale. The delivery of the old water mains was conditional, and made for a special purpose; and, the conditions not having been performed, no title to them passed either to the Water Company or to the trustee under the mortgage, and the recaption of them by the City was lawful. By the contract for their purchase, both what mains were to be purchased and the price to be paid for them remained to be determined, and so the agreement was executory. It was also by its terms conditional; and the delivery, too, was conditional, for a specific purpose, and without any intention that the City should, by the making of the agreement, part with its title to the mains.

In regard to the rights of the bondholders, although the purchasers of the bonds may have been influenced to purchase them by the terms of the resolutions of December 6, 1883, and by the letters from the officers and citizens of the City introduced in evidence, the City was not thereby estopped from refusing to pay the rental for the hydrants, which by the terms of the mortgage was to be applied in payment of the interest on the bonds, or from having the contract canceled. Although the bondholders exercised good faith in purchasing the bonds, they bought them knowing that the City was not a party to them, and that the payment of water rents by the City for the hydrants depended upon a continued compliance by the Water Company with the terms of the contract. The letters of the private citizens could not af-

fect the City; and the letters from the officers of the City could not affect its rights, because they were not written by its authority or within the scope of their powers as its officers.

The scope of the resolution of December 6, 1883, accepting the works, extended only to the fact that the provisions of the ordinance respecting their construction had been complied with and the test required by the ordinance had been satisfactorily made. It covered only the physical existence and condition of the artificial structures. The contract extended, however, to the amount of water which the works should be able actually and permanently to supply, and the character of the water to be supplied, all of which was uncertain, and the risk of which was assumed by Shelton and his assigns, their obligation being a continuing obligation, and their right to the continued enjoyment of the consideration for it being dependent upon their continuing to perform it. There was in the resolution of December 6, 1883, no guaranty that the Water Company could or would in the future comply with its contract. The liability of the City to pay in future the hydrant rents depended upon the future compliance of the Water Company with its contract; and in case of its failure the City would have the right to ask for the rescission of the contract. This the bondholders knew when they purchased the bonds. The City entered into no contract with them, and the passage of the resolution of December 6, 1883, could not deprive the City of the relief to which it would otherwise be entitled, on the failure of the Water Company to comply with its contract. The provisions of the ordinance requiring the Water Company to furnish the amount of water called for by it, and that the water supplied by the works should be good, clear water, and the source of supply not be contaminated by the sewerage of the City, were known to the bondholders when they purchased the bonds, and they also knew that the payment of the hydrant rents which would go to pay the interest on the bonds must depend upon the furnishing of water by the Water Company according to the contract.

Nor could the test required by the ordinance and satisfactorily made by the Water Company be a test of anything but the pressure power of the works. It could not be a test of the quantity of water which would thereafter be supplied by the works, nor of its continuing quality for domestic purposes. The resolution of acceptance cannot be considered as a guaranty to the bondholders that the Water Company would thereafter perform its contract for furnishing water in the quantity and of the quality called for by the ordinance. The bondholders were bound to take notice of the contents of the ordinance before purchasing their bonds, and purchased and held them subject to the continuing compliance of the Water Company with the terms of the ordinance. They bought the bonds as obligations of the Water Company, and not as evidences of indebtedness of the City; and they had information from the ordinance that the City would not be liable for hydrant rents if the Water Company failed to furnish water as agreed, and that if the Water Company neglected to comply with its contract the City would have the right to invoke the aid

of a court of equity to enforce a cancellation of the contract.

As to the old water mains, the trustee and the bondholders took the lien of the mortgage subject to the conditions of the agreement for the sale of them by the City to Shelton. Immediately after the passage of the rescinding resolution of June 1, 1885, the City proceeded to resume possession of the old mains, and its bill against the Water Company was filed immediately thereafter, and on the 20th of June, 1885. The Water Company never credited the City with any money due on account of rent for the hydrants, applying it as payment on account of the old water mains; nor did the City ever apply any money due by it to the Water Company for hydrant rents towards paying itself for the old mains.

The principal contention on the part of the appellants is that, on the acceptance of the ordinance by Shelton, a right in the franchise vested in him, which could not be defeated even though he afterwards failed to comply with its terms; that the failure of the Water Company to furnish water in the quantity and of the quality called for by the ordinance was only a breach of a condition subsequent; and that a court of equity will not lend its aid to divest an estate for such a breach. But it seems to us that in respect to a contract of the character of the present one, the ability of the Water Company to continue to furnish water according to the terms of the ordinance was a condition precedent to the continuing right of Shelton and his assigns to use the streets of the City and to furnish water for a period of thirty years; and that when, after a reasonable time, Shelton and his assigns had failed to comply with the condition as to the quantity and quality of the water, the City had a right to treat the contract as terminated, and to invoke the aid of a court of equity to enforce its rescission. A suit for a specific performance of the contract, or a suit to recover damages for its nonperformance, would be a wholly inadequate remedy in a case like the present. The danger to the health and lives of the inhabitants of the City, from impure water, and the continued exposure of the property in the City to destruction by fire, from an inadequate supply of water, were public questions peculiarly under the care of the municipality; and it was entitled and bound to act with the highest regard for the public interests, and at the same time, as it did, with due consideration for the rights of the other parties to the contract.

We see no error in the decree of the Circuit Court, and it is affirmed.

JEROME F. MANNING, *Plff. in Err.*,

ASA FRENCH.

(See S. C. Reporter's ed. 186-188.)

Jurisdiction to review state judgment—federal

NOTE.—As to jurisdiction in the United States Supreme Court, where federal question arises, or where are drawn in question statutes, treaty or Constitution, see notes to *Martin v. Hunter*, Bk. 4, p. 97, *Matthews v. Zane*, Bk. 2, p. 654, and *Williams v. Norris*, Bk. 6, p. 571.

question—decision of state court—petition for writ of error.

1. This court has no jurisdiction to review the final judgment of the state court in this case, being an action for damages for being prevented from acting as attorney and counselor in the Court of Commissioners of Alabama Claims, on the ground of the denial by the state courts of any title, right, privilege or immunity claimed under the Constitution, or treaty, or statute of, or commission or authority under, the United States, as the plaintiff in error set up and claimed; none such.
2. The decision that the defendant was not liable in damages, because in concurring in the order complained of he acted in his judicial capacity, in itself involved no federal question.
3. Nor can the plaintiff object that a federal question arose on the ground that the defendant claimed to exercise an authority under Acts of Congress, or under a commission held under the United States, since this was not plaintiff's contention, but the defendant's, and the state courts decided, not against but in favor of the authority so claimed.
4. The petition for a writ of error forms no part of the record upon which action here is taken.

[No. 1188.]

Submitted Jan. 13, 1890. Decided Jan. 27, 1890.

IN ERROR to the Superior Court of the State of Massachusetts to review a judgment of that court in favor of defendant in an action to recover damages for being prevented from acting as an attorney and counselor in the Court of Commissioners of Alabama Claims of the United States.

On motions to dismiss and affirm. *Dismissed.*
Opinion below, 149 Mass. 891.

Statement by Mr. Chief Justice Fuller:

Jerome F. Manning brought an action of tort in the Superior Court of Massachusetts against James Harlan of Iowa, Andrew S. Draper of New York and Asa French of Massachusetts, to recover damages for being prevented from acting as an attorney and counselor in or before the Court of Commissioners of Alabama Claims of the United States, or in relation to any matter of business pending therein, by the defendants, who "falsely pretended to be judges of said Court of Commissioners of Alabama Claims, and actually acted as judges thereof, though in truth and fact neither of them was a judge thereof." Service was had upon the defendant French, but upon neither of the other defendants, and he, for answer, denied each and every allegation in the declaration. The following statement appears in the record, in the "plaintiff's exceptions," which were allowed by the presiding judge:

"At the trial, which was without a jury, it appeared that the plaintiff in 1885 was and for many years had been an attorney and counselor at law duly admitted to practice in the Supreme Court of the United States, in the Court of Claims of the United States and in all the courts of this Commonwealth; that he acted as an attorney and counselor before the Court of Commissioners of Alabama Claims, commencing in January, 1875, and ending July 29, 1885; that he presented and prosecuted before said Court of Commissioners about seven

hundred and fifty petitions of the class known as 'Alabama Claims,' representing about fourteen hundred claimants and beneficiaries, and thereby became entitled to receive from said claimants and beneficiaries divers sums of money, amounting in all to many thousands of dollars; that the Court of Commissioners of Alabama Claims was established by Act of Congress approved June 28, 1874, chapter 459; re-established by another Act approved June 5, 1882, chapter 195, and continued by another Act approved June 8, 1884, chapter 62; that in 1874 said Court of Commissioners adopted, among other rules, the following: 'Rule V. Any person of good moral character admitted to practice as attorney or counsel in the Supreme Court of any State or Territory or the District of Columbia, or in any of the federal courts, on filing with the clerk a written statement of the date and place of such admission, with his name and post-office address in full, may, on motion, be admitted to practice in this court;' that on January 26, 1875, the plaintiff was, on motion of Robert M. Corwine, Esquire, admitted to practice in said Court of Commissioners; and that on October 5, 1882, said Court of Commissioners adopted certain additional rules, among which was the following: 'Rule XIV. All attorneys admitted to practice in the Court of Commissioners of Alabama Claims as created under the Law of Congress approved June 28, 1874, will be recognized as attorneys in this court, re-established under Law of Congress approved June 5, 1882;' but the plaintiff claimed that said Rules five and fourteen were unauthorized and of no effect, and that the said Court of Commissioners had no power to create a bar or to admit attorneys thereto or to expel them therefrom."

The record of the proceedings in *In Re Manning* in the said Court of Commissioners, duly attested, was put in evidence, which proceedings culminated in an order, made July 25, 1885, that "the said Jerome F. Manning be, and he hereby is, prohibited from appearing and acting in this court in relation to any matter or business therein pending, and from exercising in any way the functions of an attorney and counselor of this court,—this decree to stand until further order of the court." That record also contained a motion to rescind the foregoing order, and the action of the court denying the same.

The exceptions thus continue:

"It also appeared that on the twenty-ninth of July, 1885, said Court of Commissioners made the following order: 'Ordered, that the clerk of the court is hereby authorized to substitute the name of any attorney of this court in place of said Jerome F. Manning in any case upon the receipt of the request in writing from the claimant therein or from his legal representatives to that effect.'

"It also appeared that the defendant French was commissioned and qualified as a judge of said Court of Commissioners on or about July 5, 1882, and not otherwise, and that the defendant Harlan was commissioned and qualified about the same time, and not otherwise, and that the defendant Draper was commissioned and qualified in the year 1885, and not otherwise, and that each of said judges con-

curred in said orders of July 24, July 25, July 29 and October 15, 1885, touching the plaintiff.

"It also appeared that in addressing the court on July 25, as mentioned in the foregoing record, Robert Christy, Esq., as counsel for the plaintiff, read to said Court of Commissioners section 725 of the Revised Statutes of the United States and the decisions of the Supreme Court of the United States in the cases of *Ex parte Robinson*, in 86 U. S. 19 Wall. 505 [22: 205], and *Ex parte Bradley*, in 74 U. S. 7 Wall. 864 [19: 214], and argued that said commissioners had no power to prohibit the plaintiff from practicing before them.

"The defendant French admitted that he concurred with the other members of said Court of Commissioners in issuing and enforcing said orders of July 24 and 29, and that the plaintiff was thereby damaged, and claimed that the said Court of Commissioners had authority to issue and enforce the same, and that any loss sustained by the plaintiff thereby was *damnum absque injuria*.

"The plaintiff introduced evidence tending to show that each of the allegations in his declaration was true, and asked the court to make the following rulings:

"First. That the Court of Commissioners of Alabama Claims had no authority to make the order made by them touching the plaintiff on July 29, 1885, and that the same was unlawful.

"Second. That the defendant French having admitted that he concurred with the other defendants in issuing and enforcing said order of July 29, 1885, and that the plaintiff was thereby injured, the plaintiff is entitled to recover from said French compensation for all losses sustained by him as the direct result of said order of July 29, 1885, and of the enforcement thereof from thence to December 31, 1885.

"Third. That more than two years having elapsed after the reorganization of the Court of Commissioners of Alabama Claims, under the Act of June 5, 1882, and after the appointment of the defendant French and the other defendants, but prior to July 24, 1885, the said French and the other defendants had, on said last-mentioned day and thereafter, no lawful authority to act as judges of said Court of Commissioners of Alabama Claims.

"But the court declined so to rule, found the facts to be as stated in said printed record, ruled that the action could not be maintained, and found for the defendants.

"The plaintiff, being aggrieved by the foregoing rulings and refusals to rule, excepts thereto, and prays that his exceptions may be allowed."

The exceptions having been entered in the Supreme Judicial Court of Massachusetts, the cause was there argued and the exceptions overruled on the 21st day of June, 1889. (149 Mass. 391.) As to the contention of the plaintiff that the judges who in fact composed the court on July 25, 1885, were not lawfully in office, and particularly that the defendant French was not then lawfully in office, the court said: "It appears that French was commissioned and qualified as judge 'on or about July 5, 1882.' The argument is that, as by

the Act of June 5, 1882, the existence of the court was limited to two years, the commission of Judge French had expired before July 25, 1885, when the court passed the order of which the plaintiff complains. It is contended that, when the existence of the court was continued beyond two years by the Statute of June 8, 1884, it was necessary that the judges be reappointed in order lawfully to hold their office during the continued existence of the court." The court held that it was unnecessary to consider whether the plaintiff's right in the matter of his complaint would be greater against a judge *de facto* than against a judge *de jure*; that it did not appear that the judges were originally commissioned for any definite time; that they would continue to hold their office while the court continued to exist, unless they were lawfully removed; that it was within the power of Congress, by statute, to extend the existence of the court before the original term of its existence expired; and that the judges, by virtue of their original appointment, continued to be judges while the court continued to exist. It was also held that the Court of Commissioners of Alabama Claims had the powers which the statutes conferred upon it, and that under the Acts of Congress it had the power to prescribe by rule the qualification of attorneys to be admitted to practice before it, and therefore the power to determine whether the persons who asked to be admitted had the requisite qualifications, and whether the persons who had been admitted retained the requisite qualifications; and that "in the exercise of this power, after notice to the plaintiff and a hearing, that court prohibited the plaintiff from further exercising before it the functions of an attorney of the court. Congress had the right to confer this power exclusively upon that court, to be exercised as a judicial power, and the judges of the court are not liable to individuals for judicial acts done within their jurisdiction. *Randall v. Brigham*, 74 U. S. 7 Wall. 528 [19: 285]; *Randall, Petitioner*, 11 Allen, 473."

On the first day of July, 1889, judgment for costs was entered for the defendant. The plaintiff, Manning, thereupon sued out a writ of error from this court, and a motion to dismiss or affirm was made by defendant in error.

Mr. Chas. Theo. Russell, Jr., for defendant in error, in support of motion:

No federal question appears from the record to have been raised and decided adversely to the validity of any statute or authority of the United States.

Spies v. Illinois, 123 U. S. 181, 181 (31: 80, 91); *Brooks v. Missouri*, 124 U. S. 394 (31: 454); *Ocean Ins. Co. v. Polleys*, 38 U. S. 18 Pet. 157 (10: 105.); *Crowell v. Randell*, 85 U. S. 10 Pet. 368 (9: 458); *Williams v. Norris*, 25 U. S. 12 Wheat. 117 (6: 571); *Miller v. Nicholls*, 17 U. S. 4 Wheat. 311 (4: 578); *Lange v. Benedict*, 99 U. S. 68 (25: 469); *Montgomery v. Hernandez*, 25 U. S. 12 Wheat. 129, 132 (6: 575, 576); *Ryan v. Thomas*, 71 U. S. 4 Wall. 603 (18: 460); *Rector v. Ashley*, 73 U. S. 6 Wall. 143 (18: 783).

Upon a writ of error to a state court, this court can examine the recorded opinion to ascertain the ground of the judgment.

Kreiger v. Shelby R. Co. 125 U. S. 89 (81: 675).

The Court of Commissioners of Alabama Claims, as a court, had power to regulate the admission and removal of attorneys practicing before it.

Randall v. Brigham, 74 U. S. 7 Wall. 523, 535 (19: 285, 291); *Ex parte Garland*, 71 U. S. 4 Wall. 333 (18: 366); *Ex parte Seacombe*, 60 U. S. 19 How. 9 (15: 565); *Re Wall*, 18 Fed. Rep. 820, note; *Ex parte Wall*, 107 U. S. 265 (27: 552); *Bradley v. Fisher*, 80 U. S. 18 Wall. 335 (20: 646); *Ex parte Burr*, 22 U. S. 9 Wheat. 529 (6: 152); *Ex parte Terry*, 128 U. S. 289, 309 (32: 405, 408); *Savin, Petitioner*, 131 U. S. 267 (33: 150).

Even if the action of the court was unjustified or illegal, no action of law lies against the judges.

Ex parte Robinson, 86 U. S. 19 Wall. 505 (22: 205); *Randall v. Brigham*, 74 U. S. 7 Wall. 536 (19: 291); *Pratt v. Gardner*, 2 Cush. 68; *Chickering v. Robinson*, 3 Cush. 543; *Raymond v. Bolles*, 11 Cush. 315; *Wells v. Stevens*, 2 Gray, 115; *Kelley v. Dresser*, 11 Allen, 81.

Mr. Charles Cowley, for plaintiff in error, in opposition:

This court has jurisdiction when the record shows that a federal question was raised and decided adversely to the plaintiff in error.

Richards v. Mackall, 113 U. S. 539 (28: 1182); *Whitney v. Cook*, 99 U. S. 607 (25: 446); *Kansas Endowment & B. Assn. v. Kansas*, 120 U. S. 108 (30: 593); *Church v. Kelsey*, 121 U. S. 282 (30: 960); *Clark v. Pennsylvania*, 128 U. S. 395 (32: 487); *Bridge Props. v. Hoboken Land & I. Co.* 68 U. S. 1 Wall. 116 (17: 571); *McGuire v. Massachusetts*, 70 U. S. 8 Wall. 882 (18: 164).

Want of jurisdiction and irregularity of the writ are the only grounds for dismissal.

Foster v. Kansas, *Johnston*, 112 U. S. 205 (28: 680); *Crane Iron Co. v. Hoagland*, 108 U. S. 5 (27: 630); *Hecker v. Fowler*, 66 U. S. 1 Black, 95 (17: 45); *Sparrow v. Strong*, 70 U. S. 3 Wall. 97 (18: 49); *Canter v. American & O. Ins. Co.* 27 U. S. 2 Pet. 54 (7: 517); *Jacks v. Helena*, 115 U. S. 288 (30: 392).

The federal question must have been decided against the right claimed by the plaintiff in error.

Burke v. Gaines, 60 U. S. 19 How. 388 (15: 655); *Smith v. Adsit*, 83 U. S. 16 Wall. 185 (31: 810); *Chapman v. Goodnow*, 128 U. S. 548 (31: 238).

The federal question need not have been formally raised; but it is sufficient if it appears by clear and necessary intendment that a federal question was raised and presented to the state court.

Crowell v. Randell, 35 U. S. 10 Pet. 368 (9: 458); *Udell v. Davidson*, 48 U. S. 7 How. 769 (12: 907); *Wabworth v. Kneeland*, 56 U. S. 15 How. 348 (14: 724).

An attorney cannot be disbarred for contempt, as from time immemorial fine or imprisonment is the only penalty for contempt.

Clark v. People, Breese (Ill.) 840, 12 Am. Dec. 186; *State v. Start*, 7 Iowa. 499; *Ex parte Smith*, 28 Ind. 47; *People v. Turner*, 1 Cal. 143; *Turner v. Com.* 2 Met. (Ky.) 619; *Rice v. Com.* 18 B. Mon. 472; *Dillon v. State*, 6 Tex. 55; *Jackson v. State*, 21 Tex. 668.

138 U. S. U. S., Book 83.

Mr. Chief Justice Fuller delivered the opinion of the court:

Jurisdiction to review the final judgment rendered in this case cannot be maintained upon the ground of the denial by the state courts of any title, right, privilege or immunity claimed under the Constitution, or some treaty, or statute of, or commission held or authority exercised under, the United States, as the plaintiff in error set up and claimed none such. *Spies v. Illinois*, 128 U. S. 131, 181 [31: 80, 91]; *Chappell v. Bradshaw*, 128 U. S. 132 [32: 369]. And the decision that the defendant was not liable in damages, because in concurring in the order complained of he acted in his judicial capacity, in itself involved no federal question. *Lange v. Benedict*, 99 U. S. 68, 71 [25: 469, 470]. Nor can the plaintiff object that the validity of a statute of, or an authority exercised under, the United States was drawn in question, or that a title, right, privilege or immunity was claimed under the Constitution, or a statute of, or a commission held, or an authority exercised under, the United States, on the ground that the defendant claimed to exercise an authority under Acts of Congress, or under a commission held under the United States, since this was not plaintiff's contention, but the defendant's, and the state courts decided not against but in favor of the authority, title, right, privilege or immunity so claimed.

The three rulings asked by the plaintiff and refused by the court, were:

First. That the Court of Commissioners of Alabama Claims had no authority to make the order entered by them, touching the plaintiff.

Second. That the defendant French having admitted that he concurred with the other defendants in issuing and enforcing said order, the plaintiff was entitled to recover from him compensation for all loss sustained by him, as the direct result of its entry and enforcement.

Third. That more than two years having elapsed after the reorganization of the Court of Commissioners of Alabama Claims, under the Act of Congress of June 5, 1882, and after the appointment of the defendants, but prior to the date of the order, the defendants had no lawful authority to act as judges of said Court of Commissioners.

The court held that the term of the judges had not expired, and that they had authority to make the order, and, therefore, that the plaintiff could not recover, and in so holding decided in favor of the validity of the authority exercised by the defendant under the United States, and of the right he claimed under the statutes of the United States, and the commission held by him.

The petition for the writ of error avers "that said action involves divers federal questions, one of which is whether said Acts of Congress authorized said defendants to promulgate or enforce said order, and another of which is whether so much of said Acts of Congress as undertakes (if any part thereof undertakes) to authorize the defendants to make such order was not in violation of articles V. and VIII. of the Amendments of the Constitution of the United States, and the decision of said state court was adverse to the plaintiff's contention upon all of said federal questions."

The grounds thus suggested have been disposed of by what has been said, and it may be added that the petition for a writ of error forms no part of the record upon which action here is taken. *Clark v. Pennsylvania*, 128 U. S. 395 [32: 487]; *Warfield v. Chaffe*, 91 U. S. 690 [28: 888].

The writ of error must be dismissed for want of jurisdiction.

KNOX COUNTY, MISSOURI, *Appt.*,

v.

GEORGE W. HARSHMAN.

(See S. C. Reporter's ed. 152-156.)

When courts of equity will interfere with judgments at law—allegations in bill—decision in Harshman v. Knox County, 122 U. S. 306 (30: 1152), effect of—service upon county, how made—officer's return, effect of—neglect of the clerk.

1. A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixd with negligence of himself or his agents.
2. The allegation in the bill that the record of the judgment as it stands is a gross fraud upon the judgment debtor, is limited to the particulars specified in the bill.
3. The ground that the allegations in the petition on which the judgment was recovered were false in that they alleged that the subscription was made under the General Statutes of Missouri, authorizing the levy of a tax sufficient to pay the amount of the bonds and coupons, is fully met and disposed of by the opinion in *Harshman v. Knox County*, 122 U. S. 306 (30: 1152), that, by the judgment in favor of the relator, it was determined that the bonds sued on were issued under a statute which prescribed no limit to taxation for their payment, and that the findings in the judgment on that point are conclusive and bind the County.
4. By the Statutes of Missouri, the clerk of the county is made the agent of the county for the purpose of receiving service of process against it, and service upon him is legal and sufficient service upon the county.
5. The officer's return having stated that he served a copy of the summons upon the clerk, if the return were false, yet no fraud being charged or proved against the petitioner, redress can be sought at law only, and not by this bill.
6. Any neglect of the clerk in communicating the fact of such service to the county court was

NOTE.—In what cases equity will relieve from mistake or ignorance of material fact, see note to M'Ferran v. Taylor, Bk. 2, p. 436.

Whether equity will relieve against a mistake of law, see note to Hunt v. Rousmanler, Bk. 7, p. 27, Bk. 5, p. 589.

As to equity jurisdiction after trial at law, see note to Smith v. M'Iver, Bk. 6, p. 152.

As to when a judgment at law will be enjoined by a bill in equity, see note to Davis v. Tileston, Bk. 12, p. 366.

As to who are necessary parties in equity, see note to Marshall v. Beverley, Bk. 5, p. 97; also Christian v. Atlantic & N. C. R. Co. post, 589.

neglect of an agent of the County, and did not affect the validity of the service or of the judgment.

[No. 1212.]

Submitted Jan. 10, 1890. Decided Jan. 27, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Missouri dismissing a suit in equity by the County of Knox, Missouri, against Harshman, a citizen of Ohio, for a perpetual injunction against the prosecution of the peremptory writ of mandamus issued by that court pursuant to the judgment and mandate of this court in *Harshman v. Knox County*, 122 U. S. 306 (30: 1152), to compel the judges of the county court to levy a tax to pay a judgment recovered by him on bonds of the County issued for a subscription to the capital stock of the Missouri and Mississippi Railroad Company. *Affirmed.*

Statement by Mr. Justice Gray:

This was a bill in equity by the County of Knox, in the State of Missouri, against Harshman, a citizen of Ohio, in the Circuit Court of the United States for the Eastern District of Missouri, for a perpetual injunction against the prosecution of the peremptory writ of mandamus issued by that court, pursuant to the judgment and mandate of this court in *Harshman v. Knox County*, 122 U. S. 306 [30: 1152], to compel the judges of the county court to levy a tax sufficient to pay a judgment recovered by Harshman in the circuit court of the United States for \$77,874.46, on bonds issued by the County for a subscription to the capital stock of the Missouri and Mississippi Railroad Company.

The bill set forth that this judgment was rendered on default, upon a petition alleging that the subscription was authorized by a vote of two thirds of the qualified voters of the County at a special election held under § 17 of chap. 63 of the General Statutes of Missouri of 1866; and upon a return of the marshal that fifteen days before the return day he had made service upon the County by delivering a copy of the petition and summons to Frank P. Hall, the clerk of the county court, at Edina, in the County and district aforesaid.

The bill averred that the allegations of the petition were false; and that the bonds were in fact issued without the assent of two thirds of the voters, and under § 18 of the charter of the railroad company, by which the tax to be levied in payment of the bonds was limited to one twentieth of one per cent upon the assessed value of taxable property for each year.

The bill further alleged that neither the county court, nor any of the judges thereof, nor the county attorney, had any notice or knowledge of the commencement of the suit until after the end of the term at which the judgment was rendered, when they were informed thereof by Harshman's attorney; that Hall, the county clerk, after the pretended service upon him, never handed to the county court the copy of the petition and summons, or called the attention of the county court or its judges, or of the county attorney, to the fact of service, or said anything about it until, upon being inquired of by them after they had been informed of it as aforesaid, he denied that a copy of the petition

or summons had been served upon him, or that he had any knowledge or notice thereof; and the bill alleged, and charged the fact to be, "that neither a copy of said summons and petition, nor either of them, was served upon said Frank P. Hall, as stated by the marshal in his return to said summons, and that said return was and is false."

The bill also alleged that "said judgment on default was rendered on a false allegation of facts, and as the record stands it is a gross fraud upon your orator to the extent and in the particulars herein mentioned."

The answer averred that the allegations of the petition and the statements in the return were true, and that the County had full notice of the commencement of the action; and denied that the judgment was rendered upon a false allegation of facts, or was a fraud upon the plaintiff. The plaintiff filed a general replication.

At a hearing upon pleadings and proofs, the bill was dismissed, and the plaintiff appealed to this court.

Mr. James Carr, for appellant:

The subscription was not made under the vote cast at the special election held on the 12th day of March, 1887.

State v. Macon County Ct. 41 Mo. 453; *Macon County v. Shores*, 97 U. S. 273 (24:889); *Elliot v. Peirce*, 26 U. S. 1 Pet. 829 (7:164); *Maupin v. Franklin County*, 87 Mo. 827.

The 14th section of the 11th article of the Constitution of 1865 required legislative enactment to carry it out.

St. Joseph & D. C. R. Co. v. Buchanan County Ct. 39 Mo. 485; *Norton v. Brownsville Taxing Dist. Comrs.* 129 U. S. 479 (32:774); *Groves v. Slaughter*, 40 U. S. 15 Pet. 449 (10:800); *United States v. Bevans*, 16 U. S. 3 Wheat. 336 (4:404); *Ex parte Wall*, 48 Cal. 279.

The 17th section of chapter 68 of the General Statutes of 1866 does not provide the machinery for carrying the Constitution into effect. And said special election was void for want of proper legislation. If said subscription shall be held to have been made under said special election and said judgment by default enforced under chapter 68 of the General Statutes of Missouri of 1866, then the taxpayers would be deprived of their property for private purposes without "due process of law."

Earle v. McVeigh, 91 U. S. 508 (23:898); *Windsor v. McVeigh*, 93 U. S. 274 (23:914); *Nations v. Johnson*, 65 U. S. 24 How. 203 (16:631); *Hagar v. Reclamation District No. 108*; 111 U. S. 701 (28:569); *Davidson v. New Orleans*, 96 U. S. 97 (24:616); *Hurtado v. California*, 110 U. S. 516 (28:232); *Foster v. Kansas, Johnston*, 112 U. S. 201 (28:629); *Kennard v. Louisiana*, 92 U. S. 480 (23:478); *Northern Nat. Bank v. Porter Twp.* 110 U. S. 608 (28:258); *McClure v. Oxford Twp.* 94 U. S. 429 (24:129).

If the county court had held the opinion that two thirds of the qualified voters had voted in favor of making the subscription and that the election was in every other way a legal election, still it was discretionary with it whether to act under and by authority of it or not.

St. Joseph & D. C. R. Co. v. Buchanan 133 U. S.

County Ct. 89 Mo. 485; *Aspinwall v. Davies County Comrs.* 63 U. S. 22 How. 364 (16:296); *Marsh v. Fulton County*, 77 U. S. 10 Wall. 676 (19:1040); *Dallas County v. MacKenzie*, 94 U. S. 660 (24:182); *Norton v. Brownsville Taxing Dist. Comrs.* 129 U. S. 479 (32:774).

A State or county shall not lose its rights because an officer upon whom the law devolves a duty to be performed in order to secure the rights neglects to perform the duty.

Hannibal & St. J. R. Co. v. Smith, 76 U. S. 9 Wall. 95 (19:599); *Northern Nat. Bank v. Porter Twp.* 110 U. S. 608 (28:258); *Kelley v. Milan*, 127 U. S. 139 (32:77).

Where the officers of a private corporation are unfaithful to their trust, a court of equity, upon a proper showing, will allow stockholders to file a bill to prevent an intended fraud on them, or to set aside a fraud already consummated.

Dodge v. Woolsey, 59 U. S. 18 How. 338 (15:401); *Memphis v. Dean*, 75 U. S. 8 Wall. 64 (19:326); *Bronson v. La Crosse & M. R. Co.* 69 U. S. 2 Wall. 288 (17:725); *Hawes v. Oakland*, 104 U. S. 450 (26:827); *Newmeyer v. Missouri & M. R. Co.* 52 Mo. 81; *Dennison v. Kansas*, 14 West. Rep. 806, 95 Mo. 416.

The unauthorized *ex parte* statement by the county clerk that the bonds were issued in payment of the first subscription pursuant to said election does not bind the appellant for want of authority.

Kelley v. Milan, 127 U. S. 139 (32:77); *Jarroll v. Moberly*, 103 U. S. 580 (26:492); *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625 (23:628); *Norton v. Brownsville Taxing Dist. Comrs.* 129 U. S. 505 (32:784).

Mr. T. K. Skinner, for appellee:

The judgment complained of was regularly rendered upon process duly served.

The marshal's return of service cannot be controverted in this suit; it is conclusive as between the parties.

Walker v. Robbins, 55 U. S. 14 How. 584 (14:552); *McDonald v. Leewright*, 81 Mo. 29; *Heath v. Missouri, K. & T. R. Co.* 83 Mo. 623; *Hallowell v. Page*, 24 Mo. 590; *Delinger v. Higgins*, 26 Mo. 180; *Reeves v. Reeves*, 83 Mo. 28; *Stewart v. Stringer*, 41 Mo. 400; *Jeffries v. Wright*, 51 Mo. 215; *Phillips v. Evans*, 64 Mo. 17.

The presumption of law is that public officers do their duty.

Miller v. Dunn, 62 Mo. 225; *Baker v. Underwood*, 68 Mo. 889.

It is not averred in the bill or shown by the evidence, that there was either fraud, accident or mistake in the rendition of this judgment. The judgment being regularly rendered upon process duly served, in the absence of such averments, with evidence to support them, the court cannot disturb it.

Hendrickson v. Hinckley, 58 U. S. 17 How. 443 (15:123); *Orim v. Handley*, 94 U. S. 652 (24:216); *Brown v. Buena Vista County*, 95 U. S. 157 (24:422); *Embry v. Palmer*, 107 U. S. 3 (27:346); *George v. Tuttle*, 36 Mo. 141; *Dunn v. Hansard*, 87 Mo. 199; *State, Phelan, v. Engelmann*, 3 West. Rep. 217, 86 Mo. 562, 563; *Vastine v. Bast*, 41 Mo. 493; *Davis v. Staples*, 45 Mo. 567; *Ritter v. Democratic Press Co.* 63 Mo. 459; 2 Story, Eq. Jur. § 887; *Freeman Judgments*, § 486.

The fraud must be extrinsic to the matter

tried,—not merely fraud in the matter on which the judgment was rendered. Much less will mere falsity or error in the plaintiff's allegations suffice.

United States v. Throckmorton, 98 U. S. 68 (25:96); *Steel v. St. Louis Smelting & R. Co.* 106 U. S. 453, 454 (27:228); *Moffatt v. United States*, 112 U. S. 82 (28:625); *Carolus v. Koch*, 72 Mo. 647; *Smith v. Sims*, 77 Mo. 278; *Miller v. Major*, 87 Mo. 247.

The bill does allege that as the record stands the judgment is a gross fraud on the County. But as the pleader sets forth no fact which, if proven, would constitute fraud, this cannot be taken as entitling complainant to relief on the ground of fraud, even if the evidence were appropriate to sustain such a charge.

United States v. Atherton, 102 U. S. 372 (26:218); *Marquez v. Friable*, 101 U. S. 473, 478 (25:800, 802); *Voorhees v. Bonesteel*, 88 U. S. 16 Wall. 16, 29 (21:268, 270); *Noonan v. Lee*, 67 U. S. 2 Black, 499, 508 (17: 278, 281); *Smith v. Sims*, 77 Mo. 269; *Duffy v. Byrne*, 7 Mo. App. 417; *Dritt v. Snodgrass*, 66 Mo. 286; 1 Dan. Ch. Pl. and Pr. §24, and *note*; Bliss, Code Plead. § 211.

Original process is served by leaving a copy of the summons with the clerk of the county court.

Lafayette Ins. Co. v. French, 59 U. S. 18 How. 408 (15:453); *Leavenworth Co. Comrs. v. Sells*, 99 U. S. 624 (25:333); *Thompson v. United States*, 103 U. S. 484 (26:523); *Labette Co. Comrs. v. United States*, *Moulton*, 112 U. S. 221 (28:699); *Cloud v. Pierce City*, 86 Mo. 363; *Morgan v. Chicago & A. R. Co.* 76 Mo. 176; *Hannon v. St. Louis County*, 62 Mo. 318.

The subscription to pay which the bonds were issued, was made by authority of the vote taken under the General Law. The bonds are therefore voted bonds. This question is to be determined by the records of the county court alone.

Maupin v. Franklin County, 67 Mo. 327; *Kansas City v. Hannibal & St. J. R. Co.* 81 Mo. 296; *Johnson County v. Wood*, 84 Mo. 489, 514; *Dennison v. St. Louis County*, 33 Mo. 168.

The proposed recipient of the subscription was designated by the route it was to traverse, not by name.

Johnson County Comrs. v. Thayer, 94 U. S. 631 (24:133); *Moultrie County v. Fairfield*, 105 U. S. 370 (26:945); *Morgan County v. Allen*, 103 U. S. 498 (26:498).

The General Railroad Law expressly gave unlimited power of taxation.

State, Aull, v. Shortridge, 56 Mo. 130.

Mr. Justice Gray delivered the opinion of the court:

A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents. *Marine Ins. Co. v. Hodgson*, 11 U. S. 7 Cranch, 382, 386 [3:362, 363]; *Hendrickson v. Hinckley*, 58 U. S. 17 How. 443, 445 [15: 123, 124]; *Crim v. Handley*, 94 U. S. 652 [24: 216]; *Phillips v. Negley*, 117 U. S. 665, 675 [29: 1013, 1015].

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In the case before us, the bill in equity of the judgment debtor contains no allegation of any fraud on the part of the judgment creditor or his agents. The allegation that the record of the judgment as it stands is a gross fraud upon the judgment debtor is in terms, as it must be in legal effect, limited to the particulars specified in the bill. *United States v. Atherton*, 102 U. S. 372 [26: 218]; *Ambler v. Choteau*, 107 U. S. 586, 590, 591 [27: 322, 324]. The grounds assigned for the interposition of equity reduce themselves to two.

The first ground is that the allegations in the petition on which the judgment was recovered were false, especially in that they allege that the subscription was made under the General Statutes of Missouri, authorizing the levy of a tax sufficient to pay the amount of the bonds and coupons. But this ground is fully met and disposed of by the opinion delivered by Mr. Justice Matthews in *Harshman v. Knox County*, 122 U. S. 806 [30: 1152], in which it was said: "By the terms of the judgment in favor of the relator it was determined that the bonds sued on were issued under the authority of a statute which prescribed no limit to the rate of taxation for their payment. In such cases, the law which authorizes the issue of bonds gives also the means of payment by taxation. The findings in the judgment on that point are conclusive. They bind the respondents in their official capacity, as well as the county itself." 122 U. S. 819, 820 [30: 1155].

The other ground relied on is that the County had no notice of the commencement of the action against it. The bill of the County and the argument of its counsel proceed on two hardly consistent suppositions—that the clerk of the county court was never served with process, and that he was negligent in not seasonably informing the county court or county attorney that service had been made upon him. But in either aspect of the case the bill cannot be maintained.

The Statutes of Missouri provide that "where any action shall be commenced against any county, a copy of the original summons shall be left with the clerk of the county court fifteen days, at least, before the return day thereof." Missouri Rev. Stat. of 1879, § 3489. The clerk is thus made the agent of the county for the purpose of receiving service of process against it, and service upon him is legal and sufficient service upon the county. *Leavenworth County v. Sells*, 99 U. S. 624 [25: 533]; *Thompson v. United States*, 103 U. S. 480 [26: 521]; *Weil v. Greene County*, 69 Mo. 281. The officer's return stated that he served a copy of the summons upon the clerk. If that return were false, yet, no fraud being charged or proved against the petitioner, redress could be sought at law only, and not by this bill. *Walker v. Robbins*, 55 U. S. 14 How. 584 [14: 552]. But if the question of the truth of the return could be considered as open in this suit, the proofs given at the hearing clearly show that such service was in fact made. Any neglect of the clerk in communicating the fact to the county court was neglect of an agent of the County, and did not affect the validity of the service or of the judgment.

Decree affirmed.

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WILLIAM E. CHRISTIAN ET AL., Appts.,
v.
THE ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY ET AL.

(See S. C. Reporter's ed. 233-246.)

State, when necessary party—parties to equity suits—pledge in statute—declaration, when not a pledge—pledge as a mortgage—interest of State—right of redemption—State cannot be sued—where State is indispensable party, suit cannot be sustained.

1. Dividends due to the State cannot be seized and appropriated to the payment of its bonds, nor can stock held and owned by the State be sold and transferred, through the medium of a suit in equity, without making the State a party to the suit.
2. All persons whose interests are directly to be affected by a suit in chancery must be made parties.
3. A pledge, in the legal sense, requires to be delivered to the pledgee. He must have the possession of it.
4. A declaration in a Statute that as security for the redemption of state certificates of debt the public faith of the State is pledged to the holders thereof, is only a promise on the part of the State to redeem the certificates.
5. A further declaration in such Statute that all the stock held by the State in a Railroad Company shall be pledged for the same purpose, and any dividend declared thereon shall be applied to pay the interest on said bonds, is only a promise that the stock shall be held and set apart for the payment of the bonds, and that the dividends shall be applied to the interest. It is no actual pledge.
6. If such pledge amounted to a mortgage, it merely gave the mortgagee the right to a decree of foreclosure and sale; and the mortgagor, or his assignee, would be a necessary party in such a proceeding; but where the mortgagor in possession is a sovereign State, no such proceeding can be maintained.
7. In some cases where the State, not having the title in fee or the possession of the property, has some lien upon it, or claim against it, the foreclosure and sale of the property will not be prevented by the interest which the State has in it; but its right of redemption will remain.
8. A suit to effect a foreclosure and sale, or to obtain possession of property belonging to the State, cannot be maintained, for the reason that, in such a case, the State is a necessary party, and it cannot be sued.
9. The State is an indispensable party to any suit in equity in which its property is sought to be taken and subjected to the payment of its obligations; and, as the State cannot be sued, such a suit cannot be sustained.

[No. 46.]

Argued Oct. 30, 1889. Decided Jan. 27, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of North Carolina, dismissing a suit in equity to reach dividends on stock and apply them to bonds of the State, and for a sale of the stock held by the State, and that the Railroad Company be enjoined from paying to the State any dividends. *Affirmed.*

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The facts are sufficiently stated in the opinion.

Messrs. Jos. B. Batchelor, S. F. Phillips, W. H. Lamar and J. G. Zachry, for appellants:

The plaintiffs have a statutory lien.

Beall v. White, 94 U. S. 882, 886 (24: 173, 174); *Wilson v. Boyce*, 92 U. S. 820 (23: 608); *White Water Valley Canal Co. v. Vallette*, 62 U. S. 21 How. 414 (16: 154); *Baring v. Dabney*, 86 U. S. 19 Wall. 1 (22: 90); *Woodson v. Murdock*, 89 U. S. 23 Wall. 851 (22: 716); *U. S. v. Union P. R. Co.* 91 U. S. 72 (23: 224); *Ketchum v. St. Louis*, 101 U. S. 306 (25: 999); *Whitehead v. Vineyard*, 50 Mo. 30; *Collins v. Georgia Cent. Bank*, 1 Kelly (Ga.) 439; *Woodruff v. Trapnall*, 51 U. S. 10 How. 190 (12: 388); *Ingram v. Kirkpatrick*, 6 Ired. Eq. 463.

The security attaches to the bonds and follows them into whosoever hands they may come.

Curran v. Arkansas, 56 U. S. 15 How. 304 (14: 708); *Furman v. Nichol*, 75 U. S. 8 Wall. 44 (19: 870).

The circuit court, sitting as a court of equity, has jurisdiction of this suit.

Pennsylvania v. Wheeling & B. Bridge Co. 54 U. S. 13 How. 563 (14: 268); *Robinson v. Campbell*, 16 U. S. 8 Wheat. 212 (4: 872); *Boyle v. Zacharie*, 31 U. S. 6 Pet. 658 (8: 586); *Fitch v. Creighton*, 65 U. S. 24 How. 159 (16: 596); *Barber v. Barber*, 62 U. S. 21 How. 591, 592 (16: 229, 230); *South Fork Canal Co. v. Gordon*, 78 U. S. 6 Wall. 581 (18: 594); *Massie v. Watts*, 10 U. S. 6 Cranch, 148 (3: 181); *Payne v. Hook*, 74 U. S. 7 Wall. 430 (19: 261); *Irvine v. Marshall*, 61 U. S. 20 How. 565 (15: 998); *Clark v. Smith*, 88 U. S. 13 Pet. 195 (10: 123).

The fact that the State claims to be the owner of this stock does not oust the jurisdiction of the court.

Osborn v. Bank of U. S. 22 U. S. 9 Wheat. 859 (6: 233); *U. S. v. Peters*, 9 U. S. 5 Cranch, 115 (3: 58); *Curran v. Arkansas*, 56 U. S. 15 How. 304 (14: 705); *Woodruff v. Trapnall*, 51 U. S. 10 How. 206 (18: 389); *Furman v. Nichol*, 75 U. S. 8 Wall. 44 (19: 870); *U. S. Bank v. Planters Bank*, 22 U. S. 9 Wheat. 907 (6: 244); *Brisco v. Bank of Kentucky*, 86 U. S. 11 Pet. 257 (9: 709); *Louisville, C. & C. R. Co. v. Letson*, 43 U. S. 2 How. 497 (11: 853); *Darrington v. Alabama*, 54 U. S. 18 How. 17 (14: 82); *State v. Wagner*, *v. Stoll*, 84 U. S. 17 Wall. 425 (21: 650); *Baring v. Dabney*, 86 U. S. 19 Wall. 1 (22: 90); *Elliot v. Van Voorst*, 3 Wall. Jr. 299; *Wabash & E. Canal Co. v. Beers*, 67 U. S. 2 Black, 448 (17: 327); *U. S. v. Wilder*, 8 Sumn. 308; *Davis v. Gray*, 83 U. S. 16 Wall. 203 (21: 447); *Board of Liquidation v. McComb*, 92 U. S. 581 (23: 623); *Louisiana, Elliott v. Jumel*, 107 U. S. 711 (27: 448); *Cunningham v. Macon & B. R. Co.* 109 U. S. 446 (27: 992); *Ketchum v. St. Louis*, 101 U. S. 306 (25: 999).

The corporation is the only necessary party; it is a trustee and holds the stock in trust for its stockholders.

Vose v. Grant, 15 Mass. 505; *Wood v. Dummer*, 3 Mason, 368, opinion by Judge Story; 2 Story, Eq. Jur. § 1252; *Upton v. Tribblecock*, 91 U. S. 47 (23: 203).

Mr. R. H. Battle, for appellees:

A written transfer which shall pass the legal title is essential in the pledge of stock.

Jones, Pledges, § 152, and cases cited.

After the debt falls due, the pledgee may proceed personally against the pledgor for his debt or file a bill in chancery and have a judicial sale under a regular decree for foreclosure; or sell without judicial process, upon reasonable notice to the debtor to redeem.

Robinson v. Hurley, 11 Iowa, 410; Jones, Pledges, § 720; 2 Kent, Com. 12th ed. 582; *Kemp v. Westbrook*, 1 Ves. Sr. 878; *Vanderzee v. Willis*, 8 Bro. Ch. 21.

The mortgagor and every other person having an interest in the mortgaged property should be made defendants.

Jones, Chattel Mort. 788; 2 Jones, Mort. § 1868; *Greither v. Alexander*, 15 Iowa, 470; *Terrill v. Allison*, 88 U. S. 21 Wall. 289 (22: 684); *Robertson v. Carson*, 86 U. S. 19 Wall. 94 (22: 178); *Shields v. Barrow*, 58 U. S. 17 How. 180, 189 (15: 158, 160); *Russell v. Clark*, 11 U. S. 7 Cranch, 98 (3: 281); *Ribon v. Chicago, R. I. & P. R. Co.* 83 U. S. 16 Wall. 446 (21: 367); *N. Y. City Bank v. Carrollton R. Co.* 78 U. S. 11 Wall. 624 (20: 82); *Williams v. Bankhead*, 89 U. S. 19 Wall. 563 (22: 184).

Whenever it appears that a State is an indispensable party to enable the court to grant the relief sought, it will refuse to take jurisdiction of the suit.

Cunningham v. Macon & B. R. Co. 109 U. S. 446 (27: 992); *Hagood v. Southern*, 117 U. S. 52 (29: 805); *Re Ayres*, 123 U. S. 448 (31: 216).

If there is a contract to pledge, of course a bill for specific performance would not lie because the owner, who is to pledge, is the State of North Carolina.

United States, Levey, v. Stockslager, 129 U. S. 470 (32: 785); *Hagood v. Southern*, 117 U. S. 52 (29: 805).

Mr. Justice Bradley delivered the opinion of the court:

The State of North Carolina, by virtue of an Act of its Legislature, passed 12th February, 1855, and through its Board of Internal Improvements subscribed for \$1,066,600 of the capital stock of The Atlantic and North Carolina Railroad Company, a corporation created by Act of the Legislature of said State for the purpose of building a railroad from Beaufort to Goldsborough. In order to raise money to pay for this stock, the Board of Internal Improvement, by virtue of the same Act, issued the bonds of the State, signed by the governor and countersigned by the public treasurer, each for the sum of five hundred dollars, and in the following form, to wit:

"UNITED STATES OF AMERICA.

"\$500.00. \$500.00.

"It is hereby certified that the State of North Carolina is justly indebted to ——— or bearer five hundred dollars, redeemable in good and lawful money of the United States, at the Bank of the Republic, in the City of New York, on the first day of January, eighteen hundred and eighty-six, with interest thereon at the rate of six per cent per annum, payable half yearly, at the said bank, on the first days of July and January in each year from the date of this bond until the principal be paid, on surrendering the proper coupon hereto annexed. In

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witness whereof the governor of the said State, in virtue of power conferred by law, hath signed this bond and caused the great seal of the State to be hereunto affixed, and her public treasurer hath countersigned the same at the seat of government of the said State, this first day of January, eighteen hundred and fifty-six.

"(Signed)

"Thomas Bragg, Governor.

"Countersigned:

"D. W. Courts, Public Treasurer."

"Issued under an Act to amend an Act entitled An Act to Incorporate The Atlantic & North Carolina Railroad Company and The North Carolina & Western Railroad Company, chapter 282."

The Act which authorized the issue of these bonds contained the following guaranty of their payment (sec. 10):

"Be it further enacted, That as security for the redemption of said certificates of debt the public faith of the State of North Carolina is hereby pledged to the holders thereof, and in addition thereto all the stock held by the State in The Atlantic and North Carolina Railroad Company hereby created shall be pledged for that purpose, and any dividend of profit, which may from time to time be declared on the stock held by the State as aforesaid shall be applied to the payment of the interest accruing on said coupon bonds; but until such dividends of profit may be declared, it shall be the duty of the treasurer, and he is hereby authorized and directed, to pay all such interest as may accrue out of any moneys in the treasury not otherwise appropriated."

The State received certificates for the stock subscribed and still holds the same, which stock is represented in the meetings of the stockholders of the Railroad Company by a proxy appointed by the governor of the State, by virtue of the charter of the Railroad Company.

William E. Christian, a citizen of Virginia, the complainant in this suit, is the holder of ten of the bonds issued as aforesaid; and as no interest had been paid thereon since the year 1868, he filed this bill in July, 1888, in behalf of himself and all other holders of the bonds referred to who should come in and contribute to the expenses of the suit; and he made defendants to the suit The Atlantic and North Carolina Railroad Company, the president and directors of said Company, personally, F. M. Simmons, the proxy representing the stock owned by the State, and J. M. Worth, treasurer of the State. The bill sets forth the material parts of the Acts in question, which Acts created the Company and authorized the Board of Internal Improvements, on behalf of the State, to subscribe for two-thirds of the capital stock of the Company; and, for that purpose, to borrow money on the credit of the State and issue bonds therefor. It particularly sets forth the section before referred to, which guaranteed the payment of the bonds, and thereto pledged the stock held by the State. It states the fact of the subscription of the stock and the issue of the bonds, and alleges that the complainant is the bona fide holder for value of

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ten of the bonds, whose numbers are given, all having interest-coupons attached, the first payable January 1, 1866, and one on each bond for every six months thereafter. The bill then avers that, ever since the year 1868, the State has neglected and refused to make any provision for the payment of the interest, and that all interest accruing since that time remains due. As the next averment indicates the legal view on which the bill seems to be founded, we quote it in full. It alleges as follows, to wit:

"That the aforesaid certificates of debt or bonds are by virtue of the Act of the General Assembly of the said State of North Carolina hereinbefore recited, and of the pledges therein made by the said State, a lien upon the 10,666 shares of stock owned and held by said State, in the said The Atlantic and North Carolina Railroad Company, in payment for which the said bonds or certificates of debt were issued, and upon all dividends of profits that have been and that may hereafter be declared upon said stock, and that the holders of said certificates, among whom is your orator, are in equity and good conscience entitled to have and receive all such dividends of profits as the same are paid for and upon account of the interest due and accruing on said certificates."

The bill then states that it appears from the report of the officers of the Railroad Company made to the annual meeting of stockholders in June, 1881, that for the preceding fiscal year the Company had received more money than was expended in running and operating the road; and that, on the 1st of July, 1881, the Company leased all its property to The Midland North Carolina Railroad Company for the sum of \$40,000 per year, the lessee to keep the same in good repair; and then adds:

"That these sums not being required for the necessary expenses of said Company, or a large part thereof, should have been distributed to and among the stockholders of said Company by way of dividends, and that the holders of the coupons of said bonds or certificates, among whom is your orator, are entitled in equity and good conscience to have whatever sum may be received by the State as and for dividends on the stock owned by said State in said Company appropriated to the payment of the interest due and in arrears on said bonds."

The bill further states that the Midland Company having failed to comply with its contract, the lease has been declared forfeited and rescinded, and the property has been restored to the management of The Atlantic and North Carolina Railroad Company.

The bill then states on information and belief that it is the purpose and intent of the directors to again lease the road and property of the Company, to which the complainant objects for reasons set forth in the bill, and asks for an injunction to prevent the same being done; but as this part of the bill and the relief sought in relation thereto was abandoned at the hearing in the court below, and is not urged on this appeal, it is unnecessary to notice it further, except to quote the concluding paragraph, which states the nature of the claim of the bondholders upon the stock owned by the State in the Railroad Company, and is apposite to a

full understanding of complainants' position. It is as follows, to wit:

"XXII. That the holders of said bonds, having a lien on the said stock for the payment of the principal and interest of their said debt, are in equity the real owners of said stock, and that the same should be applied by said State, through its proper officers, to the payment of said debt, and that the State should do nothing herself nor allow anything to be done by her officers or by her associates in said Company which would destroy or impair the value of this security to her said creditors; and he insists, being so advised, that it is contrary to equity and good conscience for the proxy of the State to give his consent and thereby the consent of the State to any contract of lease to be made by said Company, without the consent and concurrence of the holders of said bonds, until the State shall have made adequate provisions for the payment of said debt, both principal and interest."

The prayer of the bill, so far as relates to the stock held by the State in the Railroad Company, and to the dividends thereon, is substantially as follows, to wit:

1st. That the bonds or certificates of debt held by the complainant and others may be decreed to be a lien upon the said stock and dividends until paid or redeemed.

2d. That all dividends on said stock may be paid to the complainant and the other bondholders who may join him in the suit.

3d. That if said dividends prove insufficient for this purpose, that a sale of said stock, or so much thereof as may be necessary to pay said certificates, may be made under the decree of the court.

4th. That an account may be taken of the amount due for interest, etc.

5th. That a receiver may be appointed to take possession of the dividends hereafter payable to the State.

6th. That the officers of the Railroad Company may be enjoined from paying to the state treasurer, or to any other person on behalf of the State, any dividends which may accrue to the State, and that the treasurer may be enjoined from receiving the same.

To this bill, Simmons, the proxy of the state stock, and Worth, the state treasurer, filed a joint answer, separate from the other defendants, admitting the material statements of the bill, so far as relates to the origin and character of the stock and bonds referred to, but denying that any dividends were or could be made on the stock, in consequence of the expenses and legitimate obligations of the Railroad Company. The concluding averment of their answer is as follows, to wit:

"VII. These defendants, further answering, say that two certificates of stock, one for one thousand and sixty-six shares, and the other for two hundred shares, have been issued to the State of North Carolina by the defendant Company, which certificates, together with the stock represented thereby, are the property of the State and are in her possession, and have been for a long time before the commencement of this suit, with authority in no one to part with the same except by the direction of the General Assembly of the State; and these de-

defendants are advised that, so being the property of the State and in her actual possession, they cannot be taken therefrom or in any wise be affected by any decree rendered in a cause to which the State is not a party; and these defendants rely upon the fact that the State is not a party to this suit as if the same had been specially pleaded."

The other defendants also filed answers to the bill, but it is unnecessary to refer to them, or to other incidental proceedings which took place in the cause. The important facts on which relief is claimed are as above recited from the statements of the pleadings. The bill was dismissed by the court below, and from that decree the present appeal was taken.

From the foregoing summary of the statements and prayer of the bill we see that its object and purpose is to obtain, in behalf of the complainant and other bondholders, the adjudication of a lien upon the stock held by the State of North Carolina in The Atlantic and North Carolina Railroad Company, and upon the dividends on said stock; and the enforcement of that lien by requiring said dividends to be paid to the bondholders, in satisfaction of the amount due on their bonds; and, if these are insufficient, by a sale of said stock, or so much thereof as may be necessary; aided by the appointment of a receiver to take possession of said dividends, and an injunction to restrain the Railroad Company, and its officers, from paying to the State treasurer, or to any other person on behalf of the State, and to restrain said treasurer from receiving, any moneys accruing and payable as dividends on said stock.

How the dividends due to the State can be seized and appropriated to the payment of the bonds, or how the stock held and owned by the State can be sold and transferred, through the medium of a suit in equity, without making the State a party to the suit, it is difficult to comprehend. The general rule certainly is, that all persons whose interests are directly to be affected by a suit in chancery must be made parties. *Russell v. Clark*, 11 U. S. 7 Cranch, 98 [8: 281]; *Shields v. Barrow*, 58 U. S. 17 How. 180, 189 [15: 158, 160]; *Ridon v. Chicago, R. I. & P. R. Co.* 88 U. S. 16 Wall. 446 [21: 367]; *Williams v. Bankhead*, 86 U. S. 19 Wall. 563 [22: 184]; *McArthur v. Scott*, 118 U. S. 340 [28: 1015]. The exceptions to the rule are pointed out in these cases, and do not touch the present case. The State has a direct interest to be affected by such a proceeding. The proposal is to take the property of the State and apply it to the payment of its debts due to the plaintiffs, and to do it through the instrumentality of a court of equity.

The ground on which it is contended that this may be done is, that the property is affected by a pledge, and may therefore be dealt with *in rem*. But a pledge, in the legal sense, requires to be delivered to the pledgee. He must have the possession of it. He may then, in default of payment of the debt for which the thing is pledged, sell it for the purpose of raising the amount, by merely giving proper notice to the pledgor. In the case of stocks and other choses in action, the pledgee must have possession of the certificate or other

documentary title, with a transfer executed to himself, or in blank (unless payable to bearer), so as to give him the control and power of disposal of it. Such things are then called pledges, but more generally collaterals; and they may be used in the same manner as pledges properly so called. If there is no transfer attached to or accompanying the document, it is imperfect as a pledge, and requires a resort to a court of equity to give it effect.

These propositions are so elementary that they hardly need a citation of authorities to support them. Reference may be made, however, to *Story on Bailments*, § 297 *et seq.*; *Casey v. Cavaroc*, 96 U. S. 467 [24: 779].

The stock and dividends of the State of North Carolina, now in question, have nothing about them in the nature of a pledge. The 10th section of the Act of 1855, relied on by the complainant for creating a pledge, must be understood as using the word in a popular and not in a technical sense. That section declares, first, that as security for the redemption of said certificates of debt the public faith of the State is hereby pledged to the holders thereof. This is no more than a solemn promise on the part of the State to redeem the certificates. The section next, in addition to the pledge of the public faith, declares that all the stock held by the State in The Atlantic and North Carolina Railroad Company shall be pledged for the same purpose, and any dividend of profit declared thereon shall be applied to the payment of the interest on said bonds. This was nothing more than a promise that the stock should be held and set apart for the payment of the bonds, and that the dividends should be applied to the interest. There was no actual pledge. It was no more of a pledge than is made by a farmer when he pledges his growing crop, or his stock of cattle, for the payment of a debt, without any delivery thereof. He does not use the word in its technical, but in its popular, sense. His language may amount to a parol mortgage, if such a mortgage can be created; but that is all. So in this case, the pledge given by the State in a Statute may have amounted to a mortgage, but it could amount to nothing more; and if a mortgage, it did not place the mortgagee in possession, but gave him merely a naked right to have the property appropriated and applied to the payment of his debt. But how is that right to be asserted? If the mortgagor be a private person, the mortgagee may cite him into court and have a decree for the foreclosure and sale of the property. The mortgagor, or his assignee, would be a necessary party in such a proceeding. Even when absent, beyond the reach of process, he must still be made a party and at least constructively cited by publication or otherwise. This is established by the authorities before referred to, and many more might be cited to the same effect. The proceeding is a suit against the party to obtain, by decree of court, the benefit of the mortgage right. But where the mortgagor in possession is a sovereign State, no such proceeding can be maintained. The mortgagee's right against the State may be just as good and valid, in a moral point of view, as if it were against an individual. But the State cannot be brought into court or sued by a private party without

its consent. It was at first held by this court that, under the Constitution of the United States, a State might be sued in it by a citizen of another State, or of a foreign state; but it was declared by the 11th Amendment that the judicial power of the United States shall not be construed to extend to such suits. *New Hampshire v. La.* 108 U. S. 76 [27: 656]; *Louisiana, Elliott, v. Jumel*, 107 U. S. 711 [27: 448]; *Marye v. Parsons*, 114 U. S. 327 [29: 207]; *Hagood v. Southern*, 117 U. S. 52 [29: 805]; *Re Ayers*, 123 U. S. 443 [31: 216].

There is a class of cases, undoubtedly, in which the interests of the State may be indirectly affected by a judicial proceeding without making it a party. Cases of this sort may arise in courts of equity where property is brought under its jurisdiction for foreclosure or some other proceeding, and the State, not having the title in fee or the possession of the property, has some lien upon it, or claim against it, as a judgment against the mortgagor, subsequent to the mortgage. In such a case the foreclosure and sale of the property will not be prevented by the interest which the State has in it; but its right of redemption will remain the same as before. Such cases do not affect the present, in which the object is to take and appropriate the State's property for the purpose of satisfying its obligations. *The Siren*, 74 U. S. 7 Wall. 152, 157 [19: 129, 181]; *Briggs v. Light Boat*, 11 Allen, 158, 178.

It remains true, therefore, that a bill will not lie to effect a foreclosure and sale, or to obtain possession of property belonging to the State; and for the very plain reason that, in such a case, the State is a necessary party and cannot be sued. This was distinctly held by this court in the case of *Cunningham v. Macon & Brunswick R. R. Co.* 109 U. S. 446 [27: 992]. In that case the State of Georgia had indorsed the bonds of a railroad company, taking a lien upon the railroad as security. The company failed to pay the interest of the indorsed bonds, and the governor of the State, under the power vested in him, took possession of the road, and put it into the hands of a receiver, who sold it to the State of Georgia and made a conveyance to the State accordingly. Thereupon the State, by the governor and other officers and directors, took possession of and operated the road. The holder of a second mortgage on the same property filed a bill to foreclose their mortgage and to set aside the sale made by the receiver as invalid, and to have priority of lien for reasons stated in the bill. They made the governor, the state treasurer and the state directors of the road parties defendant. This court held that the bill would not lie, because the State was an indispensable party. *Mr. Justice Miller*, delivering the opinion of the court, said: "Whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction." Again: "In the case now under consideration the State of Georgia is an indispensable party. It is in fact the only proper defendant in the case. No one sued has any personal interest in the matter, or any official authority to grant the relief asked. No foreclosure suit can be sustained without the

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State, because she has the legal title to the property, and the purchaser under a foreclosure decree would get no title in the absence of the State. The State is in the actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest adverse to the plaintiff in this suit is the interest of the State of Georgia in the property, of which she has both the title and possession."

These remarks are strikingly applicable to the present case. The State of North Carolina is the only party really concerned. The whole proceeding is virtually against her. The object of the suit is to get possession of her property; to sequester her dividends (if any there may be), and to compel the payment of them to the complainants; to seize and sell her stock in the railroad, stock of which she is in sole possession. Be it true that the bondholders have a lien on said dividends and stock, it is not a lien that can be enforced without suit, and that a suit against the State.

We are referred to a decision made at the circuit by *Chief Justice Waite* in the case of *Swasey v. North Carolina R. Co.* 1 Hughes, 17, in which, in a case similar to the present, it was held that, inasmuch as the shares of stock belonging to the State were pledged for the payment of the complainants' bonds, they were held by the railroad company as trustee for the bondholders as well as the State; and that if the trustee was a party to the suit, it was not necessary that the State should be a party. We are not certain that we are fully in possession of the facts of that case; but if they were the same as in the present case, with the highest respect for the opinions of the lamented chief justice, we cannot assent to the conclusions to which he arrived. In the general principles that a State cannot be sued; that its property, in the possession of its own officers and agents, cannot be reached by its creditors by means of judicial process, and that in any such proceeding the State is an indispensable party, *Chief Justice Waite* certainly did express his emphatic concurrence, in the able opinion delivered by him on behalf of the court, in the case of *Louisiana, Elliott, v. Jumel*, 107 U. S. 711 [27: 448]. His views in the *Swasey Case* seem to have been based on the notion that the stock of the State was lodged in the hands of the railroad company as a trustee for the parties concerned, and was not in the hands of the State itself, or of its immediate officers and agents. But if the facts in that case were as he supposed them to be, the facts in the present case are certainly different from that. No stockholder of any company ever had more perfect possession and ownership of his stock than the State of North Carolina has of the stock in question. There may be contract claims against it; but they are claims against the State, because based solely on the contract of the State, and not on possession.

We think that the State is an indispensable party to any proceeding in equity in which its property is sought to be taken and subjected to the payment of its obligations; and that the present suit is of that character, and cannot be sustained.

The decree of the Circuit Court is affirmed.

UNITED STATES, *Appt.*,
v.
CHARLES C. WATERS.

(See S. C. Reporter's ed. 208-216.)

Fees of district attorney—not subject to review by Attorney-General—power of Attorney-General over orders of courts.

1. The discretionary fee that may be allowed to a district-attorney for securing a conviction in a case of indictment for a crime tried by a jury is none the less an incident to the trial and judgment because its allowance is contingent upon a conviction.
2. In allowing the counsel fee to the district-attorney the court acts in its judicial capacity, and such allowance, being a judicial act of a court of competent jurisdiction, is not subject to the re-examination and reversal of the Attorney-General.
3. The supervisory power given the Attorney-General by section 868 of the Revised Statutes does not include the power of reviewing the discretion of a judge in making allowances, or of altering his orders and decrees therein.
4. The authority of the Attorney-General is purely of an executive character and cannot by any stretch of construction be made to extend over the proceedings, the judgments or the orders of the courts under whose jurisdiction the district-attorneys, under the law, are required to perform their duties.

[No. 95.]

Submitted Nov. 11, 1889. Decided Jan. 27, 1890.

A PPEAL from a judgment of the Court of Claims, in favor of claimant, in an action by a District-Attorney of the United States to recover a balance for services performed under section 824 of the Revised Statutes and withheld from him by the Treasury Department under the instructions of the Attorney-General. *Affirmed.*

The facts are stated in the opinion.

Reported below, 21 Ct. Cl. 80.

Mr. Benjamin Wilson for appellants.

Mr. Charles C. Lancaster for appellees.

Mr. Justice Lamar delivered the opinion of the court:

This is an action brought in the Court of Claims on the 18th of February, 1885, by a district attorney of the United States to recover a balance of \$320, alleged to be due him for services performed under section 824 of the Revised Statutes, and withheld from him by the accounting officers of the Treasury Department, under instructions from the Attorney-General.

The material facts in the case, as found by the court below, are substantially as follows: The claimant, Charles C. Waters, for six years immediately preceding the commencement of the action, had been United States District Attorney for the Eastern District of Arkansas, and in his official capacity, during that period, had tried twenty-two indictments for crimes, before a jury, securing a conviction in each case. The district court before which those causes were tried allowed him \$30 counsel fee in each case, in addition to the fees otherwise provided for, in accordance, as is claimed, with

the provisions of section 824 of the Revised Statutes. When his accounts were forwarded to the accounting officers of the Treasury Department they were submitted to the Attorney-General for his supervision (Rev. Stat. § 368), who reduced the amounts allowed claimant to \$10 in five, \$15 in fourteen and \$20 in three of the cases—in all \$320. The accounting officers of the Treasury Department followed the action of the Attorney-General and passed the accounts as reduced.

The practice of reducing the allowances made to district attorneys for counsel fees first began about 1878, when Attorney-General Devens issued the following circular:

"Department of Justice,
"Washington, ———, 1878.

"———, Esq.,

"United States Attorney, District of ———:

"Sir: Your attention is invited to the concluding clause of section 824 of the Revised Statutes of the United States, permitting an allowance not exceeding \$30, in addition to the other legal fees of the United States attorney, in proportion to the importance and difficulty of the cause, when a conviction is had before a jury on an indictment for crime. Whenever you have obtained the approval of the court to a special fee under this clause, you will forward with your account of the same to the first auditor a brief statement of the points and circumstances in each case, which render it one of the importance and difficulty contemplated by the statutes. Your account, together with the statement, will be submitted by the first auditor (in such cases as he deems necessary) to the Attorney-General, in order to determine from the means afforded whether such special counsel fees should be allowed in the final settlement.

"Very respectfully, Charles Devens,
"Attorney-General."

Previously to that time such allowances by the court were accepted without alteration. The claimant's whole counsel fees would not exceed the maximum of \$6,000 in any one year.

It is to recover this balance of \$320 that the suit is brought. The Court of Claims, upon the foregoing facts, rendered judgment in favor of claimant for the amount in dispute. 21 Ct. Cl. 80. The assignment of errors is a general one, and is merely to the effect that the court below erred, upon the facts found, in its conclusion of law, that the appellee was entitled to recover from the United States the sum of \$320.

The fees in question were allowed by the court under sections 823 and 824 of the Revised Statutes. Section 823 provides that "the following and no other compensation shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States, to district attorneys, clerks, etc., . . . except in cases otherwise expressly provided for by law." Section 824, after limiting the fees to the district attorneys for their official services therein named, each at a specific amount, irrespective of the labor and responsibility involved, provides in its concluding clause that, "when an indictment for crime is tried before a jury and a conviction is had, the district attorney may be allowed, in addition to the attorney's fees

herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars."

The exact amount of the allowance, within the prescribed limit, thus authorized, is left discretionary; but the section does not, in so many words, designate the person or tribunal by whom that discretion shall be exercised. The contention of the United States is that this discretionary power is vested in the Attorney-General; and that the fixing of the amount of a special counsel fee, in the absence of express legislative provision, is not a judicial but an executive act, to be exercised by the Attorney-General, as chief of the department to which district attorneys belong. The view on which the court below rested its decision was that this discretionary power pertains to the judicial functions of the court before which the cause was tried, and by which Congress manifestly intended that its importance and difficulty should be determined; and that, therefore, the allowance by the district court of the fees in question was conclusive upon the Attorney-General and the accounting officers of the Treasury Department.

It will be observed that none of the provisions of these sections has any reference whatever to the matter of rendering or revising accounts, or to the powers and duties of the Attorney-General, or of the accounting officers of the Treasury Department, in relation to the accounts of district attorneys. They relate exclusively to the compensation or fees to be taxed and allowed those officers; and the concluding paragraph applies alone to the allowance of the additional fee to the district attorney, for services rendered within the court on the trial of a cause, all the steps and incidents of which, including the taxation of costs arising in the course of the proceedings, are within the knowledge and under the jurisdiction of the court. They, in express terms, require the district attorney's fees to be taxed, and no other tribunal can tax them except the court having jurisdiction. In the case of *The Baltimore*, 75 U. S. 8 Wall. 377 [19: 463], referring to the provision of the Statute of February 26, 1853 (10 Stat. 161), part of the first section of which was incorporated *in hac verba* into these two sections of the Revised Statutes, it was held that fees and costs allowed to attorneys, solicitors and proctors in admiralty cases were taxable as costs, as an incident to the trial and judgment. Says the court in that case, page 392:

"Fees and costs, allowed to the officers therein named, are now regulated by the Act of the 26th of February, 1853, which provides in its first section that, in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, the following and no other compensation shall be allowed. Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as costs against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated."

No distinction is made by the court or by the statutes between the fees prescribed in admiralty

cases as an incident to the judgment and those so incident in other cases. All the costs and fees "therein described and enumerated" are put on the same footing, as taxable costs, incident to the judgment. The discretionary fee that "may be allowed" to a district attorney for securing a conviction in a case of indictment for a crime tried by a jury is none the less an incident to the trial and judgment because its allowance is contingent upon a conviction. Both before and since the enactment of the Statute of 1853, courts in the exercise of their discretion have allowed counsel fees in many cases without question when reviewed by this court. In *The Apollon*, 23 U. S. 9 Wheat. 362, 379 [6: 111, 115], and in *Canter v. The American and Ocean Insurance Companies*, 28 U. S. 3 Pet. 307, 319 [7: 688, 692], the allowance of counsel fees by the court below was affirmed by this court as a matter within the sound discretion of the court before whom the cause was tried; and those decisions were cited with approval in *Glendale Elastic Fabric Co. v. Smith*, 100 U. S. 110 [25: 547], and *Paper Bag Cases*, 105 U. S. 766, 772 [26: 959, 961]. In *United States v. Ingersoll*, 1 Crabbe, 135, suit was brought by the United States against a United States district attorney, for money had and received. He pleaded, as a set-off, among other items, \$5,083.20 for costs taxed and allowed in criminal cases, payment of which had been withheld by the Treasury Department. It was held that those costs (which were attorney's fees) constituted a fair and legal set-off; and the court laid down the principle, as concisely stated in the syllabus, that "the allowance of costs to a district attorney is altogether in the jurisdiction of the judge, and not within the power of the officers of the treasury."

In harmony with those decisions, and in accordance with the practical construction placed by the courts, by the Attorney-General himself and by the accounting officers of the Treasury Department, upon the Act of February 26, 1853 (now sections 823 and 824, Revised Statutes), the judge before whom the case was tried always exercised the discretion of allowing an additional counsel fee to district attorneys, in the specified cases, without the revision of any executive officer, from the passage of that Act until 1878.

But in 1878 the Attorney-General, in the circular letter hereinbefore set forth, assumed the authority to change the uniform practice, and to revise and alter the allowances of those counsel fees made by the judge. In our opinion this attempted change was not warranted by law. In allowing the counsel fee to the district attorney the court acted in its judicial capacity, and such allowance, being a judicial act of a court of competent jurisdiction, was not subject to the re-examination and reversal of the Attorney-General. *United States v. O'Grady*, 89 U. S. 22 Wall. 641 [22: 773]; *Butterworth v. United States*, Hoe, 112 U. S. 50, 67 [28: 656, 661]; *Hayburn's Case*, 2 Dall. 409, 410 [1: 436], note a.

If the Attorney-General has the right, upon information derived from a statement made to him by a district attorney as to the facts and circumstances of a trial in court, to reduce a fee allowed by the court, he may with equal right and propriety increase such fee should he

determine that the judge had underestimated the importance and difficulty of the cause tried before him, and had undervalued the services of such district attorney.

It is contended that the power of the Attorney-General to make the reduction in question is vested in him by virtue of section 368 of the Revised Statutes, which provides as follows:

"The Attorney-General shall exercise general supervisory powers over the accounts of district attorneys, marshals, clerks and other officers of the courts of the United States."

The supervisory powers given in this section are precisely those which were exercised by the Secretary of the Interior before the Department of Justice was established, and which were transferred from the Secretary of the Interior to the Attorney-General by the 15th section of the Act of June 22, 1870, chap. 150 (16 Stat. 164). That section provides that "the supervisory powers now exercised by the Secretary of the Interior over the accounts of the district attorneys, marshals, clerks and other officers of the courts of the United States shall be exercised by the Attorney-General, who shall sign all requisitions for the advance or payment of moneys out of the treasury, on estimates or accounts, subject to the same control now exercised on like estimates or accounts by the first auditor or first comptroller of the treasury."

It was never claimed by the Secretary of the Interior, nor considered by the officers of the Treasury Department, that those supervisory powers over accounts gave him any authority to make an allowance of fees under section 824 of the Revised Statutes, or to review and reverse a judicial order allowing such fees.

A close examination of the Statutes by which these supervisory powers are defined shows, as well stated in the opinion of the court below, that they extend to seeing that the accounts are in due form, in accordance with the law and regulations; that all receipts are properly credited; that all items of payments and allowances are authorized by law; that nothing is retained beyond the maximum fixed by the statute, and that in every respect the law relating to the same has been fully complied with; and does not include the power of reviewing the discretion of a judge in making allowances, or of altering his orders and decrees therein.

We are unable to perceive the pertinence and force of the argument drawn from the authority of the Attorney-General, as chief of the Department of Justice, exercising the power of superintendence and direction over the district attorneys as subordinate officers belonging to that Department. This authority is purely of an executive character, analogous to that of all the other chiefs of their respective Departments. The superintendence and direction which he exercises, however comprehensive and minute it may be, over the duties of those officers which are purely administrative and executive, cannot by any stretch of construction be made to extend over the proceedings, the judgments or the orders of the courts under whose jurisdiction the district attorneys, under the law, are required to perform their duties.

With regard to the supervisory power of the accounting officers of the Treasury Department

in this connection, it is to be observed that, according to the record in the present case, those officers simply "followed the action of the Attorney-General," which, as we have already seen, was unauthorized by law. The counsel for the United States, while insisting that the discretion in question is vested in the Attorney-General, concedes in his brief that it was not meant to be given to the accounting officers. In this connection he says:

"The accounting officers of the treasury could never have been given this discretion in fixing an additional allowance; for, from the nature of the case, they know nothing about the difficulty and importance of the work done by a district attorney, and because fixing compensation for services is foreign to their ordinary business. The discretion is of a kind they never exercise, and, moreover, when exercised by another, they cannot alter or amend what is done."

Further discussion of this point is not necessary. The powers and duties of the accounting officers are well described by the court below in the following language, with which we agree:

"Those powers and duties are well understood. The auditor merely examines and audits accounts, neither allowing nor disallowing the same, certifies balances, and transmits the same to the comptroller for his decision thereon. The comptroller decides whether or not the items are authorized by statute, and are legally chargeable. He has no power to review, revise and alter items expressly allowed by statute, nor items of expenditures or allowances made upon the judgment and discretion of other officers charged with the duty of expending the money or of making the allowances. His duty extends no further than to see that the officers charged with that duty have authorized the expenditures or have made the allowances." 21 Ct. Cl. 87, 88.

For the foregoing reasons, the judgment of the Court of Claims is affirmed.

JOHN COULAM ET AL., *Appts.*

v.

ANN DOULL.

(See S. C. Reporter's ed. 216-233.)

Utah Statute as to wills—extrinsic evidence—ambiguity in will—when explainable by parol evidence—construction of the courts of the State from whence Statute was derived.

1. Under the Statute of Utah, that when any testator shall omit to provide in his or her will for any of his or her children or for the issue of any deceased child, unless it shall appear that such omission was intentional, such child, or the issue of such child, shall have the same share in the estate of the testator as if he or she had died intestate, extrinsic evidence is admissible to show that the testator's omission to provide for a child was intentional.
2. Where a devise is, on the face of it, clear and intelligible, yet from external circumstances an

ambiguity arises as to which of two or more things or persons the testator referred to, it being legally certain that he intended one or the other, evidence of his declarations, of the instructions given for his will and of other circumstances of the like nature, is admissible to determine his intention.

3. The rule ordinarily followed in construing statutes is to adopt the construction of the courts of the country by whose Legislature the statute was originally adopted. In this case the court follows the construction of the State which was the source of the Statute, to wit: Massachusetts; not that of the State from which the Statute was immediately taken, to wit: California.

[No. 124.]

Submitted Nov. 18, 1889. Decided Jan. 27, 1890.

APPEAL from a judgment of the Supreme Court of the Territory of Utah, in favor of defendant, in an action by the children of John Coulam and by Zera Snow to recover an undivided interest in real estate in Salt Lake City. *Affirmed.*

Statement by Mr. Chief Justice Fuller:

John Coulam of Salt Lake City, in the County of Salt Lake and Territory of Utah, died at that place on the 20th day of May, A. D. 1877, leaving him surviving his widow, now Ann Doull (she having since his death intermarried with one George Doull), and John Coulam, George Coulam, Henry Coulam, Fanny Baker and Sarah J. Heiner, his children and only heirs-at-law. At the time of his death, the said John Coulam was seised in fee simple, and in possession, of the following described real property, to wit: "All of lot No. six (6), in block fifty-nine (59), in plot 'B,' Salt Lake City survey, in the City and County of Salt Lake and Territory aforesaid, with the tenements and appurtenances thereunto belonging." He left a last will and testament, which was duly admitted to probate, and was as follows:

"I, John Coulam, being of sound mind and memory, do make and publish this my last will and testament in manner and form following: I give and bequeath unto my beloved wife, Ann Coulam, all my personal property and real estate, to wit, the sum of one thousand and twenty-five (\$1,025) dollars, held in trust by Wells, Fargo & Co., and now due me from the Hon. William A. Hamill by note now in my possession; and I also give and bequeath unto my said beloved wife Ann my freehold estate known and recorded as lot six (6), block fifty-nine (59), plot 'B,' Salt Lake City survey, with all the messuages, tenements and appurtenances thereunto belonging; and all the rest, residue and remainder, and all the debts accruing to me, of my personal estate, goods and chattels of what kind and nature, soever, I give and bequeath the same to my said beloved wife, and I hereby revoke all former wills by me made."

Upon the 2d of November, 1885, the children of the testator and one Zera Snow brought an action in the District Court of the Third Judicial District of the Territory to recover an undivided interest in the real estate above described, the children claiming, as heirs-at-law, three quarters of the estate, real and personal, of Coulam, deceased, and Zera Snow, as owner by conveyance from said heirs-at-law made

since the death of John Coulam, an undivided one-fourth part of the real estate in question, the plaintiffs together averring title to an undivided three quarters thereof.

The complaint set up the will, and alleged "that in or by said will said John Coulam, testator, omitted to provide for any of his said children, the said plaintiffs; that it does not appear that said omission was intentional." The defendant answered, and denied "that the omission of said decedent testator to provide in his said will for his said children was not intentional on the part of said testator, and, on the contrary, alleges that said omission was intentional on the part of said testator and so appears." A jury having been expressly waived, the cause was heard by the court.

Upon the trial evidence was offered on behalf of the defendant, and admitted over the objection of the plaintiffs, tending to show that before and after and at the time of the execution and publication of the will, and up to the time of his death, the testator was in full possession of his faculties, and of sound and perfect memory; that he had no other property, when the will was executed or at his death, than that mentioned in the will; that he had previously personally prepared the drafts of two other wills, which he called for and which were before him when the will in question was drawn, both of those prior wills being in his own handwriting and signed by him, and omitting to provide for his children; that the instrument in question was drawn by a Mr. Campbell, to whom the testator gave instructions as to what it should contain; that the testator's wife, the defendant in this action, had lived with him for nearly thirty years, had raised his children, the youngest from babyhood, and had worked hard and helped to make the money with which the houses upon the lot were built; that the children had all attained maturity, were married and had homes of their own (chiefly bestowed on them by the testator and his wife), and were in comfortable circumstances; and that his daughters and sons were in daily attendance upon him during his last illness, and when the will was drawn up and executed. None of the evidence was offered for the purpose of showing advancements.

The court thereupon rendered its decision in writing, and made and filed the following finding of fact:

"That the omission and failure of John Coulam, senior, the testator, to provide for any of his children, the said plaintiffs, in his last will and testament, was intentional on his part."

And the conclusion of law: "That the defendant is entitled to recover herein."

Judgment was accordingly entered for the defendant, and the cause is brought here on appeal.

Messrs. William C. Hall and John A. Marshall, for appellants:

The intent of a testator must be found on the face of the will, and extrinsic evidence is inadmissible to show it, the exception being where such evidence is needed to remove a latent ambiguity.

1 Jarman, Wills, 708-710, and *note*; 1 Redfield, Wills, 589; 1 Greenl. Ev. § 290; Hawkins, Wills, 9; *Mann v. Mann*, 1 Johns. Ch. 281; *Tucker v. Seaman's Aid Society*, 7 Met. 188; *Spencer v. Higgins*, 22 Conn. 526; *Kurtz v. Hibner*, 55 Ill. 514; *Kenebel v. Scrafton*, 2 East, 541.

No extrinsic evidence is admissible to prove an intention against revocation.

Marston v. Roe, 8 Ad. & El. 14; 2 Greenl. Ev. §§ 684, 685; *Chicago, B. & Q. R. Co. v. Wasserman*, 22 Fed. Rep. 874.

Although a child had no legacy left him in the will of the parent, yet in Massachusetts, if an intention to omit him appeared, he would not be entitled to any portion of the estate.

Tucker v. Boston, 18 Pick. 167; *Wilson v. Fosket*, 6 Met. 400.

Parol evidence, including evidence of the parol declarations of the testator, is admissible in that State to show that the testator intended to omit to provide for his child.

Wilson v. Fosket, 6 Met. 400.

Iowa adopted the Massachusetts Statute and adopted with it the judicial construction placed thereon by the Massachusetts courts.

Lorieux v. Keller, 5 Iowa, 196.

Such mistake or accident as will permit the child to inherit has been held in Massachusetts to be perfectly consistent with an intentional omission of the child's name from the will.

Ramsdill v. Wentworth, 101 Mass. 126.

In Missouri to disinherit a child it is not necessary that he should be named or provided for in the will of the parent, if the omission to do so appears to be intentional; and such intention can be proved by intrinsic evidence.

Bradley v. Bradley, 24 Mo. 811; *Burch v. Brown*, 46 Mo. 441; *Pounds v. Dale*, 48 Mo. 270; *Wetherall v. Harris*, 51 Mo. 65; *Chace v. Chace*, 6 R. I. 407.

In adopting the California Statute, we adopted its received construction in California, which must be considered as accompanying the Statute to this Territory, and forming an integral part of it.

Cathcart v. Robinson, 30 U. S. 5 Pet. 264 (8: 120); *Wells, Res. Adjudicata* and *Stare Decisis*, § 500; *Bemis v. Becker*, 1 Kan. 248; *Estate of Garraud*, 35 Cal. 336; *Estate of Utz*, 43 Cal. 200; *Pearson v. Pearson*, 46 Cal. 610.

Evidence of surrounding circumstances cannot change the legal effect of clear and unambiguous words.

2 Taylor, Ev. (8th Eng. ed.) §§ 1201, 1202; 8 Jarman, Wills, 700, *note g*; 2 Jarman, Wills, 115; *Reynolds v. Commerce Fire Ins. Co.* 47 N. Y. 606; *Partridge v. Phoenix Mut. F. Ins. Co.* 32 U. S. 15 Wall. 578 (21: 280); *Maryland v. Baltimore & O. R. Co.* 89 U. S. 22 Wall. 105 (22: 713); *Kurtz v. Hibner*, 55 Ill. 514; *Waldron v. Waldron*, 45 Mich. 350.

No intention to omit to provide for the children appears by reason of the absolute devise to the appellee.

Chicago, B. & Q. R. Co. v. Wasserman, 22 Fed. Rep. 874; *Pounds v. Dale*, 48 Mo. 270; *Ramsdill v. Wentworth*, 106 Mass. 320; *Bush v. Lindsey*, 44 Cal. 126.

Messrs. Ben Sheeks and Joseph L. Rawlins, for respondent:

The evidence was admissible.

Greenl. Ev. § 297; 2 Whart. Ev. § 956; *At-*

kinson v. Cummins, 50 U. S. 9 How. 479 (13: 223); *Tillotson v. Race*, 22 N. Y. 122-126.

It was to afford relief to a child in case of actual oversight or mistake, and not to defeat the real intention of the testator, that the Statute was enacted.

Church v. Crocker, 8 Mass. 20; *Wilson v. Fosket*, 6 Met. 400; *Payne v. Payne*, 18 Cal. 291-303.

The effect of extrinsic evidence in this case is not to change the will, but to show that the will is precisely what it purports to be. For such purpose, extrinsic evidence is competent and admissible.

Stephen, Dig. of Ev. art. 91 (9) Chase's ed. 170; 1 Greenl. Ev. § 296; *Reynolds v. Robinson*, 32 N. Y. 103; *Hurst v. Beach*, 5 Madd. 351; *Abbott, Trial Ev.* 182, 186; *Taylor, Ev.* §§ 1227, 1229, 1231, and cases cited; 1 Williams, Exrs. 237, *note S*; *Wilson v. Fosket*, 6 Met. 400; *Buckley v. Gerard*, 123 Mass. 8; *Peters v. Siders*, 126 Mass. 135; *Loring v. Marsh*, 73 U. S. 6 Wall. 350 (18: 804); *Lorieux v. Keller*, 5 Iowa, 196, 203; *Reynolds v. Robinson*, 32 N. Y. 107.

The evidence was admitted to show that the publication of the will as it is, giving the property to the wife to the exclusion of the children, was not the result of oversight or mistake, but the intentional act of the testator.

Abbott, Trial Ev. 186.

The implied revocation, by a subsequent marriage and birth of a child, being founded on the presumption of intention, may be rebutted by parol evidence.

4 Kent, Com. 523; *Brady v. Cubitt*, 1 Doug. (Eng.) 81; *Brush v. Wilkins*, 4 Johns. Ch. 506.

Mr. Chief Justice Fuller delivered the opinion of the court:

Accepting the finding of fact that the testator intentionally excluded his children from any share of the property disposed of by the will, respecting which, upon this record, there could be no doubt, the only question in the case is as to whether the court erred in admitting extrinsic evidence to establish that the omission to provide for the children was intentional. The solution of this question depends upon the proper construction of the Statutes of Utah bearing upon the subject.

Under those Statutes a will or codicil to "pass the estate of the devisor" must be in writing; and by section 1 of "An Act Relative to the Estates of Decedents," approved February 18, 1876, which is section 685 of the Compiled Statutes of Utah of that year "every devise purporting to convey all the real estate of the testator" carried that subsequently acquired, "unless it shall clearly appear by his or her will that he or she intended otherwise."

Sections 9, 10 and 12 are as follows:

(693) "Sec. 9. When any child shall have been born after the making of its parent's will, and no provision shall have been made for him or her therein, such child shall have the same share in the estate of the testator as if the testator had died intestate; and the share of such child shall be assigned as provided by law, in case of intestate estates, unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child.

(694) "Sec. 10. When any testator shall omit to provide in his or her will for any of his or her children or for the issue of any deceased child, unless it shall appear that such omission was intentional, such child, or the issue of such child, shall have the same share in the estate of the testator as if he or she had died intestate, to be assigned as provided in the preceding section."

(696) "Sec. 12. If such child or children, or their descendants, so unprovided for, shall have had an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they shall take nothing in virtue of the provisions of the three preceding sections." (Compiled Laws of Utah, 1876, chap. II. tit. XIV. pp. 270, 271, 272.)

Section 19 provides that, in case of intestacy, if the decedent left a husband or a wife and more than one child, the estate of the decedent shall go, one fourth to the surviving husband or wife for life, and the remainder, with the other three fourths, to the children.

It will be seen that section 12 applies to advancements during the lifetime of the testator, and section 9 to a child born after the execution of the will, no provision having been made for it therein. The child is to take its share as provided by law in case of intestacy, "unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child." And section 10 relates to children in being, or the issue of any deceased child, at the time of the execution of the will, who are to take as in case of intestacy, "unless it shall appear that such omission was intentional."

As to a child born after the making of the will, the intention to omit must be apparent from the will; as to children in being when the will is made, the Statute does not say how it shall appear that the omission was intentional. But it is insisted on behalf of appellants that such intention is required in the latter case also to appear from the will, and cannot be shown by evidence *aliunde*.

The source of the Statute under consideration was undoubtedly that of Massachusetts upon the same subject, though it is said that this particular Statute was taken from a similar one in California.

The first and second sections of an Act of the Province of Massachusetts, passed in the year 1700 (12 Wm. III.), with their preambles, read as follows:

"Forasmuch as it often happens that children are not borne till after the death of their fathers, and also have no provision made for them in their wills,—

"*Be it therefore enacted, etc.*, That as often as any child shall happen to be borne after the death of the father, without having any provision made in his will, every such posthumous child shall have right and interest in the estate of his or her father, in like manner as if he had died intestate, and the same shall accordingly be assigned and set out as the law directs for the distribution of the estates of intestates.

"*And whereas*, through the anguish of the deceased testator, or through his solicitous intention though in health, or through the oversight of the scribe, some of the testator's chil-

dren are omitted and not mentioned in the will, many children also being borne after the making of the will, tho' in the lifetime of their parents,—

"*Be it therefore enacted, etc.*, That any child or children not having a legacy given them in the will of their father or mother, every such child shall have a proportion of the estate of their parents given and set out unto them as the law directs for the distribution of the estates of intestates; *provided*, such child or children have not had an equal proportion of his estate bestowed on them by the father in his lifetime." (1 Mass. Prov. Laws, 480.)

This Provincial Act was in effect repealed by an Act of the Commonwealth of Massachusetts, passed February 6, 1784, by which it was revised, the phraseology somewhat changed and the preambles omitted. (Mass. Stat. 1788, chap. 24, §§ 1, 8.)

By the first section of this latter Act any person seised in fee simple of any estate is authorized to devise the same to and among his children or others, as he shall think fit, without any limitation of persons whatsoever. By the eighth section it is provided "that any child or children, or their legal representatives in case of their death, not having a legacy given him, her or them in the will of their father or mother, shall have a proportion of the estate of their parents assigned unto him, her or them, as though such parent had died intestate; *provided* such child, children or grandchildren have not had an equal proportion of the deceased's estate bestowed on him, her or them in the deceased's lifetime."

The supreme judicial court held that the object of the Statute was to furnish a remedy solely for those cases, where, from accident or other causes, the children or grandchildren might be supposed to have been forgotten by the testator in making his will; and that, whenever from the tenor of the will or any part of it, sufficient evidence appeared to indicate that the testator had not forgotten his children or grandchildren, as the case might be, when he made his will, they should not be entitled to a distributive share of his estate, although no legacy was given them by the will. *Terry v. Foster*, 1 Mass. 146; *Wild v. Brewer*, 2 Mass. 570; *Church v. Crocker*, 3 Mass. 17; *Wilder v. Goss*, 14 Mass. 357.

Thus, although the Statute provided that a child should take, notwithstanding its name was omitted, the court ruled that if on the face of the will it appeared that such omission was intentional, the child could not take; hence, whenever the will was silent, the child took, and to prevent that result, where such silence was by design, the Statute was amended, so as to read as follows:

"When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, they shall take the same share of his estate, both real and personal, that they would have been entitled to if he had died intestate, unless they shall have been provided for by the testator in his lifetime, or unless it shall appear that such omission was intentional, and not occasioned by any mistake or accident." (Sec. 21, chap. 62, Rev. Stat. Mass. 1836.)

How appear? Evidently *aliunde* the will. If it must appear upon the face of the will that the omission was intentional, the words inserted in the Statute were superfluous; for, if it did so appear the child could not take, notwithstanding the provision that in case of omission it should take, inasmuch as the latter provision was only inserted to give the omitted child a share, not against the intention of the testator, but because of the presumption of an oversight. Hence, in *Wilson v. Fosket*, 6 Met. 400, the court held that under the Statute as amended evidence *dehors* the will was admissible to establish that the omission was intentional; and such is the settled law of Massachusetts. *Converse v. Wales*, 4 Allen, 512; *Buckley v. Gerard*, 128 Mass. 8; *Ramodill v. Wentworth*, 101 Mass. 125. In the latter case the court said: "The operation of the Statute is peculiar, but there is no violation under it of the rules of evidence. The only issue is whether provision was omitted in the will by design, and without mistake or accident. Parol evidence is admitted, although the result may change or modify the disposition of the testator's estate. The will is used to show that there is no legacy under it; and however the issue may be established, there is no conflict with its terms."

In *Bancroft v. Ives*, 3 Gray, 367, the Statute of Massachusetts was held to apply to children born after the making of the will and before the death of their father. The argument was pressed that the language "omit to provide in his will" necessarily meant and should be confined to children living at the time of making the will. This argument was regarded by Chief Justice Shaw as plausible but not sound, because as a man's will is ambulatory until his decease, the time to which the question of omission applied was the time of the testator's death. If, therefore, he had then made no provision by his will, the case of the Statute arose, for he had made a will, but left a child without having made any provision for such child.

By the Utah Statute, however, specific provision is made for children born after the making of the will, and also for children in being but omitted when the will is made. Children born after the making of the will but before the decease inherit, unless it appears from the will that the testator intended that they should not. And this applies to posthumous children.

Mr. Jarman lays it down that marriage and the birth of a child, conjointly, revoked a man's will, whether of personal or real estate, these circumstances producing such a total change in the testator's situation as to lead to a presumption that he could not have intended a disposition of property previously made to continue unchanged. But this effect is not produced where there is a provision made for both wife and children by the will itself (*Kenebel v. Scrafton*, 2 East, 580), or by a previous settlement providing for both. 1 Jarman on Wills, *123, 125.

Revocation, treated as matter of presumption merely, was thought, in *Brady v. Cubitt*, 1 Doug. (Eng.) 31, open to be rebutted by parol evidence, and this is guardedly conceded by Chancellor Kent in *Brush v. Wilkins*, 4 Johns. Ch. 506, and by Mr. Greenleaf, 2d vol., § 684.

But, as is stated in a note to that section, the doctrine that the presumption is not conclusive has been overruled, upon great consideration, in the cases of *Marston v. Roe*, 8 Ad. & El. 14, and *Iraell v. Rodon*, 2 Moore, P.C. 51, in the former of which it was, among other things, resolved, that "where an unmarried man, without children by a former marriage, devises all the estate he has at the time of making his will, and leaves no provision for any child of a future marriage, the law annexes to such will the tacit condition that, if he afterwards marries, and has a child born of such marriage, the will shall be revoked;" and that "evidence not amounting to proof of publication cannot be received in a court of law, to show that the testator intended that his will should stand good, notwithstanding his subsequent marriage and the birth of issue; because these events operate as a revocation by force of a rule of law, and independent of the testator."

The subject is regulated in this country by the statutes of the several States and Territories, marriage alone working revocation under some, and both marriage and birth of issue being required under others, while subsequently born children unprovided for are allowed to take unless a contrary intention appears.

But the provision we are considering concerns children in being when the will is made. As to children born after death or the making of the will, the reason why the intention to omit them should appear on the face of the will is obvious. It is the same as that upon which the doctrine of revocation rests—the change in the testator's situation. But this reason loses its force so far as children living when the will is made are concerned; and this explains the marked difference between the sections of the Statute before us applicable to the two classes.

The Statute raises a presumption that the omission to provide for children or grandchildren living when a will is made is the result of forgetfulness, infirmity or misapprehension, and not of design; but this is a rebuttable presumption, in view of the language employed, which negatives a taking contrary to an intentional omission, and at the same time leaves undefined the mode by which the affirmative purpose is to be established.

Legal presumptions drawn by the courts independently of or against the words of an instrument may be, in some instances, repelled by extrinsic evidence, and this statutory presumption of an unexpressed intention to provide may be rebutted in the same way.

Under section 12, a pretermitted child is entitled to no share if it has had an equal proportion by way of advancement, but it is not contended that this fact must necessarily appear from the will when that is not required by statute, yet proof of advancements and of intentional omission alike defeat the claimant.

The rule as to patent and latent ambiguities, so far as analogous, sustains the same conclusion. Where a devise is, on the face of it, clear and intelligible, yet from external circumstances an ambiguity arises as to which of two or more things, or of two or more persons, the testator referred to, it being legally certain that he intended one or the other, evidence of his declarations, of the instructions given for his

will, and of other circumstances of the like nature, is admissible to determine his intention.

The will in this case is entirely unambiguous. The testator's intention was that his wife should have the property. There being children at the time of the execution of the will, an ambiguity may be said to have been created by operation of the Statute, as to their having been intentionally omitted, which ambiguity evidence of the character named at once removed.

Children so situated do not set up title under the will but under the Statute. The will is used to establish that they have no legacy or devise under it. Then the inquiry arises whether the testator intended to omit them. Evidence that he did does not conflict with the tenor of the will. It simply proves that he meant what he said. Instead of tending to show the testator's real purpose to have been other than is apparent upon the face of the will, it confirms the purpose there indicated. The fact of the existence of children when a will is made is proven *dehors* the instrument, and since under the Statute that evidence opens up a question as to the testator's intention, which but for the Statute could not have arisen, and which by the Statute is not required to be determined by the will, we cannot perceive why the disposal of it should be so limited.

It is contended that the statutory provision in question was copied from that of California, and that we are bound by the construction previously put upon it by the courts of the latter State. The California Act declared that in case of the omission of the testator to provide in his will for his children, they should be entitled to the same share as in case of intestacy, "unless it shall appear that such omission was intentional." Laws of California, 1850, chap. 52, sec. 17.

In *Payne v. Payne*, 18 Cal. 291, 302, the Supreme Court of California, speaking through its then chief justice, Mr. Justice Field, said: "The only object of the Statute is to protect the children against omission or oversight, which not unfrequently arises from sickness, old age or other infirmity, or the peculiar circumstances under which the will is executed. When, however, the children are present to the mind of the testator, and the fact that they are mentioned by him is conclusive evidence of this, the Statute affords no protection, if provision is not made for them. The inference follows that no provision was intended;" and *Terry v. Foster*, *Wild v. Brewer*, *Church v. Crocker* and *Wilder v. Goss*, *supra*, were cited.

But in *Re Estate of Garraud*, 35 Cal. 386, it was held that evidence *aliunde* the will was not admissible to show that the omission to make provision for children was intentional, and, in respect to the Massachusetts decisions, the court was of opinion that the words "and not occasioned by any mistake or accident," found in the Statute of Massachusetts but not in that of California, were very material, and furnished the real ground for the admission of extrinsic evidence. We do not think so. While those words may strengthen the argument in favor of the admissibility of the evidence, it by no means follows that the construction of the Statute should be otherwise in their absence. The evidence which shows that the omission was intentional establishes that it

was not through accident or mistake. Action purposely taken by one in the sufficient possession of his faculties, and not induced by fraud or undue influence, excludes in itself the idea of casualty or error.

We are satisfied that this particular phraseology was used out of abundant caution, as serving to render the proper construction somewhat plainer, and that the construction must be the same, although those words are not used.

The rule ordinarily followed in construing statutes is to adopt the construction of the courts of the country by whose Legislature the statute was originally adopted, but we are not constrained to apply that rule in this instance. The original source of the Statute is to be found in the legislation of Massachusetts. The Supreme Court of California declined to treat the received construction in Massachusetts as accompanying the Statute and forming an integral part of it, upon a distinction which we do not regard as well drawn. That construction commends itself to our judgment, and we hold that the Supreme Court of the Territory properly applied it.

The evidence was competent, and the judgment must be affirmed.

Mr. Justice Brewer, not having been a member of the court at the time this case was considered, took no part in its decision.

UNITED STATES, *Appt.*, v.

JOHN HANCOCK, ET AL.

(See S. C. Reporter's ed. 196-197.)

Mexican grant, confirmation of—decree, when conclusive—Act of July 1, 1864—proof of fraud must be clear—survey.

1. A confirmation of a Mexican grant of a tract with specified boundaries, covered all the land within those boundaries, irrespective of quantity, and this, notwithstanding there appeared in the prior proceedings statements that the tract contained a certain amount, "a little more or less," which amount was very much less than that included within the boundaries.
2. When a decree gives the boundaries of the tract to which the claim is confirmed with precision, and has become final by stipulation of the United States and the withdrawal of their appeal therefrom, it is conclusive, not only on the question of title, but also as to the boundaries which it specifies.
3. The Act of Congress of July 1, 1864 (13 U. S. Stat. 334, § 7), requires the surveyor-general, in making surveys of the private land claims finally confirmed, to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries of the claim.
4. Clear, convincing and unambiguous proofs of fraud are required to set aside a patent; proofs which only create a suspicion do not bring the assurance of certain wrong.

NOTE.—That patents for land may be set aside for fraud, see note to *Miller v. Kerr*, Bk. 5, p. 381.

As to errors in surveys and descriptions in patents for lands and how construed, see note to *Watts v. Lindsey*, Bk. 5, p. 423.

5. Where a survey was made in good faith and has been unchallenged for over fifteen years, whatever doubts may exist as to its correctness must be resolved in favor of the title as patented.

[No. 688.]

Submitted Jan. 8, 1890. Decided Jan. 27, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of California, dismissing a suit in equity to set aside a patent of land in California. *Affirmed.*

Reported below, 80 Fed. Rep. 851.

Statement by Mr. Justice Brewer:

This is a bill filed to set aside a patent. The facts are these:

In 1848 Michael White petitioned for a tract of land at the mouth of the Cajon de los Mejicanos. This petition was sustained and a grant made by Governor Manuel Micheltorena, the Mexican governor of the Californias, which reads:

"Whereas Don Michael White, a Mexican by naturalization, has petitioned for his own benefit and that of his family for the place known by the name of 'Muscupiate,' bounded on the north by the foot of the mountain, on the south by Agua Caliente, and on the west by the 'Alisos' (sycamores), which are on the other side of the creek called 'De los Negros,' having practiced the proceedings and relative observation, according to the direction of the laws and regulations, exercising the authority conferred upon me in the name of the Mexican nation, I have concluded to grant him the aforesaid land, declaring it to be his property, by the present letters, subject to the approval of the most excellent Departmental Assembly, in and under the following conditions.

"8d. The land of which grant is hereby made consists of one league (*un sitio de granada mayor*), a little more or less, according to the explanation of the diagram which is attached to the respective *'expediente.'*

"The judge that shall give the possession shall cause it to be measured in conformity with the ordinance, reserving the overplus that may result to the nation for convenient uses."

On February 8, 1858, a petition for confirmation was presented in the name of the original grantee to the board of commissioners appointed to ascertain and settle private land claims, and on March 6, 1855, the grant was confirmed by an order in these words:

"In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the petitioner is valid, and it is therefore decreed that his application for a confirmation be allowed, with the following boundaries, to wit: On north and east by the foot of the mountains, on the south by the Agua Caliente, and on the west by the cottonwoods, which are on the other side of the creek, reference being had to the map accompanying the *'expediente.'*

An appeal was taken from this order of confirmation, but was dismissed on June 8, 1857. This confirmation is not challenged.

In 1867 instructions were issued by the surveyor-general of California for the survey; and the survey as made and returned to the surveyor-general's office was by him approved, and, on July 11, 1868, forwarded to Washington. This survey in January, 1871, was disapproved by the Secretary of the Interior as not conforming to the decree of confirmation, and a new survey ordered. On June 10, 1872, the surveyor-general reported that he had examined the original title papers and had compared them with the calls of the decree of confirmation, and had caused an examination to be made of the premises, and that therefrom he found that a survey made in strict accordance with the boundary calls of the decree of confirmation would include something like a league more of land than the present survey, and that the owners of the grant were satisfied with the present survey, and therefore suggested the propriety of accepting it. This report was returned to the Secretary of the Interior, by him approved, and, on June 22, 1872, the patent was issued. This bill was filed on May 29, 1885. The bill charges that the surveyor, Henry Hancock, who made the survey was the real owner of a large interest in the grant, although the title was nominally in another party; that concealing his interest, he secured his appointment as deputy surveyor, and in making the survey fraudulently included within its limits about twenty-six thousand acres more of land than justly belonged therein; that without any knowledge of the fraudulent acts of Hancock in the premises the surveyor-general thereafter published the required notice of the survey in a newspaper published in the City of Los Angeles, a city of another county and over fifty miles from the land, whereas, at the time, there was a newspaper published within the county and within two miles of the land. It also charges that after the survey had been disapproved by the Secretary of the Interior, Hancock fraudulently represented to the surveyor-general that a correct survey would include about one league in addition to what was embraced within the present survey, but that the owners were content to take the survey as it stood; and that, induced by and relying upon these fraudulent representations, the surveyor-general made the report and recommendation heretofore mentioned. The Circuit Court, on final hearing, dismissed the bill, and the United States appeals to this court.

Mr. Wm. A. Maury, Assistant Atty-Gen., for United States:

As against the government in its own suit, the regularity of all proceedings prior to issue of patent is not presumed, and the decision of the Land Department, therefore, is not binding upon the government when attacked on the ground of fraud.

U. S. v. Moffatt, 112 U. S. 24 (28: 623); *U. S. v. White*, 17 Fed. Rep. 561; *U. S. v. Rose*, 24 Fed. Rep. 196; *U. S. v. Marshall Silver Min. Co.* 5 McCrary, 825; *U. S. v. Minor*, 114 U. S. 233 (29: 110).

No person can be the agent of two contracting parties in the same transaction where their interests are conflicting.

Story, Agency, § 210; Paley, Id. §§ 10, 11; Whart. Agency, §§ 244, 245; *Flourance v.*

Adams, 2 Rob. (La.) 556; *New York Cent. Ins. Co. v. Nat. Protection Ins. Co.* 20 Barb. 470; *Panama & S. P. Teleg. Co. v. India Rubber, G. P. & T. W. Co.* L. R. 10 Ch. 515-520; *Michoud v. Girod*, 45 U. S. 4 How. 508 (11: 1076); *Ex parte Bennett*, 10 Ves. Jr. 381.

The policy of equity is to remove every possible temptation from the agent.

Pomeroy, Eq. § 958; *Story*, Eq. § 315 *et seq.*; *Fox v. MacKreth*, 1 Lead. Cas. in Eq. (4th Am. ed.) 188 *et seq.*

Nothing will defeat the principal's right of remedy except his own confirmation after a full knowledge of all the facts.

Pomeroy, Eq. Jur. § 959, and cases cited; *York Bldgs. Co. v. Mackenzie*, 8 Bro. Parl. Cas. 42; *Whelpdale v. Cookson*, 1 Ves. Sr. 9, 5 Ves. Jr. 682, *note*; *Davoue v. Fanning*, 2 Johns. Ch. 252.

The government cannot be estopped by the frauds or crimes or laches of its agents.

U. S. v. Southern Colorado Coal & T. Co. 5 McCrary, 568; *Gausson v. U. S.* 97 U. S. 584 (24: 1009); *U. S. v. Beebe*, 4 McCrary, 12; *U. S. v. Minor*, 114 U. S. 233 (29: 110); *U. S. v. Thompson*, 98 U. S. 486 (25: 194); *Michoud v. Girod*, 45 U. S. 4 How. 505 (11: 1077).

In case of conflict between the description in the deed and in the map, the map will prevail, if it is shown that the parties relied upon it.

McIver v. Walker, 18 U. S. 9 Cranch, 178 (3: 694); *Fossat Case*, 69 U. S. 2 Wall. 650 (17: 789); *U. S. v. Halleck*, 68 U. S. 1 Wall. 439 (17: 664).

Under the Mexican land-grant system, juridical possession bound the former government, and is equally binding upon our government.

U. S. v. Pico, 72 U. S. 5 Wall. 539 (18: 696); *Graham v. U. S.* 71 U. S. 4 Wall. 260 (18: 334); *Van Reynegan v. Bolton*, 95 U. S. 33 (24: 351); *Biley v. Heisch*, 18 Cal. 199; *Carpentier v. Thirston*, 24 Cal. 269; *Rich v. Maples*, 33 Cal. 102; *Thornton v. Mahoney*, 24 Cal. 569.

If any one of the boundaries is vague or uncertain, quantity will govern.

Field v. Columbet, 4 Sawy. 528; *Winans v. Cheney*, 55 Cal. 567.

Every purchaser under patent buys with notice of every material recital upon the face of the same, and must look to every part of the title which is essential to its validity; and he is presumed to be cognizant of not only its character, but also of the proceedings upon which it rests for a foundation.

Brush v. Ware, 40 U. S. 15 Pet. 111 (10: 679); *Hardy v. Harbin*, 4 Sawy. 545; *Wilson v. Castro*, 31 Cal. 420; *More v. Massini*, 37 Cal. 432; 2 *Pomeroy*, Eq. Jur. 626; 1 *Story*, Eq. 899, 400; 2 *Washburn*, Real Prop. 596; *U. S. v. Maxwell Land-Grant Co.* 21 Fed. Rep. 19.

The action of no officer or tribunal is binding upon the government when the same is beyond its jurisdiction.

U. S. v. Maxwell Land-Grant Co. 21 Fed. Rep. 19; *Stoddard v. Chambers*, 43 U. S. 2 How. 284 (11: 269); *Rose v. Richmond Mining Co.* 17 Nev. 25; *Newhall v. Sanger*, 92 U. S. 761 (23: 769); *Southern Pac. R. Co. v. Dull*, 22 Fed. Rep. 489, 10 Sawy. 506.

Messrs. A. T. Britton and A. B. Browne, for appellees:

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When a decree gives the boundaries of the tract, it is conclusive.

U. S. v. Halleck, 68 U. S. 1 Wall. 439 (17: 664); *U. S. v. Billing*, 69 U. S. 2 Wall. 444 (17: 848); *Higuera v. U. S.* 72 U. S. 5 Wall. 827 (18: 469).

Where no quantity is named in a final decree of confirmation, the only limitation as to quantity is that provided by the Colonization Laws of Mexico, which is eleven square leagues, or 48,825 acres of land.

U. S. v. Larkin, 59 U. S. 18 How. 561 (15: 486); *U. S. v. Sutherland*, 60 U. S. 19 How. 364 (15: 666); *U. S. v. Hartnell*, 63 U. S. 22 How. 289 (16: 841); *U. S. v. Vallejo*, 66 U. S. 1 Black, 551 (17: 283); *U. S. v. D'Aguirre*, 68 U. S. 1 Wall. 816 (17: 597).

Errors of judgment, committed after full and fair investigation by the Land Department as the special tribunal clothed with jurisdiction over a survey, cannot be reviewed or corrected by any judicial proceeding.

U. S. v. Flint, 4 Sawy. 61; *U. S. v. San Jacinto Tin Co.* 10 Sawy. 639.

San Bernardino was a grant of a quantity within larger exterior boundaries; it was therefore a floating grant, attaching to no defined tract until segregated by a legal survey from the balance of the land within the exterior boundaries.

Kissell v. St. Louis Public Schools, 59 U. S. 18 How. 25 (15: 827); *Stanford v. Taylor*, 59 U. S. 18 How. 412 (15: 454); *Henshaw v. Bissell*, 85 U. S. 18 Wall. 266 (21: 839); *Maguire v. Tyler*, 75 U. S. 8 Wall. 661 (19: 823); *Miller v. Dale*, 92 U. S. 477 (23: 737); *Dodge v. Perez*, 2 Sawy. 648; *U. S. v. Billing*, 69 U. S. 2 Wall. 448, 449 (17: 849); *Reed v. Ybarra*, 50 Cal. 465-468; *Freemont v. U. S.* 58 U. S. 17 How. 558 (15: 246).

Mr. Justice Brewer delivered the opinion of the court:

It is obvious that the confirmation was of a tract with specified boundaries, and as such covered all the land within those boundaries, irrespective of quantity, and this notwithstanding there appeared in the prior proceedings statements that the tract contained a certain amount, "a little more or less," which amount was very much less than that included within the boundaries. "When a decree gives the boundaries of the tract to which the claim is confirmed, with precision, and has become final by stipulation of the United States and the withdrawal of their appeal therefrom, it is conclusive, not only on the question of title, but also as to the boundaries which it specifies." *United States v. Halleck*, 68 U. S. 1 Wall. 439 [17: 664]; *United States v. Billing*, 69 U. S. 2 Wall. 444 [17: 848]; *Higuera v. United States*, 72 U. S. 5 Wall. 827 [18: 469]. And the Act of Congress of July 1, 1864 (18 U. S. Stat. 334, § 7), requires the surveyor-general, "in making surveys of the private land claims finally confirmed, to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries of the claim."

The charge of fraudulent misconduct on the part of the surveyor, Hancock, is not substantiated. Mr. Hancock was not appointed sur-

veyor with reference to this survey. He was the regular deputy surveyor for this district, having been appointed more than ten years prior thereto. While at one time he had owned an interest in the grant, he had more than eight years before the survey sold and conveyed it for a full consideration to his brother, and from that time forward, during all these proceedings, was without any interest in the premises. It is true that during these years Mr. Hancock acted as the general agent of his brother, and that is all the ground there is to suspect wrong on his part. There is not a syllable of testimony that after the Secretary had ordered the new survey, Mr. Hancock had anything to do with the matter, either in suggestion, recommendation or otherwise, so that the report of the surveyor-general was not made by virtue of anything that Hancock had said or done. The examination referred to by the surveyor-general in his report was made by one R. C. Hopkins, under the direction of the surveyor-general, a person who was at the time, so far as the testimony discloses, entirely disinterested.

It is true there is testimony furnished by Mr. Hopkins himself that some time after the patent had been issued he accepted a deed of a portion of this grant as a present from the owners—a tract which he subsequently sold for \$1,500. Whatever criticism may be placed upon the acceptance of this gift—a gift made long after his relations to the survey had ceased—it certainly does not establish dereliction in his discharge of prior official duty.

These matters, together with the failure to publish notice in the nearest paper, are all the evidences of fraud in the transaction. Not only are they not "the clear, convincing and unambiguous" proofs of fraud required to set aside a patent, as declared by this court in the case of *Colorado Coal & Iron Company v. United States*, 128 U. S. 317 [31: 186], but they all combined create nothing more than a suspicion. They may leave a doubt, but they do not bring the assurance of certain wrong.

Some question is made as to the correctness of the survey, and that turns as a question of fact upon what is meant by the expression "Agua Caliente" in the various descriptions. If it means a stream known as Agua Caliente then the government has no cause to challenge the survey, for it includes less than was really confirmed, but if it means a district of country known by that name in the northwestern portion of the San Bernardino rancho, a neighboring tract then the survey was excessive. If it were necessary for us to determine this question, we think the evidence in the case indicates that the stream and not the district was intended, but it is not the province of this court to correct a mere matter of survey like that. If made in good faith and unchallenged, as this has been for over fifteen years, whatever doubts may exist as to its correctness must be resolved in favor of the title as patented.

We see no error in the decree, and it is affirmed.

Mr. Justice Field takes no part in this decision.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF COMANCHE, IN THE STATE OF KANSAS, *Pff. in Err.*,

v.

CHARLES EDWARD LEWIS.

(See S. C. Reporter's ed. 198-208.)

Legislative power to organize counties in Kansas—Act recognizing corporation—county bonds, when valid—organization of County—recitals in county bonds, effect of—certificate of auditor, when estops the County—recital, when sufficient—power of County to issue bonds.

1. Ample power is delegated by the Constitution of Kansas to the Legislature of that State to organize a county in any manner it sees fit, and to validate by recognition any organization already existing, no matter how fraudulent the proceedings therefor have been.

2. When a Legislature has full power to create corporations, its Act, recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization, and makes a *de jure* out of what before was only a *de facto* corporation.

3. When both the legislative and executive departments of a State give notice to the world that a county within the territorial limits of the State has been duly organized and exists with full power of contracting, a purchaser can in open market safely purchase the securities of such county.

4. The debts of a county, contracted during a valid organization, remain the obligations of the county, although for a time the organization be abandoned and there be no officers to be reached by the process of the courts.

5. The recital in the bond of a county which shows a compliance in all substantial respects with the Statute giving authority to issue the bonds, makes the bond valid in the hands of a bona fide holder.

6. The official certificate of the auditor of the State that the bonds had been regularly and legally issued, that the signatures were genuine and that the bonds had been duly registered in his office in accordance with the Act of the Legislature of March 2, 1872, estops the County.

7. The recitals are sufficient although the particular bridge, for the building of which the bonds were to be issued, is not specified; a full and minute detail of all the proceedings is not essential to the validity of a recital.

NOTE.—As to municipal bonds as affected by change in the ruling of the highest court of a State, or by change in the Constitution, see note to *Mitchell v. Burlington*, Bk. 18, p. 350.

As to negotiability of railroad bonds, see note to *White v. Vermont & M. R. Co.* Bk. 16, p. 221.

As to suits on coupons detached from bonds, see note to *Kenosha v. Lamson*, Bk. 19, p. 725.

As to overdue coupons; rights of holders of; effect of, on bonds to which they are attached,—see note to *Texas v. White*, Bk. 19, p. 889.

As to mandamus to compel city, town or county to levy tax to pay bonds or interest on bonds,—see note to *Davenport v. U. S.* Bk. 19, p. 704.

As to recitals in negotiable bonds or securities, as evidence of the fact recited, and as an estoppel,—see note to *Mercer County v. Hackett*, Bk. 17, p. 548.

As to municipal bonds, reference to statute in,—see note to *Ogden v. Daviess County*, Bk. 23, p. 263.

8. The Act of February 22, 1888, gave the County the power to borrow money for the erection of county buildings and issue bonds therefor.

[No. 1022.]

Submitted Jan. 7, 1890. Decided Jan. 27, 1890.

IN ERROR to the Circuit Court of the United States for the District of Kansas to review a judgment in favor of plaintiff on coupons of bonds of the County of Comanche, Kansas, issued for county and bridge purposes. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 35 Fed. Rep. 843.

Meers, G. C. Clemens and A. H. Smith, for plaintiff in error:

Even in the hands of a bona fide holder, and notwithstanding the auditor's certificate of registration, the bonds are void, without regard to the question of the organization of the County.

Burlington Twp. v. Beasley, 94 U. S. 810 (24: 161); *Osborne v. Adams County*, 106 U. S. 181 (27: 129); *Lewis v. Sherman Co. Comrs.* 1 McCrary, 377; *Doty v. Ellabee*, 11 Kan. 209-218; *Independent School Dist. v. Stone*, 106 U. S. 183, 186, 187 (27: 90, 91); *Scipio v. Wright*, 101 U. S. 685 (25: 1037); *Thompson v. Perrine*, 103 U. S. 806-810 (26: 612, 613); *Dixon County v. Field*, 111 U. S. 93 (28: 863); *Katsenberger v. Aberdeen*, 121 U. S. 172-177 (30: 911, 913).

The bonds are open to proof of the actual facts and are therefore void. No purchaser of otherwise negotiable paper payable upon its face "to . . . or bearer," can enjoy the law merchant's protection.

Hogarth v. Latham, L. R. 3 Q. B. Div. 648; *France v. Clark*, L. R. 26 Ch. Div. 257; *Hatch v. Seales*, 2 Smale & G. 147, 153; *Taylor v. Great Indian Pen. R. Co.* 4 DeG. & J. 559, 574; *Toledo Nat. Bk. v. Porter Township*, 110 U. S. 608 (28: 258); *Buchanan v. Litchfield*, 103 U. S. 278 (26: 188); *Bissell v. Spring Valley Township*, 110 U. S. 162 (28: 105).

The bonds were not issued by the plaintiff in error.

State v. Sillon, 21 Kan. 207; *State v. Stevens*, 21 Kan. 210; *McClure v. Oxford Township*, 94 U. S. 429 (24: 129); *State v. Ford County*, 12 Kan. 441-446; *Barkley v. Leece Comrs.* 93 U. S. 258 (23: 898); *U. S. v. Heth*, 7 U. S. 3 Cranch, 399-413 (2: 479, 483); *Chew Heong v. U. S.* 112 U. S. 536-559 (28: 770, 771); *Murray v. Gibbon*, 56 U. S. 15 How. 421-423 (14: 755, 756); *McEwen v. Den*, 65 U. S. 24 How. 242-244 (16: 672); *Harvey v. Tyler*, 69 U. S. 2 Wall. 328-347 (17: 871, 875); *Sohn v. Waterson*, 84 U. S. 17 Wall. 596-599 (21: 737, 738).

Mr. W. H. Rossington, for defendant in error:

The whole power of organizing new counties belongs in this State to the Legislature. The Legislature has cured defects by recognizing the County.

Beach v. Leahy, 11 Kan. 28; *Borton v. Buck*, 8 Kan. 308; *Leavenworth County v. State*, 5 Kan. 688; *State v. Ford County*, 12 Kan. 445; *State v. Sillon*, 21 Kan. 207; *State v. Pawnee County*, 12 Kan. 426.

The bonds recite that they were issued in conformity to law, and as between the County and a bona fide holder no question involving the infirmity of the security can be raised.

Johnson County v. January, 94 U. S. 202 (24: 183 U. S.

110); *Knox County v. Aspinwall*, 62 U. S. 21 How. 539 (16: 208); *Bissell v. Jeffersonville*, 65 U. S. 24 How. 287 (16: 664); *Marcy v. Onwego*, 92 U. S. 637 (23: 748); *Coloma v. Eaves*, 93 U. S. 484 (23: 579); *Moran v. Miami County*, 67 U. S. 2 Black, 732 (17: 347); *Mercer County v. Hackett*, 68 U. S. 1 Wall. 83 (17: 548); *Marshall County v. Schenck*, 72 U. S. 5 Wall. 784 (18: 559); *Myer v. Muscatine*, 68 U. S. 1 Wall. 884 (17: 564); *Von Hostrup v. Madison*, 68 U. S. 1 Wall. 291 (17: 538); *St. Joseph Township v. Rogers*, 83 U. S. 16 Wall. 644 (21: 828); *Humboldt Township v. Long*, 92 U. S. 642 (23: 752); *Roberts v. Bolles*, 101 U. S. 119 (25: 880); *Brooklyn v. Aetna Life Ins. Co.* 99 U. S. 362 (25: 416); *Rock Creek Twp. v. Strong*, 96 U. S. 271 (24: 815); *Venice v. Murdock*, 92 U. S. 494 (23: 688); *Converse v. Fort Scott*, 92 U. S. 503 (23: 621); *Burlington Twp. v. Beasley*, 94 U. S. 810 (24: 161); *Leavenworth County v. Barnes*, 94 U. S. 70 (24: 63); *Johnson County v. Thayer*, 94 U. S. 631 (24: 133); *Marion County v. Clark*, 94 U. S. 278 (24: 59); *East Lincoln v. Davenport*, 94 U. S. 801 (24: 322); *Clay County v. Savings Society*, 104 U. S. 579 (26: 856); *Block v. Bourbon County*, 99 U. S. 686 (25: 491); *Lyons v. Munson*, 99 U. S. 684 (25: 451); *Orleans v. Platt*, 99 U. S. 676 (25: 404); *Lynde v. Winnebago County*, 83 U. S. 16 Wall. 6 (21: 272); *Weyauwaga v. Ayling*, 99 U. S. 112 (25: 470); *Calhoun County v. Galbraith*, 99 U. S. 214 (25: 410); *Wilson v. Salamanca Twp.* 99 U. S. 499 (25: 830); *Douglas County v. Bolles*, 94 U. S. 104 (24: 46).

Mr. Justice Brewer delivered the opinion of the court:

This is an action on coupons. There were three classes of bonds, namely, court-house, bridge and current-expense bonds. The circuit court held the latter void, the others valid, and judgment was rendered accordingly. *Lewis v. Comanche County*, 35 Fed. Rep. 843. The County alleges error. Our inquiry, therefore, is limited to the bridge and court-house bonds.

The first and principal contention of the plaintiff in error is that at the time of the issue of these bonds there was no valid county organization, no corporate entity capable of contracting; that the pretended organization in 1878 was fraudulent and void, and shortly thereafter abandoned, the County remaining unorganized until 1885, when, upon memorial presented and census taken, it was organized anew as in the case of an unorganized county.

In order to fully understand the question here presented a brief retrospect of the condition, the legislation and judicial decisions of the State is necessary.

At the time of its admission into the Union, in 1861, the settlements were confined to the eastern portion of the State, the west being wholly unoccupied. The territory of the State was divided into counties, those in the eastern portion being organized, and those in the western unorganized, the legislation as to the latter being limited to the matter of names and boundaries. Of course there were no courts in these unorganized counties, for the machinery was wanting; there were no county buildings, county officers or jurors. So they were by statute attached to the organized counties for judicial purposes. It was foreseen that they would, in

course of time, become occupied, and that provision must be made for their organization as political subdivisions of the State. So, by the Constitution, in section 1 of article 9, power was given to the Legislature in these words: "The Legislature shall provide for organizing new counties, locating counties and changing county lines."

The first Legislature, on the fourth day of June, 1861, passed an Act entitled "An Act Relating to the Organization of New Counties." This was amended in 1872, and under the Act as so amended the County of Comanche was organized. Section 1 of this chapter prescribes the proceedings, and is as follows:

"Section 1. Section 1 of an Act Relating to the Organization of New Counties is hereby amended so as to read: Section 1. When there shall be presented to the governor a memorial, signed by forty householders, who are legal electors of the State, of any unorganized county, showing that there are six hundred inhabitants in such county, and praying that such county may be organized, accompanied by an affidavit attached to such memorial, of at least three householders of such county, showing that the signatures to such memorial are the genuine signatures of householders of such unorganized county, and that the affiants have reason to and do believe that there are six hundred inhabitants in such county as stated in the memorial, it shall be the duty of the governor to appoint some competent person, who is a bona fide resident of the county, to take the census and ascertain the number of bona fide inhabitants of such unorganized county, who shall, after being duly sworn to faithfully discharge the duties of his office, proceed to take the census of such county, by ascertaining the name and age of each of the bona fide inhabitants of such unorganized county, who shall receive for services rendered under this section pay at the rate of three dollars per day, from the state treasurer, upon an itemized account, verified by affidavit. The person who shall take the census as required shall return to the governor, upon appropriate schedules, the census authorized to be taken herein, certified to be correct and true, and if it appear by such return that there are in such unorganized county at least six hundred bona fide inhabitants, he shall appoint three persons, who shall be recommended in the memorial hereinbefore provided for, to act as county commissioners, and a proper person to act as county clerk, to be recommended in like manner as the commissioners, and shall designate such place as he may select, centrally located, as a temporary county seat for such county, and shall commission such persons as such officers, and declare such place the temporary county seat of such county; and from and after qualification of the officers appointed under this section, the said county seat shall be deemed duly organized."

Obviously, full control over the matter of organization of new counties was, by the constitutional provision quoted, given to the Legislature, as was held by the Supreme Court of the State in the case of the *State v. Pawnee County*, 12 Kan. 426, in which case the court says:

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"The whole power of organizing new counties belongs in this State to the Legislature. It may provide for their organization by general laws and through the intervention of the governor, or of any other officer, agent, commissioner or person it may choose, or it may directly organize a new county itself by special Act. The provisions of article 12 of the Constitution have no application to counties as counties. See *Beach v. Leahy*, 11 Kan. 23. It may organize a county with six hundred inhabitants, or any other number more or less than six hundred. It may organize a county whenever there shall be a sufficient number of persons to hold the county offices, and the Legislature may provide for a less number of county officers than the usual number. See *Borton v. Buck*, 8 Kan. 308; *Leavenworth County v. State*, 5 Kan. 688."

In the fall of 1878 proceedings looking to the organization of Comanche County were had, which were in form in full compliance with the requirements of section 1, above quoted. These proceedings closed, as required, with the proclamation of the governor, and upon the face of the papers was presented a clear case of a regular and valid organization. But while these proceedings were regular on their face, the agreed statement of facts shows that "said organization was effected solely for purposes of plunder by a set of men intending to secure a *de facto* organization and issue the bonds of said County, register and sell them to distant purchasers ignorant of the facts, and enrich the schemers, while plundering the future inhabitants and taxpayers of the County; and upon the consummation of said scheme, in the spring or early summer of 1874, all of said schemers, together with those who were the said *de facto* officers of the said County, left said County and never returned, and said County remained with said organization totally abandoned until in February, 1885, when said County was, upon memorial presented and census taken, organized as in cases of unorganized counties."

If these were all the facts, a very interesting inquiry would arise as to how far an organization fraudulent in fact but regular in form, and duly approved by the executive, could bind the County by an issue of bonds *prima facie* valid, and passing into the hands of a bona fide holder. But that inquiry is not before us. The ample power delegated by the Constitution to the Legislature enabled it not only to organize a county in any manner it saw fit, but also to validate by recognition any organization already existing, no matter how fraudulent the proceedings therefor had been.

This proposition has been distinctly ruled by the Supreme Court of the State. See the case of *State v. Pawnee County*, in 12 Kan. *supra*; see also *State v. Steers*, 21 Kan. 210, and *State v. Hamilton*, 40 Kan. 323.

Nor is this ruling peculiar to the jurisdiction of Kansas. It is universally affirmed that when a Legislature has full power to create corporations, its Act recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization and makes a *de jure* out of what before was only a *de facto* corporation. It is true that there must be a *de facto* organiza-

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tion upon which this recognition may act, as was held in *State v. Ford County*, 13 Kan. 446; and in this case it appears from the findings, as well as from the testimony, that there was such *de facto* organization. There being this *de facto* organization, there was ample recognition by the Legislature. The very matter appears which, in *State v. Stevens*, was, by the Supreme Court of Kansas, declared a legislative recognition sufficient to cure all defects; namely, an Act detaching the County from an organized county to which, for judicial purposes, it had theretofore been attached, and establishing courts therein. This Act was approved March 9, 1874, the day before these bonds were signed. But this, which, by the Supreme Court of Kansas, was adjudged alone sufficient, is not all. Chapter 24 of the General Statutes of 1868, creating some new counties, divided the State into seventy-nine counties, numbered, named and described, among which was the unorganized County of Comanche; and provided that no county should be entitled to representation in the Legislature until it should have been organized. During the session of 1874, the session immediately succeeding this attempted organization, and before the issue of these bonds, A. J. Mowry represented Comanche County in the Legislature, taking active part in its proceedings, voting for senator, introducing bills, and otherwise. His right to a seat was challenged, examined by the committee on elections, and, after report therefrom, he was admitted and acted as a member during the entire session. Further than that, this organization having become a matter of discussion and challenge, the Legislature passed a joint resolution, which recited that it appears from the report of the secretary of state that there were but 634 inhabitants in the County of Comanche, and from the report of the auditor of the State that the bonded indebtedness of the County was \$72,000; that the interests of the people and the honor of the State required an investigation; and directed that a committee of two should be appointed, one from each House, who, together with the Attorney-General, should make an investigation and report to the succeeding Legislature. By that report, in January, 1875, the character of the organization was disclosed, and from that time on the County was, as stated, treated as an unorganized County until 1885. It also appears that in December, 1878, not only was a member of the Legislature elected, but, in addition, a new commissioner and a new county clerk, in the places of those temporarily appointed by the governor. There thus appears ample recognition, on the part of the Legislature, of the validity of the organization, and, under repeated adjudications, its validity cannot now in this collateral way be challenged. And this is no mere technical ruling. It rests on foundations of substantial justice. It is true that the present inhabitants have been wronged by the fraudulent acts of these conspirators in 1878-74, and it is a hardship for them to be bound for debts they did not contract and from which they received no benefit; but, on the other hand, it would be an equal hardship to the plaintiff to lose the money he has invested in securities placed on the market, whose validity was attested to the fullest extent by both the

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executive and legislative departments of the State. When both of those departments give notice to the world that a county within the territorial limits of the State has been duly organized and exists with full power of contracting, can it be that a purchaser cannot in open market safely purchase the securities of that county? Does the duty rest on him to traverse the limits of the county and make personal inspection of the number of the inhabitants? If any wrong has been done to the County through the want of attention on the part of the state authorities, equity would suggest that the State should bear the burden, and not cast it upon an innocent party residing far from the State and acting in reliance upon what it has done.

But it is urged that whatever may be said as to the organization in 1873-74, and its temporary validity, that organization was in 1874 abandoned, the County deserted, and a new organization made in 1885, and, it being a new organization, there is no responsibility on its part for debts fraudulently contracted more than a decade before, by a confessedly fraudulent organization. Why should honest and industrious citizens, who have recently moved into hitherto unoccupied territory, be held responsible for debts fraudulently contracted years before by a set of rascals who stopped but for a day, and then decamped with the proceeds of their rascality? But it must be borne in mind that the County, as a territorial subdivision of the State, has been in existence and unchallenged for more than a score of years. It matters not how many political organizations there may have been, or what changes in the form of organization, the County has been ever the same, and, although the name of the political community given by the statutes is the "Board of County Commissioners" of the County, it is, after all, the County, with its property and population, which is the debtor. No one would for a moment suppose that when a county has contracted a valid obligation, the fact, if it could be made to appear, that all its inhabitants had removed and their places been supplied by others, would affect that obligation. There has been no subdivision of the original territory; no addition to or subtraction from it. The only change has been in the continuity of political organization, and that, neither by municipal law nor the law of nations, destroys the territorial responsibility for legal obligations. Even a change in form does not destroy responsibility. The Republic of France recognizes as valid the debts of the Empire. A town whose growth enables it to cast off its village organization and assume the habiliments of a city continues liable for all debts theretofore contracted. And so the debts of a county, contracted during a valid organization, remain the obligations of the county, although for a time the organization be abandoned and there be no officers to be reached by the process of the courts. *State v. Hamilton*, 40 Kan. 323; *The Sapphire*, 78 U. S. 11 Wall. 164 [20: 127]; *Broughton v. Pensacola*, 98 U. S. 268 [23: 896]; *Mount Pleasant v. Beckwith*, 100 U. S. 514 [25: 699].

Passing to the question of the bonds themselves, the first to be considered are the bridge bonds. The recital is in these words:

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"This bond is executed and issued in pursuance of and in accordance with an Act of the Legislature of the State of Kansas, entitled 'An Act to Authorize Counties, Incorporated Cities and Municipal Townships to Issue Bonds for the Purpose of Building Bridges, Aiding in the Construction of Railroads, Water-Power or Other Works of Internal Improvement, and Providing for the Registration of Such Bonds, the Registration of Other Bonds, and the Repealing of All Laws in Conflict Therewith,' approved March 2, 1872, and also in accordance with the vote of a majority of the qualified electors of said County of Comanche, at a special election duly and regularly held therefor on the 31st day of January, 1884."

The Act referred to therein gave to counties full power to issue bonds for the building of bridges and prescribed the proceedings, including therein a vote of the people, essential to the vesting of authority in the county commissioners. The recital that the bond was executed and issued in pursuance of and in accordance with that Act, and also in accordance with the vote of the majority of the qualified electors, is, within repeated rulings of this court, sufficient to validate the bonds in the hands of a bona fide holder. It shows, in the language of *Independent School District v. Stone*, 106 U. S. 183 [27: 90], "a compliance in all substantial respects with the Statute giving authority to issue the bonds," and does not come within the limitations noticed in that case. Further than that, the bonds are indorsed with the official certificate of the auditor of the State that the bonds had been regularly and legally issued, that the signatures were genuine and that the bonds had been duly registered in his office in accordance with the Act of the Legislature of March 2, 1872. Inasmuch as these bonds were issued after the Act of 1872 went into effect, they fall within the decision in the case of *Lewis v. Barbour County*, 105 U. S. 789 [26: 993], rather than within that in the case of *Bissell v. Spring Valley Township*, 110 U. S. 162 [28: 105], as to the conclusiveness of the certificate of the auditor.

The suggestion that the recitals are not sufficient because the particular bridge, for the building of which the bonds were to be issued, is not specified, carries no weight. Power is given by the first section of the Act of 1872 to issue bonds for building bridges, and while the subsequent sections providing for a vote and other preliminaries seem to contemplate that a particular bridge should be the subject of consideration, yet it has never been held by this court, and ought not to be, that a full and minute detail of all the proceedings is essential to the validity of a recital. The main thing is that the County has promised to pay, and that the people by their vote have authorized such a promise for one of the purposes for which, under the Statute, they may bind themselves.

The other series of bonds is what is known as "court-house bonds," so named on the face of the bonds themselves. The recital in this bond is as follows: "This bond is executed and issued for the purpose of erecting county buildings in pursuance of and in accordance with an Act of the Legislature of the State of Kansas, entitled, 'An Act Relating to Counties

and County Officers,' approved February 29, 1868, and 'An Act to Authorize Counties,'" etc., reciting the title of the Act referred to in the bridge bonds, as well as a vote similar thereto. On the back of each bond appears the auditor's certificate, as in the bridge bonds.

But it is insisted that county buildings are not works of internal improvement within the meaning of the Act last referred to. Be that as it may—and it is unnecessary to decide this question, although in considering it reference may well be had to the opinion of the Supreme Court of Kansas in the case of *Leavenworth County v. Miller*, 7 Kan. 479—the Act first referred to, the Act of February 29, 1868, gave ample authority. That Act, section 16, provides: "The Board of County Commissioners of each county shall have power, at any meeting: . . . Fourth, . . . to borrow, upon the credit of the county, a sum sufficient for the erection of county buildings, or to meet the current expenses of the county in case of a deficit in the county revenue."

Prior to the issue of these bonds the Supreme Court of the State had held, in the case of *Doty v. Ellsbee*, 11 Kan. 209, that the power to borrow money carries with it the power to issue the ordinary evidences and security of a loan, and, among them, county bonds. So that, by that Act, the County had power to borrow money for the erection of county buildings and issue bonds therefor. There is no force in the suggestion that the purpose expressed in the recital is that of erecting county buildings, instead of borrowing money for the erection of county buildings. A general statement of the purpose, with direct reference to the Act granting authority, and a recital that the bond is issued in pursuance of and in accordance with the Act, is sufficient. The case of *Scipio v. Wright*, 101 U. S. 665 [25: 1037], rested entirely on the fact of the uniform and continuous ruling on the part of the highest court in the State of New York, in which the bonds were issued, and was a case arising between a municipality and a purchaser who took with notice of the manner in which the bonds had been disposed of. So that this cannot be considered an authority in the case before us.

These are all the matters we deem necessary to notice, and, there appearing no error in the ruling of the Circuit Court, its judgment is affirmed.

S. GRANVILLE BEALS, *Appt.*,

THE ILLINOIS, MISSOURI AND TEXAS
RAILROAD COMPANY ET AL.

(See S. C. Reporter's ed. 290-295.)

*Allegations in pleas, when admitted to be true—
sworn answers as evidence—bondholders, when*

NOTE.—Equity:—more than one witness required to overcome sworn answer; answer of defendant verified in evidence. See note to *Hughes v. Blake*, Bk. 5, p. 308.

Parties necessary, in equity, want of; when a defense; when objection to be made. See notes to *Morgan v. Morgan*, Bk. 4, p. 242, and *Marshall v. Beverley*, Bk. 5, p. 97.

bound by decree—effect of allegations of sworn answer.

1. Where the plaintiff's replication is only to "the answers" of the three defendant corporations, and not to their pleas, although each of them had filed a plea, and the only answers in the cause were those filed by two of them in support of their pleas, and no proofs are taken, and the case is set down for hearing upon the bill and pleas, the facts alleged by the defendants in their pleas are admitted to be true.
2. If the replication is treated as taking issue on the pleas as well as on the answers, and the case was submitted upon the bill, pleas, answers and replication, the facts relied upon by defendants were proved by the sworn answers, so far as they were responsive to the bill, where the plaintiff gave no evidence.
3. Where a former judgment was rendered by a court of competent jurisdiction, to which the Railroad Company that issued the bonds, and the surviving trustee under the mortgage made to secure the bonds, were made parties, the bondholders, being represented by the trustee, are bound by the decree canceling and annulling the bonds and mortgage, unless the decree was fraudulently obtained.
4. Where the bill alleges that that decree was obtained by fraud and collusion, and the pleas and answers, under oath, deny the fraud and collusion charged, and aver a purchase of the property in good faith, for valuable consideration and without knowledge or notice of any fraud in obtaining the decree, these averments, being responsive to the allegations of the bill, are conclusive in favor of the defendant and against the plaintiff's claim, no proofs in the case having been taken.

[No. 111.]

Argued Jan. 16, 17, 1890. Decided Feb. 3, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Missouri dismissing a suit in equity brought to declare a mortgage and bonds valid, and to apply the mortgaged property to the payment of the bonds, and for further relief. *Affirmed.*

Opinion below, 27 Fed. Rep. 721.

Statement by *Mr. Justice Gray*:

This was a suit in equity by Beals, a citizen of New York, against the Illinois, Missouri and Texas Railway Company, the Cape Girardeau and State Line Railroad and the Cape Girardeau Southwestern Railway Company, all three corporations of Missouri, and Thilenius and Blow, trustees of the Cape Girardeau and State Line Railroad, and Fletcher, all three citizens of Missouri.

The amended bill (which was the only one copied in the transcript of the record) alleged that in April, 1871, the Cape Girardeau and State Line Railroad, pursuant to a contract with Fletcher, executed a deed conveying all its property and franchises in its road, as then existing or afterwards to be constructed, from the shore of the Mississippi River in the City of Cape Girardeau in the State of Missouri to the boundary line between the States of Missouri and Arkansas, to Thilenius and Blow in trust, and directing them as trustees and Thilenius, the president of that Company, to join with the Illinois, Missouri and Texas Railway Company (which had been organized under

the General Laws of Missouri for the purpose of completing the road) in the execution of a mortgage of all the said property and franchises to secure the payment of bonds issued by the last-named Company; that in May, 1871, such a mortgage, afterwards duly recorded, was executed by those two Companies and by Thilenius and Blow, trustees as aforesaid, to Winston and Hoadley in trust to secure the payment of 1,500 bonds of \$1,000 each of the Company last named, which were afterwards issued; that the plaintiff was the bona fide owner and holder for value of sixty-eight of those bonds; that by default in payment of interest on those bonds there had been a breach of condition of the mortgage; that most or all of the rest of such bonds had come into the possession of the defendants, or of one or more of them, and thereby the defendants had controlled the action of Winston, the surviving trustee named in the mortgage, to the prejudice of the plaintiff; that Winston was now dead and no other trustee had been appointed; that the Cape Girardeau Southwestern Railway Company for several years had had the sole use and possession of the property and franchises, and claimed a right therein, by purchase or otherwise, prior to the plaintiff's lien; that a systematic, fraudulent and continuous effort had been made by the defendants, or some of them, to prevent the collection of interest or principal on the plaintiff's bonds; that the judgment set up in bar in the defendant's plea to the bill of complaint in this suit, and alleged to have been obtained on or about March 30, 1876, in the Circuit Court of Cape Girardeau County, Missouri, by the Cape Girardeau and State Line Railroad, one of the defendants in this cause, was obtained by the said defendants in fraud against the bondholders, in that Winston was served and appeared in person only and not as trustee, and allowed the judgment to be entered by default, without notice to the bondholders, and by collusion with Houck, then attorney for the petitioners and now president of the Cape Girardeau Southwestern Railway Company, both Winston and Houck knowing that the allegations of the petition were false and fictitious, and intending to defraud the bondholders; and that the plaintiff was not a party to the action and had no knowledge of it until his counsel examined the record on August 22, 1884.

The bill prayed for answers under oath, an injunction, and a decree declaring the mortgage and the plaintiff's bonds to be valid, and applying the mortgaged property to the payment of the bonds, and for further relief.

To the amended bill the three defendant corporations severally filed pleas, and two of them filed answers under oath in support of their pleas.

The plea of the Cape Girardeau and State Line Railroad specifically denied all the allegations of the bill as to fraud and collusion; and alleged that on March 30, 1876, it brought an action in the Circuit Court of Cape Girardeau County, being a court of general jurisdiction and possessed of full chancery powers (the principal office and place of business of that corporation, as well as the largest part of the real estate to be affected by that action, being in that county), alleging that the con-

veyance and the mortgage made in its name were without authority and in fraud of its stockholders; that the property conveyed to Thilenius and Blow was reconveyed by them to the plaintiff in December, 1871, and before the mortgage was recorded; and that the bonds of the Illinois, Missouri and Texas Railway Company, pretended to be secured by the mortgage, were issued after that time, and were held by the defendants, but not as purchasers for value; and praying that the conveyance and mortgage, as well as the bonds, might be canceled and declared void; that in that action said Railway Company, Winston, as sole surviving trustee under the mortgage, and a large number of corporations and individuals claiming to be holders of bonds secured by the mortgage, as well as all other persons whose names were unknown, but who might claim to be holders of such bonds, were made defendants; that said Railway Company, Winston, as surviving trustee, and various other defendants claiming to be holders of bonds, were actually served with process, and all nonresident bondholders who could be named, together with all unknown bondholders, were duly served by publication; that said Railway Company and Winston, as surviving trustee, as well as many bondholders, appeared and pleaded, putting in issue the allegations of the petition; that on January 25, 1878, the court entered a decree (a certified copy of which was set forth in the plea) establishing the allegations and granting the prayer of the petition, which was the same decree described in the amended bill as a judgment entered March 30, 1876; and that that decree was obtained on due and legal service of process, and after appearance of the defendants and hearing of proofs, and without any fraud, covin or concealment of any kind, or any collusion, agreement or understanding between Winston and the plaintiff's attorney, and had never been appealed from, but remained in full force. Wherefore the Cape Girardeau and State Line Railroad pleaded that decree in bar. The plea was supported by an answer under oath, denying generally and specifically all fraud charged in the amended bill.

The Cape Girardeau Southwestern Railway Company, by plea, and answer under oath in support thereof, set up the same defense; and also, by permission of the court, the further defense that in August, 1880, the Cape Girardeau and State Line Railroad, claiming to be the owner and being in full possession of the property, conveyed it for valuable consideration to Houck by deed duly recorded; that Houck took the deed in good faith and without any knowledge or notice of any right of the plaintiff or any other bondholder, or of any incumbrance on the property, or defect in the decree; that afterwards the Cape Girardeau Southwestern Railway Company was incorporated and organized under the General Statutes of Missouri on August 10, 1880, and took from Houck a conveyance of the property for valuable consideration, in good faith, and without any knowledge or notice of any fraud or irregularity in obtaining the decree, and afterwards proceeded to construct the railroad.

The plea of the Illinois, Missouri and Texas Railway Company set up the decree of Janu-

ary 25, 1878, by which it was enjoined from making any claim to the property; and alleged that it had not since claimed any right in or exercised any control over the property, or received any income therefrom.

The plaintiff filed a general replication to "the answers" of the three corporations. The Cape Girardeau and State Line Railroad and the Cape Girardeau Southwestern Railway Company moved the court for "judgment on the pleas and replication in this cause, for the reason that the plaintiff has not taken issue on the said pleas, nor is the alleged replication thereto any reply in law."

No separate ruling or order was made upon this motion. Nor were any proofs taken in the case. But the case was afterwards submitted and argued "upon the bill, pleas, answers and replication," and thereupon the court, being of opinion that the equities were with the defendants, dismissed the bill. (27 Fed. Rep. 721.) The plaintiff appealed to this court.

Messrs. Henry H. Dennison and A. G. Vanderpoel, for appellant:

Notice to agent is notice to principal.

Sias v. Roger Williams Ins. Co. 8 Fed. Rep. 186; *United States v. Distilled Spirits*, 3 Cliff. 308; *Smith v. Ayer*, 101 U. S. 320 (25: 955); *Warrick v. Warrick*, 3 Atk. 291; *Mountford v. Scott*, 1 Turn. & Russ. 274; *Dresser v. Norwood*, 17 C. B. N. S. 466; *Holden v. New York & E. Bank*, 72 N. Y. 298.

A person will be held to have notice as an individual of what he does as president of a corporation.

Lancaster v. Collins, 2 McCrary, 355, 356, 115 U. S. 222 (29: 373); *Carter v. Ottawa*, 24 Fed. Rep. 546; *Gay v. Parpart*, 106 U. S. 697 (27: 263).

Where no real defense was made in the suit because of the unfaithful conduct of the trustee and the attorney, a court of equity will take cognizance of the suit.

Pacific R. Co. v. Missouri P. R. Co. 111 U. S. 505 (28: 498).

The frauds for which courts of equity will interfere to set aside or stay the enforcement of a judgment of a court having jurisdiction of the subject matter and the parties, must consist of extrinsic collateral acts, not involved in the consideration of the merits. They must be acts by which the successful party has prevented his adversary from presenting the merits of his case, or by which the jurisdiction of the court has been imposed on.

United States v. Flint, 4 Sawy. 51; *United States v. Throckmorton*, 98 U. S. 68 (25: 96); *Wierich v. DeZoja*, 7 Ill. 385; *Pearce v. Olney*, 20 Conn. 553, 554; *Kent v. Richards*, 8 Md. Ch. 395-397; *State of Iowa v. Gorley*, 2 Iowa, 54-59; *Wells, Res Adjudicata*, § 499, pp. 428-490, and cases cited in notes; *Smith v. Lowry*, 1 Johns. Ch. 321-324.

Mr. Geo. D. Reynolds, for appellees:

The trustee, Frederick S. Winston, was a party to the suit. The beneficiaries were not necessary parties. He was in court on their behalf, and the appellant, as one of the beneficiaries, though not a party to the suit, is concluded in the decree, unless it is impeached for fraud or collusion.

Kerrison v. Stewart, 98 U. S. 155 (23: 848); *Corcoran v. Chesapeake & O. Canal Co.* 94 U. S. 741 (24: 190); *Shaw v. Little Rock & F. S. R. Co.* 100 U. S. 605 (25: 757); *McArthur v. Scott*, 118 U. S. 396 (28: 1038); *Rand v. Walker*, 117 U. S. 844 (29: 909); *Cleveland First Nat. Bank v. Shedd*, 121 U. S. 84 (30: 881); *Richter v. Jerome*, 128 U. S. 246 (31: 137); *Vetterlein v. Barnes*, 124 U. S. 172 (31: 401).

The appellant was also represented in the suit as being a bondholder of the Illinois, Missouri & Texas Railway Co., which was a party to it.

Denver & R. G. R. Co. v. Ailing, 99 U. S. 463 (25: 438).

The appellant has no right to bring this suit alone. The other bondholders are necessary parties.

Nashville & D. R. Co. v. Orr, 85 U. S. 18 Wall. 471 (21: 810).

The decree of the Circuit Court of Cape Girardeau County is conclusive and binding, unless impeached for fraud.

Cromwell v. Sac County, 94 U. S. 351 (24: 195); *Stout v. Lye*, 103 U. S. 66 (26: 428).

The rule that a decree cannot be pronounced fraudulent on the testimony of a single witness, unaccompanied by corroborating circumstances, against a positive denial by answer, applies to an answer in support of a plea.

Hughes v. Blake, 19 U. S. 6 Wheat. 458 (5: 303).

Mr. Justice Gray delivered the opinion of the court:

The irregular form in which the plaintiff's case is presented need not be dwelt upon, because, in any possible aspect of the controversy between the parties, the result is not doubtful.

The former judgment, upon which the plaintiff anticipated that the defendants would rely, is not described in the amended bill otherwise than by reference to a plea to the original bill, neither of which is made part of the record transmitted to this court. But the pleas to the amended bill clearly identify the judgment drawn in issue.

The plaintiff's replication is, in terms, only to "the answers" of the three defendant corporations, and not to their pleas, although each of them had filed a plea, and the only answers in the cause were those filed by two of them in support of their pleas. But it is immaterial to consider whether the effect of the submission of the case to the court "upon the bill, pleas, answers and replication," after the defendants had moved for judgment for insufficiency of the replication, was, so far as the pleas were concerned, to set down the case for hearing upon the bill and pleas, or to treat the replication as taking issue on the pleas as well as on the answers. In the one view, the facts relied on by the defendants were conclusively admitted to be true; in the other view, so far as they were responsive to the allegations of the bill, they were conclusively proved by the answers under oath, which the plaintiff introduced no evidence to control. *Mitford*, Pl. (4th ed.) 301, 302; *Rules 33 and 38 in Equity*; *Farley v. Kitten*, 120 U. S. 308, 315 [30: 684]; *Vigil v. Hopp*, 104 U. S. 441 [26: 765].

Upon the facts thus established, no ground is shown for maintaining the bill. The former judgment was rendered by a court of competence

jurisdiction, to which not only the Railroad Company that issued the bonds, but the surviving trustee under the mortgage made in the name of another company to secure the payment of those bonds, were made parties. The bondholders were thus fully represented in that suit, and bound by the decree canceling and annulling the bonds and mortgage, unless the decree was fraudulently obtained. *Kerrison v. Stewart*, 98 U. S. 155 [23: 848]; *Shaw v. Little Rock & F. S. R. Co.* 100 U. S. 605 [25: 757]; *Richter v. Jerome*, 128 U. S. 233 [31: 132]; *Knox County v. Harshman*, ante, p. 536. The bill alleges that that decree was obtained by fraud, and by collusion between the trustee and second Company and Houck its attorney, and that the third Company claimed a right in the property, by purchase or otherwise, prior to the plaintiff's supposed lien. The pleas and answers under oath of both these Companies fully and explicitly deny the fraud and collusion charged; and those of the third Company further aver that after the decree the property was conveyed by the second Company to Houck and by him to the third Company, and that both Houck and the third Company purchased the property in good faith, for valuable consideration, and without knowledge or notice of any fraud or irregularity in obtaining the decree.

These averments being "directly responsive to the allegations of the bill, and therefore conclusive in favor of the defendants' title to the property and against the plaintiff's claim, it is unnecessary to consider other grounds taken in argument.

Decree affirmed.

CALVIN R. CORBIN ET AL., *Appls.*,

v.

WALTER J. GOULD ET AL.

(See S. C. Reporter's ed. 308-314.)

Infringement of trade-mark—the word "Tycoon" not proper for a trade-mark—what words are improper as trade-marks—no trade-mark in the word "Tycoon" used alone.

1. Where the labels of complainants and defendants are so entirely dissimilar that one cannot readily be mistaken for the other, and a mere glance is sufficient to distinguish them, and there is no more similarity between them than is to be found ordinarily between tea labels, the fact that the word "Tycoon" is found in both of them does not make a case of infringement of a trade-mark.
2. A word such as "Tycoon," which has been for many years in general and common use as a term descriptive of a class of teas introduced into the American market, belongs to the public, as the common property of the trade, and therefore is not subject to appropriation by any person as a trade-mark.
3. One has no right to appropriate as a trade-mark a sign, or a symbol, or a name which, from the nature of the fact it is used to signify,

NOTE.—As to when an injunction will be granted restraining the unauthorized use of trade-marks, see note to *McLean v. Fleming*, Bk. 24, p. 822.

others may employ with equal truth, and therefore have an equal right to employ for the same purpose.

4. If the complainants can claim a trade-mark for the combination of a diamond and the words "The Tycoon Tea" inclosed in it, as described in their application to the Patent Office, there is no trade-mark in the word "Tycoon" considered by itself.

[No. 131.]

Argued Nov. 22, 1889. Decided Feb. 3, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Michigan to review a decree dismissing a suit for the infringement of a trade-mark. *Affirmed.*

The facts are stated in the opinion.

Mr. Lewis L. Coburn for appellants.

Messrs. Elliott G. Stevenson and Don M. Dickinson for appellees.

Mr. Justice Lamar delivered the opinion of the court:

This is a suit in equity brought in the court below by Calvin R. Corbin and Horatio N. May, copartners as Corbin, May & Company, doing business in Chicago, against Walter J. Gould, Edward Telfer, David D. Cady and L. F. Thompson, copartners as W. J. Gould & Company, doing business in Detroit, for the alleged infringement of a trade-mark.

The bill, filed on the 24th of September, 1885, alleged substantially as follows: That for over six years complainants had been engaged in manufacturing, preparing and shipping to the United States, and selling in the United States and elsewhere, a particular quality of tea, of which their immediate predecessors in business, Ingraham, Corbin & May, were the first and exclusive manufacturers, importers and wholesale dealers in this country; that during this period they had imported large quantities of such tea, which, by reason of its superior quality and because of the advertising they gave it, became well and favorably known, and was sold extensively in the chief cities and towns of the United States, particularly in Michigan; that said particular tea was known as "Tycoon Tea," the word "Tycoon" being properly attached to the cases and coverings in which the tea was imported; that this name "Tycoon" was given by them to their tea in 1879 in order to more clearly identify it, and had since been used as their adopted trade-mark for it; that having complied with the Act of Congress in such case made and provided, and with the regulations prescribed by the commissioner of patents, they procured the registration and recording of said trade-mark in the Patent Office on the 27th of December, 1881, and received from the commissioner of patents a certificate showing such record; that since the word "Tycoon" was first applied by them as a trade-mark, and since the date of such registration, the defendants, confederating with divers other persons in different parts of the United States, with full knowledge of complainants' rights under and by virtue of their trade-mark, in violation thereof, without complainants' consent, and with the intent fraudulently to divert to themselves complainants' trade in such tea, put upon the market in Detroit and elsewhere

large quantities of tea in packages or cases of the same size and general appearance as those used by complainants, with the word "Tycoon" stamped thereon in imitation of complainants' trade-mark—all of which was intended to deceive and mislead the public into buying defendants' tea, which is of an inferior quality, greatly to the injury of the reputation of complainants' tea; that by reason of such fraudulent acts and practices on the part of defendants, complainants had been deprived of great gains and profits in the sale of their tea, and had been damaged more than \$10,000; and that defendants were still using the aforesaid facings or labels with the word "Tycoon" stamped thereon upon tea, and threaten to continue to do so, to the great injury and damage of plaintiffs. The bill prayed for an injunction to restrain the defendants and their agents from the further use of complainants' trade-mark, for an accounting, and for damages.

Upon the filing of this bill, supported by a number of affidavits corroborating its allegations, the court issued a temporary restraining order as prayed for, and the defendants thereupon filed their answer denying specifically all the material allegations of the bill. The answer further alleged that the word "Tycoon" could not have been lawfully adopted and used as a trade-mark, because it had been a word in common use in trade as a brand or name for various kinds of tea imported from Japan, for many years prior to the time when complainants claim to have adopted it as a trade-mark. It further set forth that the defendants had been using the word "Tycoon" on the facings or labels of their tea in connection with the word "chop;" but it denied that these labels bore any more similarity to those of complainants than is usually the case with tea labels, and alleged that except in the word "Tycoon" there was no resemblance whatever between them. It therefore prayed that the bill be dismissed.

Considerable testimony was taken in the case, and the court below, on the 14th of June, 1886, rendered a decree dismissing the bill, without delivering any opinion. An appeal from that decree brings the case here.

We are of opinion that the decree below must be affirmed. The material allegations of the bill are not sustained by the evidence, and the one which presents the entire foundation for the claim of relief is disproved by the exhibit which the complainants append to their bill. After alleging that complainants had adopted as their trade-mark the word "Tycoon," and stamped it upon packages of a particular kind of tea manufactured and imported by themselves alone into the American market in 1879, and that the word "Tycoon," having never before been adopted as a trade-mark, had become known to the trade as exclusively designating a particular kind of tea dealt in by the complainants, the bill states that, for the purpose of obtaining protection for their exclusive right to the said word "Tycoon" as a trade-mark, they deposited it as above described in the Patent Office at Washington; and that in 1881 the same was registered and recorded by the commissioner of patents of the United States, and a certificate was issued therefor,

securing to the complainants protection for the said trade-mark. The exhibits A and B, appended to the bill, and other exhibits attached to Corbin's deposition, show that the trade-mark adopted by the complainants, deposited and registered in the Patent Office, is not the word "Tycoon," as stated in the bill, but a transverse diamond-shaped symbol inclosing the word "The" at the top, and "Tea" at the bottom, between which, lengthwise the diamond, is the word "Tycoon." A fac-simile is as follows:



The claim of the complainants, filed in the Patent Office for the registration of the trade-mark in question, is in these words: "Our trade-mark consists of the letters and words and arbitrary symbols 'The Tycoon Tea, I. C. & M. C., Japan Tea,' ornamental scroll border, transverse diamond shape. . . . The letters or words 'I. C. & M. C., Japan Tea,' may be omitted or they may be partly omitted and partly changed as to their position within the square without materially altering the character of our trade-mark, the essential features of which are the symbol of a diamond and the arbitrarily selected word 'Tycoon.'"

It is not pretended that this combination, claimed and registered as the trade-mark of complainants, has ever been used by the defendants either in the identical form, or in a form having such resemblance thereto as might be calculated to deceive. A comparison of the label of defendants with that of the complainants, as given in the exhibit to the bill, shows many striking points of difference, and but few, if any, points of similarity, except that the word "Tycoon" is found in both. In the complainants' label, the diamond figure, the words "The Tycoon Tea," "Choicest" and "Spring Leaf" are printed in blue ink; and the other words are printed in black ink, all in different kinds of ornamental letters—the whole surrounded by an ornamental black scroll border. The defendants' label is water-marked in red and pink colors, surrounded by a heavy blue border with black decorations. The words are printed in various styles of letters of different colors—the words "Tycoon Chop," for instance, being in large white letters with red facings on a solid black ground; and "Japan Tea," in large black letters, some of which are plain and some ornamental. On the complainants' label the proprietorship of the tea is indicated by the letters "I. C. & M.," representing Ingraham, Corbin & May, the predecessors of the present firm; while on the defendants' label the name of their firm and their place of business appear prominently near the bottom of it.

These labels are so entirely dissimilar that it is difficult to perceive how they could be mis-

taken the one for the other. A mere glance is sufficient to distinguish them. There are certainly no more points of similarity between them than are to be found ordinarily between tea labels or facings; and were it not for the fact that the word "Tycoon" is found in both of them there would be no semblance of a case of infringement.

With respect to the word "Tycoon," the evidence shows beyond question that it has been used as a name or brand for Japan tea for many years. Invoices of "Tycoon tea" were received at the custom-house in San Francisco as early as May 15, 1873, as shown by a copy of the official records of that office filed in this case; and the evidence of dealers and merchants of California is all to the effect that the word was in common use as a brand for Japan tea for several years prior to that date. It is unnecessary to go into this evidence in detail; but it is conclusive as to the long use of the word prior to the alleged adoption of it as a part of the trade-mark of the complainants.

The authorities cited by complainants' counsel, to show that the prior use of a word as a trade-mark by another party who had abandoned it is not sufficient to debar the present owner of it from protection, do not apply to this case. At the time complainants claim to have adopted the word "Tycoon" as their trade-mark, for the particular species of tea dealt in by them, it was not an abandoned trade-mark previously used by some other person or firm to designate a particular quality of tea; but it was, and had been for many years, in general and common use as a term descriptive of a class of teas introduced into the American market—a term which all men engaged in the tea business had an equal right to use, and which belonged to no one individual either as a trade-mark or a trade label. It belonged to the public, as the common property of the trade, and therefore was not subject to appropriation by any one person. The following language used in *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599, quoted with approval by this court in *Delaware & H. Canal Co. v. Clark*, 80 U. S. 13 Wall. 311, 324 [20:581, 583], is applicable to the claim of the complainant in this case: "He has no right to appropriate a sign or a symbol [or a name] which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose." See also *Goodyear India Rubber Glove Co. v. Goodyear Rubber Co.* 128 U. S. 598 [32:585]; *Liggett & Myers Tobacco Co. v. Finzer*, 128 U. S. 182 [32:395]; *Stachelberg v. Ponce*, 128 U. S. 686 [32:569]; *Menendez v. Holt*, 128 U. S. 514 [32:526].

Even conceding that the complainants may claim a trade-mark for the combination of the diamond and the words inclosed in it, as described in their application to the Patent Office, there was, upon the authorities above cited, clearly no trade-mark in the word "Tycoon" considered by itself.

The decree of the court below dismissing the bill should be, and it hereby is, affirmed.

GEILINGER AND BLUM ET AL., *Plffs.*
in Err.

v.

CÆSAR PHILIPPI, Syndic of the Insolvent,
 GILBERT H. GREEN, ET AL.

(See S. C. Reporter's ed. 246-257.)

Effect of a cessio bonorum by insolvent in Louisiana—extent of title of syndic—property not liable to execution or attachment—distribution among creditors—property not included in schedule—property omitted by mistake or fraud—intention of insolvent—property claimed by wife of insolvent—creditors, when not estopped—nonresident creditors—seizure, when invalid—judgment of the court below.

1. By the laws of Louisiana, when a *cessio bonorum* has been accepted by the court and the creditors, and a syndic has been appointed and qualified, all the property and rights of property of the insolvent are vested in his creditors, represented by the syndic as their trustee, and pass to the creditors by the cession, whether included in his schedule or not.
2. This rule relates to possession and disposition, and the surrender of the insolvent does not divest him of the title to the property surrendered, though it strips him of the power to control, alienate or dispose of the same during the administration of his estate.
3. Such surrender so vests the property in the creditors, or in the syndic for them, that it is no longer liable to seizure, attachment or execution, but is held to be administered and disposed of according to law for the benefit of the creditors.
4. Although the title may not vest absolutely in the syndic or creditors, yet the surrender operates as a transfer for the specific purpose of the disposal of the property and the distribution of the proceeds *in concursu* among the creditors.
5. In this case, the order of the court in insolvency which stayed all judicial proceedings against the insolvent and his property and passed all his assets to the syndic for the creditors, was not confined in its operation to the property specifically named in the schedule, nor did the acceptance by the creditors have that effect.
6. If property be omitted by mistake or with fraudulent intention, it is the duty of the syndic to have the schedule amended so as to include it, and to take possession and administer upon it, and it is the duty of the creditors to bring it to his attention that he may do so.
7. Evidence offered that the insolvent did not intend to include such property, because advised by counsel that it was not liable for his debts, was properly excluded, as his intention could not control the operation of the law, or defeat the rights of his creditors.
8. Where such property was named in the schedule as belonging to the wife individually and not claimed by the debtor, the action of creditors in signing consents to the insolvent's discharge, under the erroneous belief that this property was not subject to their claims, does not estop them, and they are entitled to share in its proceeds when the mistake is discovered.
9. While nonresident creditors are entitled to come in *pari passu* with domestic, yet, if they do not do so, they cannot participate in the distribution.

10. Under the circumstances of this case, this property formed part of the assets belonging to an administration pending when the writs of *f. fa.* were issued, and its seizure under such writs was invalid.

11. The judgment of the circuit court which released the property upon condition that the costs in the making of the seizure be paid by the syndic, and that he present and file an order from the state district court authorizing and directing him to take possession of the property and administer the same as part of the insolvent estate, was proper.

[No. 367.]

Submitted Jan. 8, 1890. Decided Feb. 3, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana to review a judgment in an action brought by Cæsar Philippi, syndic of the creditors of Gilbert H. Green, an insolvent, decreeing that the seizure of certain property of the insolvent on execution be set aside and the marshal be restrained from selling the property. *Affirmed.*

Statement by Mr. Chief Justice Fuller:

This was a suit by way of third opposition, brought in the Circuit Court of the United States for the Eastern District of Louisiana, by Cæsar Philippi, syndic of the creditors of Gilbert H. Green individually, and as a member of the late commercial firm and partnership of Gilbert H. Green & Co., of New Orleans, and also of Green, Stewart & Co., of Liverpool, England, in the suits of *Bank in Winterthur v. Gilbert H. Green and Geilinger and Blum v. Gilbert H. Green*, on the docket of said circuit court. After the answers were filed, the two causes were consolidated and tried by the court as one case.

The submission, findings of fact and judgment are as follows:

"This cause came on this day for trial, and the parties having filed a stipulation in writing waiving the intervention of a jury and submitting the cause to the court on the issues of law and of fact, with the request that the court do make a special finding of the facts—

"Whereupon the court makes the following finding of facts:

"Geilinger & Blum, a commercial firm, domiciled and doing business at Winterthur, in Switzerland, filed their action against the defendant, Gilbert H. Green, on November 25th, 1886, and on the 31st day of January, 1887, recovered a verdict and judgment in this court against Gilbert H. Green for the sum of ten thousand five hundred and nine $\frac{1}{10}$ dollars, with interest. The Bank in Winterthur, a corporation organized under the laws of the Canton of Zurich, in the Swiss Republic, filed its action against Gilbert H. Green on the 25th day of November, 1886, and on the 31st day of January, 1887, recovered a verdict and judgment in this court against Gilbert H. Green for the sum of forty thousand three hundred and six $\frac{1}{10}$ dollars, with interest. On December 26th, 1886, Gilbert H. Green made a surrender under the Insolvent Law of the State of Louisiana, individually and as a member of the com-

NOTE.—As to priority of United States in cases of insolvency, see notes to *Prince v. Bartlett*, Bk. 3, p. 614, and to *Field v. U. S. Bk.* 9, p. 94.

As to assignments with preferences, when valid and when not, see note to *Marbury v. Brooks*, Bk. 5, p. 522.

mercial copartnership of Gilbert H. Green & Company, of New Orleans, Green, Stewart & Co., of Liverpool, England, in the form and manner set forth in the certified copy of the record of said insolvent proceedings, No. 19,784 of the docket of the Civil District Court, Parish of Orleans, which said record is made part of the finding of facts in this cause to show the character and contents of the proceedings had in said cause; that on or about the 20th of May, 1887, under writs of *alias fi. fa.* issued in the case of *Geilinger & Blum v. Gilbert H. Green* and in the case of the *Bank in Winterthur v. Gilbert H. Green*, the marshal of this court levied upon certain real estate described in the petition of Cæsar Philippi, syndic. This property was acquired by act before Theodore Guyol, notary public, of date May 19th, 1882, and said deed is hereto annexed and made part of this statement of facts to show the form, purport and contents thereof.

"At the time that this levy was made the said property was in possession of Gilbert H. Green and his wife and was their matrimonial domicile, and the said property had been continuously in possession of the said Green and wife from the date of the purchase thereof down to the date of the seizure thereof under writs of *fi. fa.* in these causes. Up to the time that this seizure was made no demand had been made upon Green and wife by Cæsar Philippi, syndic, for the said property, and no claim of title or possession had been set up by the said Philippi, syndic, for the said property.

"And thereupon the court, upon these facts, finds the issues of law in favor of the said Cæsar Philippi, syndic, and it is thereupon ordered, adjudged and decreed that the seizure of the said property above described under the *alias writ of fi. fa.* issued in these causes, dated May 20th, 1887, be set aside and the property released by the marshal, and that R. B. Pleasants, United States marshal for the Eastern District of Louisiana, be restrained and enjoined from proceeding to advertise and sell the property herein claimed, upon this condition, however, that said Philippi shall pay all the costs which have been incurred in the making of said seizure, and shall also present and file in this cause an order from the Civil District Court for the Parish of Orleans, Division E, authorizing and directing him to take possession of said property from the said Green and wife, and to administer the same as part of the insolvent estate of the said Gilbert H. Green committed to the charge of the said court and the said syndic.

"It is further ordered, adjudged and decreed that Geilinger & Blum and the Bank of Winterthur be condemned jointly to pay the costs of this suit.

"Judgment rendered June 18, 1887. Judgment signed June 17, 1887."

Annexed to the findings was a certified copy of the insolvency proceedings and of the deed to Mrs. Green.

The schedule of his assets showed this entry therein by Green:

"The house in which I reside on St. Charles street, and the furniture therein, is the individual property of my wife, and I have no claim thereto."

From the *procès-verbal* of the meeting of the 188 U. S.

creditors, it appeared that Philippi was unanimously elected syndic, and letters issued to him accordingly; that nineteen out of twenty-seven local creditors of Green & Co. appeared and took part in the proceedings, accepted the surrender of property made by the insolvent, and voted to grant him a full discharge; and that the court appointed an attorney to represent the absent creditors, who declared that he had taken full cognizance of the meeting.

The deed was dated May 19, 1882, and purported to grant, bargain, sell, assign, convey, transfer and deliver with full warranty to Mrs. Green, wife of Gilbert H. Green, "by whom she is herein assisted and authorized," the property therein described. The notes for the deferred payments were signed by her, but it did not appear in the deed that the purchase price was paid for with the paraphernal or separate estate of Mrs. Green.

Upon the trial a bill of exceptions was taken, which states that Geilinger and Blum and the Bank of Winterthur "placed Gilbert H. Green upon the witness stand and offered to prove by the said Gilbert H. Green that in making the surrender of his property, as set forth in the record No. 19,784, division E, civil district court, referred to in the statement of facts in this cause, he did not intend to include in that surrender the property seized in this cause, for the reason that he was informed and advised by his counsel that the said property was the property of his wife and was not liable for his debts or covered by the said surrender; to the introduction of which testimony the said Cæsar Philippi, syndic, then and there objected, on the ground that the said testimony was irrelevant and that Green's intention in making his surrender would not affect the issue in this cause; which objections the court sustained, and refused to allow said testimony to be adduced. To which ruling Geilinger and Blum and the Bank in Winterthur then and there excepted." To the judgment rendered as above, the pending writ of error was sued out from this court.

The errors assigned are:

1. That the court erred in refusing plaintiffs in error the right to prove the facts set forth in the bill of exceptions herein filed.
2. That the court erred in concluding as a matter of law that Gilbert H. Green had surrendered the property seized in this cause under and by virtue of the insolvent proceedings No. 19,784, of the civil district court.
3. That the court erred in ordering the release of the property herein sued for.

Messrs. Edgar H. Farrar, B. F. Jonas and Ernest B. Kruttschnitt, for plaintiffs in error:

The insolvent proceedings in the State court and the Insolvent Laws of Louisiana have no extraterritorial effect, and do not affect or control nonresident creditors, unless they voluntarily make themselves parties to the proceedings.

Ogden v. Saunders, 25 U. S. 12 Wheat. 213 (6: 606); *Baldwin v. Hale*, 68 U. S. 1 Wall. 223 (17: 581); *Gilman v. Lockwood*, 71 U. S. 4 Wall. 411 (18: 432); *Towne v. Smith*, 1 Woodb. & M. 136; *Kettlewell v. Stewart*, 8 Gill, 499; *Poe v. Duck*, 5 Md. 1.

Where the parties are not the same, nor the cause of action the same in both courts, that court holds the property which first obtained physical custody of it.

Payne v. Drewe, 4 East, 528; *Taylor v. Carryl*, 61 U. S. 20 How. 594 (15: 1081); *Freeman v. Howe*, 65 U. S. 24 How. 450 (16: 749); *Wilmer v. Atlantic & R. Air-Line R. Co.* 2 Woods, 409.

Messrs. Thomas J. Semmes and Alfred Goldthwaite, for defendants in error:

The property ought to have been surrendered to the creditors by Green, and should have been placed upon the schedule of assets, being community property and liable for the debts of Green.

Miller v. Handy, 38 La. Ann. 160; *Bouligny v. Fortier*, 16 La. Ann. 214; *Shaw v. Hill*, 20 La. Ann. 581; *Reid v. Rochereau*, 2 Woods, 151; *Duncan v. Duncan*, 3 Mart. O. S. (La.) 232.

The whole property must be surrendered, to be administered and disposed of according to law.

Muse v. Yarborough, 11 La. 530.

If any property has been omitted from the schedule, it does not belong to the debtor, but passes to the creditors by the cession.

Levy v. Jacobs, 12 La. 112; *Baldwin v. Union Ins. Co.* 2 Rob. (La.) 188; *West v. Creditors*, 8 Rob. (La.) 128; *Dwight v. Smith*, 9 Rob. (La.) 83; *Dwight v. Simon*, 4 La. Ann. 490; *Duplessis v. Boutte*, 11 La. 345; *Bank of Tennessee v. Horn*, 58 U. S. 17 How. 157 (15: 70); *Tua v. Carriere*, 117 U. S. 208 (29: 857).

After acceptance of the *cessio bonorum* by the judge for the benefit of creditors, the property surrendered is vested in the latter so as to be no longer liable to seizure, attachment or execution, but they acquire no real ownership in it.

Walling v. Morefield, 38 La. Ann. 1177; *Jacquet v. His Creditors*, 38 La. Ann. 866; *La Forest v. His Creditors*, 18 La. Ann. 293; Civ. Code, 2175; *Rivas v. Hunstock*, 2 Rob. (La.) 194; *Elmes v. Estevan*, 1 Mart. O. S. (La.) 198.

Not only the property omitted from the schedule is transferred to the creditors, but the syndic as their representative, may sue to annul the transfer of any property which the debtor has made to their prejudice prior to his cession.

Chaffe v. Scheen, 34 La. Ann. 686.

Mr. Chief Justice Fuller delivered the opinion of the court:

It is conceded by counsel for the plaintiffs in error that the St. Charles Street property was under the law of Louisiana community property, and liable for Green's debts, and should have been surrendered to the syndic; that if Green had casually omitted it from his schedules it would have passed under the control of the syndic; and that if he had fraudulently omitted the property from his schedules and put the title in the name of his wife before the insolvency proceedings, an action would lie by the syndic to recover it. But it is contended that as Green declared the property to be his wife's, and did not intend it to go under his insolvent proceedings, and as his surrender in the form and manner as made was accepted, and the syndic set up no claim of title or possession until after the seizure by the marshal, "the property remaining thus in Green's actual possession was not *in gremio legis* so as to exclude

his foreign creditors, who were in no manner bound by his insolvent proceedings, from levying their writs upon it."

The Louisiana Code contains these articles (Rev. Civ. Code La. 1875, 478):

"Art. 2175 [2171]. The surrender does not give the property to the creditors; it only gives them the right of selling it for their benefit and receiving the income of it, till sold.

"Art. 2178 [2174]. As the debtor preserves his ownership of the property surrendered, he may divest the creditors of their possession of the same, at any time before they have sold it, by paying the amount of his debts, with the expenses attending the cession."

Sections 1781 to 1822, inclusive, of the Revised Statutes of Louisiana constitute a system of Insolvent Laws. (Rev. Stat. La. 1870, 853.)

Section 1791 reads: "From and after such cession and acceptance, all the property of the insolvent debtor mentioned in the schedule shall be fully vested in his creditors; and the syndic shall take possession of, and be entitled to claim and recover, all the property, and to administer and sell the same according to law."

These provisions have formed part of the laws of Louisiana for many years, and the Supreme Court of that State has repeatedly held in respect to them that, when a *cessio bonorum* has been accepted by the court and the creditors, and a syndic has been appointed and qualified, all the property and rights of property of the insolvent are vested in his creditors, represented by the syndic as their trustee, and pass to the creditors by the cession, whether included in his schedule or not. *Dwight v. Simon*, 4 La. Ann. 490; *Muse v. Yarborough*, 11 La. 521; *West v. His Creditors*, 8 Rob. (La.) 128; *Dwight v. Smith*, 9 Rob. (La.) 82. These cases sustain and are therefore cited to the proposition by Chief Justice Taney, delivering the opinion of this court in *Bank of Tennessee v. Horn*, 58 U. S. 17 How. 157, 160 [15: 70, 71]. The rule relates to possession and disposition, and it has been frequently decided that the surrender of the insolvent does not divest him of the title to the property surrendered, though it strips him of the power to control, alienate or dispose of the same during the administration of his estate, and so vests it in the creditors or in the syndic for them that it is no longer liable to seizure, attachment or execution, but is held to be administered and disposed of according to law for the benefit of the creditors. *Rivas v. Hunstock*, 2 Rob. (La.) 187; *Jacquet v. His Creditors*, 38 La. Ann. 866; *Walling v. Morefield*, 38 La. Ann. 1174, 1177; *Nimick v. Ingram*, 17 La. Ann. 85.

It is therefore immaterial that title may not vest absolutely in the syndic or creditors. It is enough that the surrender operates as a transfer for the specific purpose of the disposal of the property and the distribution of the proceeds *in concursu* among the creditors, and is protected accordingly. *Laforest v. His Creditors*, 18 La. Ann. 292; *West v. His Creditors*, *ubi supra*.

In *Nimick v. Ingram*, 17 La. Ann. 85, Nimick & Co., judgment creditors of Ingram, issued execution against him from the Fourth District Court of New Orleans, where they had recovered their judgment, and caused property to

be seized thereunder after Ingram had gone into insolvency and made a surrender in the fifth district court. The proceedings in Nimick & Co's suit were transferred to the fifth district court and cumulated with the insolvent proceedings. Thereupon, Ingram took out of the latter court a rule on Nimick & Co. to show cause why all further action under the writ of *fi. fa.* should not be stayed and set aside, which rule was made absolute; and from that order an appeal was taken to the Supreme Court of Louisiana. There Nimick & Co. urged that by their diligence they had discovered the property seized by them, and that, Ingram having fraudulently attempted to screen the property, it was legally incompetent for him to take any steps in relation to it to affect their rights; but the Supreme Court said:

"What these rights are it is not necessary for us to decide, being understood, as we are, that they can only be determined contradictorily with the mass of the insolvent's creditors, before the court seized of the *concursio*, as the whole proceedings in the suit pending originally in the fourth district court were . . . properly ordered to be cumulated with the insolvent proceedings in the fifth district court. . . .

"Any informality in the proceedings, when questioned, must be by direct action. No creditor will be permitted to disregard and treat as an absolute nullity a judgment accepting a surrender made by his debtor, and granting a stay of proceedings.

"The acceptance for the creditors by the court of the ceded estate vests in them all the rights and property of the insolvent, whether placed on the schedule or not; and the syndic may sue to recover them.

"But any creditor may show, provided it be contradictorily with the mass of the creditors, or their legal representative, that any particular object or fund is not embraced in the surrendered estate, but is subject exclusively to his individual claim. And this is the remedy of the plaintiffs, if any they have."

Nimick v. Ingram is quoted from and approved in *Tva v. Carriere*, 117 U. S. 201, 207 [29: 855, 857].

In the case in hand, the order of the court in insolvency stayed all judicial proceedings against the insolvent and his property, and, by the acceptance of the cession, passed all the insolvent's assets to the syndic for the benefit of creditors; but its operation was not confined to the property specifically named, nor did the acceptance by the creditors have that effect. If property be omitted by mistake or with fraudulent intention, it is the duty of the syndic to have the schedule amended so as to include it, and to take possession and administer upon it (*Chaffe v. Scheen*, 34 La. Ann. 686); and it is the duty of the creditors to bring it to his attention, that he may do so. The evidence offered by appellants that Green did not intend to include this property because advised by counsel that it was not liable for his debts was properly excluded, as his intention could not control the operation of the law, or defeat the rights of his creditors.

The property was named in the schedule as belonging to the wife individually and therefore not claimed by the debtor; but any creditor, by

inquiry, could have ascertained the circumstances and been informed of its liability under the law. There is nothing to impugn the good faith of the syndic; and if there were, he could have been compelled to act and was liable to removal. (Rev. Stat. La. § 1814.) Nor was there any element of estoppel involved in the action of the creditors who signed the consents to Green's discharge. The surrender which they accepted covered all the insolvent's assets, and even if they were laboring under the erroneous belief that this particular property was not subject to their claims, they would be entitled, so far as appears from this record, to share in its proceeds when the mistake was discovered. No other creditor was misled to his injury by their action, and no adjudication foreclosed their rights.

And in addition to this, as Geilinger and Blum and the Bank in Winterthur recovered their judgments after the insolvency proceedings were commenced and the surrender made by Green, if they wished to attack those proceedings they should have done so, as we have seen, "contradictorily with the mass of the insolvent's creditors, before the court seized of the *concursio*."

It is said, however, that insolvency proceedings and laws can have no extraterritorial effect, and do not affect or control nonresident creditors unless they voluntarily make themselves parties to the proceedings.

And it is argued that, as these were foreign creditors who had not made themselves such parties, and had sought relief through the United States circuit court, that placed them on different ground as to the property of an insolvent from that occupied by the creditors of his domicile. But so far as the property of an insolvent is concerned in the jurisdiction within which proceedings against him are taken, its destination is fixed (existing priorities being of course respected) by the laws of that jurisdiction. The insolvency decree is in the nature of an execution, and, though it cannot by its own force attach assets in another State, it takes the assets within its own. And while nonresident creditors are entitled to come in *pari passu* with domestic, if they do not do so they cannot participate in the distribution.

By the insolvency proceedings Green's assets were placed in *gremio legis*, and could not be seized by process from another court. *Peale v. Phipps*, 55 U. S. 14 How. 368, 375 [14: 459, 461]; *Tva v. Carriere*, 117 U. S. 201, 208 [29: 855, 857]. What the rights of the appellants might be if they declined to prove their claims or intervene in the state court, upon the termination of the administration there, it is not necessary to consider. *Williams v. Benedict*, 49 U. S. 8 How. 107, 112 [12: 1007, 1008]; *Union Bank of Tennessee v. Vaiden*, 59 U. S. 18 How. 503 [15: 472]; *Green v. Creighton*, 64 U. S. 28 How. 90, 107 [16: 419, 428]. The conclusion that under the particular circumstances disclosed, this property formed part of the assets belonging to an administration pending when the writs of *fi. fa.* were issued, determines the invalidity of the seizure under them. *Rio Grande R. Company v. Gomila*, 182 U. S. 478 [38: 400].

The judgment of the circuit court released the property upon condition that the costs in

the making of the seizure be paid by the syndic, and that he present and file an order from the state district court authorizing and directing him to take possession of the property and administer the same as part of the insolvent estate of Green. This was an eminently judicious and proper order, apparently effectual to secure the appropriation of the property to the claims to which it was subject, while these judgment creditors were absolved from the expense incurred in emphasizing the fact of its liability.

We see no error in the record, and the judgment is therefore affirmed.

M. B. BUFORD ET AL., *Appts.*,

v.

JOHN S. HOUTZ ET AL.

(See S. C. Reporter's ed. 320-322.)

Unoccupied public lands, use of for stock raising—implied license to use—government permission—duty of owner of cattle—law and customs of Utah—law of England—inequitable suit.

1. Plaintiffs, engaged in stock raising on unoccupied public lands of the United States, although owning detached uninclosed portions of such land, cannot, by suit in equity, enjoin defendants, owning none of such lands, from the use of such public lands for pasturage, on the ground that defendants' sheep pastured thereon will trespass and pasture on plaintiff's uninclosed lands; plaintiffs cannot, by so excluding defendants, secure to themselves the exclusive right of pasturage on such public lands.
2. There is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them, when left open and uninclosed.
3. The government of the United States in all its branches has known of this use, has never forbidden it, nor taken any steps to arrest it, but has consented to and encouraged it.
4. In this country, in the progress of its settlement, the principle that a man was bound to keep his cattle confined within his own grounds or else would be liable for their trespasses upon the uninclosed grounds of his neighbors was never adopted or recognized as the law of the country, except as it might refer to animals known to be dangerous.
5. The law of Utah and its customs in this regard are the same as above stated, and the privileges accorded by the United States for grazing upon her public lands are subject alone to their control.
6. There is no equity in allowing plaintiffs to deprive defendants of this recognized right to permit their cattle to run at large over the unoccupied lands of the United States and feed upon the grasses found in them, and, under pretense of owning a small proportion of the land in controversy, obtain for themselves the monopoly of this valuable privilege.

[No. 711.]

Submitted Jan. 6, 1890. Decided Feb. 3, 1890.

NOTE.—As to pre-emption rights to public lands, see note to U. S. v. Fitzgerald, Bk. 10, p. 788.

APPEAL from a decree of the Supreme Court of the Territory of Utah affirming a decree of the Third Judicial District Court of Utah Territory in and for Salt Lake County, dismissing a suit to enjoin defendants from pasturing their sheep upon certain lands.

Affirmed.

The facts are stated in the opinion.

Mr. M. Kirkpatrick, for appellants:

An equitable action will lie to restrain parties who severally contribute to a nuisance.

Chipman v. Palmer, 77 N. Y. 56; *Blaisdell v. Stephens*, 14 Nev. 22; *Keyes v. Little York Gold W. & W. Co.* 53 Cal. 724; *Hillman v. Newington*, 57 Cal. 64; *Oliver v. Platt*, 44 U. S. 8 How. 413 (11: 658); *Gaines v. Chew*, 48 U. S. 2 How. 642 (11: 411); *Cent. Pac. R. Co. v. Dyer*, 1 Sawy. 641.

In actions to quiet title to lands against persons setting up adverse claims, the rule is that all such persons are properly made defendants.

Fisher v. Hepburn, 48 N. Y. 41-55; *Pomeroy, Remedies*, § 372; *Comstock v. Rayford*, 1 Smedes & M. 423, 40 Am. Dec. 102, and note, 106; *Fellows v. Fellows*, 4 Cow. 682, 15 Am. Dec. 427, note, and cases cited; *Dinmock v. Birby*, 20 Pick. 377; *Bowers v. Keescher*, 9 Iowa, 422; *Bugbee v. Sargent*, 23 Me. 269; *Lewis v. St. Albans Iron & S. Works*, 50 Vt. 477; *Butler v. Spann*, 27 Miss. 234.

The complaint states a good cause of action in equity for injunctive relief.

Watson v. Sutherland, 72 U. S. 5 Wall. 74 (18: 580); *Boyce v. Grundy*, 28 U. S. 3 Pet. 210 (7: 655); *Mulry v. Norton*, 1 Cent. Rep. 743, 100 N. Y. 424.

The legal remedy is not adequate; the inadequacy of legal remedies is the test and limit of the injunctive jurisdiction.

8 Pom. Eq. Jur. § 1857, and note 1; *Sullivan v. Finnegan*, 101 Mass. 447; *Clouston v. Shearer*, 99 Mass. 209; *Gage v. Rohrbach*, 56 Ill. 262, 266; *McDowell v. Langdon*, 3 Gray, 518; *Buxton v. Broadway*, 45 Conn. 540; *Ferguson v. Fisk*, 23 Conn. 501; *Gage v. Billings*, 56 Ill. 268.

There is a strong analogy between the facts in this case and those of the *Mining Debris Case*, 9 Sawy. 441.

When the United States sells land and parts with the fee by patent, it retains no right to take that land for public use without just compensation, nor does it confer such a right on the State within which it lies.

Pumpelly v. Green Bay & M. Canal Co. 80 U. S. 13 Wall. 181 (20: 581); *Eaton v. B. C. & M. R. Co.* 51 N. H. 510; *Cooley, Torts*, 569; *Mining Debris Case*, 9 Sawy. 508.

Messrs. Joseph L. Rawlins, **Ogden Hiles** and **James N. Kimball**, for appellees:

It is not true that the law bounds every man's property, and is his fence, in the sense for which appellants contend in this case.

Laws of the Territory of Utah, 1886, p. 8, chap. 8; *Keruehaker v. Cleveland, C. & O. R. Co.* 8 Ohio St. 172; *Seeley v. Peters*, 10 Ill. 130; *Studwell v. Ritch*, 14 Conn. 293; *Beaufort v. Danner*, 1 Strobl. L. 176; *Fripp v. Hasell*, 1 Strobl. L. 173; Utah Comp. Laws 1888, § 2234; *Comerford v. Dupuy*, 17 Cal. 808; *Logan v. Gedney*, 88 Cal. 579.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the Supreme Court of the Territory of Utah.

The bill was originally filed by the appellants in the Third Judicial District Court of Utah Territory in and for Salt Lake County, and in that court a demurrer was filed setting forth two grounds of objection to the bill: first, that it does not state facts sufficient to constitute a cause of action; and, second, that several causes of action have been improperly united in this, that said complaint states a separate cause of action against each individual defendant, and nowhere states or attempts to state a cause of action against all of the defendants. This demurrer was sustained, and a decree rendered dismissing the bill at the costs of plaintiffs, and on appeal to the Supreme Court of the Territory that decree was affirmed.

The case is here on an appeal from that judgment. The complainants were M. B. Buford, J. W. Taylor, Charles Crocker and George Crocker, copartners under the firm name and style of the Promontory Stock Ranch Company. The defendants were John S. Houtz and Henry and Edward Conant, under the firm name and style of Houtz & Conant, the Box Elder Stock and Mercantile Company, a corporation, and twenty individuals whose names are given in the bill.

The plaintiffs allege that they are the owners of certain sections and parts of sections of land in the Territory of Utah, which they describe specifically by the numbers and the style of their congressional subdivisions, very much of which is derived from the Central Pacific Railroad Company, to which they were granted by the Congress of the United States. These lands were alternate sections of odd numbers according to the congressional grant to the railroad company, and they with the other tracts mentioned in the plaintiffs' bill are said to amount to over 850,000 acres, "and extend over an area of forty miles in a northerly and a southerly direction, by about thirty-six miles in an easterly and westerly direction."

The allegation is that these lands are very valuable for pasturage and the grazing of stock, and are of little or no value for any other purpose, and were held by the plaintiffs, and are now held by them, for that purpose solely. That owing to their character, the scarcity of water and the aridity of the climate where these lands are situated, they can never be subjected to any beneficial use other than the grazing of stock. That plaintiffs own and are possessed of large numbers of horned cattle, to wit, 20,000 head, of the value of \$100,000, and are engaged in the sole business of stock raising. That for a long time they have had and now have all said cattle running and grazing upon these lands. That all the even-numbered sections in each and all of the townships and fractional townships above mentioned belong to and are part of the public domain of the United States. That the defendants have not, nor has either of them, any right, title, interest or possession or right of possession, of or to any of the lands embraced in any of the townships or fractional townships above mentioned, nor have they ever had any such right, title, interest or possession.

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That none of the lands included within said townships or fractional townships are fenced or inclosed, except a small portion owned by plaintiffs, which they have heretofore inclosed with fences for use as corrals, within which to gather from time to time their cattle in order to brand the young thereof. They allege that for various reasons they cannot fence and inclose their lands without inclosing large portions of the lands of the United States, and without rendering large and valuable portions of their own of no value, by reason of the shutting off and preventing their own cattle from obtaining necessary water. That the defendants Houtz and Conant, now and for a long time past, have owned a large number, to wit, 15,000 head, of sheep, and each of the other defendants to this action is now, and for a long time past has been, the owner of a large flock or herd of sheep. The smallest number owned by any one party exceeds, as plaintiff believes, five thousand, and the aggregate number of sheep so held exceeds two hundred thousand.

It is then alleged that the official survey of the United States has been extended over all land within the townships and fractional townships mentioned in the bill, and that there are seven well-defined and well-known traveled highways over those lands, four of which run in a northerly and southerly direction, and three in an easterly and westerly direction, entirely across the lands embraced in said townships and fractional townships, along which the sheep of the defendants may be driven without injury to plaintiffs' lands, notwithstanding which each of said defendants claims and asserts that he has the lawful right and is entitled to drive all sheep owned by him over and across any of said lands of these plaintiffs, and to pasture and graze his sheep thereon whenever and wherever he may desire so to do. That all of said defendants respectively rely upon and set up a common, though not a joint, pretended right to drive, graze and pasture his sheep thereon, and each of said defendants bases his pretended right to drive, graze and pasture his sheep upon the lands of the plaintiffs upon precisely the same state of facts as that relied upon by each of the other defendants. That is to say, each of said defendants claims that, all the even-numbered sections in each of said townships and fractional townships being unoccupied public domain of the United States, he has an implied license from the government of the United States to drive, graze and pasture his sheep thereon, and that he cannot do this without having them run, graze and pasture upon the lands of the plaintiffs. Therefore each of said defendants claims and asserts that he is entitled to have his said sheep run, graze and pasture upon the lands of the plaintiffs as aforesaid; and that during the year past each of said defendants did repeatedly drive large bands and herds of sheep over, upon and across the lands of these plaintiffs, and graze and pasture the same thereon, to the great injury and damage of the said plaintiffs, and that they and each of them threaten to continue to do this and will do it unless restrained by order of the court.

It is then alleged that the sheep, in grazing upon the lands, do it a permanent injury, and

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drive away the cattle from such lands, whereby, if the defendants are permitted to drive and pasture their sheep on the lands of the plaintiffs, those lands will be greatly damaged, and, for a long period of time in the future, rendered valueless for the purpose of grazing and pasturing their cattle. They then allege that they have no adequate way of estimating the damage which they will suffer should defendants, or either of them, do as they have threatened to do as herein stated, for the reason, among others, that the destruction of the food grasses and herbage on plaintiffs' lands will result in depriving plaintiffs' cattle of necessary food, thereby causing great deterioration in flesh and consequent value, which loss and deterioration cannot be adequately determined by witnesses; which will result in the destruction of plaintiffs' business, will waste and impair their freehold, and obstruct them and each of them in the use of their said property. They allege, therefore, that they have no plain, adequate and speedy remedy at law; and that it will be impossible to establish the amount of damages which said plaintiffs will suffer by the wrong or trespass of any particular one of said defendants.

The prayer of the plaintiffs is for a judgment and decree of the court—

1st. That said defendants have not, nor has either of them, any right of way for any of his or their sheep over said lands of plaintiffs or any part thereof, except over and along the highways aforesaid; that they have not, nor has either of them, any right to graze or pasture any of his or their sheep thereon or on any part thereof.

2d. That, pending this action, said defendants and each of them, their and each of their agents, servants and employes, be enjoined from driving any of his or their sheep upon any of said lands, except over and along said highways, or permitting any of them to go, graze or pasture thereon, and that upon the final decree herein said injunction be made perpetual.

3d. For such other and further relief as may be just and equitable, together with their costs in this behalf incurred.

The Supreme Court of the Territory, in affirming the judgment of the court of the third judicial district, did not consider the question of the misjoinder of defendants, but rested its judgment upon the want of equity in the bill. It might be difficult to sustain a bill which, like this, united fifteen or twenty different defendants, to restrain them from committing a trespass, where, if the parties are guilty or should attempt to commit the trespass, they do it without concert of action, at different times, in different parts of a large district of country such as here described, and each in his own way and by his own action or that of his servants. But, waiving this question, we are of opinion that the bill has no equity in it.

The appellants being stock-raisers, like the defendants, whose stock are raised and fattened on the unoccupied public lands of the United States mainly, seek by the purchase and ownership of parts of these lands, detached through a large body of the public domain, to exclude the defendants from the use of this public domain as a grazing ground, while they them-

selves appropriate all of it to their own exclusive use. This they propose to do, not by any Act of Congress or of any legislative body whatever, but by means of this bill in chancery, obtaining an injunction against the defendants, who they allege to be the owners of 200,000 sheep grazing upon these public lands, which shall exclude defendants from the use of them, and thereby secure to themselves the exclusive right to pasture their 20,000 head of cattle upon the same lands.

If we look at the condition of the ownership of these lands, on which the plaintiffs rely for relief, we are still more impressed with the injustice of this attempt. A calculation of the area from which it is proposed to exclude the defendants by this injunction, under the allegation that it is forty miles in one direction and thirty-six in another, shows that it embraces 1,440 square miles, or 921,000 acres, all of which, as averred by the bill, is uninclosed and unoccupied except for grazing purposes. Of this 921,000 acres of land the plaintiffs only assert title to 350,000 acres; that is to say, being the owners of one third of this entire body of land, which ownership attaches to different sections and quarter-sections scattered through the whole body of it, they propose by excluding the defendants to obtain a monopoly of the whole tract, while two thirds of it is public land belonging to the United States, in which the right of all parties to use it for grazing purposes, if any such right exists, is equal. The equity of this proceeding is something which we are not able to perceive.

It seems to be founded upon the proposition that while they, as the owners of the 350,000 acres thus scattered through the whole area, are to be permitted for that reason to exercise the right of grazing their own cattle upon all of the land embraced within these 1,440 square miles, the defendants cannot be permitted to use even the lands belonging to the United States, because in doing this their cattle will trespass upon the uninclosed lands of plaintiffs. In other words, they seek to introduce into the vast regions of the public domain, which have been open to the use of the herds of stock-raisers for nearly a century without objection, the principle of law derived from England and applicable to highly cultivated regions of country, that every man must restrain his stock within his own grounds, and if he does not do so, and they get upon the uninclosed grounds of his neighbor, it is a trespass for which their owner is responsible.

We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them, where they are left open and uninclosed, and no act of government forbids this use. For many years past a very large proportion of the beef which has been used by the people of the United States is the meat of cattle thus raised upon the public lands without charge, without let or hindrance or obstruction. The government of the United States in all its branches has known of this use, has never forbidden it nor taken any steps to arrest it. No doubt it may be

safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, with its direct encouragement.

The whole system of the control of the public lands of the United States as it has been conducted by the government, under Acts of Congress, shows a liberality in regard to their use which has been uniform and remarkable. They have always been open to sale at very cheap prices. Laws have been enacted authorizing persons to settle upon them, and to cultivate them, before they acquire any title to them. While in the incipency of the settlement of these lands, by persons entering upon them, the permission to do so was a tacit one, the exercise of this permission became so important that Congress, by a system of laws called the Pre-emption Laws, recognized this right so far as to confer a priority of the right of purchase on the persons who settled upon and cultivated any part of this public domain. During the time that the settler was perfecting his title, by making the improvements which that Statute required, and paying, by installments or otherwise, the money necessary to purchase it, both he and all other persons who desired to do so had full liberty to graze their stock upon the grasses of the prairies and upon other nutritious substances found upon the soil.

The value of this privilege grew as the population increased, and it became a custom for persons to make a business or pursuit of gathering herds of cattle or sheep and raising them and fattening them for market upon these uninclosed lands of the government of the United States. Of course the instances became numerous in which persons purchasing land from the United States put only a small part of it in cultivation, and permitted the balance to remain uninclosed and in no way separated from the lands owned by the United States. All the neighbors who had settled near one of these prairies or on it, and all the people who had cattle that they wished to graze upon the public lands, permitted them to run at large over the whole region, fattening upon the public lands of the United States and upon the uninclosed lands of the private individual without let or hindrance. The owner of a piece of land, who had built a house or inclosed twenty or forty acres of it, had the benefit of this universal custom, as well as the party who owned no land. Everybody used the open uninclosed country which produced nutritious grasses as a public common on which their horses, cattle, hogs and sheep could run and graze.

It has never been understood that in those regions and in this country, in the progress of its settlement, the principle prevailed that a man was bound to keep his cattle confined within his own grounds or else would be liable for their trespasses upon the uninclosed grounds of his neighbors. Such a principle was ill adapted to the nature and condition of the country at that time. Owing to the scarcity of means for inclosing lands, and the great value of the use of the public domain for pasturage, it was never adopted or recognized as the law of the country, except as it might refer to animals known to be dangerous and permitted to go where their dangerous character might produce evil results. Indeed, it is only within a

few years past, as the country has been settled and become highly cultivated, all the land nearly being so used by its owners or by their tenants, that the question of compelling the owner of cattle to keep them confined has been the subject of agitation.

Nearly all the States in early days had what was called the Fence Law, a law by which a kind of fence, sufficient in a general way to protect the cultivated ground from cattle and other domestic animals which were permitted to run at large, was prescribed. The character of this fence in most of the Statutes was laid down with great particularity, and unless it was in strict conformity to the Statute there was no liability on the part of the owner of cattle if they invaded the inclosure of a party and inflicted injury on him. If the owner of the inclosed ground had his fence constructed in accordance with the requirements of the Statute, the law presumed then that an animal which invaded this inclosure was what was called a breachy animal, was not such animal as should be permitted to go at large, and the owner was liable for the damages done by him. Otherwise the right of the owner of all domestic animals to permit them to run at large, without responsibility for their getting upon the lands of his neighbor, was conceded.

The Territory of Utah has now, and has always had, a similar Statute, section 2234 of the Compiled Laws of Utah. It is now a matter of occasional legislation in the States which have been created out of this public domain, to permit certain counties, or parts of the State, or the whole of the State, by a vote of the people within such subdivisions, to determine whether cattle shall longer be permitted to run at large and the owners of the soil compelled to rely upon their fences for protection, or whether the cattle-owner shall keep them confined, and in that manner protect his neighbor without the necessity on the part of the latter of relying upon fences which he may make for such protection.

Whatever policy may be the result of this current agitation can have no effect upon the present case, as the law of Utah and its customs in this regard remain such as we have described it to be in the general region of the northwest, and the privileges accorded by the United States for grazing upon her public lands are subject alone to their control.

These principles were very clearly enunciated by the Supreme Court of Ohio in 1854 in the case of *Kerwaker v. Cleveland, C. & C. R. Co.* 8 Ohio St. 179. In discussing this question, the court expresses so well the principle which we are considering that we venture to make an extensive quotation from the opinion:

"Admitting the rule of the common law of England in relation to cattle and other live stock running at large to be such as stated, the question arises whether it is applicable to the condition and circumstances of the people of this State, and in accordance with their habits, understandings and necessities. If this be the law in Ohio now, it has been so since the first settlement of the State, and every person who has allowed his stock to run at large and go upon the uninclosed grounds of others has been a wrong-doer, and liable to an action for

damages by every person on whose lands his creatures may have wandered. What has been the actual situation of affairs, and the habits, understandings and necessities of the people of this State from its first settlement up to the present period in this respect? Cattle, hogs and other kinds of live stock not known to be breachy and unruly, or dangerous, have been allowed at all times and in all parts of the State to run at large and graze on the range of uncultivated and uninclosed lands.

So that it has been the general custom of the people of this State, since its first settlement, to allow their cattle, hogs, horses, etc., to run at large, and range upon the uninclosed lands of the neighborhood in which they are kept; and it has never been understood by them that they were tortfeasors, and liable in damages for letting their stock thus run at large. The existence or enforcement of such a law would have greatly retarded the settlement of the country, and have been against the policy of both the general and the state governments.

"The common understanding upon which the people of this State have acted since its first settlement has been that the owner of land was obliged to inclose it with a view to its cultivation; that without a lawful fence he could not, as a general thing, maintain an action for a trespass thereon by the cattle of his neighbor running at large; and that to leave uncultivated lands uninclosed was an implied license to cattle and other stock at large to traverse and graze them. Not only, therefore, was this alleged rule of the common law inapplicable to the circumstances and condition of the people of this State, but inconsistent with the habits, the interests, necessities and understanding of the people."

In the case of *Seeley v. Peters*, 10 Ill. 142, in the Supreme Court of Illinois in 1848, six years earlier than the Ohio case, the court in reference to the same subject, by Judge Trumbull, uses the following language:

"Perhaps there is no principle of the common law so inapplicable to the condition of our country and people as the one which is sought to be enforced now for the first time since the settlement of the State. It has been the custom in Illinois, so long that the memory of man runneth not to the contrary, for the owners of stock to suffer them to run at large. Settlers have located themselves contiguous to prairies for the very purpose of getting the benefit of the range. The right of all to pasture their cattle upon uninclosed ground is universally conceded. No man has questioned this right, although hundreds of cases must have occurred where the owners of cattle have escaped the payment of damages on account of the insufficiency of the fences through which their stock have broken, and never till now has the common-law rule, that the owner of cattle is bound to fence them up, been supposed to prevail or to be applicable to our condition. The universal understanding of all classes of the community, upon which they have acted by inclosing their crops and letting their cattle run at large, is entitled to no little consideration in determining what the law is, and we should feel inclined to hold, independent of any statutes up-

on the subject, on account of the inapplicability of the common law rule to the condition and circumstances of our people, that it does not and never has prevailed in Illinois. But it is unnecessary to assume that ground in this case. The legislation upon this subject, from the time when we were a part of the Indiana Territory down to the last law contained in the Revised Statutes, clearly shows that the Legislature never supposed that this rule of the common law prevailed in Illinois, or intended that it should."

The same principle is asserted in the case of *Comerford v. Dupuy*, 17 Cal. 310; and in the case of *Logan v. Gedney*, 88 Cal. 579, the court distinctly held that "the rule of the law of England, that every man is bound to keep his beasts in his own close under the penalty of answering in damages for all injuries resulting from their being permitted to range at large, never was the law in California." This decision is the more in point, as California, like Utah, was acquired from Mexico by the same treaty. See also *Studdwell v. Ritch*, 14 Conn. 293.

As evidence of the liberality with which the government of the United States has treated the entire region of country acquired from Mexico by the Treaty of Guadalupe Hidalgo, it is only necessary to refer to the fact that while by the laws of Mexico every discoverer of a mine of the precious metals was compelled to pay a certain royalty to the government for the use of the mine in extracting its minerals, as soon as the country came under the control of the United States an unlimited right of mining by every person who chose to enter upon and take the risks of the business was permitted without objection and without compensation to the government; and while this remained for many years as a right resting upon the tacit assent of the government, the principle has been since incorporated into the positive legislation of Congress, and to-day the larger part of the valuable mines of the United States are held by individuals under the claim of discovery, without patent or any other instrument from the government of the United States granting this right, and without tax or compensation paid to the government for the use of the precious metals.

As showing this extreme liberality on the part of the general government, reference may be had to the case of *Forbes v. Gracey*, 94 U. S. 762 [24: 818]. In that case a mining company which had no title whatever from the United States, and which was taking out mineral ore of immense value from the lands of the United States, sought to enjoin the State of Nevada from taxing the ore thus taken, on the ground that it was the property of the United States and not taxable by the State of Nevada. But this court, reverting to the liberality of the government in that regard, decided that the moment the ore became detached from the main vein in which it was embedded in the mine, it became the property of the miner, the United States having no interest in it, and was therefore subject to state taxation.

Upon the whole, we see no equity in the relief sought by the appellants in this case, which undertakes to deprive the defendants of this recognized right to permit their cattle to run

at large over the lands of the United States and feed upon the grasses found in them, while, under pretense of owning a small proportion of the land which is the subject of controversy, they themselves obtain the monopoly of this valuable privilege.

The decree of the Supreme Court of Utah is therefore affirmed.

ADAM G. ADAMS, Trustee, *Plff. in Err.*,
v.

JAMES C. CONNER, Administrator, ET AL.

(See S.C. Adams v. Ottenden, Reporter's ed. 290-299.)

Bankruptcy—title from assignee—foreclosure of liens—jurisdiction of state court—error—remedy by appeal.

1. Where the assignee in bankruptcy sold land recovered by him as the property of the bankrupt, and deeded the same to the purchaser and put him in possession, those having liens on the land, not having been made parties to the proceedings in the bankrupt court, nor having proved their claims there, may afterwards foreclose their liens in the state court, making the bankrupt, his assignee in bankruptcy and the purchaser parties defendant.
2. The state court had jurisdiction of the parties who were served with process and appeared, and of the foreclosure of the liens, and could determine whether the alleged liens existed, and whether there was any defense to them, the property being not in the possession of the bankrupt court, but in that of the purchaser, who was a party to the foreclosure proceedings.
3. Whether the state court erred in deciding that the lienholders had a claim upon the land, rather than upon the fund in the hands of the assignee in bankruptcy, presented simply a matter of error, its ruling upon which, if erroneous, did not oust it of jurisdiction, and could only be corrected by appeal.
4. The failure of the party, the purchaser from the assignee in bankruptcy, to exhaust his remedy by appeal, does not entitle him to disregard the entire proceedings as without jurisdiction.

[No. 952.]

Submitted Jan. 15, 1890. Decided Feb. 3, 1890.

IN ERROR to the Circuit Court of the United States for the Northern District of Alabama to review a judgment dismissing an action of ejectment, brought by a purchaser from an assignee in bankruptcy against a purchaser at subsequent foreclosure sale in a state court. *Affirmed.*

The facts are stated in the opinion.

Messrs. S. Watson, H. E. Jones and Lawrence Cooper, for plaintiff in error:

To set up a claim in a court against the estate of a bankrupt, without such proof as can only be made in a court of bankruptcy, would be an attempt to nullify the provisions of the Bankrupt Act, and a contempt of the bankrupt court.

NOTE.—As to Bankrupt and Insolvent Laws of State, constitutionality of; laws of United States suspend State Bankrupt Laws; discharge in foreign country no bar.—see note to *Sturges v. Crowninshield*, Bk. 4, p. 529.

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Davis v. Anderson, 6 Nat. Bankr. Reg. 159; *Re Vogel*, 2 Nat. Bankr. Reg. 427, 3 Nat. Bankr. Reg. 198; Bump, Bankruptcy (10th ed.) 817; Rev. Stat. U. S. § 5081.

By section 5081 the court or any creditor has a right to question every claim.

The defendants never proved their claims in bankruptcy according to the requirements of the Bankrupt Act, and are therefore in no condition to ask any court to enforce them. The Act expressly says that unless so proven they shall not be allowed.

Clafin v. Houseman, 93 U. S. 180 (23: 833).

The jurisdiction of a district court of the United States, sitting as a court of bankruptcy, is superior and exclusive in all matters arising under the statutes.

Bump, Bankruptcy (10th ed.) 327, 638; *Hewett v. Norton*, 1 Woods, 71.

The legal title to the lands, by the surrender to the assignee, and by operation of the Bankrupt Act, vested in the assignee, as the officer of the bankrupt court.

Bump, Bankruptcy (10th ed.) 328; *Phelps v. Sellick*, 8 Nat. Bankr. Reg. 390; *Watson v. Citizens Sav. Bank*, 11 Nat. Bankr. Reg. 161.

The lien creditor must prove his demand in the bankrupt court or lose it.

Davis v. Anderson, 6 Nat. Bankr. Reg. 145; *Steele v. Moody*, 53 Ala. 425; *Glover v. Love*, 68 Ala. 219; *Pollock v. Hill*, 69 Ala. 515; *Tennessee & C. R. Co. v. East Alabama R. Co.* 75 Ala. 516.

Where the bankrupt court has first taken jurisdiction by ordering a sale of mortgaged premises discharged of liens, it thereby ousts a state court of jurisdiction to foreclose the mortgage.

Re Devore, 16 Nat. Bankr. Reg. 56; *Atkins v. Strodley*, 51 Iowa, 414.

Messrs. Milton Humes and R. C. Brickell, for defendants in error:

In Alabama, the vendor of lands, though making an absolute conveyance, reciting full payment of the consideration, retains a lien for the unpaid purchase money, if he does not take some independent security, which a court of equity will enforce against the vendee and his privies in estate, other than bona fide purchasers for value.

Simpson v. McAllister, 56 Ala. 228; *Craft v. Russell*, 67 Ala. 9; *Stringfellow v. Ivis*, 73 Ala. 209; *Wilkinson v. May*, 69 Ala. 33; *Napier v. Jones*, 47 Ala. 90; *Foster v. Athenaeum Trustees*, 3 Ala. 302; *Burns v. Taylor*, 23 Ala. 255.

A purchaser is bound to take notice of all that appears upon the face of conveyances which are links in his chain of title, and if the lien be shown by a deed which is a link in his chain of title, he cannot claim protection as a bona fide purchaser.

Manich v. Shearer, 49 Ala. 226; *Burch v. Carter*, 44 Ala. 115; *Ketchum v. Creagh*, 58 Ala. 224; *Johnson v. Thweatt*, 18 Ala. 741; *Rosette v. Wynn*, 73 Ala. 146.

An assignee in bankruptcy is not, nor is a purchaser from him, a bona fide purchaser, entitled to protection against equities to which the estate of the bankrupt is subject.

Smith v. Perry, 56 Ala. 266; 2 Story, Eq. § 1228; *Cook v. Tullis*, 85 U. S. 18 Wall. 333 (21: 933).

The lien of the vendor is assignable, and

passes as an incident to the assignee of the debt for the purchase money.

Latham v. Staples, 46 Ala. 462; *White v. King*, 53 Ala. 162; *Wolfe v. Nall*, 62 Ala. 24; *Wilkinson v. May*, 69 Ala. 33; *Preston v. Elington*, 74 Ala. 133.

The vendor having the lien has and retains only the right to charge the land with the payment of the purchase money through the decree of a court of equity.

Gilman v. Brown, 1 Mason, 221; *Bankhead v. Owen*, 60 Ala. 457; *Stringfellow v. Ivie*, 73 Ala. 209.

The court of bankruptcy did not have jurisdiction to enforce the lien on the lands for the unpaid purchase money due to Mrs. Weaver and Crittenden.

Eyster v. Gaff, 91 U. S. 521 (23: 408); *Smith v. Mason*, 81 U. S. 14 Wall. 419 (20: 748); *Marshall v. Knox*, 83 U. S. 16 Wall. 551 (21: 481).

The Chancery Court of the State had plenary jurisdiction to enforce the lien.

Hunt v. Hunt, 72 N. Y. 217-229.

The court of chancery having jurisdiction of the subject matter and of the parties, and the assignee in bankruptcy and the plaintiff in error having appeared and litigated all the questions now involved, and from an adverse decree having prosecuted an appeal to the Supreme Court of the State, resulting in an affirmation of the decree, that litigation cannot be opened, and, in a collateral suit or proceeding, these decrees declared void.

Mays v. Fritton, 87 U. S. 20 Wall. 314 (22: 389); *Doe v. Childress*, 88 U. S. 21 Wall. 642 (22: 549); *Scott v. Kelly*, 89 U. S. 22 Wall. 57 (22: 759); *Eyster v. Gaff*, 91 U. S. 521 (23: 408); *Burbank v. Bigelow*, 92 U. S. 179 (23: 542); *Davis v. Friedlander*, 104 U. S. 570 (26: 818); *Winchester v. Heiskell*, 119 U. S. 450 (30: 462).

As to those who were not parties to the bankruptcy proceedings and had no notice of them, those proceedings are *res inter alios acta*.

Smith v. Mason, 81 U. S. 14 Wall. 419 (20: 748); *Marshall v. Knox*, 83 U. S. 16 Wall. 551 (21: 481); *Ray v. Norneworthy*, 90 U. S. 23 Wall. 128 (23: 116).

Sec. 121, Rev. Stat., did not divest the jurisdiction of the Court of Chancery of the State to enforce the lien on the lands.

Thatcher v. Rockwell, 105 U. S. 467 (26: 949); *Winchester v. Heiskell*, 119 U. S. 450 (30: 462); *Goodrich v. Wilson*, 119 Mass. 429; *Kidder v. Horrobin*, 72 N. Y. 159; *Ansley v. Patterson*, 77 N. Y. 156.

Mr. Justice Brewer delivered the opinion of the court:

This was an action of ejectment, and was submitted to the trial court upon an agreed statement of facts, which appears in the record. The contest is between a purchaser from an assignee in bankruptcy and a purchaser at subsequent foreclosure proceedings in a state court. The land was incumbered with liens at the time the bankruptcy proceedings were commenced. The title was not in the bankrupt, nor was the property surrendered by him to the assignee. Subsequently, however, the

assignee sued the party in whose name the title stood and recovered the land. Thereafter it was sold by the assignee, and the plaintiff in error became the purchaser. Such sale was for one third cash, the balance on time, a lien being retained for the deferred payments. Upon this sale a deed was made, and the purchaser put in possession. The lienholders were not made parties to any proceedings in the bankrupt court. They never proved their claims there. After the conveyance by the assignee to the plaintiff in error, these lien owners commenced proceedings in the Chancery Court of the State to foreclose their liens, making the bankrupt, the assignee in bankruptcy and the purchaser, among others, parties defendant. The assignee and the purchaser defended on the ground that the state court had no jurisdiction to ascertain and enforce liens upon property of a bankrupt which had passed into the jurisdiction of the bankrupt court and by it been disposed of; but this defense was overruled, the liens declared and the land ordered to be sold. An appeal was taken to the Supreme Court of the State, but it affirmed the decree. Pending the proceedings in the State Chancery Court, a bill was filed in the United States circuit court to enjoin those proceedings, but, after hearing, that bill was dismissed. After the affirmation by the supreme court of the decree of the chancery court, the land was sold, and the defendants in error became the purchasers. Upon such purchase they received the ordinary deed and were put in possession. Thereupon this action of ejectment was brought.

The regularity of the proceedings of the state court is not challenged. They were all subsequent to the proceedings in the bankrupt court, and were not commenced until after the title had passed away from the assignee in bankruptcy. The general jurisdiction of the state court is conceded. The purchaser, the plaintiff in error, was a party to that suit, and the claim of the plaintiff in error can only be sustained upon the theory that by reason of the bankrupt proceedings the state court was prevented from taking jurisdiction.

But the truth is, the question is one of error and not of jurisdiction. The state court had jurisdiction of the parties, and they were served with process and appeared. It had jurisdiction of the foreclosure of liens, and it had a right to hear and determine whether the alleged liens still existed, and whether there was any valid defense to their enforcement. The property upon which the liens were claimed was not in the possession of the bankrupt court, but only in the possession of the party purchasing from it. So whether it erred in deciding that the lienholders had a claim upon the land rather than upon the fund in the hands of the assignee in bankruptcy is immaterial. It presented simply a matter of error. An error in its ruling did not oust it of jurisdiction. The error, if error it was, could be corrected only by appeal. The failure of the party to exhaust his remedy in that direction does not now entitle him to disregard the entire proceeding as without jurisdiction. *Winchester v. Heiskell*, 119 U. S. 450 [30: 462].

We see no error in the ruling of the Circuit Court and its judgment is affirmed.

UNITED STATES, Appt.,
v.
JOHN S. MOSBY.
JOHN S. MOSBY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 273-280.)

Public officers—payment of money into treasury does not estop—consul at Hong Kong—fees for examining Chinese emigrants—official and unofficial services—certifying invoices and shipments of merchandise—fees for recording—interest on public moneys—certifying signature of notary public—fees for settling estate—for shipping and discharging seamen—free goods—jurisdiction as to amount.

1. Public officers, upon the question of their compensation and the payment of money into the treasury, are not bound, in order to save their rights, to place themselves in antagonism to the accounting officers of the Department, suffer themselves to be sued, and incur the odium, for the time, of being in default; but have the right to pay into the treasury the disputed moneys, and then seek the courts to adjust and determine their claims against their superior and sovereign. Such payment is not an estoppel against the claimant.
2. The consul of the United States at Hong Kong, in examining Chinese emigrants going to the United States on foreign vessels, does not perform a service required by law or by the regulations, or any service specified in any tariff of fees, or any official service.
3. The fees received for such service, being paid voluntarily to the consul by the person to whom it was rendered, became the private property of the consul and not the money of the United States, although the consul attached his seal as evidence of his official character.
4. The consul in all such cases acts as a private citizen, and the government cannot in any way be made responsible for his acts. The statutes and regulations make a distinction between official and unofficial services rendered by a consul.
5. Certifying extra copies of quadruplicate invoices of goods shipped to the United States before the Regulations of 1881 are official services, which can be performed only under the hand of the consul and his seal of office to the certificate, and the emolument therefor is an official fee.
6. Fees received for certificates of shipment of merchandise in transit through the United States to other countries, where the law did not require the consul to issue those certificates, belong to such consul and not to the United States.
7. Fees collected for recording, which did not relate to official instruments, or to official acts, but related to private transactions for individuals, not requiring the use of the consul's title or seal of office, belonged to the consul individually; so also the fees for cattle-disease certificates.
8. Interest on public moneys deposited, in respect to which the consul was a trustee, belonged to the United States. He was not required to put the funds out at interest, but if he did so the accretion belonged to the government.
9. Certifying by such consul of official character and signature of notary public was not an offi-

cial service, and the fees therefor were his individually.

10. A fee in the settlement of a private estate belongs to the consul individually.
11. Fees collected by such consul for shipping and discharging seamen on foreign-built vessels sailing on the China coast under the United States flag belong to the consul individually, where the seamen were not American citizens and the vessel did not clear from a port of the United States.
12. Fees for certifying invoices by such consul for free goods imported into the United States concern an official duty, and do not belong to such consul, but to the government.
13. Section 707 of the Revised Statutes authorizes an appeal to this court on behalf of the United States, from all judgments of the Court of Claims adverse to the United States; and as the appeal by the United States in this case is from the judgment of \$13,889.21 in favor of the claimant, it is competent for the claimant, as he also has taken an appeal from that judgment, to avail himself of anything in the case which properly shows that that judgment was not for too large a sum. And the fact that the items for the disallowance of which the claimant appealed do not amount to over \$3,000, does not take away such right.

[Nos. 1112, 1420.]

Argued Jan. 17, 1890. Decided Feb. 3, 1890.

APPEALS from a judgment of the Court of Claims in favor of claimant, John S. Mosby, against the United States, for moneys which he had received as fees while he was consul of the United States at Hong Kong, and had paid into the treasury, and which he claimed to belong to himself individually. *Reversed.*

The facts are stated in the opinion.

Opinion below, 24 Ct. Cl. 1.

Mr. Wm. A. Maury, Assistant Atty-Gen., for the United States:

All public offices are trusts to be exercised for the public good. The claimant is forbidden by law to receive the fees claimed.

U. S. v. Shoemaker, 74 U. S. 7 Wall. 898 (19: 80); *Hall v. U. S.* 91 U. S. 565 (23:448); *Converse v. U. S.* 62 U. S. 21 How. 471 (16: 194); *U. S. v. Saunders*, 120 U. S. 126 (80:594); *Oscanyan v. Winchester R. Arms Co.* 108 U. S. 273 (26: 544); *Conner v. Mayor of New York*, 5 N. Y. 285; *Coffin v. State*, 7 Ind. 157.

Mr. Jno. S. Mosby, pro se:

The President cannot delegate the legislative power granted by section 1745, Rev. Stat. Such grants of power are always strictly construed.

Cooley, Const. Lim. (5th ed.) 249; *Clark v. Washington*, 25 U. S. 12 Wheat. 40 (6: 544); *Lyon v. Jerome*, 26 Wend. 494; *Runkle v. U. S.* 122 U. S. 557 (80: 1171).

A tariff of consular fees is nothing but a presidential ordinance, issued by statutory authority. An ordinance to be valid must be certain.

Cooley, Const. Lim. 248; *Dillon, Mun. Corp.* §§ 819, 820, 822; *Robinson v. Mayor of Franklin*, 1 Humph. (Tenn.) 156, 34 Am. Dec. 635, note; *McConvill v. Jersey City*, 39 N. J. L. 42; *Endlich, Interpretation of Statutes*, § 852; 2 Kent, Com. (12th ed.) 364; *The Idaho*, 98 U. S. 575 (23: 978); *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Bank of State v. Cooper*, 2 Yerg. 599, 24 Am. Dec. 517; *Baltimore v. Radecke*, 49 Md. 217, 38 Am. Rep. 239; *Re Frazer*, 68 Mich. 896, 6 Am. St. Rep. 810.

NOTE.—As to extra pay and compensation to officers, see note to *U. S. v. Macdaniel*, Bk. 8, p. 587.

The law must be impartial and general, or it is no law.

Waite v. Garston Local Board of Health, L. R. 8 Q. B. 5; *U. S. v. Cruikshank*, 92 U. S. 555 (23: 592); *Pick Wo v. Hopkins*, 118 U. S. 856 (30: 220); *Dillon, Mun. Corp.* §§ 819, 820, 822; *Ex parte Frank*, 52 Cal. 606; *U. S. v. Badeau*, 33 Fed. Rep. 573, 81 Fed. Rep. 697.

It has always been the policy of the government to allow salaried consuls to retain a certain amount of fees.

Pickett's Claim, 9 Ops. Atty-Gen. 496; *Appointment of Consuls*, 7 Ops. Atty-Gen. 242; *Notarial Powers of American Consuls*, 12 Ops. Atty-Gen. 1; *U. S. v. Moore*, 95 U. S. 763 (24: 589); *U. S. v. Pugh*, 99 U. S. 269 (25: 823); *U. S. v. Macdaniel*, 33 U. S. 7 Pet. 14 (8: 592).

The collector has no authority to take a bond; if he exacts a bond with an arbitrary sum as a penalty it is void.

U. S. v. Tyngey, 30 U. S. 5 Pet. 114 (8: 66); *U. S. v. Rice*, 17 U. S. 4 Wheat. 246 (4: 562).

Certifying invoices for free goods is not a part of the business of a consul.

Siegfried v. Phelps, 40 Fed. Rep. 660; *Balfour v. Sullivan*, 8 Sawy. 649, and cases cited; *Merritt v. Welsh*, 104 U. S. 695, 700 (26: 896); *Morrill v. Jones*, 106 U. S. 466 (27: 287).

Foreign-built vessels, owned by citizens of the United States, are not embraced in the provisions of the Act of 1884 (June), forbidding the collection of fees by consular officers from American vessels.

Ops. Atty-Gen. July 20, 1885; *Badger v. Gutierrez*, 111 U. S. 736 (28: 581); *White's Bank v. Smith*, 74 U. S. 7 Wall. 656 (19: 218).

Fees for examining Chinese going to the United States on foreign vessels were voluntarily paid and belong to claimant.

Chao Chan Ping v. U. S. 130 U. S. 581 (32: 1068); *Siemen v. Sellers*, 123 U. S. 285 (31: 156); *U. S. v. Duval*, 1 Gilp. 872; *Runkel v. U. S.* 122 U. S. 544 (30: 1168); *Ah Kow v. Nunan*, 5 Sawy. 559.

The doctrine of estoppel by voluntary payment applies only to parties standing on an equal footing.

Swift Co. v. U. S. 111 U. S. 22 (28: 841); *U. S. v. Lawson*, 101 U. S. 169 (25: 863); *U. S. v. Ellsworth*, 101 U. S. 178 (25: 862); *Huguenin v. Baseley*, 14 Ves. Jr. 273; *Dent v. Bennett*, 4 Myl. & C. 277.

Mr. Justice Blatchford delivered the opinion of the court:

This is a suit brought in the Court of Claims by John S. Mosby against the United States, claiming to recover the sum of \$29,180.01, moneys which he had received while he was consul of the United States at Hong Kong, from February 4, 1879, to July 21, 1885, and had paid into the treasury, the items composing the above sum being as follows: (1) for examining Chinese emigrants departing on foreign vessels for the United States, \$5,147; (2) for certifying extra copies or quadruplicate invoices, about \$2,000; (3) for certifying invoices for goods in transit through the United States to other countries, \$5,805; (4) for notarial and clerical work, \$644.01; (5) for services to foreign-built vessels carrying the American flag, \$584; and (6) for certifying invoices for goods exported to the United States, which were on

the free list, and for which no invoice was required by law as a condition of entry, about \$15,000.

The petition alleged that those fees were paid voluntarily to the claimant by persons at whose request the services were performed, and were turned by him into the treasury because he did not wish to involve himself in a controversy with the Department as long as he held a subordinate position in it, and because he was compelled to obey its orders or be dismissed from office and subjected to the imputation of appropriating money which did not belong to him; and that he credited the fees to the treasury, relying on the good faith of the government to restore to him whatever belonged to him on the final settlement of his accounts.

The Court of Claims found the facts as follows:

"1. The claimant was consul of the United States at Hong Kong from February, 1879, until July, 1885, and remained at his post until the latter date, when he returned to the United States.

"2. During his term he turned into the treasury the sum of \$5,147 on account of fees collected for examining Chinese emigrants going to the United States on foreign vessels; of this sum \$3,923.50 were collected prior to September 1, 1881, and \$1,223.50 were collected between September 1 and December 31, 1881. Said fees were voluntarily paid by the masters and charterers of said vessels at whose solicitation the service was rendered, and were collected in good faith by the consul.

"3. Soon after assuming charge of the consulate, to wit, February 21 and March 19, 1879, claimant informed the Department of State that, since the enactment of the Law of February 19, 1862, prohibiting the coolie trade in which American vessels had been engaged, it had been the practice at Hong Kong to procure for American and foreign vessels carrying Chinese passengers to the United States a consular certificate of the fact that they were free and voluntary emigrants. The claimant addressed said communications to the State Department to establish that the fees belonged to him, but paid into the treasury, before receiving a reply, the sum of \$731.75. In reply to a claim that he, the consul, was entitled to such fees, the Secretary of State replied, in substance, that the fee is an official fee, and must be accounted for to the treasury.

"4. He gave written advice to the agent of the O. & O. S. S. Co., at Hong Kong, to send steamships which were under the English flag without a consular certificate for the Chinese emigrants, as no law required it, and the agent declined to do so. A copy of his letter to the said agent was forwarded to the State Department. It does not appear that the Department replied to his communication accompanying said letter.

"5. The Bothwell Castle, an English steamship, sailed from Hong Kong about January 6, 1882, carrying Chinese emigrants without the usual consular certificate of examination, but with a letter from the United States consul addressed to the collector at San Francisco, explaining why the master did not have it. Said vessel entered the Port of San Francisco with-

out trouble about February 1, 1882; all other foreign vessels after that time ceased to procure the said consular certificate. A copy of said letter to the collector at San Francisco was forwarded to the State Department; but claimant did not receive a reply. All emigration fees collected up to December 31, 1881, were turned into the treasury.

"6. The sum of \$638.25 was collected in January, 1882, for examination of Chinese on foreign vessels, which was first credited and then charged back to the treasury; and a letter was written by the claimant to the first comptroller explaining that item in his accounts. The comptroller allowed the item as a proper charge.

"7. The charterers of foreign vessels who had paid these fees to the consul afterwards applied to the treasury to have them refunded, which was refused by the comptroller on the ground 'that the collection of said fees was proper and they should not be refunded.'

"8. The claimant, after his removal from office, claimed the emigration fees from foreign vessels. His claim was also disallowed. The fees collected subsequently to January 8, 1882, were refunded by the consul to the parties who paid them. The consul was not charged with the fees so refunded, or those he might have collected if he had not declined to continue the practice of examining Chinese emigrants on foreign vessels. The claimant refused to collect fees after receiving from the State Department notice that such fees must thereafter be accounted for as official fees. Said notice, in the form of a letter from the Department, was dated on said date, and reached claimant in due course of mail.

"9. The claimant paid into the treasury the sum of \$5,805 on account of fees received by him for certificates of shipment of merchandise in transit through the United States to other countries.

"10. The claimant paid into the treasury the sum of \$1,592 for certifying extra copies or quadruplicate invoices of goods shipped to the United States. The said sum was collected by claimant before the 1st day of September, 1881.

"11. He credited and paid to the treasury \$584 on account of fees collected for shipping and discharging seamen on foreign-built vessels sailing on the China coast under the United States flag. He credited and paid into the treasury \$2,095 on account of invoices certified by him for free goods imported into the United States.

"12. The claimant credited and paid into the treasury fees aggregating \$644.01, accruing as follows:

(a) Recording instruments at various times between February 4, 1879, and December 31, 1880.....	\$39 29
(b) Cattle-disease certificates collected in small items from time to time, between February 4, 1879, and September 30, 1880.....	152 00
(c) Interest on deposits at the bank (public moneys deposited between February 4, 1879, and June 30, 1882).....	1 104 51
(d) Acknowledgments and authentications of instruments collected from time to time in small quantities, between February 4, 1879, and December 31, 1879, certifying official character and signature of notary public.....	48 00
(e) Certificates of shipments, or extra in-	
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voices, collected during the December quarter, 1881, \$2.50 each.....	202 00
(f) Five per cent commission on the estate of Alice Evans, May, 1881.....	8 21
	\$644 01

"13. The payment by the claimant of these several sums of money into the treasury was for the purpose of avoiding a controversy with the Department. Soon after the claimant was removed from office, and before a final settlement of his accounts, he made a demand that all fees now claimed be credited to him.

"14. At the request of claimant's counsel, the following facts are also found: Said claimant wrote to the State Department, March 19, 1879, as stated in finding 8, in which communication he informed said Department that it had been the habit of his predecessors to retain said fees as unofficial, and asked to be instructed whether he, the claimant, was not entitled to same. The said Department replied as follows: 'It is now deemed to be the more advisable course to prescribe the fee as an official one to be accounted for to the treasury.' In instructions to said claimant, dated August 26, 1879, the said Department instructed claimant that the fees for acts which the consul is empowered but not required by law to perform, and which relate only to private transactions, are unofficial."

As conclusions of law, the court held that the claimant was entitled to recover, for item (1) in the petition, \$5,147; for item (3), \$5,805; for items *b*, *d* and *f* in finding 12, being part of item (4), \$208.21; for item (5), \$584; and, as a part of item (6), \$2,095. It rejected the claim of \$1,592 for certifying extra copies or quadruplicate invoices of goods shipped to the United States, being the amount proved and found as to item (2); and also items *a*, *c* and *e*, in finding 12, amounting to \$485.80, being a part of the \$644.01 in item (4). A judgment was rendered for the claimant for \$18,839.21, from which both parties appealed. The opinion of the Court of Claims, disposing of the various matters involved, is reported in 24 Ct. Cl. 1.

It is provided as follows by section 1745 of the Revised Statutes: "The President is authorized to prescribe, from time to time, the rates or tariffs of fees to be charged for official services, and to designate what shall be regarded as official services, besides such as are expressly declared by law, in the business of the several legations, consulates and commercial agencies, and to adapt the same, by such differences as may be necessary or proper, to each legation, consulate or commercial agency; and it shall be the duty of all officers and persons connected with such legations, consulates or commercial agencies to collect for such official services such and only such fees as may be prescribed for their respective legations, consulates and commercial agencies, and such rates or tariffs shall be reported annually to Congress."

This section concerns itself wholly with "official services." The tariffs of fees to be prescribed by the President from time to time are those to be charged for "official services." The President is to designate what are to be regarded as "official services," in addition to such as are expressly declared by law. The inhibition on consular officers, as to the collection of fees,

is only against the collection, for "such official services," of other fees than the prescribed fees. It is not claimed by the United States in this case that the fees sued for by the claimant fall within the class mentioned in section 1745, of "such as are expressly declared by law." The question for determination is, whether the fees collected by the claimant, and paid into the treasury, were fees for official services, within the regulations prescribed by the President under section 1745.

The claimant acted with propriety, and with a high sense of honor, in paying the fees into the treasury, in order to avoid a controversy with the Department; and he asserted his right to have the fees refunded to him by making a demand that they should be credited to him in his accounts, before such accounts were finally settled. He did not concede the right of the government to retain the fees, and his action was equivalent to a formal protest made at the time of paying them over. As is said by Judge Weldon, speaking for the Court of Claims in its opinion: "Public officers (upon the question of their compensation and the payment of money into the treasury) are not bound, in order to save their rights, to place themselves in antagonism to the accounting officers of the Department, suffer themselves to be sued, and incur the odium, for the time, of being in default; but have the right to pay into the treasury the disputed moneys, and then seek the courts to adjust and determine their claims against their superior and sovereign." Nothing done in the present case can amount to an estoppel against the claimant.

Part of the fees in question accrued while the Consular Regulations of 1874 were in force, and part under those of 1881. These Regulations must be considered in regard to each specific item.

1. As to item (1), \$5,147, the facts relating to that item are in findings 2 to 8, both inclusive. The Consular Regulations of 1874 were prescribed by the President on September 1, 1874, and those of 1881 on May 1, 1881.

Paragraph 321 of the Regulations of 1874 is as follows:

"321. All acts are to be regarded as 'official services' when the consul is required to use his seal and title officially, or either of them; and the fees received therefor are to be accounted for to the Treasury of the United States."

It is to be observed that this paragraph uses the word "required," and does not say that all acts are to be regarded as official services when the consul uses his seal and title officially, or either of them.

Paragraph 333 of those Regulations contains a tariff of fees for 107 different services; but none of them specifies the fee for an examination of Chinese emigrants going to the United States on foreign vessels.

Paragraph 489 of the Regulations of 1881 reads as follows:

"489. All acts or services for which a fee is prescribed in the tariff of fees are to be regarded as official services, and the fees received therefor are to be reported and accounted for to the treasury of the United States, except when otherwise expressly stated therein."

Paragraph 496 in those Regulations says: "The following is the revised tariff of official

fees, prescribed by order of the President, and to be observed by all consular officers." Among 106 items contained in that tariff, item 85 prescribes a fee of 25 cents for a certificate "to the examination required by section 2162 of the Revised Statutes, for each emigrant. (Art. XXI.)" Section 2162 of the Revised Statutes, in connection with section 2158, provides for a certificate to be signed by the consul of the United States residing at the port from which any vessel registered, enrolled or licensed in the United States may take her departure carrying a subject of China, Japan or any other Oriental country, known as a coolie, containing his name, and setting forth the fact of his voluntary emigration from such port, such certificate to be given to the master of the vessel, and not to be given until the consul is first personally satisfied by evidence of the truth of the facts therein contained. These provisions do not refer to foreign vessels. Article XXI. of the Regulations of 1881, referred to in item 85 of paragraph 496, embraces 7 paragraphs, and is headed: "Duties as to American Vessels Engaged in the Transportation of Chinese and other Emigrants;" and the article expressly states that the duties of the consul under it apply to vessels of the United States. Article XVIII. of the Regulations of 1874 is to the same purport as Article XXI. of the Regulations of 1881.

Neither in the Regulations of 1874 nor in those of 1881 is there any designation, as an official service, of the examination of the subjects of China, Japan or any other Oriental country, known as coolies, carried as passengers on board of any vessel other than a vessel registered, enrolled or licensed in the United States. Therefore the consul, in examining Chinese emigrants going to the United States on foreign vessels, did not perform a service required by law or by the Regulations, or any service specified in any tariff of fees, or any official service. The fees received for such service, being paid voluntarily to the consul by the person to whom it was rendered, became the private property of the consul and not the money of the United States. This view is not varied by the fact that the person employed the consul to render the service because he was consul, or by the fact that the consul attached his seal as evidence of his official character; because he was not required by any law or regulation to use either his seal or his title of office officially, nor was any fee prescribed for the service in any tariff of fees.

The practice of consuls to do acts which are not official is recognized in several places in the Consular Regulations of 1874, as in paragraphs 296 and 297, where it is stated that consuls are at liberty to examine titles for their countrymen at home, "or to do other services for them in a foreign land," "for a private compensation, if it does not interfere with the performance of their official duties;" in paragraph 308, the performing of notarial acts; in paragraph 309, the taking the acknowledgment of deeds, and the taking of depositions and affidavits under the laws of the States and Territories of the Union, for use as evidence in such States and Territories, respectively; in paragraph 310, the execution of a commission for taking testimony under the authority of a state or territorial

tribunal, which function paragraph 311 states "is regarded as outside of the regular duties and responsibility of a consular officer," and in regard to which paragraph 312 states as follows: "It is to be understood that in such cases the consular officer does not act in his quality of an agent of the federal government, but simply as a citizen of the United States whose local position and character rendered him available to his fellow-citizens for such services as might have been rendered by a private individual. He should make himself as useful as he can to his fellow citizens, without giving offense to the government which gives him his *exequatur*. But it must be understood in all such cases that he acts as a private citizen, and that the government cannot in any way be made responsible for his acts."

Like provisions are found in paragraphs 471 to 477 of the Consular Regulations of 1881; and paragraph 478 of the latter says: "The compensation or fee of a consular officer for performing a notarial service, executing a judicial commission, or letters rogatory, or the unofficial services referred to in paragraphs 471, 472 and 475, is not an official but a personal fee, for which he is not responsible to the government as for official fees, unless the service, or a part of it, is one for which a fee is prescribed in the tariff of fees. In that case he must account to the government for the fee prescribed in the tariff."

Section 1724 of the Revised Statutes makes a consul liable for the omission to collect any fees "which he is entitled to charge for any official service." By section 1726 it is made the duty of a consular officer to "give receipts for all fees collected for his official services;" by section 1727, to keep a fee-book for the registry of "all fees so received by him;" and by section 1728, to render with his account of fees received a full transcript of such register, and make oath that it contains "a full and accurate statement of all fees received by him, or for his use, for his official services as such consular officer, during the period for which it purports to be rendered."

It is quite clear, therefore, that the Statutes and Regulations make a distinction between official and unofficial services rendered by a consul.

The allowance to the claimant of the item of \$5,147 was therefore proper.

2. The next item, but which was disallowed, is \$1,592, for certifying extra copies of quadruplicate invoices of goods shipped to the United States, and which sum was collected by the claimant before the 1st of September, 1881, and is covered by finding 10. It is stated in the opinion of the Court of Claims that all such fees paid after the Regulations of 1881 took effect have been refunded, and are not now in controversy.

Sections 2853 and 2855 of the Revised Statutes, as they stood prior to the 1st of July, 1880, when the Act of June 10, 1880, chap. 190 (21 Stat. 173), took effect, provided as follows:

"Sec. 2853. All invoices of merchandise imported from any foreign country shall be made in triplicate, and signed by the person owning or shipping such merchandise, if the same has actually been purchased, or by the manufac-

turer or owner thereof, if the same has been procured otherwise than by purchase, or by the duly authorized agent of such purchaser, manufacturer or owner."

"Sec. 2855. The person so producing such invoice shall at the same time declare to such consul, vice-consul or commercial agent the port in the United States at which it is intended to make entry of merchandise; whereupon the consul, vice-consul or commercial agent shall indorse upon each of the triplicates a certificate, under his hand and official seal, stating that the invoice has been produced to him, with the date of such production, and the name of the person by whom the same was produced, and the port in the United States at which it shall be the declared intention to make entry of the merchandise therein mentioned. The consul, vice-consul or commercial agent shall then deliver to the person producing the same one of the triplicates, to be used in making entry of the merchandise; shall file another in his office, to be there carefully preserved; and shall, as soon as practicable, transmit the remaining one to the collector of the port of the United States at which it shall be declared to be the intention to make entry of the merchandise."

Paragraph 491 of the Consular Regulations of 1874 reads as follows:

"491. Consular officers will, on request of the proper collectors, supply them, free of charge, with copies of any such documents on file in their offices as they may need in the discharge of their official duties. Copies prepared by other persons for their own use will, on request, be certified on payment of two dollars. When, however, duplicates of originals are required, or the copy is prepared by the consul, the schedule fee will be exacted as for original service."

A like provision is found in paragraph 668 of the Regulations of 1881.

By section 4 of the Act of June 10, 1880, before referred to, it was provided that sections 2853 and 2855 of the Revised Statutes should be so amended as to require that all invoices of merchandise imported from any foreign country and intended to be transported without appraisement to any of the ports mentioned in section 7 of that Act, should be made in quadruplicate, and that the consul, vice-consul or commercial agent, to whom the same should be produced, should certify each of said quadruplicates under his hand and official seal in the manner required by section 2855, and should "then deliver to the person producing the same two of the quadruplicates, one to be used in making entry at the port of first arrival of the merchandise in the United States, and one to be used in making entry at the port of destination, file another in his office, there to be carefully preserved, and as soon as practicable transmit the remaining one to the collector or surveyor of the port of final destination of the merchandise: *Provided, however,* That no additional fee shall be collected on account of any service performed under the requirements of this section."

By item 86 of the tariff of fees in paragraph 833 of the Regulations of 1874, a fee of \$2.50 is prescribed for a certificate "to invoice, including declaration, in triplicate." Nothing is there said as to a fee for a copy of an invoice, but in paragraph 491, before quoted, a fee of \$2 is

prescribed for a certificate to a copy of a document on file in the office of a consular officer, which would include an invoice. In the tariff of fees in paragraph 496 of the Regulations of 1881, in item 36, a like fee of \$2.50 is prescribed for certificate "to invoice, including declaration, in triplicate," and a like fee of \$2 under paragraph 668 of the Regulations of 1881.

The charges which make up the \$1,592 are manifestly for official services, which can be performed only under the hand of the consul and his seal of office to the certificate. As is said by the Court of Claims: "The act pertains to a duty specifically prescribed by the laws of the United States, and, upon a tender of the fee, the party making application is entitled to have a certificate attached to the instrument, if it is a copy of the document executed in triplicate. The party being entitled to the certificate, it is the duty of the officer to attach his official seal upon payment of the fees. This is an official duty, and the emolument becomes an official fee." The item of \$1,592 was therefore properly disallowed.

3. The item of \$5,805, which was allowed, is covered by finding 9, and is for fees received for certificates of shipment of merchandise in transit through the United States to other countries. These were not the invoices referred to in sections 2853 and 2855 of the Revised Statutes, either as they originally stood or as they were amended by the Act of June 10, 1880. The law did not require the consul to issue those certificates; no provision was made for a fee for them in the Regulations of 1874 or in those of 1881; and it does not appear that the regulations of the Treasury Department required a consul to perform any duty in relation to such goods. This item was therefore properly allowed.

4. The next item, \$644.01, relates to fees "for notarial and clerical work," being six items covered by finding 12. Of these, item *a*, being fees collected for "recording instruments at various times, between February 4, 1879, and December 31, 1880, \$39.29," was disallowed. This item was rejected by the Court of Claims because it did not appear, from the specification or proof, what was the character of the instruments recorded, and because it was therefore said to be impossible to determine whether the recording came within the Regulations of 1874 or those of 1881, and because, for aught that appeared, the instruments might have been those specially provided for by the tariff of fees in the Regulations.

But we think the Court of Claims erred in rejecting that item. The fees accrued from February 4, 1879, to December 31, 1880, while the Regulations of 1874 were in force. Article XXV. of those Regulations, headed "Record-Books and Archives," in paragraphs 398 to 414, requires that a consul shall keep various books of records. Of course, the fees in question were not for keeping such record books or for recording in them the instruments which were recorded in them, because such instruments were all of them official documents, and the fact that the item covers fees collected by the consul for recording instruments and paid into the treasury shows that the recording did not relate to official instruments, or to official acts,

but related to private transactions for individuals, not requiring the use of the consul's title or seal of office. This item should have been allowed.

Item *b* in finding 12, which was allowed, is for "cattle-disease certificates, collected in small items from time to time, between February 4, 1879, and September 30, 1880, \$152." It was properly allowed, as there is nothing in the Statutes or in the Regulations in relation to the duties or powers of a consul as to "cattle disease" or certificates respecting the same.

Item *c*, in finding 12, is "interest on deposits at the bank (public moneys deposited between February 4, 1879, and June 30, 1882), \$104.51." This was disallowed, and we think properly. The moneys are stated to be "public moneys," in respect to which the consul was a trustee, and any interest which he received on the funds belonged to the United States. He was not required to put the funds out at interest, but if he did so the accretion belonged to the government.

Item *d* in finding 12, which was allowed, is for "acknowledgments and authentications of instruments, collected from time to time in small quantities, between February 4, 1879, and December 31, 1879, certifying official character and signature of notary public, \$48." These were not official services required by statute or the Regulations, and were rendered to persons who requested their performance. The allowance of this item was proper.

Item *e* in finding 12, which was disallowed, is for "certificates of shipments, or extra invoices, collected during the December quarter, 1881, \$2.50 each, \$292." This disallowance was proper, for the reasons stated in regard to the item of \$1,592.

Item *f* in finding 12 is for "five per cent commission on the estate of Alice Evans, May, 1881, \$8.21." This evidently was a fee in the settlement of a private estate, and was properly allowed.

Thus, of the \$644.01 in finding 12, items *a*, *b*, *d* and *f* are allowable, amounting in all to \$247.50, instead of \$208.21 allowed by the Court of Claims.

5. The next item, and which was allowed, is \$584, on account of fees collected for shipping and discharging seamen on foreign-built vessels sailing on the China coast under the United States flag, and is covered by finding 11. The claimant insists that, while he had authority to perform those services, he was not required to do so by any statute or regulation.

Paragraph 194 of the Regulations of 1881 says:

"194. In the case of American or foreign-built vessels purchased abroad and wholly owned by American citizens, it is known that the crews are usually made up of men who are not American citizens, and who have not acquired the character of American seamen under the law and as set forth in paragraph 190. Seamen of this class, when not serving under a contract made in the United States, are not regarded as within the jurisdiction of a consular officer as to their shipment or discharge."

In paragraph 181 of the Regulations of 1874 it is said that the statutory authority of a consul to act in respect to the discharge of seamen from a vessel of the United States clearing

from a port of the United States is limited to: "1st. The sale in a foreign country of a ship or vessel belonging to a citizen of the United States. 2d. The discharge, with his own consent, of a seaman or mariner, being a citizen of the United States. 3d. A discharge after a survey of the vessel, and finding the same unseaworthy."

In the present case, what the consul did was to ship and discharge seamen on foreign-built vessels sailing on the China coast under the United States flag. It must be taken that these seamen were not American citizens, and that the vessel did not clear from a port of the United States, so as to come within the provisions of paragraphs 128, 129, 180 and 181 of the Regulations of 1874. The item of \$584 was therefore properly allowed.

6. The next item allowed was one of \$2,095, for certifying invoices "for free goods imported into the United States," and is covered by finding 11. This allowance seems to have proceeded upon the view that the law did not require an invoice of goods which were not subject to duty; that the consul had no official duty to perform in respect to an invoice of such goods; that the service was performed at the instance of the shipper, and for his convenience; that the matter was one purely personal between the consul and the party who paid the fee for the certificate; and that, as the government was not interested in the goods, the consul was under no obligation to account to the United States for the fees.

We think this view was erroneous. By section 2853 of the Revised Statutes, "all invoices of merchandise imported from any foreign country" are to be made in triplicate, whether the goods have actually been purchased or have been procured otherwise than by purchase. By section 2854, "all such invoices" are required, before the merchandise is shipped, to be produced to the proper consul. By section 2855, the person producing "such invoice" is to make a specified declaration, and the consul is to indorse upon each of the triplicates a specified certificate, and is to transmit one of the triplicates "to the collector of the port of the United States at which it shall be declared to be the intention to make entry of the merchandise." By section 2860 it is provided that, except as allowed in the four preceding sections, which do not apply to the present question, "no merchandise imported from any foreign place or country shall be admitted to an entry unless the invoice presented in all respects conforms to the requirements" of sections 2853, 2854 and 2855, and has thereon the certificate of the consul specified in those sections, nor unless the invoice is verified, at the time of making the entry, by a specified oath, nor unless the triplicate transmitted by the consul to the collector has been received by him. By section 2851, a consul is entitled to demand and receive a fee of \$2.50 for taking the verification of an invoice and making the certificate. It is quite clear, therefore, that there can be no entry without a properly certified invoice.

By paragraph 462 of the Regulations of 1874 and paragraph 637 of those of 1881, "all invoices of importations from countries in which there are" consul officers, "must, before the

shipment of the merchandise, be produced to and authenticated by the United States consular officer nearest the place of shipment for the United States."

In addition to this, it is entirely clear that the question of determining whether goods to be shipped will, when imported into the United States, be free from duty, is a question which could not be left to the determination of a consul. It often involves intricate points of fact and of law, and must be as wholly cognizable by the proper officers and tribunals of the United States, appointed for the purpose, as the question of the proper rate of duty, on dutiable goods.

The item of \$2,095 was therefore improperly allowed.

It results, therefore, that the items to be allowed are \$5,147, \$5,805, \$247.50 and \$584, being an aggregate of \$11,783.50.

It is contended for the United States that the claimant has no right to appeal in regard to the items which he claims were improperly disallowed, because they do not in the aggregate amount to more than \$8,000. But we are of opinion that, as section 707 of the Revised Statutes authorizes an appeal to this court on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and as the appeal by the United States in this case is from the judgment of \$18,889.21 in favor of the claimant, it is competent for the claimant, as he also has taken an appeal from that judgment, to avail himself of anything in the case which properly shows that that judgment was not for too large a sum.

The judgment of the Court of Claims is reversed, and the case is remanded to that court with a direction to enter a judgment in favor of the claimant for \$11,783.50.

HARLOW L. STREET, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 299-307.)

Act of July 13, 1866—power of President to reduce army officers—proceedings to muster out—limit as to time—Sunday—legislative recognition.

1. The Act of July 13, 1866 (14 Stat. 92), was not intended to have any effect on the power of a subsequent Congress to reduce the army by appropriate legislation in respect to either its officers or enlisted men.
2. The Act of July 15, 1870 (16 Stat. 315), is a grant of a general power to the President to reduce the number of officers of the army by selecting the best and mustering out the residue.
3. The government could abandon the proceedings initiated under section 11 of that Act and, without an adjudication of unfitness, proceed to muster out the appellant under section 12.
4. The President could muster out an officer who

NOTE.—As to when Sunday begins and ends; contracts made on; injuries incurred in travelling on; work done on; sales on,—see note to *Powhatan Steamboat Co. v. Appomattox R. Co.* Bk. 16, p. 682.

was transferred to the supernumerary list on the second day of January, 1870, although Congress prescribed the thirty-first day of that month as the limit of the time; there is no subordination of the power to the matter of time.

5. Sunday is a *dies non*, and a power that may be exercised up to and including a given day of the month may generally, when that day happens to be Sunday, be exercised on the succeeding day.
6. The power which can give authority to act, can ratify any act that is taken, and legislative recognition of an act validates the act, although it may not have had full prior legal authority.

[No. 1128.]

Submitted Jan 10, 1890. Decided Feb. 3, 1890.

APPEAL from a judgment of the Court of Claims dismissing an action for sixteen years' salary as first lieutenant, due by reason of alleged illegality in the order discharging appellant from the service. *Affirmed*.

The facts are stated in the opinion.

Opinion below, 24 Ct. Cl. 280.

Mr. J. M. Vale, for appellant:

Appellant, then an officer in the military service of the United States, could not be legally mustered out of the service under the Act of July 15, 1870, without being allowed a hearing before the board provided for in section 11 of said Act.

Congressional Globe, part 2, p. 1848, 2d sess. 41st. Cong.; Congressional Globe, 3398, 5386, 5843, 5401, 5533, 2d sess. 41st Cong.; *U. S. v. Bassett*, 2 Story, 389; *Muster-out of Army Officers*, 18 Ops. Atty-Gen. 353; *Army Officers Unfit for Discharge of Duty*, Id. 412; *U. S. v. Freeman*, 44 U. S. 3 How. 556-565 (11: 724, 728).

The 12th section of the Act of July 15, 1870, gave to the President authority to transfer certain officers from active duty to the list of supernumeraries; but no transfers could legally be made to or from that list on the 2d day of January, 1871.

Brown v. Barry, 8 U. S. 3 Dall. 365 (1: 638); *Minor v. Mechanics' Bank*, 26 U. S. 1 Pet. 46 (7: 47); *Thornley v. U. S.* 118 U. S. 810 (28: 999).

The acceptance or non-acceptance by appellant of the discharge and year's pay, provided for officers discharged under the Act of July 15, 1870, with or without protest, did not alter his legal status, if notified of his discharge as a supernumerary officer under the erroneous construction of the law.

Brant v. Virginia Coal Co. 93 U. S. 326 (28: 927); *Ketchum v. Duncan*, 96 U. S. 659 (24: 868); *Morgan v. Chicago & A. R. Co.* 96 U. S. 716 (24: 743); Ops. Atty-Gen. March 6, 1886; Genl. Order Navy Dept., No. 844, March 10, 1886; *Redgrave's and Perkin's Cases*, 116 U. S. 474, 483 (29: 697, 700).

The nomination of Wainright by the President *vice* Weisendorf promoted, and his confirmation by the Senate, did not operate to supersede appellant.

Official Army Register, 1871; *Blake v. U. S.* 108 U. S. 227 (26: 462); Army Regulations, 1868, par. 20.

Appellant's muster-out was in contravention of the clause of section 11 inhibiting muster-out of officers reported without opportunity for defense.

U. S. v. Bassett, 2 Story, 389; *U. S. v. Freeman*, 44 U. S. 3 How. 556-565 (11: 724, 728);

Congressional Globe, 1848, part 2, 2d sess. 41st Cong.

When the intention of the Legislature in enacting a law can be discovered from the language used, it should prevail.

Brown v. Barry, 8 U. S. 3 Dall. 365 (1: 638); *Minor v. Mechanics' Bank*, 26 U. S. 1 Pet. 46 (7: 47); *Thornley v. U. S.* 118 U. S. 810 (28: 999).

Appellant's acceptance of pay cannot operate as an estoppel concluding him from questioning the regularity of his discharge.

Brant v. Virginia Coal Co. 93 U. S. 326 (28: 927).

Messrs. John B. Cotton, Assistant Atty-Gen., and *F. P. Dewees*, for appellee:

Under the opinion and judgment in *Hildeburn's Case*, 13 Ct. Cl. 62, the claimant was without standing in the Court of Claims.

Duryea v. U. S. 17 Ct. Cl. 88; *Redgrave v. U. S.* 20 Ct. Cl. 226, 116 U. S. 474 (29: 697).

The board of officers was in no sense a court or quasi judicial tribunal.

Shereburne v. U. S. 16 Ct. Cl. 499; *Duryea v. U. S.* 17 Ct. Cl. 24.

There was no purpose by the fifth section of the Act of July 18, 1866, to withdraw from the President the power, with the advice and consent of the Senate, to supersede an officer in the military or naval service by the appointment of someone in his place.

Blake v. U. S. 103 U. S. 227 (26: 462); *Gratiot's Case*, 1 Ct. Cl. 258; *Smith v. U. S.* 2 Ct. Cl. 206; *Winter v. U. S.* 3 Ct. Cl. 137; *Keynolds v. U. S.* 3 Ct. Cl. 198; *Barnes v. U. S.* 4 Ct. Cl. 217; *Montgomery v. U. S.* 5 Ct. Cl. 94; *Mimmack v. U. S.* 10 Ct. Cl. 584, 97 U. S. 426 (24: 1087).

When, for any reason, an officer of the army or navy loses his position, nothing short of a new appointment, confirmed by the Senate, can have the effect of restoring him to the office.

Mimmack's Case, 12 Ops. Atty-Gen. 555; *Du Barry's Case*, 4 Ops. Atty-Gen. 608; *Bennett's Case*, 19 Ct. Cl. 379; *McElraith's Case*, 12 Ct. Cl. 201, 102 U. S. 426 (26: 189); *Miller v. U. S.* 19 Ct. Cl. 338; *Badeau's Case*, 15 Ops. Atty-Gen. 407; *Blake's Case*, 14 Ct. Cl. 462, 103 U. S. 227 (26: 462); *Montgomery's Case*, 19 Ct. Cl. 870; *Palen's Case*, 19 Ct. Cl. 889; *McBlair's Case*, 19 Ct. Cl. 528; *Vanderslice's Case*, 19 Ct. Cl. 480; *Corson's Case*, 17 Ct. Cl. 344, 114 U. S. 619 (29: 254).

A new appointment to the place of an officer of the army or navy supersedes such officer.

Blake v. U. S. 14 Ct. Cl. 462, 103 U. S. 227 (26: 462); *McElraith v. U. S.* 12 Ct. Cl. 201, 102 U. S. 426 (26: 189).

Mr. Justice Brewer delivered the opinion of the court:

This is an appeal from a judgment of the Court of Claims. (24 Ct. Cl. 280.) Appellant brought his action in that court to recover, not for services actually rendered, but for sixteen years' salary as first lieutenant, claiming that this was due by reason of an alleged illegality in the order of January 2, 1871, discharging him from the service. That order is therefore the matter of inquiry.

In 1869 and 1870 Acts of Congress were passed looking to a reduction in the army, and

the order in question was made in pursuance of the last of these Acts. The intent of Congress is obvious, and all proceedings had to carry such intent into effect should be liberally construed, and not subjected to any such technical limitations as will thwart such obvious purpose. The Act of July 13, 1866 (14 Stat. 92), has no bearing on the case at bar, for, as held by this court in *Blake v. U. S.* 108 U. S. 227 [26: 462], it simply placed a limitation on the personal power of the President, as commander-in-chief in time of peace, to dismiss from the service. It was not intended to have—as it could not have—any effect on the power of a subsequent Congress to reduce the army by appropriate legislation in respect to either its officers or enlisted men.

The Act of March 8, 1869 (15 Stat. 315, §§ 2-7 inclusive), is significant only as indicating the intent of Congress that the army should be reduced, for the method of reduction there provided is simply the cessation of enlistments and appointments. Evidently the reduction by this method was not as rapid as was desired, for on July 15, 1870, an Act was passed making provision for a direct reduction. (16 Stat. 315.) Section 2 authorizes and directs the President to reduce on or before the first day of July, 1871, the number of enlisted men to thirty thousand. With respect to the officers, there were several sections aimed at reduction, some abolishing certain offices, others providing that no appointments to particular offices should be made until the number of incumbents was reduced below a prescribed limit. In addition, there were four provisions having general application. Section 3 authorized the President to grant an honorable discharge to all officers applying on or before the first of January, 1871, and giving the officers so discharged an additional year's pay and allowances. Sections 4 and 5 increased the retired list to 800, and authorized the President to place on such list, on their own application, officers with thirty years' service. The other provisions are found in sections 11 and 12, which, as being the sections especially bearing on the questions in this case, are quoted as follows:

"SEC. 11. *And be it further enacted*, That the general of the army and commanding officers of the several military departments of the army shall, as soon as practicable after the passage of this Act, forward to the Secretary of War a list of officers serving in their respective commands deemed by them unfit for the proper discharge of their duties, from any cause except injuries incurred or disease contracted in the line of their duty, setting forth specifically in each case the cause of such unfitness. The Secretary of War is hereby authorized and directed to constitute a board to consist of one major-general, one brigadier-general and three colonels, three of the said officers to be selected from among those appointed to the regular army on account of distinguished services in the volunteer force during the late war; and on recommendation of such board, the President shall muster out of the service any of the said officers so reported, with one year's pay; but such muster-out shall not be ordered without allowing such officer a hearing before such board to show cause against it.

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"SEC. 12. *And be it further enacted*, That the President is hereby authorized to transfer officers from the regiments of cavalry, artillery and infantry to the list of supernumeraries, and all vacancies now existing, or which may occur prior to the first day of January next, in the cavalry, artillery or infantry, by reason of transfer, or from other causes, shall be filled in due proportion by the supernumerary officers, having reference to rank, seniority and fitness, as provided in existing law regulating promotions in the army. And if any supernumerary officers shall remain after the first day of January next they shall be honorably mustered out of the service with one year's pay and allowances: *Provided*, That vacancies now existing in the grade of second lieutenants, or which may occur prior to said date, may be filled by the assignment of supernumerary first lieutenants, or officers of higher grades, who, when so assigned, shall rank as second lieutenants, provided such officer shall prefer to be assigned, instead of being mustered out under the provisions of this section; and officers so assigned shall take rank from the date of their original entry into the service: *And provided further*, That no chaplain be appointed to posts or regiments until those on waiting orders are assigned."

It appears from the findings that on October 27, 1870, the claimant, who was on active duty at Fort Bidwell, California, was reported by the department commander, Lieutenant-Colonel George Crook, as unfit for the proper discharge of his duties from other causes than injuries incurred or disease contracted in the line of his duties. His name was submitted to the board organized in pursuance of the 11th section quoted *supra*. On the 17th of November the board requested that he, with others named, be given a hearing, as required by that section. On November 19th the adjutant-general informed the board that the stations of these officers were so remote that it was impossible for it to consider their cases, and that the Secretary of War had directed that they be not ordered to appear. In compliance with this order, on November 22d, the papers in these cases were returned to the Secretary of War. In other words, the proceedings initiated under section 11 were abandoned. No inquiry was ever made as to the alleged unfitness for the proper discharge of his duties from causes other than injuries incurred or disease contracted in the line of duty. It appears, further, than on January 2, 1871, January 1st being Sunday, an order was issued by the Secretary of War, which, so far as it affects this claimant, reads as follows:

"(General Orders, No. 1.)

"War Department, Adjutant-General's Office,

"Washington, January 2, 1871.

"By direction of the President, the following officers of the Army are transferred, assigned or mustered out of the service, to take effect from the 1st instant:

"I.—Transfers to the List of Supernumeraries, under Section 12 of the Act Approved July 15, 1870.

* * * * *

"First Lieutenant Harlow L. Street, First Cavalry.

* * * * *

"II.—Transfers and Assignments to Fill Vacancies to the Present Date.
* * * * *

"First Lieutenant Max Wessendorff, unassigned, to the First Cavalry, *vice* Street, transferred to the list of supernumeraries.
* * * * *

"III.—Unassigned Officers whose Commissions have Expired under Section 12 of the Act of Congress approved July 15, 1870, and who are Honorably Mustered out of the Service.
* * * * *

"First Lieutenant Harlow L. Street.
* * * * *

"By order of the Secretary of War:

"E. D. Townsend,

"Adjutant-General."

Subsequently, on September 18, 1871, he received the year's pay provided for in section 12, and still later, on the 18th of February, 1881, he was paid the sum of \$117.95 upon treasury settlement, on account of some errors in the previous payment.

The principal contention of the appellant is that, proceedings having been commenced under section 11, they should have been carried to a close, and that he could be mustered out of the service only upon an adjudication by that board of unfitness. But this view cannot be sustained. It arises from a misconception of the scope of the two sections. The first aims to eliminate from the army those officers who are unfit for the discharge of their duties, and whose unfitness springs from no cause of meritorious claim upon the consideration of the government; while the other is a grant of general power to the President to reduce the number of officers by selecting the best and mustering out the residue. It is comprehensive in its scope, and not at all dependent upon the failure to accomplish the requisite reduction through proceedings under section 11. It is in no manner subordinated to or dependent upon that section, and grants a power which can be exercised irrespective of all other proceedings.

The appellant had no vested right to an adjudication upon the matter reported against him. In the absence of express limitation, the government may always withdraw charges which it has made. There is nothing in the words of either section, nothing in the scope and purpose of their provisions, or in any general rule of law, which prevented the government from abandoning the proceedings initiated under section 11, and proceeding to muster out the appellant under section 12.

The other proposition of the appellant is that the authority given by section 12 was not strictly pursued. While it is conceded that the President might add to or take from the list of supernumerary officers, it is urged that he could muster out only those who were supernumerary officers at the close of the first day of January, 1879, the language being: "And if any supernumerary officers shall remain after the first day of January next they shall be honorably mustered out," etc., whereas, by the order actually made, he was transferred to the supernumerary list only on the second day of January. Concede the irregularity, and it is not such as vitiates the order. The

purpose of the Act is obvious. The direction of Congress was clear and distinct, and it would be strange if any executive officer could, by irregularity in executing the mandate of Congress, thwart this purpose. The matter of time was not vital. The purpose was reduction and a reduction to be accomplished by selecting the best and mustering out the poorer element; and while Congress prescribed the time within which this mandate was to be executed, there is neither in terms nor by implication any subordination of the power to the matter of time.

Again, it must be noticed that the first day of January was Sunday, that is, a *dies non*, and a power that may be exercised up to and including a given day of the month may generally, when that day happens to be Sunday, be exercised on the succeeding day. So that it is a matter worthy at least of consideration whether the power was not exercised within the very limits of time prescribed by the Act.

It is well in this respect to compare this section with section 3. By that the President was authorized to honorably discharge, with pay and allowances, officers who should apply on or before January 1, 1871. By that section a reduction through the voluntary act of army officers was contemplated, and such voluntary action was authorized and invited to be had on the first day of January. While section 12 was not dependent upon section 3, yet it is obvious that action so voluntarily taken by any army officer would limit the amount of enforced reduction, and to that extent relieve the President from embarrassment in the selection authorized by section 12; and there was a propriety, if nothing else, in waiting until the close of the first day of January before exercising the power of selection and mustering out.

It will also be noticed that section 12 places no limitation on the time within which the President is authorized to transfer officers to the list of supernumeraries. If voluntary resignation by the close of the first day of January made sufficient reduction, there would be no necessity of transferring any to the list of supernumeraries, and it was only the supernumerary officers remaining after the 1st of January—that is, the officers then found not to be needed for the service—who were to be mustered out under that section. There was therefore no requirement that the President should transfer to the supernumerary list before the close of the 1st of January; the number which it was necessary to transfer could not be absolutely determined until the close of that day, and it was only those who, at the close of that day were not needed in the service, that the President could muster out. All these matters justified the action of the President taken on the 2d of January, and if they do not establish that it was in full and literal compliance with the exact provisions of section 12, they certainly leave so slight a departure as scarcely to be worthy of mention. It is certainly no such deviation from the prescribed course as to vitiate the order and thus nullify the express direction of Congress.

But we are not limited to this. Full power of legislation in the matter of increase and reduction of the army is with Congress. It

prescribed in this Act the proceedings by which that reduction was to be accomplished. In pursuance of that Act certain proceedings were had. The power which can direct what proceedings shall be had can approve and make valid any proceedings which are actually taken. The power which can give authority to act can ratify any act that is taken, and generally legislative recognition of an act or a corporation validates the act or the corporation, although neither one nor the other may have had full prior legal authority. *County of Comanche v. Lewis*, 133 U. S. 198 [33:604].

There was but one order issued under section 12 for the mustering-out of supernumerary officers. In that order were many names besides that of the appellant, and the Act of March 3, 1875 (18 Stat. 497, § 2), refers to "any person who was mustered out as a supernumerary officer of the army with one year's pay and allowances," under the Act of 1870, that we have been considering. Further, on April 8, 1878 (20 Stat. 85), 25th of February, 1879 (20 Stat. 321), March 3, 1879 (20 Stat. 354), and March 3, 1881 (21 Stat. 510), Acts were severally passed authorizing the restoration to the army of John A. Darling, Michael O'Brien, Phillip W. Stanhope and Redmond Tully, who had been mustered out by this order of January 2, 1871, and those Acts all assume the validity of that order. There has been thus full legislative recognition of its validity. It is too late, therefore, now to inquire as to whether it was in technical compliance with the procedure prescribed by the Act of 1870.

We see no errors in the ruling of the Court of Claims, and its judgment is affirmed.

C. H. SMITH ET AL., *Plffs. in Err.*,

v.

O. T. LYON.

(See S. C. Reporter's ed. 815-820.)

Jurisdiction by reason of diverse citizenship—when plaintiffs must all be citizens of State where suit is brought—co-plaintiffs and co-defendants.

1. A suit by two partners, where one of them is a resident and citizen of the Eastern District of Missouri, and the other is a resident and citizen of Arkansas, and the defendant is a resident and citizen of Texas, cannot be brought in the United States Circuit Court for the Eastern District of Missouri.
2. Under the Act of Congress approved March 3, 1887 (24 Stat. 552), as amended by the Act of August 13, 1888 (25 Stat. 433), where two plaintiffs are citizens of different States, they cannot both unite in one suit in a State of which only one of them is a citizen.
3. If there are several co-plaintiffs, each plaintiff must be competent to sue, and if there are several co-defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained.

[No. 1164.]

Submitted Jan. 6, 1890. Decided Feb. 3, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment dismissing a suit for want of jurisdiction, by reason of the want of proper residence and citizenship of the parties. *Affirmed.*

The facts are stated in the opinion. Opinion below, 38 Fed. Rep. 53.

Mr. Jefferson Chandler for plaintiffs in error.

Mr. R. C. Foster for defendant in error.

Mr. Justice Miller delivered the opinion of the court:

This is a writ of error to the Circuit Court for the Eastern District of Missouri. It was dismissed in that court for want of jurisdiction, and judgment rendered accordingly, to which this writ of error is prosecuted.

The facts out of which the controversy arises are found in the first few lines of plaintiffs' petition. In this they allege that they are partners doing business under the firm name of C. H. Smith & Co.; that the said C. H. Smith is a resident and citizen of St. Louis, in the State of Missouri, and Benjamin Fordyce is a resident and citizen of Hot Springs, in the State of Arkansas; and that the defendant, O. T. Lyon, is a resident and citizen of Sherman, in the State of Texas.

To this petition, which set out a cause of action otherwise sufficient, the defendant, Lyon, who was served with the summons in the Eastern District of Missouri, filed a plea to the jurisdiction of the court, appearing by attorney especially for that purpose, the ground of which is that one of the plaintiffs, Benjamin Fordyce, is and was at the time of the institution of this suit a resident and citizen of Hot Springs, in the State of Arkansas, and the defendant was a resident and citizen of Sherman, in the State of Texas, and that the suit was not brought in the district of the residence of either the plaintiff Fordyce or of the defendant.

The motion to dismiss for want of jurisdiction was sustained by the circuit court, and the soundness of that decision is the question which we are called upon to decide.

The decision of it depends upon the proper construction of the first section of the Act of Congress approved March 3, 1887 (24 Stat. 552), as amended by the Act of August 13, 1888 (25 Stat. 433). That Statute professes to be an Act to amend the Act of March 3, 1875, and its object is "to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from state courts, and for other purposes." The first section of the Act confers upon the circuit courts of the United States original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds the sum of \$2,000, and arising under the Constitution or laws of the United States or treaties made or which shall be made under their authority. It then proceeds to establish a jurisdiction in reference to the parties to the suit. These are controversies in which the United States are plaintiffs, or in which there shall be a controversy between citizens of different States, with a like limitation upon the amount in dispute, and other controversies between parties which are described in the Statute. This first clause of the Act describes the juris-

diction common to all the circuit courts of the United States, as regards the subject matter of the suit, and as regards the character of the parties who by reason of such character may, either as plaintiffs or defendants, sustain suits in circuit courts. But the next sentence in the same section undertakes to define the jurisdiction of each one of the several circuit courts of the United States with reference to its territorial limits, and this clause declares "that no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

In the case before us, one of the plaintiffs is a citizen of the State where the suit is brought, namely, the State of Missouri, and the defendant is a citizen of the State of Texas. But one of the plaintiffs is a citizen of the State of Arkansas. The suit, so far as he is concerned, is not brought in the State of which he is a citizen. Neither as plaintiff nor as defendant is he a citizen of the district where the suit is brought. The argument in support of the error assigned is that it is sufficient if the suit is brought in a State where one of the defendants or one of the plaintiffs is a citizen. This would be true if there were but one plaintiff or one defendant. But the Statute makes no provision in terms for the case of two defendants or two plaintiffs who are citizens of different States. In the present case, there being two plaintiffs, citizens of different States, there does not seem to be in the language of the Statute any provision that both plaintiffs may unite in one suit in a State of which either of them is a citizen.

It may be conceded that the question thus presented, if merely a naked one of construction of language in a statute, introduced for the first time, would be one of very considerable doubt. But there are other considerations which must influence our judgment, and which solve this doubt in favor of the proposition that such a suit cannot be sustained.

The original Judiciary Act of 1789, which established the courts of the United States and defined their jurisdiction, declared in reference to the circuit courts, in section one of that Act (1 Stat. 78), that the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State. The construction of this phrase, "where the suit is between a citizen of the State where the suit is brought and a citizen of another State," came before the supreme court at an early day in the case of *Straubridge v. Curtiss*, 7 U. S. 8 Cranch, 267 [2: 485], and Chief Justice Marshall delivered the opinion of

the court, which was without dissent, in the following language:

"The court understands these expressions" [referring to the words "suit between a citizen of the State where the suit is brought and a citizen of another State"] "to mean that each distinct interest should be represented by persons all of whom are entitled to sue or may be sued in the federal courts. That is, that where the interest is joint each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts."

This construction has been adhered to from that day to this, and although the statutes have modified the jurisdiction of the court as regards the amount in controversy and in many other particulars, the language construed by the court in *Straubridge v. Curtiss* has been found in all of them. This Statute, conferring and defining the jurisdiction of circuit courts of the United States, has been re-enacted and recast several times since the original decision of *Straubridge v. Curtiss*. The first of these was the general revision of the statutes of the United States, passed in 1874, in which the language of the Statute of 1789 is supposed to be reproduced accurately. But an Act of March 8, 1875 (18 Stat. 470), undertook to recast the jurisdiction of the circuit courts, and its first section, the important one in this connection, contains the same language in regard to the jurisdiction of the court in controversies between citizens of different States, and also the provision that no civil suit shall be brought in either of said courts by any original process or proceeding in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving process. The Statute remained in this condition until the Act of 1887, which we are now considering, as amended by the Act of August 18, 1888 (25 Stat. 438).

During this period, and since the case of *Straubridge v. Curtiss*, this jurisdictional clause has been frequently construed by this court, and that case has been followed. In the case of *New Orleans v. Winter*, 14 U. S. 1 Wheat. 91 [4: 44], the same question arose, and was decided in the same way. In the case of *Susquehanna & W. V. R. & Coal Co. v. Blatchford*, 78 U. S. 11 Wall. 172 [20:179], Mr. Justice Field, referring to these decisions, states the effect of them in the following language:

"In other words, if there are several co-plaintiffs, the intention of the Act is that each plaintiff must be competent to sue, and if there are several co-defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained."

The question was very fully considered in the case of *The Sewing Machine Companies*, 85 U. S. 18 Wall. 553 [21: 914], where the same proposition is stated in almost identical language. And in the case of *Peninsular Iron Company v. Stone*, 121 U. S. 631 [30:1020], the chief justice reviews all these cases and reaffirms the doctrine as applicable to cases arising under the Act of 1875.

The Statute which we are now construing leaves out the provision that if the party has the diverse citizenship required by the Statute

he may be sued in any district where he may be found at the time of the service of process. The omission of these words, and the increase of the amount in controversy necessary to the jurisdiction of the circuit court, and the repeal of so much of the former Act as allowed plaintiffs to remove causes from the state courts to those of the United States, and many other features of the new Statute, show the purpose of the Legislature to restrict rather than to enlarge the jurisdiction of the circuit courts, while, at the same time, a suit is permitted to be brought in any district where either plaintiff or defendant resides.

We do not think, in the light of this long-continued construction of the Statute by this court during a period of nearly a hundred years, in which, though the Statute has been the subject of renewed legislative consideration and of many changes, it has always retained the language which was construed in the case of *Strawbridge v. Curtis*, that we are at liberty to give that language a new meaning, when it is used in reference to the same subject matter. It is not readily to be conceived that the Congress of the United States, in a Statute mainly designed for the purpose of restricting the jurisdiction of the circuit courts of the United States, using language which has been construed in a uniform manner for over ninety years by this court, intended that that language should be given a construction which would enlarge the jurisdiction of those courts, and which would be directly contrary to that heretofore placed upon it by this court.

These considerations require the affirmance of the judgment of the Circuit Court, and it is so ordered.

SAMUEL D. DAVIS, *Appt.*,

v.

H. G. BEASON, Sheriff of ONEIDA COUNTY, IDAHO TERRITORY.

(See S. C. Reporter's ed. 333-348.)

Jurisdiction of Idaho court—Mormons, as voters—habeas corpus—questions examinable—bigamy and polygamy—constitutional provision—punitive power of the government—power of Territorial Legislatures to prescribe qualifications of voters—Statutes of Idaho forbidding bigamists or polygamists to vote—Act of March 22, 1882.

1. The District Court of the Territory of Idaho has jurisdiction of the offense charged in an indictment for a conspiracy by defendant and others to pervert and obstruct the laws of the Territory by unlawfully procuring themselves to be registered as voters, while members of the Mormon Church.

2. If it had jurisdiction, this court cannot look into any alleged errors in the rulings on the trial of the defendant. The writ of habeas corpus cannot be turned into a writ of error to review the action of that court; nor can this court inquire whether the evidence established the facts alleged, that the defendant was a member of the Mormon Church, which taught its members to commit the crimes of bigamy and polygamy as duties.

3. On this hearing, this court can only consider whether, such allegations being taken as true, an offense was committed of which the territorial court had jurisdiction to try the defendant.

4. Bigamy and polygamy are crimes by the laws of all civilized and Christian countries, and the First Amendment to the Constitution that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, cannot be invoked as a protection against legislation for their punishment.

5. The punitive power of the government for acts recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation cannot be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

6. Territorial Legislatures have the power to prescribe any reasonable qualifications of voters and for holding office, not inconsistent with the limitations of the United States Statutes.

7. The Statutes of Idaho Territory, forbidding bigamists or polygamists to vote, and requiring an oath by the voter that he is not a member of an order that teaches the commission of those crimes, are valid.

8. The Statute of Congress of March 22, 1882, in reference to bigamy, does not restrict the legislation of the Territories over kindred offenses, or over the means for their ascertainment and prevention.

[No. 1261.]

Argued Dec. 9, 10, 1889. Decided Feb. 3, 1890.

APPEAL from a judgment of the Third Judicial District Court of the Territory of Idaho, deciding that sufficient cause was not shown for the discharge of the defendant, Samuel D. Davis, upon a writ of habeas corpus, who had been convicted and imprisoned for an unlawful conspiracy, and ordering him to be remanded to the custody of the sheriff. *Affirmed.*

Statement by Mr. Justice Field:

In April, 1889, the appellant, Samuel D. Davis, was indicted in the District Court of the Third Judicial District of the Territory of Idaho, in the County of Oneida, in connection with divers persons named, and divers other persons whose names were unknown to the grand jury, for a conspiracy to unlawfully pervert and obstruct the due administration of the laws of the Territory in this, that they would

NOTE.—As to civil rights; state decisions; removal of causes, where denied,—see note to Civil Rights Cases, Bk. 27, p. 335.

As to jurisdiction of U. S. Supreme Court, where federal question arises, and where are drawn in question statutes, treaty or Constitution, see notes to *Martin v. Hunter*, Bk. 4, p. 97; *Matthews v. Zane*, Bk. 2, p. 654, and *Williams v. Norris*, Bk. 6, p. 571.

As to jurisdiction of U. S. Supreme Court to declare state law void, and to review state decrees, see

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notes to *Hart v. Lamphire*, Bk. 7, p. 379, and to *Commercial Bank v. Buckingham*, Bk. 12, p. 169.

As to when habeas corpus may issue, and when not; and from what courts, and by what judges; what may be inquired into by writ of,—see note to *U. S. v. Hamilton*, Bk. 1, p. 490.

As to what questions may be considered on habeas corpus, see note to *Ex parte Carll*, Bk. 27, p. 238.

As to suspension of writ of habeas corpus, see note to *Luther v. Borden*, Bk. 12, p. 531.

unlawfully procure themselves to be admitted to registration as electors of said County of Oneida for the general election then next to occur in that county, when they were not entitled to be admitted to such registration, by appearing before the respective registrars of the election precincts in which they resided, and taking the oath prescribed by the Statute of the State, in substance as follows: "I do swear (or affirm) that I am a male citizen of the United States of the age of twenty-one years (or will be on the 6th day of November, 1888); and that I have (or will have) actually resided in this Territory four months and in this county for thirty days next preceding the day of the next ensuing election; that I have never been convicted of treason, felony or bribery; and that I am not registered or entitled to vote at any other place in this Territory; and I do further swear that I am not a bigamist or polygamist; that I am not a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law as a duty arising or resulting from membership in such order, organization or association, or which practices bigamy, polygamy or plural or celestial marriage as a doctrinal right of such organization; that I do not and will not, publicly or privately, or in any manner whatever, teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise; that I do regard the Constitution of the United States and the laws thereof and the laws of this Territory, as interpreted by the courts, as the supreme laws of the land, the teachings of any order, organization or association to the contrary notwithstanding, so help me God," when, in truth, each of the defendants was a member of an order, organization and association, namely, the Church of Jesus Christ of Latter-Day Saints, commonly known as the Mormon Church, which they knew taught, advised, counseled and encouraged its members and devotees to commit the crimes of bigamy and polygamy as duties arising and resulting from membership in said order, organization and association, and which order, organization and association, as they all knew, practiced bigamy and polygamy and plural and celestial marriage as doctrinal rights of said organization; and that in pursuance of said conspiracy the said defendants went before the registrars of different precincts of the county (which are designated) and took and had administered to them respectively the oath aforesaid.

The defendants demurred to the indictment, and the demurrer being overruled they pleaded separately not guilty. On the trial which followed on the 12th of September, 1889, the jury found the defendant Samuel D. Davis guilty as charged in the indictment. The defendant was thereupon sentenced to pay a fine of \$500, and in default of its payment to be confined in the county jail of Oneida County for a term not exceeding 250 days, and was remanded to the custody of the sheriff until the judgment should be satisfied.

Soon afterwards, on the same day, the de-

fendant applied to the court before which the trial was had, and obtained a writ of habeas corpus, alleging that he was imprisoned and restrained of his liberty by the sheriff of the county; that his imprisonment was by virtue of his conviction and the judgment mentioned and the warrant issued thereon; that such imprisonment was illegal; and that such illegality consisted in this: (1) that the facts in the indictment and record did not constitute a public offense, and the acts charged were not criminal or punishable under any statute or law of the Territory; and (2) that so much of the Statute of the Territory which provides that no person is entitled to register or vote at any election who is "a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization or association, or which practices bigamy or polygamy or plural or celestial marriage as a doctrinal rite of such organization," is a "law respecting an establishment of religion," in violation of the First Amendment of the Constitution, and void.

The court ordered the writ to issue, directed to the sheriff, returnable before it, at three o'clock in the afternoon of that day, commanding the sheriff to have the body of the defendant before the court at the hour designated, with the time and cause of his imprisonment, and to do and receive what should then be considered concerning him. On the return of the writ, the sheriff produced the body of the defendant and also the warrant of commitment under which he was held, and the record of the case showing his conviction for the conspiracy mentioned and the judgment thereon. To this return, the defendant, admitting the facts stated therein, excepted to their insufficiency to justify his detention. The court, holding that sufficient cause was not shown for the discharge of the defendant, ordered him to be remanded to the custody of the sheriff. From this judgment the defendant appealed to this court. (Rev. Stat. § 1909.)

Messrs. Franklin S. Richards, Jeremiah M. Wilson and Samuel Shellabarger, for appellant:

The power of Congress to pass a statute under which a prisoner is held in custody may be inquired into under a writ of habeas corpus.

Nielsen's Case, 181 U. S. 193 (32: 120); *Re Coy*, 127 U. S. 759 (32: 281); *Ex parte Siebold*, 100 U. S. 376, 377 (25: 719); *Re Snow*, 120 U. S. 274 (30: 658); *Ex parte Lang*, 35 U. S. 18 Wall. 163 (21: 872).

The Idaho Statute disfranchising and disqualifying citizens from holding office because of membership in the Mormon Church is unconstitutional and void, because it prohibits the free exercise of religion.

Constitution, art. 1, Amendments; *Reynolds' Case*, 98 U. S. 164 (25: 249); 2 Kent, Com. 35; Cooley, Torts, 33; 1 Jefferson's Works, 45; 8 Writings of Washington, 568; *Board of Education v. Minor*, 23 Ohio St. 211; *Atty-Gen. v. Detroit*, 58 Mich. 213; Georgia Const. 1777, art. 56; Maryland Declaration of Rights, 1776,

art. 83; Massachusetts Declaration of Rights 1780, art. 3; New Jersey Const. 1776, art. 18; North Carolina Const. 1776, art. 84; N. Y. Const. 1777, art. 83; New Hampshire Bill of Rights 1784, art. 5; Pennsylvania Declaration of Rights 1776, art. 11; Virginia Bill of Rights 1776, § 16; 1 Tucker's Blackstone, Appendix, 296, 297; 2 Tucker's Blackstone, Appendix, 4, 6, 10; 2 Story, Const. §§ 1876, 1879; Cooley, Const. Lim. 469, 470.

The Idaho Statute violates the XIVth Article of Amendments to the Constitution of the United States.

Strauder v. West Va. 100 U. S. 307 (25:665); *Ex parte Virginia*, 100 U. S. 347 (25: 679); *Yick Wo v. Hopkins*, 118 U. S. 369 (30: 226); *U. S. v. Cruikshank*, 1 Woods, 308, 92 U. S. 555 (28: 592); *Minor v. Happersett*, 88 U. S. 21 Wall. 176 (22: 631); Hamilton's History of the Republic of the United States, vol. III. p. 24; *Cummings v. Missouri*, 71 U. S. 4 Wall. 320 (18: 356).

"It cannot be necessary to say much in refutation of the idea that there cannot be a legal interest or ownership in anything which does not yield a pecuniary benefit; as, if the law regarded no rights but rights of money and visible, tangible property, of what nature are all rights of suffrage? No elector has a particular personal interest, but each has a legal right, to be exercised at his own discretion, and it cannot be taken away from him."

*Daniel Webster in *Dartmouth College Case*, 5 Webster's Works, 479.

Congress, in legislating for the Territories, has no right to prescribe a religious test for the qualification of voters and for holding office.

Murphy v. Ramsey, 114 U. S. 44 (29: 57).

This Idaho Statute violates Article VI. of the Constitution of the United States and is void because Congress has exercised its power on the same subject.

Paschal's Annotated Const. (3d ed.) § 288; *Ex parte McNeil*, 80 U. S. 13 Wall. 240 (20: 625); *Pennsylvania v. Wheeling Bridge*, 59 U. S. 18 How. 490 (15: 436); *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. 17 Wall. 568 (21: 714); 1 Kent, Com. 859; *Houston v. Moore*, 18 U. S. 5 Wheat. 22, 24 (5: 24).

The Mormon Church is not a criminal organization.

People v. Maynard, 15 Mich. 471; *Lanning v. Carpenter*, 48 N. Y. 408; *Atty-Gen. v. St. Clair County*, 11 Mich. 63; *Calder v. Bull*, 3 U. S. 3 Dall. 888 (1: 649); *Vanhorne v. Dorrance*, 2 U. S. 2 Dall. 808, 809 (1: 393); *Osborn v. Nicholson*, 80 U. S. 13 Wall. 662 (20: 695); *Gunn v. Barry*, 82 U. S. 15 Wall. 622 (21: 214); *Loan Assn. v. Topeka*, 87 U. S. 20 Wall. 668 (22: 462).

Mr. H. W. Smith, for appellee:

The right to vote may be granted, abridged or taken away by the state government in its discretion, except so far as it is secured by the State Constitution.

Anderson v. Baker, 28 Md. 581, Brightly's Lead. Cas. on Elections, 27; *Blair v. Ridgely*, 41 Mo. 63, Brightly's Lead. Cas. on Elections, 90; *Minor v. Happersett*, 88 U. S. 21 Wall. 177

(22:631); *Paine, Elections*, §§ 2, 22, 94; *Murphy v. Ramsey*, 114 U. S. 43 (29: 57); *Case of Reynolds*, 98 U. S. 168 (25: 250); *Wooley v. Watkins* (Idaho) 22 Pac. Rep. 106; *Innis v. Bolton* (Idaho) 17 Pac. Rep. 264; Cooley, Torts, 83; Spear, Religion and State, 317.

This Law of Idaho does not violate the Fourteenth Amendment to the Constitution.

Minor v. Happersett, 88 U. S. 21 Wall. 177 (22:631); *Murphy v. Ramsey*, 114 U. S. 45 (29:57); *Clawson v. U. S.* 114 U. S. 477 (29: 179); *Blain v. Bailey*, 25 Ind. 165.

To repeal a statute by implication there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled.

Wood v. U. S. 41 U. S. 16 Pet. 342 (10: 987); *McCool v. Smith*, 66 U. S. 1 Black, 459 (17: 218); *Furman v. Nichol*, 75 U. S. 8 Wall. 44 (19: 370); *Clay County v. Savings Society*, 104 U. S. 579 (26: 856); *Ex parte Crow Dog*, 109 U. S. 556 (27: 1080); *Chew Heong v. U. S.* 112 U. S. 586 (28: 770); *Red Rock v. Henry*, 116 U. S. 596 (27: 251).

The question presented by this case is very materially different from that passed on by this court in *Cummings v. Missouri*, 71 U. S. 4 Wall. 277 (18: 356); *Ex parte Garland*, 71 U. S. 4 Wall. 883 (18: 366), and *Pierce v. Car-skaddon*, 88 U. S. 16 Wall. 284 (21: 276).

Mr. Justice Field delivered the opinion of the court:

On this appeal our only inquiry is whether the District Court of the Territory had jurisdiction of the offense charged in the indictment of which the defendant was found guilty. If it had jurisdiction, we can go no farther. We cannot look into any alleged errors in its rulings on the trial of the defendant. The writ of habeas corpus cannot be turned into a writ of error to review the action of that court. Nor can we inquire whether the evidence established the fact alleged, that the defendant was a member of an order or organization known as the Mormon Church, called the Church of Jesus Christ of Latter Day Saints, or the fact that the order or organization taught and counseled its members and devotees to commit the crimes of bigamy and polygamy as duties arising from membership therein. On this hearing we can only consider whether, these allegations being taken as true, an offense was committed of which the territorial court had jurisdiction to try the defendant. And on this point there can be no serious discussion or difference of opinion. Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach,

*See same words in argument of Daniel Webster, in full, in report of Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 571, 572 (4: 643). Ed.

advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases.

The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform in their religious beliefs and modes of worship to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons and enforce an outward conformity to a prescribed standard, led to the adoption of the Amendment in question. It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes as prompted by the passions of their members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government, for acts recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

On this subject the observations of this court through the late *Chief Justice* Waite, in *Reynolds v. United States*, are pertinent. (98 U. S. 145, 165, 166 [25:244, 250]). In that case the defendant was indicted and convicted under section 5852 of the Revised Statutes, which declared that "every person having a husband or wife living, who marries another, whether married or single, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term not more than five years." The case being brought here, the court, after referring to a law passed in December, 1788, by the State of Virginia, punishing bigamy and polygamy with death, said that from that day there never had been a time in any State of the Union when polygamy had not been an offense against society cognizable by the civil courts and punished with more or less severity; and added: "Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests." And referring to the Statute cited, he said: "It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the Statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or, if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." And in *Murphy v. Ramsey*, 114 U. S. 15, 45 [29:47, 57], referring to the Act of Congress excluding polygamists and bigamists from voting or holding office, the court, speaking by *Mr. Justice* Mat-

thews, said: "Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony—the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this Act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment."

It is assumed by counsel of the petitioner that, because no mode of worship can be established or religious tenets enforced in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion.

It only remains to refer to the laws which authorized the Legislature of the Territory of Idaho to prescribe the qualifications of voters and the oath they were required to take. The Revised Statutes provide that "the legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents." (Rev. Stat. § 1851.)

Under this general authority it would seem that the Territorial Legislature was authorized to prescribe any qualifications for voters calculated to secure obedience to its laws. But, in addition to the above law, section 1859 of the Revised Statutes provides that "every male citizen above the age of twenty-one, including persons who have legally declared their intention to become citizens in any Territory hereafter organized, and who are actual residents of such Territory at the time of the organization thereof, shall be entitled to vote at the first election in such Territory, and to hold any office therein; subject, nevertheless, to the limitations specified in the next section," namely, that at all elections in any Territory subsequently organized by Congress, as well as at all elections in Territories already organized, the qualifications of voters and for holding office shall be such as may be prescribed by the Legislative Assembly of each Territory, subject, nevertheless, to the following restrictions:

First. That the right of suffrage and of holding office shall be exercised only by citizens of the United States above the age of twenty-one

or persons above that age who have declared their intention to become such citizens;

Second. That the elective franchise or the right of holding office shall not be denied to any citizen on account of race, color or previous condition of servitude;

Third. That no soldier or sailor or other person in the army or navy, or attached to troops in the service of the United States, shall be allowed to vote unless he has made his permanent domicile in the Territory for six months; and,

Fourth. That no person belonging to the army or navy shall be elected to or hold a civil office or appointment in the Territory.

These limitations are the only ones placed upon the authority of Territorial Legislatures against granting the right of suffrage or of holding office. They have the power, therefore, to prescribe any reasonable qualifications of voters and for holding office not inconsistent with the above limitations. In our judgment, section 501 of the Revised Statutes of Idaho Territory, which provides that "no person under guardianship, *non compos mentis* or insane, nor any person convicted of treason, felony or bribery in this Territory, or in any other State or Territory in the Union, unless restored to civil rights; nor any person who is a bigamist or polygamist, or who teaches, advises, counsels or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization or association which teaches, advises, counsels or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust or profit within this Territory," is not open to any constitutional or legal objection. With the exception of persons under guardianship or of unsound mind, it simply excludes from the privilege of voting, or of holding any office of honor, trust or profit, those who have been convicted of certain offenses, and those who advocate a practical resistance to the laws of the Territory and justify and approve the commission of crimes forbidden by it. The second subdivision of section 504 of the Revised Statutes of Idaho, requiring every person desiring to have his name registered as a voter to take an oath that he does not belong to an order that advises a disregard of the criminal law of the Territory, is not open to any valid legal objection to which our attention has been called.

The position that Congress has, by its Statute, covered the whole subject of punitive legislation against bigamy and polygamy, leaving nothing for territorial action on the subject, does not impress us as entitled to much weight. The Statute of Congress of March 22, 1882, amending a previous section of the Revised Statutes in reference to bigamy, declares "that no polygamist, bigamist or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section, in any Territory or other place over which the United

States have exclusive jurisdiction, shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor or emolument in, under or for any such Territory or place, or under the United States." (22 Stat. 31.)

This is a general law applicable to all Territories and other places under the exclusive jurisdiction of the United States. It does not purport to restrict the legislation of the Territories over kindred offenses or over the means for their ascertainment and prevention. The cases in which the legislation of Congress will supersede the legislation of a State or Territory, without specific provisions to that effect, are those in which the same matter is the subject of legislation by both. There the action of Congress may well be considered as covering the entire ground. But here there is nothing of this kind. The Act of Congress does not touch upon teaching, advising and counseling the practice of bigamy and polygamy, that is, upon aiding and abetting in the commission of those crimes, nor upon the mode adopted, by means of the oath required for registration, to prevent persons from being enabled by their votes to defeat the criminal laws of the country.

The judgment of the court below is therefore affirmed.

NOTE.—The Constitutions of several States, in providing for religious freedom, have declared expressly that such freedom shall not be construed to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the State. Thus, the Constitution of New York of 1777 provides as follows: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." (Art. XXXVIII.) The same declaration is repeated in the Constitution of 1821 (art. VII. § 3), and in that of 1846 (art. I. § 3), except that for the words "hereby granted," the words "hereby secured" are substituted. The Constitutions of California, Colorado, Connecticut, Florida, Georgia, Illinois, Maryland, Minnesota, Mississippi, Missouri, Nevada and South Carolina contain a similar declaration.

GEORGE LOUIS DOMINIQUE ANTOINE
DE GEOFROY ET AL., *Appts.*,

v.

E. FRANCIS RIGGS ET AL.

(See S. C. Reporter's ed. 258-273.)

French citizens can take by descent land in District of Columbia—treaty power of U. S.—Treaty of 1800 between France and U. S.—

NOTE.—As to construction and operation of treaties, see note to U. S. v. *Amistad*, Bk. 10, p. 826.

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District of Columbia, a State—"States of the Union" in French Treaty of 1853 include that District—right of Frenchmen to inherit—construction of treaties—Act of March 3, 1857.

1. Citizens of France can take land in the District of Columbia by descent from citizens of the United States.
2. The treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations.
3. During the continuance of the Treaty of 1800 between France and this country, citizens of France could take property in the District of Columbia by inheritance from citizens of the United States.
4. According to the definition of writers on general law, the District of Columbia, being a separate political community, is a State.
5. By the words "States of the Union" in the Treaty between the United States and France, concluded February 28, 1853, is meant all political communities exercising legislative powers in the country, not only the United States, but also the Territories and the District of Columbia.
6. By that Treaty the disability of Frenchmen from alienage in disposing and inheriting property, real and personal, is removed.
7. Treaties should be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them.
8. In the Act of March 3, 1857, there is a plain implication that property in the District of Columbia and in the Territories may be acquired by aliens by inheritance under existing laws.

[No. 1431.]

Submitted Dec. 23, 1889. Decided Feb. 3, 1890.

APPEAL from a decree of the Supreme Court of the District of Columbia sustaining a demurrer and dismissing an action for the sale of real estate of an intestate, situate in the District of Columbia, and a division of the proceeds among his heirs, citizens of France. *Reversed.*

Statement by *Mr. Justice Field*:

On the 19th day of January, 1888, T. Lawrason Riggs, a citizen of the United States and a resident of the District of Columbia, died at Washington, intestate, seised in fee of real estate of great value in the District. The complainants are citizens and residents of France and nephews of the deceased. On the 12th of March, 1872, the sister of the deceased, then named Kate S. Riggs, intermarried with Louis de Geofroy, of France. She was at the time a resident of the District of Columbia and a citizen of the United States. He was then and always has been a citizen of France. The complainants are the children of this marriage, and are infants now residing with their father in France. One of them was born July 14, 1873, at Pekin, in China, whilst his father was the French minister plenipotentiary to that country, and was there only as such minister. The other was born October 18, 1875, at Cannes, in France. Their mother, who was a sister of all the defendants except Medora, wife of the defendant E. Francis Riggs, died February 7, 1881. The deceased, T. Lawrason Riggs, left one brother, E. Francis Riggs, and three sisters, Alice L. Riggs, Jane A. Riggs and

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Cecilia Howard, surviving him, but no descendants of any deceased brother or deceased sister, except the complainants.

The defendants, with the exception of Cecilia Howard, are, and always have been, citizens of the United States and residents of the District of Columbia. Cecilia Howard, in 1867, intermarried with Henry Howard, a British subject, and since that time has resided with him in England.

The real property described in the bill of complaint cannot be divided without actual loss and injury, and the interest of the complainants, if they have any, as well as of the defendants, in the property would be promoted by its sale and a division of the proceeds.

To the bill of complaint setting up these facts and praying a sale of the premises described and a division of the proceeds among the parties to the suit according to their respective rights and interests, the defendants demurred, on the ground that the complainants were incapable of inheriting from their uncle any interest in the real estate. The Supreme Court of the District of Columbia sustained the demurrer and dismissed the bill. From the decree the case is brought to this court on appeal.

Mr. J. Hubley Ashton, for appellants:

Aliens, at the date of the Treaty of February 23, 1853, were permitted to take and hold an indefeasible title, in fee, to real estate in the District of Columbia.

Van Ness v. Hyatt, 88 U. S. 13 Pet. 298 (10: 169); *Morsell v. Washington First Nat. Bank*, 91 U. S. 359 (23: 436); 1 Dorsey, Laws of Md. 158; *Buchanan v. Deshon*, 1 Harr. & G. 291; *Chirac v. Chirac*, 15 U. S. 2 Wheat. 269 (4: 286); *Spratt v. Spratt*, 26 U. S. 1 Pet. 343 (7: 171), 29 U. S. 4 Pet. 393 (7: 897).

All international treaties are to be equitably, and not technically, construed.

Phillimore, Int. Law, chap. 8, p. 79; *Shanks v. Dupont*, 28 U. S. 3 Pet. 249 (7: 666); *U. S. v. Arredondo*, 31 U. S. 6 Pet. 710 (8: 554); *Hauenstein v. Lynham*, 100 U. S. 487 (25: 629); *The Choctaw Nation v. U. S.* 119 U. S. 28 (30: 815); *Fairfax v. Hunter*, 11 U. S. 7 Cranch, 627 (8: 461).

The Treaty includes and applies to the District of Columbia.

Jost v. Jost, 1 Mackey (D. C.) 487; *Hepburn v. Elzey*, 6 U. S. 2 Cranch, 452 (2: 385); *Re Bryant*, Deady, 118.

Treaties are to be interpreted according to the law of nations.

Drummond's Case, 2 Knapp, P. C. Rep. 295.

The intention of the law-maker constitutes the law, and what is implied in a statute is as much part of it as what is expressed.

U. S. v. Babbitt, 66 U. S. 1 Black, 61 (17: 96); *Indianapolis & St. L. R. Co. v. Horst*, 98 U. S. 301 (23: 901); *Platt v. Union Pac. R. Co.* 99 U. S. 60 (25: 428); *Oates v. Montgomery First Nat. Bk.* 100 U. S. 244 (25: 532); *Postmaster-Gen. v. Early*, 25 U. S. 12 Wheat. 148 (6: 582); *Munn v. Illinois*, 94 U. S. 134 (24: 87); *King v. Cornell*, 106 U. S. 395 (27: 60); *Murdock v. Memphis*, 87 U. S. 20 Wall. 617 (22: 437); *U. S. v. Tynen*, 78 U. S. 11 Wall. 88 (20: 153); *Bartlett v. King*, 12 Mass. 183 U. S.

546; *U. S. v. Freeman*, 44 U. S. 3 How. 565, (11: 738.)

Mr. John Selden, for appellees:

The Convention between the United States and France of 1800 expired by its own limitation eight years afterwards.

Chirac v. Chirac, 15 U. S. 2 Wheat. 272, 277 (4: 287, 288); *Carneal v. Banks*, 22 U. S. 10 Wheat. 182, 189 (6: 297, 299); *Buchanan v. Deshon*, 1 Harr. & G. 290, 291.

Neither the District of Columbia, nor a Territory of the United States, falls within the definition of a State, as that term is employed in the Constitution, or in the Acts of Congress.

Hepburn v. Elzey, 6 U. S. 2 Cranch, 445 (2: 332); *Corporation of New Orleans v. Winter*, 14 U. S. 1 Wheat. 94 (4: 45); *Barney v. Baltimore*, 73 U. S. 6 Wall. 287 (18: 827).

This District was not embraced in the words "States of the American Union," as used in the Convention concluded between the United States and the Swiss Confederation, on November 25, 1850.

Jost v. Jost, 1 Mackey (D. C.) 487.

Whether the United States could by treaty alter the rules of inheritance within the several States of the Union was considered a question of great magnitude for some years after the conclusion of the Consular Convention of 1858.

Frederickson v. Louisiana, 64 U. S. 28 How. 448 (16: 578).

The Treaty is expressly limited to the States of the Union whose laws permit it.

Prevost v. Greneaux, 60 U. S. 19 How. 7 (15: 574).

Two clauses cannot be inverted, for the purpose of creating a meaning for them.

Doe v. Considine, 73 U. S. 6 Wall. 458 (18: 869).

By the common law, as the same was transplanted into Maryland, the alien was excluded from the acquisition of land by descent.

Buchanan v. Deshon, 1 Harr. & G. 289; *Guyer v. Smith*, 22 Md. 247.

The Act of Maryland of December 19, 1791, does not remove the disability, arising from common-law principles, of an alien to inherit lands lying in this District, from a citizen thereof.

Spratt v. Spratt, 26 U. S. 1 Pet. 343 (7: 171), 29 U. S. 4 Pet. 393 (7: 897); *Jost v. Jost*, 1 Mackey (D. C.) 493.

A later statute which does not expressly repeal previous legislation upon the subject does not supersede such legislation unless the new statute embraces the entire field covered by the former, or manifests a plain intention to furnish a new and exclusive system upon the subject.

U. S. v. Tynen, 78 U. S. 11 Wall. 92 (20: 154); *Henderson's Tobacco*, 78 U. S. 11 Wall. 657 (20: 237); *Murdock v. Memphis*, 87 U. S. 20 Wall. 617 (22: 438); *King v. Cornell*, 106 U. S. 396 (27: 60); *Red Rock v. Henry*, 106 U. S. 601, 602 (27: 258); *Cook County v. U. S. Nat. Bank*, 107 U. S. 451 (27: 539); *Pana v. Bowler*, 107 U. S. 538 (27: 428).

Repeals by implication are not to be favored.

Arthur v. Homer, 96 U. S. 140 (24: 812); *Ex parte Crow Dog*, 109 U. S. 570 (27: 1035); *Cheo Heong v. U. S.* 112 U. S. 549, 550 (28:

778, 774); *U. S. v. Langston*, 118 U. S. 898 (80: 165); *Chicago, M. & St. P. R. Co. v. U. S.*, 127 U. S. 409 (82: 182).

Even in penal enactments, the intention of the Legislature is to be collected from the words they employ.

U. S. v. Wiltberger, 18 U. S. 5 Wheat. 95 (5: 42); *The Emily and Caroline*, 22 U. S. 9 Wheat. 888 (6: 117); *American Fur Co. v. U. S.* 27 U. S. 2 Pet. 387 (7: 453); *U. S. v. Morris*, 39 U. S. 14 Pet. 475 (10: 548); *U. S. v. Hartwell*, 78 U. S. 6 Wall. 396 (18: 832).

No statute is to be construed as altering the common law, further than its words import.

Shaw v. St. Louis Nat. Bank, 101 U. S. 565 (25: 894); *McCool v. Smith*, 66 U. S. 1 Black. 470 (17: 221); *U. S. v. Herron*, 87 U. S. 20 Wall. 263 (22: 279); *McCreery v. Somerville*, 22 U. S. 9 Wheat. 354 (6: 109); *Ogden v. Saunders*, 25 U. S. 12 Wheat. 835 (6: 648).

A lien upon land is a vested right of property, which no subsequent law of the State can defeat or destroy.

Gunn v. Barry, 82 U. S. 15 Wall. 622 (21: 214); *Royal Ins. Co. v. Stinson*, 103 U. S. 80 (26: 477).

What is an acquisition by inheritance, as distinguished from an acquisition by purchase, must depend upon the local law.

Jost v. Jost, 1 Mackey (D. C.) 491; *Barnitz v. Casey*, 11 U. S. 7 Cranch, 464 (8: 406); *Brown v. Maryland*, 25 U. S. 12 Wheat. 488 (6: 685); *Morgan v. Louisiana*, 118 U. S. 464 (80: 241).

The duty of the Judicial Department is to execute the law, not to make it.

Doe v. Considine, 73 U. S. 6 Wall. 490 (18: 876); *Spratt v. Spratt*, 29 U. S. 4 Pet. 408 (7: 902).

Mr. Justice Field delivered the opinion of the court:

The complainants are both citizens of France. The fact that one of them was born in Peking, China, does not change his citizenship. His father was a Frenchman, and by the law of France a child of a Frenchman, though born in a foreign country, retains the citizenship of his father. In this case, also, his father was engaged, at the time of the son's birth, in the diplomatic service of France, being its minister plenipotentiary to China, and by public law the children of ambassadors and ministers accredited to another country retain the citizenship of their father.

The question presented for solution, therefore, is whether the complainants, being citizens and residents of France, inherit an interest in the real estate in the District of Columbia of which their uncle, a citizen of the United States and a resident of the District, died seised. In more general terms the question is, Can citizens of France take land in the District of Columbia by descent from citizens of the United States?

The complainants contend that they inherit an estate in the property described, by force of the stipulation of article VII. of the Convention between the United States and France, concluded February 23, 1853, and the provisions of the Act of Congress of March 3, 1887, to restrict the ownership of real estate in the Territories to American citizens. Before consider-

ing the effect of this article and of the Act of 1887, a brief reference will be had to the laws of Maryland in force on the 27th of February, 1801, which were on that day declared by Act of Congress to be in force in the District of Columbia. The language of the Act is "that the laws of the State of Maryland as they now exist shall be and continue in force in that part of the said District which was ceded by that State to the United States, and by them accepted." (2 Stat. 103.)

A part of these laws was the common law, and two Acts of Maryland, one passed in March, 1780, "to declare and ascertain the privileges of the subjects of France" within that State; the other, passed December 19, 1791, to ratify her cession to the United States, entitled "An Act Concerning the Territory of Columbia and the City of Washington." The common law, unmodified by statute or treaty, would have excluded aliens from inheriting lands in the United States from a citizen thereof. Its doctrine is that aliens have no inheritable blood through which a title can be transferred by operation of law. The Act of Maryland of 1780 modified that law so far as to allow a subject of France who had settled in that State, and given assurances of allegiance and attachment to it as required of citizens, to devise to French subjects, who for that purpose were to be deemed citizens of the State. (Dorsey's Laws of Md. 158.)

It also provided that if the decedent died intestate his natural kindred, whether residing in France or elsewhere, should inherit his real estate in like manner as if such decedent and his kindred were citizens of the United States. It had no bearing, however, upon the inheritance of a subject of France, except from a Frenchman domiciled in the State. The Act of Maryland of December 19, 1791, which provided in its sixth section that any foreigner might, by deed or will thereafter made, take and hold lands within the State in the same manner as if he were a citizen thereof, and that the lands might be conveyed by him, and transmitted to and inherited by his heirs and relations as if he and they were citizens of the State, did not do away with the disability of foreigners to take real property within that State by inheritance from a citizen of the United States. It was so held in effect in *Spratt v. Spratt*, 26 U. S. 1 Pet. 848 [7: 171], and 29 U. S. 4 Pet. 398 [7: 897].

On the 30th of September, 1800, a Convention of Peace, Commerce and Navigation was concluded between France and the United States, the 7th article of which provided that "the citizens and inhabitants of the United States shall be at liberty to dispose by testament, donation or otherwise, of their goods, movable and immovable, holden in the territory of the French Republic in Europe, and the citizens of the French Republic shall have the same liberty with regard to goods, movable and immovable, holden in the territory of the United States, in favor of such persons as they shall think proper. The citizens and inhabitants of either of the two countries, who shall be heirs of goods, movable or immovable, in the other, shall be able to succeed *ab intestato*, without being obliged to obtain letters of naturalization, and without having the effect of

this provision contested or impeded under any pretext whatever." (8 Stat. 182.)

This article, by its terms, suspended, during the existence of the Treaty, the provisions of the common law of Maryland and of the Statutes of that State of 1780 and of 1791, so far as they prevented citizens of France from taking by inheritance from citizens of the United States, property, real or personal, situated therein.

That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 541 [29: 264, 270]. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. *Ware v. Hylton*, 3 U. S. 8 Dall. 199 [1: 568]; *Chirac v. Chirac*, 15 U. S. 2 Wheat. 259 [4: 284]; *Hauenstein v. Lynham*, 100 U. S. 488 [25: 628]; *Droit d'Aubaine*, 8 Ops. Atty-Gen. 417; *People v. Gerke*, 5 Cal. 381.

Article VII. of the Convention of 1800 was in force when the Act of Congress adopting the Laws of Maryland, February 27, 1801, was passed. That Law adopted and continued in force the law of Maryland as it then existed. It did not adopt the law of Maryland as it existed previous to the Treaty; for that would have been in effect to repeal the Treaty so far as the District of Columbia was affected. In adopting it as it *then existed*, it adopted the law with its provisions suspended during the continuance of the Treaty so far as they conflicted with it—in other words, the Treaty, being part of the supreme law of the land, controlled the statute and common law of Maryland whenever it differed from them. The Treaty expired by its own limitation in eight years, pursuant to an article inserted by the Senate. (8 Stat. 192.) During its continuance citizens of France could take property in the District of Columbia by inheritance from citizens of the United States.

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But after its expiration that right was limited as provided by the statute and common law of Maryland, as adopted by Congress on the 27th of February, 1801, until the Convention between the United States and France was concluded, February 23, 1853. The seventh article of that Convention is as follows:

"In all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed.

"As to the States of the Union by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right.

"In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property, and to inheritance, as are enjoyed there by its own citizens." (10 Stat. 996.)

This article is not happily drawn. It leaves in doubt what is meant by "States of the Union." Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as States, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. (Halleck on Int. Law, chap. 8, §§ 5, 6, 7.) The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government. Within this definition the District of Columbia, under the government of the United States, is as much a State as any of those political communities which compose the United States. Were there no other territory under the government of the United States, it would not be questioned that the District of Columbia would be a State within the meaning of international law; and it is not perceived that it is any less a State within that meaning because other States and other territory are also under the same government. In *Hepburn v. Ellzey*, 6 U. S. 2 Cranch, 445, 452 [2:333, 335], the question arose whether a resident and a citizen of the District of Columbia could sue a citizen of Virginia in the circuit court of the United States. The court, by Chief Justice Marshall, in deciding the question, conceded that the District of Columbia was a distinct political society, and therefore a State accord-

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ng to the definition of writers on general law; but held that the Act of Congress, in providing for controversies between citizens of different States in the circuit courts, referred to that term as used in the Constitution, and therefore to one of the States composing the United States. A similar concession, that the District of Columbia, being a separate political community, is, in a certain sense, a State, is made by this court in the recent case of *Metropolitan R. Co. v. District of Columbia*, decided at the present term. 132 U. S. 1, 9 [38: 281, 286].

Aside from the question in which of these significations the terms are used in the Convention of 1858, we think the construction of article VII. is free from difficulty. In some States aliens were permitted to hold real estate, but not to take by inheritance. To this right to hold real estate in some States reference is had by the words "permit it" in the first clause, and is alluded to in the second clause as not permitted in others. This will be manifest if we read the second clause before the first. This construction, as well observed by counsel, gives consistency and harmony to all the provisions of the article, and comport with its character as an agreement intended to confer reciprocal rights on the citizens of each country with respect to property held by them within the territory of the other. To construe the first clause as providing that Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as citizens of the United States, in States, so long as their laws permit such enjoyment, is to give a meaning to the article by which nothing is conferred not already possessed, and leaves no adequate reason for the concession by France of rights to citizens of the United States, made in the third clause. We do not think this construction admissible. It is a rule, in construing treaties as well as laws, to give a sensible meaning to all their provisions if that be practicable. "The interpretation, therefore," says Vattel, "which would render a treaty null and inefficient cannot be admitted;" and again, "it ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory." (Vattel, Book II. chap. 17.) As we read the article it declares that in all the States of the Union by whose laws aliens are permitted to hold real estate, so long as such laws remain in force, Frenchman shall enjoy the right of possessing personal and real property by the same title and in the same manner as citizens of the United States. They shall be free to dispose of it as they may please—by donation, testament or otherwise—just as those citizens themselves. But as to the States by whose existing laws aliens are not permitted to hold real estate, the Treaty engages that the President shall recommend to them the passage of such laws as may be necessary for the purpose of conferring that right.

In determining the question in what sense the terms "States of the Union" are used, it is to be borne in mind that the laws of the District and of some of the Territories, existing at the time the Convention was concluded in 1858, allowed aliens to hold real estate. If, therefore, these terms are held to exclude those

political communities, our government is placed in a very inconsistent position—stipulating that citizens of France shall enjoy the right of holding, disposing of and inheriting, in like manner as citizens of the United States, property, real and personal, in those States whose laws permit aliens to hold real estate; that is, that in those States citizens of France, in holding, disposing of and inheriting property, shall be free from the disability of alienage; and, in order that they may in like manner be free from such disability in those States whose existing laws do not permit aliens to hold real estate, engaging that the President shall recommend the passage of laws conferring that right; while, at the same time, refusing to citizens of France holding property in the District and in some of the Territories, where the power of the United States is in that respect unlimited, a like release from the disability of alienage, thus discriminating against them in favor of citizens of France holding property in States having similar legislation. No plausible motive can be assigned for such discrimination. A right which the government of the United States apparently desires that citizens of France should enjoy in all the States, it would hardly refuse to them in the District embracing its capital, or in any of its own territorial dependencies. By the last clause of the article the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property and to inheritance as are enjoyed there by its own citizens. There is no limitation as to the territory of France in which the right of inheritance is conceded. And it declares that this right is given in like manner as the right is given by the government of the United States to citizens of France. To insure reciprocity in the terms of the Treaty, it would be necessary to hold that by "States of the Union" is meant all the political communities exercising legislative powers in the country, embracing not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as Territories and the District of Columbia. It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Hauenstein v. Lynham*, 100 U. S. 487 [25: 629]. The stipulation that the government of France in like manner accords to the citizens of the United States the same rights within its territory in respect to real and personal property in inheritance as are enjoyed there by its own citizens, indicates that that government considered that similar rights were extended to its citizens.

within the territory of the United States, whatever the designation given to their different political communities.

We are therefore of opinion that this is the meaning of the article in question—that there shall be reciprocity in respect to the acquisition and inheritance of property in one country by the citizens of the other; that is, in all political communities in the United States where legislation permits aliens to hold real estate, the disability of Frenchmen from alienage in disposing and inheriting property, real and personal, is removed, and the same right of disposition and inheritance of property, in France, is accorded to citizens of the United States, as is there enjoyed by its own citizens. This construction finds support in the first section of the Act of March 3, 1887. (24 Stat. 476, chap. 340.) That section declares that it shall be unlawful for any person or persons not citizens of the United States, or who have not declared their intention to become citizens, to thereafter acquire, hold or own real estate, or any interest therein, in any of the Territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts previously created. There is here a plain implication that property in the District of Columbia and in the Territories may be acquired by aliens by inheritance under existing laws; and no property could be acquired by them in the District by inheritance except by virtue of the law of Maryland as it existed when adopted by the United States during the existence of the Convention of 1800 or under the seventh article of the Convention of 1853. Our conclusion is that the complainants are entitled to take by inheritance an interest in the real property in the District of Columbia of which their uncle died seized. *The decree of the court below will therefore be reversed and the cause remanded, with direction to overrule the demurrer of the defendant; and it is so ordered.*

JOHN W. BURT ET AL., *Appts.*,
v.
ALEXANDER F. EVORY ET AL.

(See S. C. Reporter's ed. 349-350.)

Rule for construing patent—patent for improvement in boots and shoes—no patentable invention—improvement, when patentable—improvement in degree—combining old devices—for what a patent may be granted.

NOTE.—For what patents are granted; when declared void,—see note to *Evans v. Eaton*, Bk. 4, p. 433.

As to patentability of inventions, see note to *Thompson v. Boisselier*, Bk. 20, p. 76, and to *Corning v. Burden*, Bk. 14, p. 633.

As to abandonment of invention, see note to *Penock v. Dialogue*, Bk. 7, p. 327.

As to distinction between inventions of mechanism, articles or products, and processes; when latter patented,—see note to *Corning v. Burden*, Bk. 14, p. 633.

As to including process and product in same patent; separate patents therefor,—see note to *Evans v. Eaton*, Bk. 4, p. 433.

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1. In construing a patent, it is necessary to consider the state of the art when the application for it was made.
2. The claim in the patent No. 59,375, issued to Evory and Heston Nov. 6, 1866, for an "improvement in boots and shoes," is for a manufactured article, and not for a mode of producing it; as such, there is no patentable device or function in their shoe.
3. There is no patentable invention in the patent; it is merely a carrying forward of the original idea of the earlier patents on the same subject,—a change in form and arrangement of the constituent parts of the shoe, or an improvement in degree only.
4. Every improvement in an article is not patentable. The test is that the improvement must be the product of an original conception.
5. A mere carrying forward or more extended application of an original idea—a mere improvement in degree—is not invention.
6. Neither is it invention to combine old devices into a new article without producing any new mode of operation.
7. A person, to be entitled to a patent, must have invented or discovered some new and useful art, machine, manufacture or composition of matter, or some new and useful improvement thereof; and it is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must amount to an invention or discovery.

[No. 164.]

Argued Dec. 16, 1889. Decided Feb. 3, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Massachusetts, in favor of plaintiffs, for damages for the amount of royalty found due by the master for infringement of letters-patent No. 59,375, issued to Evory and Heston, Nov. 6, 1866, for an improvement in boots and shoes. *Reversed.*

The facts are stated in the opinion.

Mr. George D. Noyes, for appellants:

The practice of maintaining bills nominally for injunction and account, but really for the purpose of compelling payment of license fees, has been condemned and virtually overruled by this court.

Eureka Co. v. Bailey Co. 78 U. S. 11 Wall. 488 (20: 209); *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 205 (26: 981); *Sanders v. Logan* 2 Fish. Pat. Cas. 168.

The right to profits depends on the right to an injunction.

Parker v. Winnipisaukee Lake C. & W. Co. 67 U. S. 2 Black, 545 (17: 838); *New York Guaranty Co. v. Memphis Water Co.* 107 U. S. 205 (27: 484); *Wright v. Ellison*, 68 U. S. 1 Wall. 16 (17: 555).

As to what re-issue may cover, see note to *O'Reilly v. Morse*, Bk. 14, p. 601.

As to assignment, before issuing and reissuing patent; recording, when assignment transfers extended terms,—see note to *Gayler v. Wilder*, Bk. 13, p. 504.

As to when assignee may sue for infringement; when patentee must; when they must join,—see note to *Wilson v. Rousseau*, Bk. 11, p. 1141.

As to damages for infringement of patent; treble damages,—see note to *Hogg v. Emerson*, Bk. 13, p. 824.

As to notes given for patent-rights; purchaser before maturity,—see note to *Mandeville v. Welch*, Bk. 5, p. 87.

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The law does not recognize a right of the patentee either to compensation or to profits when he has not lost anything and when the infringer has not made a profit.

Rude v. Westcott, 180 U. S. 152 (82: 888).

A court of equity is governed by the same evidence of damages as is a court of law.

Parks v. Booth, 102 U. S. 96 (26: 54); *Philp v. Nock*, 84 U. S. 17 Wall. 460 (21: 679); *Tees v. Huntingdon*, 64 U. S. 28 How. 2 (16: 479); *Whitney v. Emmett*, 1 Baldw. 303.

This court has affirmed decrees for nominal damages, but the matter does not appear to have been brought to the attention of the court.

Garretson v. Clark, 111 U. S. 120 (28: 871); *Black v. Thorne*, 111 U. S. 122 (28: 872); *Rude v. Westcott*, 180 U. S. 152 (82: 888).

The statute does not authorize a recovery of a defendant's profits.

Whitney v. Emmett, 1 Baldw. 303; *Hogg v. Emerson*, 52 U. S. 11 How. 587 (13: 824); *Seymour v. McCormick*, 57 U. S. 16 How. 480 (14: 1024); *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 205 (26: 981); *Tilghman v. Proctor*, 125 U. S. 136 (31: 664).

The statute was intended to supply the obvious defect in equity jurisdiction illustrated in *Livingston v. Woodworth*, 56 U. S. 15 How. 546 (14: 809); or *Dean v. Mason*, 61 U. S. 20 How. 198 (15: 876); *Whittemore v. Cutter*, 1 Gall. 478; *Silsby v. Foote*, 61 U. S. 20 How. 378 (15: 953); *Littlefield v. Perry*, 88 U. S. 21 Wall. 205 (22: 577); *Birdsall v. Coolidge*, 98 U. S. 64 (23: 802).

In the absence of all other evidence, the law presumes a nominal damage.

Whitney v. Emmett, 1 Baldw. 303; *Seymour v. McCormick*, 57 U. S. 16 How. 480 (14: 1024); *Birdsall v. Coolidge*, 98 U. S. 64 (23: 802); *New York v. Ransom*, 64 U. S. 23 How. 487 (16: 515).

Mr. Frederick H. Betts, for appellees:

The changes introduced by the plaintiff, apparently slight in themselves, are yet important as adapting the shoes to a proper fulfillment of their uses, and hence are properly deserving of protection.

Emerson v. Howe, 8 Fed. Rep. 327; *Treadwell v. Parrott*, 5 Blatchf. 369, 873.

The grant of royalties in a number of instances, in which the license fees were paid, is sufficient to justify recovery against an infringing defendant.

Burdell v. Denig, 92 U. S. 716-720 (23: 764-766); *Sanders v. Logan*, 2 Fish. Pat. Cas. 167-170; *Livingston v. Jones*, 2 Fish. Pat. Cas. 207-210; *Judson v. Bradford*, 16 Pat. Off. Gaz. 171-174; *Clark v. Wooster*, 119 U. S. 322-326 (30: 392, 393).

Mr. Justice Lamar delivered the opinion of the court:

This is a suit in equity brought in the Circuit Court of the United States for the District of Massachusetts, by Alexander F. Evory, Alonzo Heston and J. B. Belcher against John W. Burt and Fred Packard, composing the firm of Burt & Packard, for the alleged infringement of letters-patent No. 59,375, issued to said Evory and Heston, November 6, 1866, for an "improvement in boots and shoes."

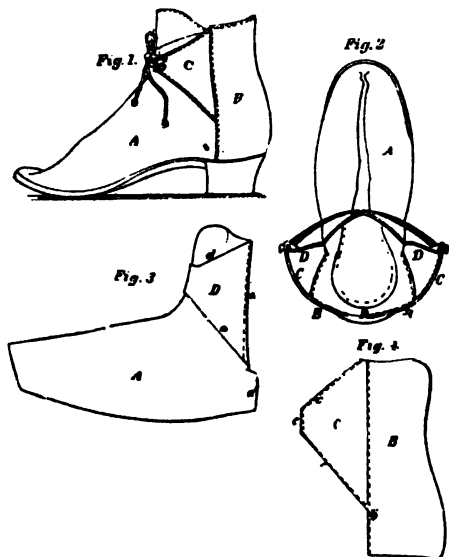
The bill, filed December 9, 1880, alleged the

issue of said letters-patent to the plaintiffs Evory and Heston; the assignment of a one-half interest therein to the plaintiff Belcher; the granting of an exclusive license to the National Rubber Company to manufacture rubber goods containing the invention patented; and the infringement by the defendants, which was said to consist in their having made and sold shoes and gaiters constructed in accordance with the specification and drawings contained in letters-patent No. 205,129, granted to the defendant Packard June 18, 1878, and also other shoes and gaiters, all of which contained the invention in the plaintiffs' patent. The bill prayed an injunction, an accounting and damages.

The defenses pleaded in the answer were non-infringement; an anticipation of the plaintiffs' invention by certain English patents dated in 1856 and 1860, respectively; and want of novelty in the invention, because, long prior to the issue of plaintiffs' patent, one Jacob O. Patten of Philadelphia had manufactured and sold shoes constructed on the same plan as described in that patent. Issue was joined, proofs were taken, and on the 3d of February, 1883, the circuit court entered a decree sustaining the plaintiffs' patent, and adjudging that there had been an infringement of it by the defendants; and accordingly referred the case to a master for an account of profits, and for the determination of damages, if any, by reason of such infringement. *Evory v. Burt*, 15 Fed. Rep. 112. October 18, 1884, the master filed his report, in which he found that the defendants had made and sold 41,297 pairs of shoes which infringed the plaintiffs' patent, but that, as they made no difference in price between shoes containing the invention of the plaintiffs and those without it, they therefore made no profit from such infringement; that Belcher was the only one of the plaintiffs who was engaged in making or selling shoes, and, as he made and sold less than 1,000 shoes containing the invention in the patent, he was not damaged by reason of defendants' infringement; but that, as the evidence showed that the plaintiffs had an established royalty of three cents a pair, for shoes made under that patent, and had issued licenses and sold stamps to persons desiring to use their patent, the licensees paying such royalty, the defendants should pay the plaintiffs that royalty on the number of shoes made by them containing the infringing device, to wit, 41,297 pairs, that is, the sum of three cents a pair, or \$1,238.91. Exceptions were filed to this report, but they were overruled by the court, and on the 29th of January, 1886, a final decree was entered confirming it and assessing damages in the sum of \$1,238.91, that being the amount of the royalty found due by the master. An appeal from that decree brings the case here.

The material parts of the specification of the plaintiffs' patent and the drawings are as follows: "Our said invention consists in a novel mode of constructing shoes and gaiters, whereby the ordinary elastic goring at the sides and the tedious lacing up at the front are both dispensed with, while at the same time the tops will expand to receive the foot, and fit neatly and closely around the ankle when the shoe is on, being also water-tight to the extreme top of the shoe. . . . Figure 1 represents a side ele-

vation of our invention; Fig. 2 a plan or top view of the same; and Figs. 3 and 4 represent detached views or patterns of the several parts.



Similar letters of reference in the several figures indicate like parts of our invention. A represents the front of the shoe, and has attached to its rear edge *a*, as shown, a gore flap (marked D). B represents the back of the shoe, and has attached to its front edge *b*, as shown, a corresponding gore flap (marked C). The front and back are sewed together at those parts of their contiguous edges marked *a'* and *b'*, and the flap C is arranged upon the flap D, bringing their corresponding edges *c* and *d* upon each other, which are then sewed together, the two flaps thus arranged forming a double extension gore upon each side of the shoe, which readily expands to admit the foot, and which may then be folded forward over the instep, and be secured by a buckle or knot, or by a suitable lacing, as desired. . . . We do not claim, broadly, for an extension-gore flap inserted in the ankle of gaiter shoes, for this is fully covered by the broad claim of Samuel Babbitt's patent, issued March 7, 1885, to which our patent will be subject; but our mode of construction is an improvement upon that, and all the other modes since patented, in the following particulars, viz: first, it requires less stock in its construction, and is therefore cheaper than those in which the gore is inserted in the heel; second, it is neater in appearance, and, being adjustable to the ankle, it may be fitted even where there is a variation in the size of the shoe, thus rendering it more available in the construction of shoes for sale at wholesale; third, it avoids the wrinkle in the heel in Babbitt's construction of shoes, which, being exposed to the friction of the leg of the pantaloons, soon wears into a hole; fourth, by giving expansion forward to the vamp in front of the ankle it admits of the more easy introduction of the foot, and allows a neater fit than is attainable when the gore is in the heel. What we do claim as our invention, and desire to secure by letters-

patent, is—a shoe when constructed with an expansion-gore flap, C D, the external fold, C, of which is attached to and in front of the quarter, B, and the internal fold, D, of which is attached to and in rear of the vamp, A, the said several parts and pieces being respectively constructed and the whole arranged for use substantially in the manner and for the purpose set forth."

In construing this patent the court below followed the decision of the Circuit Court of the United States for the District of Connecticut (*Judge Shipman*) in *Evory v. Candee*, 2 Fed. Rep. 542, and seemed to assume that no question was presented here touching its validity. After referring to the fact that the patent had been held valid in *Evory v. Candee*, *supra*, the court said: "Its validity is not now assailed, unless a wide construction is given to the claim; and this, as is most usual, is the difficult point."

The assignments of error are seven in number; but in the view we take of the case it is necessary to examine only the first three of them, which are, that the court erred (1) in holding that the patent is valid; (2) in holding that, in view of the antecedent state of the art, the patent had been infringed by the defendants; and (3) in construing the patent.

These assignments may be properly considered together. In construing the patent it will be necessary to consider the state of the art when the application for it was made. The object sought to be accomplished was to make improvements upon ordinary shoes so that they would be water tight and would exclude dirt. It is shown by the record that long prior to the time when the application for the patent was made there had been a number of efforts made in the direction of accomplishing the same result. As early as 1856, Stephen Norris, of England, received a patent there for "improvements in the manufacture of boots and shoes and other coverings for the human feet;" and in 1860, Norris and Robert Rogers obtained another patent in England relating to the same subject matter, and intended to be an improvement upon the invention in the prior patent. These patents were broad in their claims, and were intended to cover any device by which boots and shoes could be made water-tight by means of the cut of the various pieces composing them. Various designs were adopted and used by the patentees in those patents for the manufactured article to which the patents related.

In his specification to the patent of 1856, Norris says: "My improvements consist in adapting to boots, shoes and other coverings for the human feet, gussets of novel and improved construction, in combination with ordinary fastenings, for the purpose of enabling boots, etc., to be readily adapted and secured to and detached from the feet, and at the same time preserved water-tight at such parts when necessary. The following are a few examples of the mode of adapting my said improvements to certain descriptions of boots, shoes and other coverings for the human feet. First, as regards ladies' boots, I propose to employ side gussets of cloth or leather, so combined with elastic material as that the said gussets shall always be preserved flat, instead of wrinkling or overlapping, as heretofore. Another mode is to se-

cure folding side gussets and fastenings, composed either by interlacing into two rows of hooks strips of elastic or eyelets. The openings for the gussets I propose to make at each side of the boot, and to extend it from the top in an ornamental direction, either towards the toe of the boot or the sole thereof, or towards the heel. And as regards gentlemen's boots and other similar coverings, I propose, in manufacturing boots known and distinguished as Bluchers, to form the side seams thereof, or close the 'fore' and 'back' parts, somewhat after the manner of Wellington boots, so as to resemble the same when on the feet, and to enable Blucher boots to be more readily put on and taken off than heretofore, by employing the aforesaid gussets in combination with boots of the above description. In order to explain my said invention as completely as possible, I now proceed to describe the best means I am acquainted with for carrying the same into practical effect, reference being had to the illustrative drawings hereunto annexed, and to the numeral figures and letters of reference marked thereon respectively, as follows." Then follows the description of the drawings relating to the patent, and, in conclusion, the specification says: "I would remark that the principal points to be attended to in these improvements are to have the gussets the proper size, and to connect them to the front and back parts of the boot, or to the back part only thereof, by sewing and stabbing, or other known means, so that they may, when necessary, be rendered water-proof; and this applies more particularly to men's boots. And as regards the fastenings for securing the boots on the feet, I employ any of the known means for that purpose." And again he says: "I hereby declare that I claim as my invention: firstly, the modes above particularly described, set forth, and represented at figures 1, 2, 3, 4, 10, 11, 12, 13, 18, 19, of sheet 1, of manufacturing Blucher boots, and more particularly the cutting of the back part of such boots in the manner exhibited at figures 5, 6, 15, 16, 18, for the purpose set forth; secondly, the inserting of the gusset at the back part of the boot, as at figure 14; and lastly, as regards the boots exhibited at the several other figures of the drawings, I claim the adapting thereto of two gussets, as above described."

In the patent of 1860 some minor changes were made, in the shape of several of the parts composing the boot or shoe, but the object of the invention remained the same, namely, to make the boots and shoes to which it related water-tight and capable of excluding dirt, etc.

An examination of the drawings accompanying the applications for those patents shows that several of their shoes differ very little, if any, in their essential features from those manufactured under the Evory and Heston patent. The shoes under the English patent, as do those under the Evory and Heston patent, consist of quarters, the vamp, and a folding gusset or gore flap uniting the vamp and the quarters. It is contended on behalf of the appellees, and the testimony of their expert, Mr. Brevoort, is to the same effect, that the material point of difference between their shoe and the Norris shoe is, that in the latter the gusset or gore flap folds in such a manner that it lies within the shoe proper next to the foot, while in their shoe

the gore or gusset folds outside of the shoe, thus rendering their shoe more comfortable to the foot and more easily worn than the English shoe. But we do not think it can be safely averred that the specifications and drawings of the English patents require the gore or gusset to be folded so that it will lie inside of the vamp, next to the foot. It is true that Norris does not say in so many words that the folds of the gore will lie wholly outside of the shoe proper; but neither does he say that they shall lie wholly within the shoe. We think a fair construction of Norris' patents leaves the question of where the folds of the gussets of his shoes shall lie within the discretion of the manufacturer of them, who, if he be a skillful mechanic, will be enabled to so arrange the gores or gussets that they will accomplish their object without interfering with the comfort of the wearer of them.

On the 7th of March, 1865, Samuel Babbit of Kokomo, Indiana, obtained a patent, No. 46,622, for an "improvement in gaiter boots." In his specification Babbit says: "The object of this invention is to dispense with the use of the ordinary gore or elastic webbing in the manufacture of gaiter boots, and at the same time so construct the shoe as that the purposes of such webbing shall be subserved. To this end the invention consists in forming that part of the shoe which covers the ankle with an extension which enlarges the opening to such a degree as to permit the foot to be readily inserted, and which, after the shoe is on the foot, is folded and buckled or fastened against the ankle after the manner of a flap; and this shoe is made without the formation of a joint and is perfectly water-tight." Babbit's shoe had the quarters extended at the heel about one half the width of the shoe at the ankle, thus enlarging the opening in the top of the shoe through which the foot is inserted to an extent commensurate with such extension. When the shoe was on the foot those elongated quarters were folded against the side of the shoe and buttoned to it, and the shoe was thus rendered water-tight clear to the top.

Another patent, No. 49,076, for the same sort of an invention, was granted to David Brown and William S. Wooton, of Kokomo, Indiana, on the 1st of August, 1865. That invention is thus described in the specification: "The present invention consists in attaching to the back portion of the boot or shoe in which a vertical slit or opening has been made a folding flap or piece of sufficient size and shape that, when the boot or shoe is put on the foot, it can be folded or passed entirely around the instep, and there fastened by buckling, buttoning or in any other proper manner, said flap being connected therewith by means of two wings or sectional pieces, each fastened by sewing, or in any other suitable way, at one edge to one side of opening or slit in the boot or shoe and at the other to the inner surface of the folding flap, and which wings, when the folding flap has been buttoned, as described, lie and are held between it and the exterior surface of the boot or shoe upper." The advantages claimed for the Brown and Wooton patent were the ease with which the shoe could be put on and taken off, the absence of eyelet holes or any kind of apertures communicating

with the interior of the shoe, and the peculiar construction and arrangement of the flap, whereby the counter of the shoe was prevented from being broken down.

Such was the state of the art when Evory and Heston made their application for the patent in suit. Let us now carefully examine the Evory and Heston patent to see what patentable improvements are embraced by it. In the first part of the specification it would seem that they were seeking a patent for a mode of constructing a shoe, for they say: "Our said invention consists in a novel mode of constructing shoes and gaiters," etc. And in another part of their specification they say: "Our mode of construction is an improvement upon" the Babbitt patent, etc. But the concluding part of their specification would seem to negative the idea that they were claiming a patent for a mode of construction, and not for a manufactured article; for they say: "What we do claim as our invention and desire to secure by letters-patent is a shoe when constructed with an expansion-gore flap," etc. In the brief of counsel for appellees it is conceded that the patent is for a shoe, and not for a mode of constructing it. Counsel says, after quoting the concluding paragraph of the specification: "This is a claim for a shoe having on each side an expansion-gore flap," etc.

We think, therefore, the claim in this case must be regarded as being for a manufactured article, and not for a mode of producing it. This being true, it is difficult to see any patentable device or function in the Evory and Heston shoe. It is a mere aggregation of old parts with only such changes of form or arrangement as a skillful mechanic could readily devise—the natural outgrowth of the development of mechanical skill as distinguished from invention. The changes made by Evory and Heston in the construction of a water-tight shoe were changes of degree only, and did not involve any new principle. Their shoe performed no new function. In the construction of it the vamp, the quarters and the expansible gore flap were cut somewhat differently, it is true, from like parts of the shoes constructed under the earlier patents referred to, but they subserve the same purposes.

It is well settled that not every improvement in an article is patentable. The test is that the improvement must be the product of an original conception. *Pearce v. Mulford*, 103 U. S. 112, 118 [26: 98, 95]; *Slawson v. Grand Street etc. R. Co.* 107 U. S. 649 [27: 576]; *Munson v. New York City*, 124 U. S. 601 [31: 598], and many other cases. And a mere carrying forward or more extended application of an original idea—a mere improvement in degree—is not invention. In *Smith v. Nichols*, 88 U. S. 21 Wall. 112, 118, 119 [22: 566, 567], Mr. Justice Strong, delivering the opinion of the court, said: "A patentable invention is a mental result. It must be new and shown to be of practical utility. Everything within the domain of the conception belongs to him who conceived it. The machine, process or product is but its material reflex and embodiment. A new idea may be ingrafted upon an old invention, be distinct from the conception which preceded it, and be an improvement. In such case it is patentable. The prior patentee cannot use it

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without the consent of the improver, and the latter cannot use the original invention without the consent of the former. But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions or degree, the substitution of equivalents, doing substantially the same thing in the same way, by substantially the same means, with better results, is not such invention as will sustain a patent. These rules apply alike, whether what preceded was covered by a patent or rested only in public knowledge and use. In neither case can there be an invasion of such domain and an appropriation of anything found there. In one case everything belongs to the prior patentee; in the other, to the public at large."

Neither is it invention to combine old devices into a new article without producing any new mode of operation. *Stimpson v. Woodman*, 77 U. S. 10 Wall. 117 [19: 866]; *Heald v. Rice*, 104 U. S. 737 [26: 910]; *Hall v. Macneale*, 107 U. S. 90 [27: 867].

In the recent case of *Hill v. Wooster*, decided January 13th of this year [*ante*, 502], it is said: "This court, however, has repeatedly held that, under the Constitution and the Acts of Congress, a person, to be entitled to a patent, must have invented or discovered some new and useful art, machine, manufacture or composition of matter, or some new and useful improvement thereof, and that it is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must, under the Constitution and the Statute, amount to an invention or discovery," citing a long list of authorities.

We are of the opinion that the patent in suit does not meet the requirements of the rules deduced from the decisions to which we have referred. We do not think there is any patentable invention in it; but, on the contrary, that it is merely a carrying forward of the original idea of the earlier patents on the same subject—simply a change in form and arrangement of the constituent parts of the shoe, or an improvement in degree only.

For these reasons the decree of the court below is reversed, with a direction to dismiss the bill.

JAMES COYNE, *Plff. in Err.*,

v.

THE UNION PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 870-874.)

Master and servant—injury to servant by the falling of a rail while loading—boss hurrying

NOTE.—*Liability of master to servant.*

Following are the principal recent American decisions upon the subject:

That a negligent manner of loading cars is customary with railroads is not an excuse which will relieve a company from liability to a servant for injuries received in consequence of such negligence. *Hosie v. Chicago, R. I. & P. R. Co.* 75 Iowa, 668.

That a car by which a brakeman was killed while coupling it with another was improperly loaded by

men and swearing at them—failure of duty on part of boss—keeping out of way of construction train—assumption of risk.

1. One employed by a railway company as a laborer or construction hand, under a construction boss or foreman, cannot recover of the company for injuries received by him through the negligence of his fellow servants in allowing a rail to drop which he and they were loading on a car, whereby his leg and foot were broken and crushed.
2. Where the method of loading the rail, by lifting it and walking with it to the car, halting, dressing, and then in concert lifting the rail at the word of command of the boss and throwing it on the floor of a flat car, is shown to be a proper and safe method of loading the rails, if, in the course of such loading, the injury to the plaintiff occurred, no negligence can be complained of.
3. The facts that the boss hurried the men and used oaths, whereby they became confused and failed to act in concert, do not show negligence on his part, nor excuse their negligence. The use of oaths and imprecations by the boss is not an element of negligence.
4. That, after the men had lifted the rail which produced the injury and had carried it forward to the car and were there holding it awaiting the word of command from the boss to lift it further and throw it on the car, the boss failed to give the word of command in such way as to produce concert of action in the men, but, on the contrary, ordered them to get the rail on the car in any way they could, does not authorize a recovery.

reason of the fact that lumber projected over the end so as to interfere with the space necessary for coupling, or that the conductor knew that the car was improperly loaded, does not show willful neglect; but to constitute such neglect it must appear that the conductor, or other person in charge of the train, knew, or by the use of ordinary care could have known, that the car was so improperly loaded as to imperil the life of the servant or employé. *Louisville & N. R. Co. v. Brice*, 84 Ky. 298.

The loading of a car with lumber protruding longitudinally over its ends, and so enhancing the danger of coupling, is not *per se* negligence. *Louisville & N. R. Co. v. Gower*, 85 Tenn. 465.

In the absence of any rules requiring section men to guard against irregular trains, or of any care to notify them of the approach of such a train, proof of the death of a section man while going with a hand-car on a special order, by a collision with a wild train, creates a *prima facie* case of negligence on the part of the company. *Cincinnati, I. St. L. & C. R. Co. v. Lang*, 118 Ind. 579.

Where men are rightfully at work on a trestle over which a railroad is operated, with the knowledge of the officers and persons operating the road, who know that the men are thereby placed in great danger, it is the duty of the company to operate and run its trains with care proportionate to the danger; and if it does not do so it is guilty of culpable negligence. *Interstate C. R. T. R. Co. v. Fox*, 41 Kan. 715.

Fellow servants and their negligence.

In order to constitute persons fellow servants, it is necessary that they shall be, at the time, directly co-operating with each other in the business in hand, or that their usual duties shall bring them into habitual consociation, so that they may exercise an influence upon each other promotive of proper caution. *Chicago & A. R. Co. v. Kelly*, 127

5. The necessity of keeping the construction train out of the way of the freight train was one of the risks of the employment.

6. Where the work of construction and repair must be done in the intervals between the running of regular trains, and this fact is known to the employé who is employed to do such work, he assumes the risk of doing it at the times at which it has to be done.

[No. 8.]

Argued Jan. 23, 24, 1890. Decided March 3, 1890.

IN ERROR to the Circuit Court of the United States for the District of Colorado to review a judgment in favor of defendant in an action to recover damages for personal injuries. *Affirmed.*

The facts are stated in the opinion.

Messrs. Edward L. Johnson and E. T. Wells, for plaintiff in error:

The negligence on the part of McCormick was negligence on the part of the Railroad Company, whose vice-principal he was.

Chicago, St. P. M. & O. R. Co. v. Lundstrom, 16 Neb. 254, 259; *Cleveland etc. R. Co. v. Keary*, 8 Ohio St. 201, 211.

Plaintiff and McCormick were not fellow servants, but McCormick was a vice-principal for whose negligence the defendant Company is responsible.

Cunard Steamship Co. v. Carey, 119 U. S. 245 (30: 354); *Moon v. Richmond & A. R. Co.*, 78 Va. 745, 749, 750; *McDermott v. Hannibal & St. J. R. Co.*, 87 Mo. 285, 294; *Burlington &*

Ill. 687; *Fort Hill Stone Co. v. Orm*, 84 Ky. 188; *Kroeg v. Atlanta & W. P. R. Co.*, 77 Ga. 202.

In Tennessee, where servants of the same master are engaged in different departments of a common service, or one is the superior of another in the same department, either temporarily or permanently, they are not fellow servants. *East Tenn. V. & G. R. Co. v. DeArmond*, 86 Tenn. 73.

An employé cannot look to his employer for an injury resulting from the negligence of a co-employé. *Hoffman v. Clough*, 124 Pa. 505; *Anderson v. Bennett*, 16 Or. 515; *Brodeur v. Valley Falls Co.*, 16 R. I.—; *Anderson v. Sowle Elevator Co.*, 37 Minn. 530; *Gulf, C. & S. F. R. Co. v. Blohn*, 73 Tex. 637, 4 L. R. A. 764; *Casey v. Louisville & N. R. Co.*, 84 Ky. 79.

The rule as to fellow servants has no application where the injury was occasioned by exposing the employé to risks not within his contract of employment. *Jones v. Old Dominion Cotton Mills*, 82 Va. 140.

In order to recover damages from an employer for injuries sustained through the negligence or incompetency of a co-employé, it must be shown that the employer failed to exercise proper care in his selection. *Pilkinton v. Gulf, C. & S. F. R. Co.*, 70 Tex. 226; *Keith v. Walker Iron & Coal Co.*, 81 Ga. 49; *Stephens v. Doe*, 73 Cal. 26.

The foreman of a gang of section or track men, engaged in the discharge of his ordinary duties in the course of his employment, is a fellow servant with them. *Olson v. St. Paul, M. & M. R. Co.*, 38 Minn. 117.

A "gang boss" in the car-shops of a railroad company is a mere fellow servant of a member of the "gang," where, although he has immediate control of the work, he is under the general control of the master mechanic. *McBride v. Union Pac. R. Co.* (Wyo.) 21 Pac. Rep. 687.

A brakeman on the forward end of a freight train which is uncoupled or broken in two, leaving the conductor on the rear end, although, under the

M. R. Co. v. Crockett, 19 Neb. 188, 145; *Mason v. Edison Machine Works*, 28 Fed. Rep. 228; *Chicago & A. R. Co. v. May*, 108 Ill. 293; *Wabash, St. L. & P. R. Co. v. Hawk*, 10 West. Rep. 137, 121 Ill. 259; *Missouri Pac. R. Co. v. Perego*, 86 Kan. 424.

Mr. John F. Dillon, for defendant in error:

One who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of his employment.

Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 647 (29: 755, 758); *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 383 (28: 787, 789); *Randall v. Baltimore & O. R. Co.* 109 U. S. 483 (27: 1005); *Bartonskill Coal Co. v. Reid*, 3 Macq. 266, 282; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326.

The master's obligations which the law has created are:

1. The exercise of reasonable care to furnish suitable machinery and appliances to carry on the business for which he employs the servant.

Hough v. Texas & P. R. Co. 100 U. S. 213 (25: 612); *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642 (29: 755); *Cunard Steamship Co. v. Carey*, 119 U. S. 245 (30: 354).

2. The exercise of like care in not subjecting the servant to risk of injury from unskillful, drunken, habitually negligent or otherwise unfit fellow servants.

Wabash R. Co. v. McDaniels, 107 U. S. 454 (27: 605).

rules of the company, the right to command thereupon devolves upon the engineer, is a fellow servant of the latter until the engineer avails himself of his right to take charge of the train, and does take charge, and assumes to direct and control the movements of the brakeman; and where, acting without directions from the engineer, but in performance of his duty, under the rules of the company, the brakeman goes to the rear end of his fragment of the train, to act as lookout and give signals to the engineer, and by the latter's negligence in suddenly jerking the train is thrown off and injured, he cannot recover. *Louisville & N. R. Co. v. Martin*, 3 L. R. A. 282, 87 Tenn. 398.

The negligence of a station agent whose duty it is to inspect loaded cars, in permitting a car to go into a train improperly loaded, in consequence of which an employé of the company is injured, does not give to the latter any right of action against the company, as the negligence is that of a fellow servant. *Byrnes v. N. Y. L. E. & W. R. Co.* 4 L. R. A. 151, 113 N. Y. 251.

Laborers at work on a railroad in transporting dirt on a small truck to the cars a short distance, alternately acting as brakeman, are in the same grade of employment; and one who is injured by the neglect of another cannot recover from the company, although the negligent laborer was, at the time, acting as brakeman and the injured laborer was not. *Casey v. Louisville & N. R. Co.* 84 Ky. 79.

Although asleep upon a side track, in a car provided for that purpose, the foreman of a bridge gang, who is liable to be called at any moment to go out with his gang upon the road, is on duty so far as to be at the time a fellow servant with the men operating a freight train whose negligence causes his injury. *St. Louis, A. & T. R. Co. v. Welch*, 72 Tex. 296, 2 L. R. A. 839.

A station agent, with authority to employ and discharge hands on duty at the station, is a fellow servant of a brakeman on a freight train, so as to 188 U. S.

3. The exercise of care, when the master employs a youthful and inexperienced servant, to see that he is not employed in any more hazardous position than that for which he was employed, and to give him such warning of his danger as his youth and inexperience demand.

Union Pac. R. Co. v. Fort, 84 U. S. 17 Wall. 553 (21: 739); *Randall v. Baltimore & O. R. Co.* 109 U. S. 483 (27: 1005).

Often one person acts in two capacities, namely, as the representative of the master to perform certain duties, and also as a servant engaged in a common employment with the other servants.

Ford v. Fitchburg R. Co. 110 Mass. 241; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 650, 658 (29: 759, 760); *Hough v. Texas & P. R. Co.* 100 U. S. 219 (25: 615).

For the negligence of McCormick, if any there be, the Railway Company is not responsible.

Whart. Neg. § 283, and cases.

A vice-principal is one to whom the employer commits the entire or general charge of his business.

Murphy v. Smith, 19 C. B. N. S. 361; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 889, 390 (28: 792); *Brick v. Rochester, N. Y. & P. R. Co.* 98 N. Y. 211.

The negligence of a fellow servant or co-employé, acting as such, will not authorize a recovery in any case, although the fellow serv-

prevent a recovery by the latter for negligence in allowing a car of lumber which had been loaded by a shipper to be put into the train with lumber projecting over the end so as to be dangerous. *Galveston, H. & S. A. R. Co. v. Farmer*, 73 Tex. 85.

A section foreman whose duties require him to be on and about the track, to keep it in proper condition for running trains over it, where he is liable to be injured by passing trains, is a fellow servant with the conductor of a freight train, so as to prevent any recovery for injuries received by him in consequence of the conductor's negligence. *Elliot v. Chicago, M. & St. P. R. Co.* 3 L. R. A. 383, 5 Dak. 523.

A railroad company is not responsible to its section or track men for the negligence of the engineer or brakeman of a train, they being fellow servants. *Connelly v. Minneapolis E. R. Co.* 88 Minn. 80.

The brakeman of a freight train, and the conductor and other employés of a passenger train of the same railroad company, are fellow servants; and an action for damages for the death of such brakeman, caused by the negligence of such conductor and other employés, is not maintainable against the railroad company. *McMaster v. Illinois C. R. Co.* 85 Miss. 264.

A railroad company is responsible for injuries inflicted upon a brakeman on its train through the negligence of the conductor thereof. *Ayers v. Richmond & D. R. Co.* 84 Va. 679; *Johnson v. Richmond & A. R. Co.* 84 Va. 713.

A roadmaster is a fellow servant with the engineer and conductor of a train upon which he rides in obedience to directions and in the performance of his duties, and cannot, in the absence of an allegation or proof of want of care in their selection, recover damages against the company for injuries caused by their negligence. *Gulf, W. T. & P. R. Co. v. Ryan*, 69 Tex. 665.

A locomotive engineer is a fellow servant of his fireman, so that the latter cannot recover from the

ant or co-employé may be a superior officer, an agent or a foreman; but if the superior agent is charged with the performance of the master's duty, then, in so far as that duty is concerned, his acts and his negligence are the acts and the negligence of the master, and not simply those of a co-employé or fellow servant.

Krueger v. Louisville, N. A. & C. R. Co. 9 West. Rep. 249, 111 Ind. 51; *Copper v. Louisville, E. & St. L. R. Co.* 103 Ind. 305; *Atlas Engine Works v. Randall*, 100 Ind. 298; *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261-273; *Mitchell v. Robinson*, 80 Ind. 281; *Hough v. Texas & P. R. Co.* 100 U. S. 219 (25: 615); *Mullan v. Phila. & S. M. Steamship Co.* 78 Pa. 25; *Gunter v. Graniteville Mfg. Co.* 18 S. C. 262; *Crispin v. Babbitt*, 81 N. Y. 516; *Flike v. Boston & A. R. Co.* 53 N. Y. 549; *Corcoran v. Holbrook*, 59 N. Y. 517; *McCooker v. Long Island R. Co.* 84 N. Y. 77; *Brothers v. Carter*, 52 Mo. 872; *Tierney v. Minneapolis & St. L. R. Co.* 33 Minn. 311; *Towne v. Vicksburg, S. & P. R. Co.* 87 La. Ann. 630.

The power of direction and control or superiority, entirely disconnected from any duty of a master delegated to the servant, does not render the person possessing this power a fellow servant with those who work under his direction.

Pollock, Torts, 88; Whart. Neg. § 229; Wood, Ry. Law, 1497; 2 Thomp. Neg. 1026,

company for injuries resulting from the former's negligence. *Gulf, C. & S. F. R. Co. v. Blohn*, 73 Tex. 637, 4 L. R. A. 764.

An engineer in charge of the train of a railroad company is the superior, not the fellow servant, of a brakeman on the same train acting under his orders. *East Tennessee & W. N. C. R. Co. v. Collins*, 85 Tenn. 227.

A laborer employed by a railroad company to remove snow and other obstructions from its track, and under the immediate control of a roadmaster, is a fellow servant with a trackwalker and a conductor in consequence of whose negligence he is killed, and no recovery therefore can be had against the company for his death. *Fagundes v. Central Pac. R. Co.* 79 Cal. 97, 3 L. R. A. 824.

A yard-inspector of cars and a yard-foreman are fellow servants. *St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 467, 4 L. R. A. 173.

In Tennessee a telegraph operator at a way station, who has no control or of connection with the running of railway trains, except as a medium through which orders from the superintendent's office are communicated to servants of the company in charge of its trains, is not the fellow servant of a train conductor. The operator is the conductor's superior, as an aid or helper to the superintendent of trains. *East Tennessee, V. & G. R. Co. v. De Armond*, 86 Tenn. 73.

The conductor and engineer of a "wild train" are not fellow servants of a laborer on a gravel train, who is injured by a collision due to their negligence. *Northern Pac. R. Co. v. O'Brien* (Wash. Ter.) 21 Pac. Rep. 82.

An engineer is not a fellow servant with an "overhauler of cars." *Richmond & D. R. Co. v. Norment*, 84 Va. 167.

A car inspector in the employment of a railroad company, upon whom is enjoined the duty of inspecting the company's cars, is not a co-employé of a brakeman or of a conductor who is, in the line of his service, discharging the duties of a brakeman. *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439.

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1028; *Beach, Contr. Neg.* 109; *Loughlin v. State*, 7 Cent. Rep. 70, 105 N. Y. 159.

A command to hurry does not excuse negligence on the part of the servant to whom the command is addressed.

Taylor v. Carey Mfg. Co. 1 New Eng. Rep. 210, 140 Mass. 150.

It was not error in the court below to direct the jury to render a verdict for the defendant.

Randall v. Baltimore & O. R. Co. 109 U. S. 482 (27: 1005).

Mr. Justice Blatchford delivered the opinion of the court:

James Coyne brought an action in the Circuit Court of the United States for the District of Colorado, against the Union Pacific Railway Company, to recover damages for a personal injury. After issue joined, the case was tried by a jury. The court instructed the jury to find the issues for the defendant, to which instruction the plaintiff excepted. The jury rendered a verdict for the defendant, and the plaintiff has brought a writ of error.

The bill of exceptions sets forth that the plaintiff gave evidence tending to show the following facts: On and before the 18th of May, 1882, the plaintiff was in the employ of the defendant as a laborer or construction hand, under one McCormick, construction boss or foreman of the defendant. McCormick had

A person employed in a car-shop of a railroad company is a fellow servant with those in charge of a train, by whose negligence he is injured. *Pierce v. Central Iowa R. Co.* 73 Iowa, 140.

A track-walker over a section of a railroad is not a fellow servant with those in charge of a train by which he is struck and killed. *Sullivan v. Missouri Pac. R. Co.* 97 Mo. 113.

Track repairers are not fellow servants with a railroad brakeman. *Torian v. Richmond & A. R. Co.* 84 Va. 192.

A telegraph operator is not the fellow servant of a brakeman. *Hall v. Galveston, H. & S. A. R. Co.* 39 Fed. Rep. 18.

Where a workman on a railroad grade was injured by the falling of a trestle upon which he was working, it was held that all the workmen on the grade, consisting of team-drivers drawing dump cars, and men unloading them, and the foreman assisting the man injured to work on the trestle, were all fellow servants. *Lindvall v. Woods* (Minn.) 4 L. R. A. 793.

Men employed at a hopper at the foot of a hill to unload cars and crush stone taken from a quarry situated on the side of the hill, and moved by trucks to a turntable, from which it is carried by an inclined railway to such hopper, are fellow servants of those at the turntable, although one of the latter was charged with the special duty of attaching a cable to the loaded car and paid an extra price therefor, and the owner of the quarry is not liable for the death of one of them, caused by the negligence of someone at the turntable in shoving off the car before the cable was attached. *Fort Hill Stone Co. v. Orm*, 84 Ky. 183.

As to responsibility of master to servant for carelessness and competency of co-servants, see note to *Wabash R. Co. v. McDaniel*, Bk. 27, p. 605.

As to who are co-employés or co-servants, within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a co-servant, see note to *Hough v. Texas & P. R. Co.* Bk. 25, p. 612.

authority to control and direct, and compel obedience of, the plaintiff, and also, in his discretion, to discharge the plaintiff or any other servant of the defendant working under his direction and control. While employed by the orders of McCormick, the plaintiff, with the other servants and section men of the defendant, went upon its construction train, which was under the control and direction of McCormick, to a place between two stations on its railroad, known respectively as Byers' and River Bend, about two miles east from Byers' station, and at such place the plaintiff and the other servants were commanded by McCormick to load upon a certain flat car in the construction train about forty steel rails, which were then lying near the track of the railroad. The plaintiff and the other employees of the defendant proceeded to load the rails on the flat car, as directed by McCormick, and under his orders, he directing the labor of the plaintiff and the other servants. Each of the rails was from 24 to 29 feet long, and weighed from 400 to 600 pounds. To lift one of them, the labors of about ten men were required; and the plaintiff and the other servants under the command of McCormick were divided into two gangs, of ten or more men each. In loading the rails, each of the gangs was required and directed by McCormick to act in concert, and to lay hold of and lift the rail, and walk with it to the flat car, and there halt, dress, and, at the word of command given by McCormick, lift the rail, and cast it, with one motion, on the floor of the flat car. By reason of the length and great weight of the rails, it was necessary, in loading them upon flat cars, that, in order to avoid injury to the workmen engaged, care, deliberation and concert of action should be observed, and that some person should give the word of command in each of the several stages of progress in loading them, and particularly at the point when the rail was to be thrown upon the car. Prior to the injury complained of, McCormick had controlled and directed the men in loading the rails, and the plaintiff supposed that, in loading the last rail, the one which hurt him, the same course would be pursued by McCormick. Neither at such place nor nearer than Byers' Station was there any siding or switch. When all but three or four of the rails were loaded upon the flat car, the regular freight train of the defendant appeared rapidly approaching from the east. McCormick thereupon, with violent oaths and imprecations, urged the plaintiff and the other men of the party to make haste and complete the loading of the rails, so that he might move the construction train back to Byers' Station and out of the way of the freight train. By reason of the great haste so commanded by McCormick, and the confusion resulting therefrom, the plaintiff, who had before been, and then was, working and lifting at the end of the rail seized by the gang to which he belonged, was crowded off from that rail. McCormick, who was then, as before, standing on the flat car, commanded the plaintiff, with oaths and violent language, to lay hold of the other rail and not to stand idle. Thereupon the plaintiff, in obedience to the commands of McCormick, rushed to and seized upon the rail being lifted by the other gang of men and

moved forward to the flat car. While the plaintiff and the other men so holding that rail were awaiting the word of command to lift it, McCormick, with further oaths, imprecations and harsh and violent commands, ordered the party to get the rail on in any way they could, not giving to them any word of command. Thereupon, the party, hurried and agitated by the oaths, imprecations and violent commands of McCormick, lifted without concert, some at one moment and some at another, and threw the rail at one end with force and at the other end with less force, so that it struck the side of the flat car at one end and fell backwards. The plaintiff, seeing that it was about to fall, endeavored to retreat out of the way of it, but was unable to avoid it, and it fell on him, bore him down, and broke and crushed his foot and leg. He had been in the service of the defendant only about seven days. At the time of his going with McCormick to the place of loading the rails, the time at which the freight train of the defendant would approach that place was well known to McCormick and was unknown to the plaintiff. The freight train was overdue at Byers' Station at the time the construction train left that station, and McCormick knew the fact of its being so overdue, and knew that the freight train was then coming towards Byers' Station from the east; and the plaintiff knew nothing about the freight train. The injury so occasioned to the plaintiff was probably due and owing to the haste and confusion occasioned by the oaths, violent commands and injunctions to make haste given by McCormick.

The only question to be considered in the case is whether it was proper for the court to instruct the jury to find for the defendant, or whether the case should have been left to the jury.

We are of opinion that it was proper to direct a verdict for the defendant. On the facts set forth, the injury to the plaintiff was not caused by any negligence on the part of McCormick. It is alleged that McCormick, knowing of the approach of the regular freight train, moved out his train in the face of it; but that does not show any negligence, for it does not appear that the approaching freight train was so near as to render it unsafe for McCormick to start the construction train. Whatever the distance away of the freight train, it would properly be called an approaching train; and it is very plain that the work of construction and repair must be done in the intervals between the running of regular trains. This latter fact was known as well to the plaintiff as to McCormick, and the plaintiff, being employed to do construction work with a construction train, must be held to have assumed the risk of doing it at the times at which it had to be done. The fact that all of the rails save three or four had been loaded at the time shows that there was no negligence in undertaking to load the rails upon the construction train at the time they were loaded. The negligence on the part of McCormick, if there was any, could have been only as to the manner of loading the particular rail whose fall injured the plaintiff.

It is clearly to be deduced from the evidence that the method described, of lifting the rail, walking with it to the car, halting, dressing, and then, acting in concert, lifting the rail, at

the word of command given by McCormick, and throwing it upon the floor of the flat car, was a proper and safe method of loading the rails, and that if, in the course of such action, the injury to the plaintiff had happened, no negligence could have been complained of. The negligence alleged consists in the fact that, after the men had lifted the rail in question and had carried it forward to the car and were there holding it, awaiting the word of command from McCormick to lift it further and throw it on the car, McCormick failed to give the word of command in such a way as to produce concert of action in the men, but, on the contrary, ordered them to get the rail on the car in any way they could. The fact that McCormick hurried the men does not show any negligence on his part, or excuse any negligence on theirs. The necessity of keeping the construction train out of the way of the freight train was one of the risks of the employment. The use of oaths and imprecations by McCormick was not an element of negligence. The fact that McCormick urged the men, to hasten, even if, as a consequence, the plaintiff and his fellow workmen became confused and failed to act in concert, cannot be regarded as a fault or negligence in McCormick. Whatever negligence there was, was the negligence either of the plaintiff himself or of his fellow servants who with him had hold of the rail.

These views being conclusive in favor of the defendant, it is unnecessary to consider the broader grounds urged in support of the judgment below.

Judgment affirmed.

Mr. Justice Brewer concurs in the judgment.

THE QUEBEC STEAMSHIP COMPANY,
Plff. in Err.,
v.
BARBARA MERCHANT.

(See S. C. Reporter's ed. 375-379.)

Fellow servants, who are—employer's liability—negligence—stewardess of steamship—assump-

NOTE.—*Master and servant; fellow servants, who are; master's liability for negligence.*

Among the more recent American decisions reported are the following:

A second hand or second foreman under the regular foreman of the machine-shop department of a cotton factory, who takes his orders from his immediate foreman or the general superintendent, is a fellow servant with the overseer of the slashing and dressing room, in the upper part of the factory. *Brodeur v. Valley Falls Co.* 16 R. I. —.

In working with a derrick the foreman and his assistants are fellow servants, and the master is not responsible to any one of them for the negligence of any other in the use of the materials and implements which the master has supplied. *McKinnon v. Norcross*, 3 L. R. A. 320, 148 Mass. 533.

A painter upon a new house, who uses a scaffold erected by carpenters in building the house, is a fellow servant with the carpenter. *Hoar v. Merritt*, 62 Mich. 386.

A grain-trimmer employed by a contractor to work in trimming a cargo of grain on a steamship is not a fellow servant with a mate and seaman of

tion of risks—question of fact—jurisdictional amount—amount of judgment—interest.

1. The porter and the carpenter of a steamship are fellow servants with the stewardess of the ship.
2. An employer is exempt from liability for injuries to a servant caused by another servant.
3. The employer is liable when his own negligence contributes to the injury, or when the other servant occupies such a relation to the injured party, or to his employment, in the course of which his injury was received, as to make the negligence of such servant the negligence of the employer.
4. Where the stewardess of a steamship was injured by falling overboard, through the negligence of the porter and carpenter of the ship in omitting to properly fasten the rods composing the railing of the gang-way for passengers, she cannot recover of the Steamship Company for such injuries.
5. The stewardess took upon herself the natural and ordinary risks incident to the performance of her duty, and among such risks was the negligence of the porter and the carpenter, or of either of them, in the course of the common employment of the three.
6. The court left it as a question for the jury to determine if they found that negligence existed, whether the injury was occasioned by the careless act of a servant not employed in the same department with the plaintiff. This ruling held to be erroneous.
7. Where the judgment below was for the amount of the verdict and interest, which together, as entered in the judgment, amount to over \$5,000, this court has jurisdiction, although the verdict does not exceed that sum.
8. The test as to the jurisdiction of this court, in a case like the present, is the amount of the judgment below, even though, without the interest included in it, the amount, exclusive of costs, would not be over \$5,000.

[No. 30.]

Argued Jan. 24, 1890. Decided March 3, 1890.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment for the plaintiff in an action to recover damages for personal in-

the ship, through whose negligence he is injured. *Crawford v. The Wells City*, 38 Fed. Rep. 47.

The chief manager of charcoal works, who works at charging the retorts, etc., with no direct charge over the machinery, but with the right to repair it, and with the duty to see whether it is out of repair, but with no authority to buy, alter or change machinery, is a fellow servant with a man employed in such works. *Yates v. McCullough Iron Co.* 69 Md. 370.

A second mate superintending the work of reeling in a hawser is a fellow servant with a seaman turning the reel on board ship. *The Egyptian Monarch*, 36 Fed. Rep. 773.

A servant in a shop who has repaired a chain used in raising locomotive driving wheels, and another servant who, in so using the chain, is injured by its breaking at the link which had been repaired, are fellow servants. *Rogers Locomotive & N. Works v. Hand*, 13 Cent. Rep. 236, 50 N. J. L. 464.

Where the superintendent of repairs to a ship directed assistants to be sent up from the hold to open a hatchway on the main deck, and the hatch fell through the opening, injuring another workman under it, in the hold, the master was not liable

juries against a Steamship Company. *Reversed.*

The facts are stated in the opinion.

Messrs. William Allen Butler and Wilhelmus Mynderse, for plaintiff in error:

An employer is exempt from liability for injuries to a servant caused by the negligence of a fellow servant.

Hough v. Texas & P. R. Co. 100 U. S. 213 (25: 612); *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377 (28: 787); *Tuttle v. Detroit, G. H. & M. R. Co.* 122 U. S. 189 (30: 1114); *Northern Pac. R. Co. v. Mares*, 123 U. S. 710 (31: 296); *Priestley v. Toule*, 3 Mees. & W. 1; *Hutchinson v. York, N. & B. R. Co.* 5 Exch. 343; *Murray v. South Carolina R. Co.* 1 McMull. L. 385; *Farwell v. Boston & W. R. Corp.* 4 Met. 9; *Coon v. Syracuse & U. R. Co.* 6 Barb. 231, 5 N. Y. 492; *Flike v. Boston & A. R. Co.* 53 N. Y. 549.

One who enters the service of another for the performance of specified duties takes upon himself the natural and ordinary risks incident to the performance of such duties, and among these risks are the carelessness and negligence of fellow servants in the course of the common employment.

Farwell v. Boston & W. R. Corp. 4 Met. 49; *Hough v. Texas & P. R. Co.* 100 U. S. 213 (25: 612); *Union Pac. R. Co. v. Fbrt*, 84 U. S. 17 Wall. 553 (21: 739).

The accident causing the injuries which the plaintiff sustained were not only due, solely, to the negligence of her fellow servants, but the negligence itself was one of the incidental risks of her employment.

Quinn v. New Jersey Lighterage Co. 23 Blatchf. 209; *Hudson v. Ocean Steamship Co.* 12 Cent. Rep. 644, 110 N. Y. 625.

The ship's carpenter and the ship's porter were fellow servants of the plaintiff.

2 Parsons, Shipping and Ad. 49; *The Jane and Mutilda*, 1 Hagg. Adm. 187; U. S. Rev. Stat. § § 4511, 4512.

Where the negligence is that of a fellow servant not occupying a position which makes him the representative of the employer as to the servant injured, and the employer has fulfilled his duty, the employer is exempt from liability.

Hickey v. Tnaaffe, 7 Cent. Rep. 72, 105 N. Y. 26; *Anthony v. Leeret*, 7 Cent. Rep. 698, 105 N. Y. 591; *Crispin v. Babbitt*, 81 N. Y. 516; *Cahill v. Hilton*, 9 Cent. Rep. 255, 106 N. Y. 512; *Brick v. Rochester, N. Y. & P. R. Co.* 98 N. Y. 211; *Powers v. N. Y. L. E. & W. R. Co.* 98 N. Y. 274; *Mackin v. Boston & A. R. Co.* 135 Mass. 201; *Hodgkins v. Eastern R. Co.* 119 Mass. 419; *Webber v. Piper*, 109 N. Y. 496.

In order that two workmen should be fellow servants it is not necessary that both should be engaged in performing the same or similar acts.

Buckley v. Gould & C. Silver Min. Co. 14 Fed. Rep. 833, cases cited, and note pp. 840, 841, 846; *Holden v. Fitchburg R. Co.* 129 Mass. 268; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432; *The Harold*, 21 Fed. Rep. 428; *Armour v. Hahn*, 111 U. S. 518 (28: 440); *The City of Alexandria*, 17 Fed. Rep. 390; Whart. Neg. § 231; *Chicago & A. R. Co. v. Murphy*, 53 Ill. 336; *Morgan v. Vale of Neath R. Co.* L. R. 1 Q. B. 149; *Garrahy v. Kansas City, St. J. & C. B. R. Co.* 25 Fed. Rep. 258; *Howard v. Denver & Rio Grande R. Co.* 26 Fed. Rep. 837; *Mealman v. Union Pac. R. Co.* 87 Fed. Rep. 189.

There is not any difference in the grade of service performed by the several classes or departments of the service on the ship.

Henry v. Staten Island R. Co. 81 N. Y. 373; *Smith v. Potter*, 46 Mich. 258; *Kidwell v. Houston R. Co.* 3 Woods, 813; *Vallee v. Ohio & M. R. Co.*

for the injuries. *Hussey v. Coger*, 3 L. R. A. 559, 112 N. Y. 614.

The engineer in charge of an engine operating a machine for sawing, whose duties include that of keeping the machinery in good condition, and repairing it when broken or defective, is a fellow servant with another engaged in operating the saw. *Teleman v. Moeller*, 73 Iowa, 108.

An employé having ridden in a freight elevator to the highest floor in the building, cannot recover against his employer for injuries received, due to the carelessness of the engineer in starting the elevator in the wrong direction. *Stringham v. Stewart*, 1 L. R. A. 433, 111 N. Y. 188.

The fact that an employé has authority from the master to discharge his fellow servants does not alone constitute him more than a fellow servant himself. *Webb v. Richmond & D. R. Co.* 97 N. C. 387.

One having the full control of another's timber yard and employing and discharging men is a vice-principal. *Baldwin v. St. Louis, K. & N. W. R. Co.* 75 Iowa, 297.

A master is not responsible for mere personal negligence of a superior fellow servant causing injury to an inferior. *Louisville & N. R. Co. v. Lahr*, 86 Tenn. 335.

It is not the rank of an employé, or his authority over other employés, but the nature of the duty or service he performs, which determines whether he is a vice-principal or a fellow servant. *Lindvall v. Woods (Minn.)* 4 L. R. A. 793; *Kelley v. Cable Co.* 7 Mont. 70; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140.

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Whenever a master delegates to another the performance of a duty to a servant which rests upon himself absolutely, he is liable for the manner in which the duty is performed. *Lindvall v. Woods (Minn.)* 4 L. R. A. 793; *Anderson v. Bennett*, 16 Or. 515.

A railroad company is liable to any one of its employes operating its road for the negligence of either one of its officers or employes whose duty it is to keep the road in a reasonably safe condition, and who culpably fails to perform such duty or to give notice or warning thereof. *Kansas City, Ft. S. & G. R. Co. v. Kier (Kan.)* 21 Pac. Rep. 770.

A foreman putting up a staging is not a fellow servant of a carpenter who is injured by his negligence. *Heckman v. Mackey*, 36 Fed. Rep. 363.

A foreman in charge of men employed in raising a part of a railroad track is an agent of the company, and not a fellow servant of one of the men under his orders. *Stephens v. Hannibal & St. J. R. Co.* 96 Mo. 207.

A company of men under the control of a foreman engaged in the business of repairing bridges, water-tanks and telegraph lines along a line of railway, in going to and from their labor on a hand-car on such railway, are under the control of such foreman; and his principal is liable for his negligence occurring in the course of his employment. *Sioux City & P. R. Co. v. Smith*, 22 Neb. 775.

A foreman in charge of a gang of railroad laborers, with power to discharge them, subject to the approval of the supervisor, and under the duty to see that they work faithfully, is the direct repre-

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85 Ill. 500; *Kumler v. Junction R. Co.* 83 Ohio St. 150; *Smith v. M. & L. R. Co.* 18 Fed. Rep. 304.

Mr. A. J. Dittenhoefer, for defendant in error:

As the verdict does not exceed five thousand dollars this court has no jurisdiction.

Merrill v. Petty, 83 U. S. 16 Wall. 338-345 (21: 499, 500); *Walker v. U. S.* 71 U. S. 4 Wall. 163 (18: 319); *First Nat. Bank v. Redick*, 110 U. S. 224 (28: 124); *Western U. Teleg. Co. v. Rogers*, 93 U. S. 565 (23: 977).

The master's immunity from damages for injuries sustained by one employé through the negligence of another is limited to cases where the servants are engaged in the same department of duty, and does not extend to cases where servants are engaged in departments essentially foreign to each other.

8 Abb. Nat. Dig. 202, 203, and cases cited; *Gravelle v. Minneapolis & St. L. R. Co.* 10 Fed. Rep. 711, 11 Fed. Rep. 569; *King v. Ohio R. Co.* 14 Fed. Rep. 277; *Crew v. St. Louis, K. & N. W. R. Co.* 20 Fed. Rep. 87; *The Titan*, 23 Fed. Rep. 413; *Garrahy v. Kansas City, St. J. & C. B. R. Co.* 25 Fed. Rep. 258; *McKenna v. The Carolina*, 30 Fed. Rep. 199; *Central T. Co. v. Wabash, St. L. & P. R. Co.* 34 Fed. Rep. 616; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 389 (23: 792); *Northern P. R. Co. v. Herbert*, 116 U. S. 642 (29: 755); *Cunard S. S. Co. v. Carey*, 119 U. S. 245 (30: 354).

It is proper to submit to the jury, as a matter of fact, whether the plaintiff and such other servant were in the same line of employment.

Toledo, W. & W. R. Co. v. Moore, 77 Ill. 217; *Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 272; *Indianapolis & St. L. R. Co. v. Morganstern*, 106 Ill. 216.

The English rule that all servants of the same master are fellow servants has encountered constant resistance.

representative of the railroad company, and not a fellow servant with the laborers. *Criswell v. Pittsburgh, C. & St. L. R. Co.* 30 W. Va. 798.

A mine boss who directs a ten-year-old boy to leave the work he is doing and assist in switching coal cars is not a fellow servant of such boy. *Brazil Block Coal Co. v. Gaffney*, 119 Ind. 455, 4 L. R. A. 860.

As to who are co-employés or co-servants, within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a co-servant, see also earlier cases in note to *Hough v. Texas & P. R. Co.* Bk. 25, p. 612; also note to *Coyne v. Union Pac. R. Co.* ante, p. 651.

Machinery and appliances.

In determining the question of reasonable care on the part of the master, regard must be had to the risks and dangers attending the use of the instrumentality furnished the servant in his employment, and the obligation of the former, as respects due care, extends as well to the matter of inspection and repair as to furnishing. *Anderson v. Minnesota & N. W. R. Co.* 39 Minn. 523; *Hannibal & St. J. R. Co. v. Kanaley*, 39 Kan. 1; *Missouri Pac. R. Co. v. Crenshaw*, 71 Tex. 340; *New York & C. M. S. & Co. v. Rogers*, 11 Colo. 8; *Clairain v. West. U. Tel. Co.* 40 La. Ann. 178; *Ayers v. Richmond & D. R. Co.* 84 Va. 679; *Gulf, C. & S. F. R. Co. v. Silliphant*, 70 Tex. 623; *Eicheler v. Hanggi*, 40 Minn. 263; *Georgia Pac. R. Co. v. Brooks*, 84 Ala. 188; *Steen v. St. Paul & D. R. Co.* 37 Minn. 310; *Johnson v. Ashland Water*

Chicago & N. W. R. Co. v. Moranda, 93 Ill. 326.

In the following cases in the federal courts it has been determined that as matter of law the servant injured was not a fellow servant with one whose neglect caused the accident:

Common laborer engaged in unloading vessel and officer of ship,—

McKenna v. Carolina, 30 Fed. Rep. 199.

Expressman and engineer,—

Central T. Co. v. Wabash, St. L. & P. R. Co. 34 Fed. Rep. 616.

Common workman and conductor of switch-engine,—

Garrahy v. Kansas City, St. J. & C. B. R. Co. 25 Fed. Rep. 258.

So also station agent and carpenter,—

Palmer v. Utah & N. R. Co. (Idaho) 13 Pac. Rep. 425.

Laborer in carpenter shop and engineer,—

Ryan v. Chicago & N. W. R. Co. 60 Ill. 171; *Bain v. Athens Foundry & M. Works*, 75 Ga. 718; *Louisville & N. R. Co. v. Moore*, 83 Ky. 675-684; *Stroble v. Chicago, M. & St. P. R. Co.* 70 Iowa, 555; *Chicago & A. R. Co. v. Hoyt*, 122 Ill. 369; *East Tennessee, V. & G. R. Co. v. DeArmond*, 86 Tenn. 78, 37 Alb. L. J. 22.

Mr. Justice Blatchford delivered the opinion of the court:

This was an action to recover damages for personal injuries, brought by Barbara Merchant against the Quebec Steamship Company, a Canadian corporation, in the Superior Court of the City of New York, and removed by the plaintiff into the Circuit Court of the United States for the Southern District of New York. The case was tried by a jury, which found a verdict for the plaintiff for \$5,000, on which a judgment was entered in her favor for that amount, with \$306 interest from the time of

Co. 71 Wis. 558; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140.

Where an employé undertakes a hazardous employment, he is deemed to assume the risks of the same, so far as they are open to observation or are known to him. *Woods v. St. Paul & D. R. Co.* 39 Minn. 435; *Chesapeake & O. R. Co. v. Lee*, 84 Va. 642; *Central R. & Bkg. Co. v. Sims*, 80 Ga. 749; *Smith v. Sellars*, 40 La. Ann. 527; *Norfolk & W. R. Co. v. Cottrell*, 83 Va. 512; *Jenney Electric Light & P. Co. v. Murphy*, 115 Ind. 566, 15 West. Rep. 507; *Melzer v. Peninsular Car Co.* (Mich.) 42 N. W. Rep. 1073; *Minty v. Union Pac. R. Co.* (Minn.) 4 L. R. A. 408; *Campbell v. Lunsford*, 83 Ala. 512; *Berger v. St. Paul R. Co.* 39 Minn. 78; *Nelling v. Industrial Mfg. Co.* 73 Ga. 260.

The risk of danger from dangerous machinery is not assumed by an employé unless he knows the danger or it is so obviously evident that he will be presumed to have known it. *Scanlon v. Boston & A. R. Co.* 7 New Eng. Rep. 141, 147 Mass. 484; *Louisville R. Co. v. Wright*, 15 West. Rep. 320, 115 Ind. 304.

A switchman assumes the hazard of an unblocked frog of a switch which he uses, when he accepts the service and continues therein. *Appel v. Buffalo, N. Y. & P. R. Co.* 111 N. Y. 550; *Wolson v. Winona & St. P. R. Co.* 37 Minn. 828; *Goff v. Norfolk & W. R. Co.* 26 Fed. Rep. 299; *Buckley v. Gutta Percha & R. Mfg. Co.* 118 N. Y. 540.

A man who enters upon employment in a tannery, where he walks backwards, dragging hides from vats to a wash-wheel, on a slippery floor, across a

rendering the verdict to the time of entering judgment, and \$60.25 costs,—in all \$5,366.25.

The plaintiff was the stewardess of the steamship *Bermuda*, a vessel belonging to the defendant, and one of a line of vessels plying between the City of New York and the West Indies. She has been employed on the vessel for about eighteen months. It was her duty as stewardess to attend to the ladies' rooms in the cabin, and, in the course of that duty, to empty slops, as to which her orders were to throw them over the side of the vessel. The cabin was on deck. A railing extended around the vessel, and consisted of four horizontal iron rods, which were supported, at intervals of about 4½ feet, by stanchions. In this railing there were openings or gangways, for receiving and discharging freight and passengers. Three of the gangways were for passengers. One of them faced one of the doors of the cabin which open on the deck. In order to use these openings or gangways, the four iron rods which formed the railing of the gangway, instead of being fixed immovably to the stanchions, were each of them fastened at one end to a stanchion by a ring or eyelet in which the rod could swing, the other end of each rod being formed into a hook which went into an eye fastened on another stanchion to receive it. This was a proper construction of the railing at the gangway.

On the 28th of December, 1883, the vessel was at anchor from a mile-and-a-half to two miles off the shore of the Island of Trinidad, one of the islands at which she stopped in her trips. Some passengers from New York were to land at Trinidad, and their baggage was put off through the gangway on the starboard side aft into a boat from the shore. To do this, the four rods composing the railing in the gangway were raised, and the gangway was opened.

After the baggage had been discharged, the carpenter and the porter of the vessel undertook, according to the testimony of a witness for the plaintiff, to replace the rods in their proper position. He says that the porter, one West, "was at one stanchion, pushing forward, while the carpenter stood at the other, where the hook fitted into the eye, trying to force it into the eye. It began raining, and the carpenter and West were beginning to get wet." Thereupon the carpenter left the gangway and the porter left it soon afterwards. The rods were not placed in their proper positions, but remained so far unfastened that the hooks were not secured in the eyes. The porter testified, as a witness for the defendant, that he told the carpenter to put the rods in, and that he replied, "Wait until the rain goes over." While the rods were thus unfastened, the plaintiff came out of the cabin door with a pail of slops, to throw its contents over the side of the vessel. She leaned over the railing at the gangway, the rods gave way, and she fell overboard through the opening and was seriously injured. She probably struck the edge of a small boat which was lying there, and thence fell into the water. She had been in the habit of emptying slops at this gangway, but had never noticed the hooks.

The ship's company consisted of thirty-two or thirty-three persons, divided into three classes of servants, called three departments, the deck department, the engineer's department and the steward's department. The captain, the first and second officers, the purser, the carpenter and the sailors were in the deck department. The engineers, the firemen and the coal-passers were in the engineer's department. The steward, the waiters, the cooks, the porter and the stewardess were in the steward's department. Every one on board, in-

space about 16 inches wide along the edge of a vat, assumes the risk of falling into the vat. *Balle v. Detroit Leather Co.* (Mich.) 41 N. W. Rep. 216.

One of a bridge gang employed to make repairs of railroad bridges, assigned to the duty of pulling down an elevated water-tank, cannot recover for an accident which could not have been foreseen, at least by anyone except himself and the other members of his gang, who were his fellow servants. *Easton v. Houston & T. C. R. Co.* 39 Fed. Rep. 65.

A boy of fourteen or fifteen years old cannot recover of his employer for injuries received in consequence of allowing his hand to be caught under a stamping machine at which he was employed, as the danger was as obvious to him as to an adult. *O'Keefe v. Thorn* (Pa.) 24 W. N. C. 379.

An employé who continues in his employment with knowledge of the dangerous condition of the premises where he is employed, on the employer's promise to make them safe, is entitled to recover for injuries received therefrom, if within a reasonable time for removing the defects, but not if after the expiration of such reasonable time. *Stephenson v. Duncan*, 73 Wis. 404; *Darracott v. Chesapeake & O. R. Co.* 83 Va. 238; *Foster v. Pusey* (Del.) 13 Cent. Rep. 47; *Gulf, C. & S. F. R. Co. v. Donnelly*, 70 Tex. 371; *Southern Kan. R. Co. v. Crocker* (Kan.) 21 Pac. Rep. 785; *Weld v. Missouri P. R. Co.* 39 Kan. 63.

Contributory negligence.

Although a servant be injured by the negligence of his master, yet if he could by reasonable care

and prudence have averted the accident, and the injury can be traced to his own negligence as well as that of the defendant, he cannot recover. *Cornwall v. Charlotte, C. & A. R. Co.* 97 N. C. 11; *Pierce v. Atlanta Cotton Mills*, 79 Ga. 782; *Stewart v. Phila. W. & B. R. Co.* (Del.) 17 Atl. Rep. 630; *East Tennessee, V. & G. R. Co. v. Maloy*, 77 Ga. 237; *Yall v. Central Pac. R. Co.* 76 Cal. 474; *Trinity & S. R. Co. v. Mitchell*, 72 Tex. 608; *Wilson v. Louisville & N. R. Co.* 85 Ala. 280; *Norfolk & W. R. Co. v. Emmert*, 83 Va. 640; *Piedmont Electric Illuminating Co. v. Patteson*, 84 Va. 747; *The Leocadia*, 35 Fed. Rep. 534; *Judkins v. Maine Cent. R. Co.* 6 New Eng. Rep. 715, 80 Me. 417.

Where the negligence of an employé of a railway company contributes to his death, his widow cannot recover. *Central R. & Bkg. Co. v. Kitchens* (Ga.) 9 S. E. Rep. 827.

A master is not released from liability for an injury to a servant from a defective machine, by the fact that the operator of the machine was negligent in managing it, where his negligence simply contributed to the injury caused by the master's negligence. *Sherman v. Menomonee River Lumber Co.* 1 L. R. A. 173, 72 Wis. 122; *Cincinnati, I. St. L. & C. R. Co. v. Lang*, 118 Ind. 379.

An employé may recover, notwithstanding his own negligence, if the employer could, by the exercise of care, have avoided the consequences of the employé's negligence. *Chesapeake & O. R. Co. v. Lee*, 84 Va. 642.

As to responsibility of master to servant for carelessness and competency of co-servants, see *note to Wabash R. Co. v. McDaniels*, Bk. 27, p. 605.

cluding the plaintiff, had signed the shipping articles, and she had participated in salvage given to the vessel. The master or captain was in command of the whole vessel.

At the close of the evidence, the counsel for the defendant requested the court to direct the jury to find a verdict for the defendant, on the grounds (1) that the injury sustained by the plaintiff was one occasioned, if there was any negligence, by the negligence of a fellow servant; and (2) that, on the uncontradicted testimony, the plaintiff herself was guilty of contributory negligence, and could not recover. The court refused so to direct the jury, to which refusal the defendant excepted.

We think the court ought to have directed the jury to find a verdict for the defendant, on the ground that the negligence was that of a fellow servant, either the porter or the carpenter. As the porter was confessedly in the same department with the stewardess, his negligence was that of a fellow servant. The contention of the plaintiff is that, as the carpenter was in the deck department and the stewardess in the steward's department, those were different departments in such a sense that the carpenter was not a fellow servant with the stewardess. But we think that, on the evidence, both the porter and the carpenter were fellow servants with the plaintiff. The carpenter had no authority over the plaintiff, nor had the porter. They and the plaintiff had all signed the shipping articles; and the division into departments was one evidently for the convenience of administration on the vessel, and did not have the effect of causing the porter and the carpenter not to be fellow servants with the stewardess.

The injuries to the plaintiff were caused solely by the negligence of one or the other of two fellow servants, who were in a common employment with her; and there was no violation or omission of duty on the part of the employer contributing to such injuries. Neither of her fellow servants stood in such relation to her or to the work done by her, and in the course of which her injuries were sustained, as to make his negligence the negligence of the employer. The case therefore falls within the well-settled rule, as to which it is unnecessary to cite cases, which exempts an employer from liability for injuries to a servant caused by another servant, and does not fall within any exception to that rule which destroys the exemption of the employer when his own negligence contributes to the injury, or when the other servant occupies such a relation to the injured party, or to his employment, in the course of which his injury was received, as to make the negligence of such servant the negligence of the employer.

The plaintiff took upon herself the natural and ordinary risks incident to the performance of her duty, and among such risks was the negligence of the porter and the carpenter, or of either of them, in the course of the common employment of the three. There was nothing in the employment or service of the carpenter or the porter which made either of them any more the representative of the defendant than the employment and service of the stewardess made her such representative. The court left it as a question for the jury to determine, if

they found that negligence existed, whether the injury was occasioned by the careless act of a servant not employed in the same department with the plaintiff. This ruling was excepted to by the defendant, and we think it was erroneous.

The plaintiff takes the point that, as the verdict did not exceed \$5,000, this court has no jurisdiction, although the judgment was for the amount of the verdict, with interest and costs. The statute in regard to the jurisdiction of this court provides that the matter in dispute must exceed the sum or value of five thousand dollars, exclusive of costs (Act of February 16, 1875, chap. 77, § 3, 18 Stat. 316). It is well settled that the test as to the jurisdiction of this court, in a case like the present, is the amount of the judgment below, even though without the interest included in it, the amount, exclusive of costs, would not be over \$5,000. *N. Y. Elevated Railroad Co. v. Fifth Nat. Bank*, 118 U. S. 608 [30: 259].

The judgment of the Circuit Court is reversed, and the case is remanded to that court with a direction to award a new trial.

GUSTAVUS C. HOPKINS ET AL., *Plffs.*
in *Err.*,
v.

JOHN J. McLURE, Administrator, etc.,
ET AL.

(See S. C. Reporter's ed. 380-387.)

State decree, when not reviewable—decision based on independent ground.

1. Where the decree of the state court does not rest upon the State Statute in question, but upon independent grounds, it cannot be said that the decision of the state court was based upon the application of the Statute as a valid Act affecting the contract of the plaintiffs in error and impairing its obligation.
2. Where the Supreme Court of a State decides a federal question, in rendering a judgment, and also decides against the plaintiff in error on an independent ground, not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question.

[No. 126.]

Argued Nov. 20, 1889. Decided March 3, 1890.

IN ERROR to the Supreme Court of the State of South Carolina to review a decree affirming a decree of the Circuit Court of Chester County, South Carolina, that the liens of certain mortgages were exhausted and they were no longer preferred claims, and that the debts they were given to secure could only be

NOTE.—As to jurisdiction in the United States Supreme Court, where federal question arises, or where are drawn in question statutes, treaty or Constitution, see notes to *Martin v. Hunter*, Bk. 4, p. 97; *Matthews v. Zane*, Bk. 2, p. 654; *Williams v. Norris*, Bk. 6, p. 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with State Constitution; to revise decrees of state courts as to construction of state laws,—see note to *Hart v. Lamphire*, Bk. 7, p. 679; also note to *Commercial Bank of Cincinnati v. Buckingham*, Bk. 12, p. 169.

proved and take rank against the assets in the hands of the administrator according to the nature of the instrument evidencing the debt and the statute relating thereto, in an action to marshal the assets of the estate and have the real property of the deceased sold and have the creditors of the estate establish their demands.
Dismissed.

The facts are stated in the opinion.

Opinion below, 24 S. C. 559.

Mr. Wm. E. Earle for plaintiffs in error.

Mr. Jno. J. Hemphill for defendants in error.

Mr. Justice Blatchford delivered the opinion of the court:

On the 9th of July, 1876, George W. Melton died, intestate and insolvent, in South Carolina, leaving surviving him his widow, Margaret A. Melton, and three infant children. John J. McLure was appointed administrator of his estate, and commenced an action in the Circuit Court of Chester County, South Carolina, in July, 1877, to marshal the assets of the estate, to have the real property of the deceased sold in aid of assets, and to have the creditors of the estate establish their demands. The creditors were called in, and numerous claims were established, among them a note under seal to R. G. Ratchford & Co., bearing date February 22, 1859; a note under seal to Dr. A. P. Wylie, bearing date May 8, 1872; a note under seal to Samuel D. Melton, bearing date February 1, 1871; a bond secured by a mortgage on real estate to one Duvall, sheriff, dated June 4, 1875, which had been transferred to one Kerr, as clerk of the court of Fairfield County, South Carolina; and a bond secured by a mortgage on real estate to Hopkins, Dwight & Co., dated May 19, 1876. The widow and the infant children, and various creditors of the deceased, were made defendants. The case was referred to a special referee, who reported that the assets of the estate could not exceed \$11,000; that the amount due on the mortgage to Duvall, sheriff, was \$1,087.35, and the amount due on the mortgage to Hopkins, Dwight & Co. was \$30,748.44; and that there were debts on sealed notes and specialties dated prior to November 25, 1873, amounting to \$7,005.04, and debts on simple contracts amounting to \$36,415.98, the total of the three classes of debts being \$75,256.81. The special referee reported that, after the payment of the costs, the assets were applicable first to the satisfaction of the bond and mortgage to Duvall, sheriff, and next to the bond and mortgage to Hopkins, Dwight & Co. Exceptions were filed by various creditors to the report of the referee, and the case was heard by the circuit court.

It appeared that the mortgage to Hopkins, Dwight & Co. had been foreclosed by a judicial sale of the land covered by it; that the proceeds of the sale were insufficient to pay the debt; that the debt and the mortgage were set up as a preferred claim against the general assets in the hands of the administrator; that the land covered by the mortgage held by Kerr as clerk was sold under an order of the court before Kerr became a party to the suit by proving his debt and mortgage; that, after that sale, Kerr, not having obtained its proceeds, insti-

tuted proceedings to foreclose the mortgage, obtained judgment and sold the land, but the proceeds of sale were insufficient to pay the mortgage debt; and that Kerr set up the debt as a preferred one against the general assets of the estate.

The circuit court said in its opinion that the referee held that both of these debts were preferred claims on the authority of the case of *Edwards v. Sanders*, 6 S. C. 316; and it discussed the question whether the mortgage debt of Hopkins, Dwight & Co. was a preferred claim after its specific lien had been exhausted, because it was a mortgage.

Section 26 of the Act of South Carolina, which became a law March 13, 1789, being Act No. 1455, entitled "An Act Directing the Manner of Granting Probates of Wills and Letters of Administration, and for Other Purposes Therein Mentioned" (Stat. at L. of S. C. 1839, vol. 5, p. 111), provided as follows: "That the debts due by any testator or intestate shall be paid by executors or administrators in the order following, viz.: funeral and other expenses of the last sickness; charges of probate of will or of the letters of administration; next, debts due to the public; next, judgments, mortgages and executions, the oldest first; next, rent; then, bonds or other obligations; and lastly, debts due on open accounts; but no preference whatever shall be given to creditors in equal degree, where there is a deficiency of assets, except in the cases of judgments, mortgages that shall be recorded, from the time of recording, and executions lodged in the sheriff's office, the oldest of which shall be first paid, or in those cases where a creditor may have a lien on any particular part of the estate."

This provision was construed by the Constitutional Court of South Carolina, in 1822, in the case of *Tunno v. Hoppoldt*, 2 McCord, L. 188. In that case the deceased left an outstanding "obligation or sealed instrument of mortgage and covenant" and some outstanding simple-contract debts. The question arose whether that instrument was to be ranked, in the legal order of payment under the Statute, among bond debts, or among simple-contract debts. The court said that the claim was by simple contract, that is, by a note; that the question was whether the mortgage deed could change the character of the note, or give it a preference over other simple-contract debts under the Statute; that the simple-contract debt was not changed by the mortgage; and that the deed gave a particular lien upon certain property, but its object and intent had terminated, and otherwise left the note as it stood before, still a simple contract.

In *Kinard v. Young*, 2 Rich. Eq. 247, in the Court of Appeals in Equity and Court of Errors of South Carolina, in 1846, it was held that, in the administration of the assets of an insolvent testator or intestate, mortgages, as mortgages, were not entitled to priority over rent, specialties and simple-contract debts, except so far as they were liens on any particular part of the estate, and that, after the lien was exhausted, the grade of the demand must be determined by the nature of the instrument which the mortgage was given to secure; the court following the decision in *Tunno v. Hoppoldt*.

The provision of the Act of 1789 was incorporated in 1873 in the Revised Statutes of South Carolina, as section 8 of chapter 90, p. 457, as follows: "The assets which come to the hands of an executor or administrator, after proper allowance to the executor or administrator, in a due course of administration, shall be applied to the payment of his debts in the following order, that is to say: (1) funeral and other expenses of the last sickness, charges of probate or letters of administration; (2) debts due to the public; (3) judgments, mortgages and executions—the oldest first; (4) rent; (5) bonds and debts by specialty; (6) debts by simple contract.

In 1875, the case of *Edwards v. Sanders*, 6 S. C. 316, was decided by the Supreme Court of the State. It was held that, under section 26 of the Act of 1789, prescribing the order in which debts of a decedent are to be paid, mortgages, whether of chattels or real estate, rank in the third class, and are entitled to payment out of the general estate in preference to specialty and simple-contract debts; that a purchaser of the mortgaged premises, by the mortgagee or his assignee, under a decree for foreclosure, does not extinguish the mortgage debt for any unsatisfied balance that may remain; and that, where the purchase is made after the death of the mortgagor, the unsatisfied balance retains its rank as a mortgage debt, with right to priority of payment out of the general estate, over specialty and simple-contract debts.

While the case of *Edwards v. Sanders* stood as the rule of construction, the referee in the present case held that the mortgages in question were preferred claims. Before the case came on to be heard upon exceptions to the report of the referee, the case of *Piester v. Piester*, 22 S. C. 139, was decided, in January, 1885, by the Supreme Court of the State, which held that, under the Act of 1789, a mortgage, as such, had no precedence in the administration of the estate of a deceased person except to the extent of its specific lien upon the property mortgaged, and that when such lien was exhausted the mortgage ranked according to the grade of the demand secured by it; thus approving the case of *Kinard v. Young*, and overruling that of *Edwards v. Sanders*. The court said: "We think that a creditor of a decedent's estate, whose claim is secured by a mortgage on particular property, has under the Act a lien upon that property: but when that is exhausted the mortgage as such is *functus officio*; and in further marshaling the assets the demand must rank according as it may be a simple contract or specialty." The court cited the cases of *Tunno v. Happoldt* and *Kinard v. Young*, and said that the doctrine asserted by them was regarded as the settled construction of the Act of 1789, until the case of *Edwards v. Sanders*. Of that case the court said that it "is not only unsustained by proper rules of construction, but is in direct opposition to the decided cases and what was at that time considered the settled law of the State." The court then referred to the Act of South Carolina, passed December 14, 1878, entitled "An Act to Alter and Amend the Law in Relation to the Payment of Debts of a Decedent" (No. 548, 16 Stat. 686), which provides: "That in the administration of the assets of a decedent, mortgages shall not be en-

titled to a priority over rents, debts by specialty, or debts by simple contract, except as to the particular parts of the estate affected by the liens of such mortgages. That after the property covered by the liens is exhausted, the grade of the demand shall be determined by the nature of the instrument which the mortgage was given to secure," as an Act which, although it was passed after the facts in the case then at bar arose, "only declared what had been the law of the State since the Act of 1789."

After a consideration of these cases, the circuit court reached the conclusion, in the present case, that the mortgages in question came under the operation of the decision in *Piester v. Piester*, and were not preferred claims as mortgages. The decree of that court was that, the lien of the mortgages having been exhausted, they were no longer preferred claims; and that the debts they were given to secure could only be proved and take rank against the assets in the hands of the administrator according to the nature of the instrument evidencing the debt, and the Statute relating thereto. Exceptions were filed to the decree and the case was heard on appeal by the Supreme Court of the State, which, in April, 1886, affirmed the decree of the circuit court. 24 S. C. 559.

The point was taken by the appellants in the Supreme Court of South Carolina, that the case of *Piester v. Piester* could not be applied to their cases, for the reason that so to apply it would impair the obligation of contracts or divest vested rights, because, at the time of the making of the contract of Hopkins, Dwight & Co., the law, as then declared by the case of *Edwards v. Sanders*, required that the balances due on the two debts should be ranked as mortgages, and as such be entitled to priority over specialty debts; and that the decision in *Piester v. Piester* could not divest rights which became vested at the time the intestate died, under the law as it was then declared to be.

But the supreme court said that the construction placed on the provisions of the Act of 1789 by the decision in *Piester v. Piester* was the same as that laid down in *Tunno v. Happoldt* and *Kinard v. Young*; that the law stood unquestioned down to the time of the decision in *Edwards v. Sanders*; that that decision did not seem to have been followed in a single instance; that from what was said in *Piester v. Piester* it would seem never to have been satisfactory to the profession; that at the first opportunity it was overruled; and that, in the meantime, the Legislature, by the Act of 1878, had shown its dissatisfaction with the construction adopted in the case of *Edwards v. Sanders*. On the question whether the decision in *Piester v. Piester* effected such a change in the law as would forbid its application to the case under consideration, because it would impair the obligation of a contract or divest rights vested under the law as declared in *Edwards v. Sanders*, the supreme court said that, as the proper construction of the Statute had been settled for a long series of years by decisions of both of the courts of final resort in the State, in accordance with the view declared in *Piester v. Piester*, it would be going very far to say that a single isolated decision, never recognized or followed in any subsequent case, and never recommending itself to the approval

of the profession, should be regarded as having the effect of changing the law. "On the contrary," says the court, "whatever may be the opinions of individuals as to its correctness, it must be regarded as an erroneous declaration of what was the law, and as only the law of the particular case in which it was made."

The members of the firm of Hopkins, Dwight & Co., as successors of the former members of that firm, and the trustee of that firm and of Mrs. Melton and her infant children, have brought a writ of error to review the decree of the supreme court affirming that of the circuit court; and the defendants in error now move to dismiss the writ of error, on the ground of a want of jurisdiction in this court.

It is contended on the part of the plaintiffs in error that the decision of the court below was based upon the application of the Act of 1878 as a valid Act, affecting the contract of the plaintiffs in error and impairing its obligation. But the validity of that Statute was not drawn in question, and the supreme court did not pass upon it. The decree of that court does not rest upon that Statute, but upon independent grounds. The decision rests upon a ground broad enough to cover the entire case, without considering the Statute. It rests upon the ground that the law of South Carolina, under the Act of 1789, was such as it had always been held to be, in *Tunno v. Huppoldt*, *Kinard v. Young* and *Piester v. Piester*, and that the law as so declared had always been the law, and was not varied or changed by anything decided in *Edwards v. Sanders*. That being so, we must hold that no federal question is presented by the record.

This view is in accordance with the decisions of this court in *Kreiger v. Shelby Railroad Co.* 125 U. S. 39 [31: 675]; *De Saussure v. Gastard*, 127 U. S. 216 [32: 125], and *Hale v. Akers*, 132 U. S. 554 [33: 442], the ruling in which cases is that, where the Supreme Court of a State decides a federal question, in rendering a judgment, and also decides against the plaintiff in error on an independent ground, not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question.

The writ of error is dismissed.

THE PHOENIX CASTER COMPANY,
Appl.,
v.

AUGUSTUS SPIEGEL ET AL.

(See S. C. Reporter's ed. 360-369.)

Patents—construction and infringement of.

1. Where a patentee has modified his claim in obedience to the requirements of the Patent

Office, he cannot have for it an extended construction which has been rejected by the Patent Office.

2. In a suit on his patent, his claim must be limited, where it is a combination of parts, to a combination of all the elements which he has included in his claim as necessarily constituting that combination.
3. The Martin caster patented to him by letters-patent No. 190,152, May 1, 1877, is not infringed by the Yale caster used and sold by defendants.
4. In view of the state of the art, the words "the rocker-formed collar-bearing, or its mechanical equivalent," in the claim of the Martin patent, must be restricted to such a bearing resting on a collar beneath the floor-wheel housing, as is shown in the patent.
5. The housing in the Yale caster is not of a construction similar to that described by Martin; and there is not in the Yale caster any equivalent for such "rocker-formed collar-bearing." The housing of the Martin patent has an opening from top to bottom, while the Yale caster has no such opening.

[No. 150.]

Argued Dec. 10, 1889. Decided March 3, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Indiana to review a decree dismissing a suit for an infringement of letters-patent granted to Alexander C. Martin for an improvement in furniture casters. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 26 Fed. Rep. 272.

Mr. Charles P. Jacobs for appellant.
(No counsel for appellees.)

Mr. Justice Blatchford delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the District of Indiana, by the Phoenix Caster Company, an Indiana corporation, against Augustus Spiegel, Henry Frank and Frederick Thoms, to recover for the alleged infringement of letters-patent No. 190,152, granted May 1, 1877, on an application filed September 16, 1876, to Alexander C. Martin, for an "improvement in furniture casters."

The specification, claim and drawings of the patent are as follows: "This invention relates to swiveling casters, and the objects of the invention are to secure in such casters freedom from pivotal wear of carpet or floor and increased mobility in swiveling. The first object is attained by the use of two floor-wheels whose axes are coincident, in connection with devices which insure the contact of both wheels with the floor, regardless of ordinary irregularities of floor surface. The second object of the invention is a natural result of the suppression of floor friction. In the accompanying drawing, Fig. 1 is an elevation of my improved caster. Part of Fig. 1 is a vertical section. Fig. 2 is a side elevation, and Fig. 3 is a part

NOTE.—As for what patents are granted and when declared void,—see note to *Evans v. Eaton*, Bk. 4, p. 433.

As to patentability of invention, see note to *Thompson v. Boisselier*, Bk. 29, p. 76; also note to *Corning v. Burden*, Bk. 14, p. 693.

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As to abandonment of invention, see note to *Pennock v. Dialogue*, Bk. 7, p. 327.

As to distinction between inventions of mechanism, articles or products, and processes; when latter patented,—see note to *Corning v. Burden*, Bk. 14, p. 693.

As to including process and product in same patent;

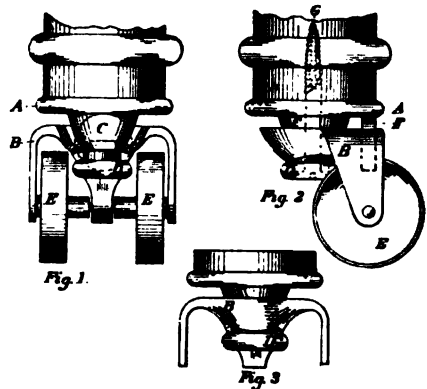
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elevation, exhibiting the portion cut away in Fig. 1. Common casters, in swiveling, pivot upon the floor. The point of pivot motion is the point of contact between wheel and floor. Such pucker and wear carpets, and are sluggish in their swiveling action. Two rollers side by side will, in swiveling, turn in opposite directions, and it will be found that they roll upon the floor instead of pivoting, as does the single wheel; but if the floors should be irregular, as is often the case, one wheel of the pair would not touch the floor, and the two-wheeled caster would become practically a one-wheeled caster. My improvement consists in making the axis of the two wheels oscillatory with reference to the article to which the furniture caster is attached. The axis of oscillation, being at right angles to the floor-wheels' axis, allows the wheels to accommodate themselves to ordinary inequalities of floor. Referring to the drawing, A is a flange, from which depends the stem or boss C. This stem serves as a pivot for the swiveling motion, as a draft pin for the wheel-housing, and as a means of uniting the parts. The housing B furnishes bearing supports for the two floor-wheels E E and the anti-friction pivot wheel F. The latter wheel is situated centrally between and vertically above the floor-wheels. The housing swivels upon the stem in the usual manner. Were only a swiveling motion of the housing desired, its fit upon the central pivot might be close, allowing only looseness enough for the swiveling action; but the object sought by my improvement demands that the housing should have a compound motion with reference to the central pivot. It must revolve upon a vertical axis and oscillate upon a horizontal axis. This compound bearing is formed by making the housing bearing slightly elliptical and the housing collar-bearing in rocker form, as shown in Fig. 3. The rocker may be on the side of the hole nearest the anti-friction wheel or on the opposite side, and the axis of the rocker should be in line with, and a continuation of, the axis of the anti-friction wheel F, so that the anti-friction wheel may not impede the oscillating motion. By means of the relief resulting from the elliptic nature of the housing opening and the rocker-bearing, freedom for oscillation is secured without interfering with the functions of the central pivot as a bearing of rotation, draft-pin and means of union. I claim, as my invention, a furniture-caster composed of the following elements: The floor-wheels E E, the anti-friction pivot wheel F, the housing B, the elliptical housing opening or its mechanical equivalent, and the rocker-formed collar-bearing or its mechanical equivalent, all combined so as to allow the floor-wheel axis to oscillate horizontally, substantially as and for the purpose specified."

The answer sets up as defenses want of novelty and non-infringement. After a replication, proofs were taken on both sides. The

case was heard before Judge Woods, and a decree was entered which stated that the court found that there had been no infringement of the patent, and that the bill was dismissed, with costs. From this decree the plaintiff has appealed. The opinion of the court is reported in 26 Fed. Rep. 272.

The caster used and sold by the defendants was known as "the Yale caster," and was made at New Haven, Connecticut. The opinion of the court stated that the prior art was shown by reference to numerous earlier patents, both American and English, "which, it is alleged, anticipated the Martin combination entirely, or, at least, in so far as to impose upon it a strict construction, limiting it to the particular arrangement of parts described and excluding any pretense of infringement by the defendants." The opinion then proceeds as follows: "After a painstaking consideration of the evidence and accompanying models, the opinions of the experts, and the arguments and briefs of counsel, which upon both sides have been quite exhaustive, I am compelled to the conclusion that infringement has not been shown, and consequently that the bill must be dismissed. The combination of the patent in question accomplished no new result in mechanics, and differed from previous known combinations, designed for the same and like purposes, only in the construction of one or two of the parts, whereby, perhaps, a better but certainly not a different kind of result was accomplished than had been before effected. More than this cannot be justly claimed, as it seems to me. Besides, it appears that Martin's application for a patent was rejected and withdrawn two or more times, the examiner insisting, upon certain references, 'that all applicant's novelty in entire device is only expressed



by words as specified.' "In obedience to this ruling the claim, and perhaps the specification, was modified and the patent granted. It follows that the patent cannot now, by a liberal construction, be made to include anything so

separate patents therefor,—see note to Evans v. Eaton, Bk. 4, p. 433.

As to what release may cover, see note to O'Reilly v. Morse, Bk. 14, p. 601.

As to assignment, before issuing and retaining patent; recording; when assignment transfers extended terms,—see note to Gayler v. Wilder, Bk. 13, p. 504.

As to when assignee may sue for infringement:

when patentee must; when they must join,—see note to Wilson v. Rousseau, Bk. 11, p. 1141.

As to damages for infringement of patent; treble damages,—see note to Hogg v. Emerson, Bk. 13, p. 824.

As to notes given for patent-rights; purchaser before maturity,—see note to Mandeville v. Welch, Bk. 5, p. 87.

denied by the Patent Office, and without this the device of the defendants cannot, I think, be said to infringe."

The claim of the patent is for a combination of the following elements: (1) the floor-wheels E E; (2) the anti-friction pivot-wheel F; (3) the housing B; (4) the elliptical housing-opening, or its mechanical equivalent; (5) the collar; (6) the rocker-formed collar-bearing, or its mechanical equivalent. All these are to be so combined as to allow the axis of the two floor-wheels to oscillate horizontally with reference to the article to which the caster is attached. The floor-wheels E E are mounted in a housing. This housing also furnishes bearing supports for an anti-friction pivot-wheel F, which latter wheel constitutes the principal bearing-surface between the floor-wheels' housing and the plate at the bottom of the piece of furniture, on which plate the anti-friction pivot-wheel travels in the swiveling movement of the caster. The collar, which is not referred to by letter in the specification, is marked D in figure 8 of the drawings. It sustains the downward pressure at the heel of the housing, which is that part most remote from the floor-wheels. The convex surface of the rocker-formed collar-bearing, which is between the heel of the housing and the collar, is formed on the housing itself. There is an elliptical opening in the housing, in which the entire caster swivels, so as to permit its lateral oscillation. No one of the six elements above mentioned can be dispensed with, without departing from the invention specified in the claim of the patent. The collar is a necessary element in the combination specified in the claim, because there cannot be a rocker-formed collar-bearing unless there be a collar.

A copy of the file-wrapper and its contents, in the matter of the patent, is found in the record. The claims in the specification originally filed were as follows:

"First. The housing B, in combination with the anti-friction wheel F, and two or more floor-wheels, E, substantially as described.

"Second. The combination of the housing B, flange A, boss C, so arranged that the axis of rotation and oscillation of the housings shall intersect below the flange A, substantially as and for the purpose specified.

"Third. The combination of the flange A, boss C and screw G, substantially as and for the purpose specified."

The application was rejected on the 27th of September, 1876, by a reference to four United States patents, the examiner saying that the invention claimed lacked apparently any element of patentable novelty, and adding that, in view of those references, "and in the absence, as far as is perceived, of any new formation or showing of patentable improvement over them," the application was rejected.

The applicant then canceled said three claims, and substituted for them the following, leaving the text of the specification to stand:

"In a furniture-caster, the combination of the above-described housing B with the anti-friction wheel F and floor-wheels E E, when the anti-friction wheel F is situated above and

centrally between the floor-wheels E E, substantially as and for the purpose specified."

On the 5th of October, 1876, the Patent Office informed the applicant that it was not patentable to double the number of wheels which before existed, the examiner adding: "It would not, of course, be possible to repatent all our devices used with a single wheel to everyone who should put in two wheels instead of one."

The applicant then made amendments in his specification and drawings, and submitted his case again, with an argument, to which the Patent Office replied, on the 19th of October, 1876, that if the applicant would define, in his claim, his "housing B" as "having an elliptical opening bearing upon a point opposite to and farthest from the anti-friction wheel F," the case would pass all reference.

In reply to this, the applicant, on the 23d of October, 1876, substituted a new specification and claims for those already presented. The new claims were as follows:

"In a caster, the combination of the housing B, anti-friction wheel F and floor-wheels E E, when the anti-friction wheel is located centrally between and vertically above the floor-wheels, for the purpose and substantially as specified.

"In a caster, the combination of the flange A, stem C, housing B and floor-wheels E E, so arranged that the axis of the floor-wheels may oscillate with reference to the plane of the flange A."

On the 26th of October, 1876, the examiner wrote to the applicant as follows: "The examiner, in official letter of 19th inst., suggested all he felt that he could possibly allow, considering the state of the art. Applicant's present amended first claim could not be allowed, as it is for just what in every letter the Office has stated that it could not allow, viz.: 'adding the usual friction roller in the usual way to two wheels, also old.' This is a mere double use. The 2d amended claim could not be allowed, even were applicant the first to use two wheels, for it is not for devices, but for a result or function (never patentable), applicant claims, 'so arranged that the axis may oscillate,' etc. A dozen inventions may do this, and yet not be equivalents of applicant's arrangement of devices, to which alone he is entitled. Just as stated in letter of 19th, the examiner thinks that in granting the claim there suggested he, if anything, errs on the liberal side."

In reply, the applicant, on the 31st of October, 1876, amended his specification and claim. The following paragraph was inserted in the specification: "It is also necessary that the housing should be capable of having a compound motion upon the central pivot. It must revolve upon a vertical axis and oscillate upon a horizontal axis. This compound bearing is formed by making the housing bearing slightly elliptical and making its collar-bearing in rocker form, as shown in Fig. 8. The rocker may be on the side of the hole nearest the anti-friction wheel, or on the opposite side. By means of the described relief and rocker-bearing, freedom for oscillation is secured, without interfering with the function of the pivot

as a bearing of rotation, draft-pin, and means of union." The following claim was substituted for all previous claims: "In a caster, the floor-wheels, E E, and an anti-friction wheel, F, in the relative position specified, when combined with the housing B, having its pivot bearing relieved as specified, or its mechanical equivalent, substantially as and for the purpose specified."

In reply, the examiner said, in a letter to the applicant dated November 15, 1876: "Part of applicant's claim reads as follows: 'having its pivot bearing relieved as specified, or its mechanical equivalent.' Applicant will see at once that all applicant's novelty in entire device is only expressed by words 'as specified.' This sort of claim has never been allowed, save through some error, since 1870. . . . Again, 'its mechanical equivalent' refers to no specified devices. One cannot say 'having a thing done so and so, or its mechanical equivalent.' Again, the specification says, 'One important feature of my invention is so and so,' and, 'a further improvement consists in,' etc. Applicant has one novelty only, and should be well aware that he should not still claim, in his nature of invention, the anti-friction wheel. Applicant should claim definitely his devices (which he includes in 'relieved as specified') and their equivalents, and change specification to correspond, as suggested. An appeal from the examiner is, of course, proper at any time, but he can issue no patent unless the specification and claims, fairly and without ambiguity, only cover the novel device."

The applicant then, on the 17th of November, 1876, withdrew his existing specification and claim, and substituted those which are in the patent as issued, and it was granted.

It therefore appears that, while the applicant at first claimed a combination of merely three elements, namely, the housing, the anti-friction wheel and the floor-wheels, he finally limited that combination by adding to those three elements the elliptical housing-opening, the collar and the rocker-formed collar-bearing. When the applicant presented his original application, he evidently supposed that he was the first inventor of a two-wheeled caster in which the axis of the floor-wheels could oscillate relatively to the furniture leg. In his letter of October 26, 1876, the examiner criticized the second amended claim, namely, "in a caster, the combination of the flange A, stem C, housing B and floor-wheels E E, so arranged that the axis of the floor-wheels may oscillate with reference to the plane of the flange A," as not being for devices, but for an arrangement so made that the axis of the floor-wheels could oscillate, while the applicant was entitled only to his arrangement of devices. The combination of specified elements constituting such arrangement, selected by the applicant after all the correspondence between him and the Patent Office, is contained in the claim as granted.

It is well settled that where a patentee has modified his claim in obedience to the requirements of the Patent Office, he cannot have for it an extended construction which has been rejected by the Patent Office; and that, in a suit on his patent, his claim must be limited, where it is a combination of parts, to a combination of all the elements which he has included in

his claim as necessarily constituting that combination. The authorities on the subject are collected in the case of *Roemer v. Peattie*, 132 U. S. 313, 317 [33: 882, 883].

The defendants' caster is a two-wheeled caster, with two floor-wheels and two anti-friction wheels, one of the latter located on each side of the vertical plane of the axis of the floor-wheels, the attachment of the floor-wheel housing to the furniture-plate being through the medium of a pivot-pin which turns in the furniture-plate and is secured to the floor-wheel housing by the horizontal axis-pin of the anti-friction wheels, which axis-pin thus becomes the centre of oscillation for the caster. It is provided also with a hollow stud, formed in one piece with the furniture-plate and projecting downward therefrom, within which hollow stud the verticle swiveling-pin turns. It is wanting entirely in the collar of the Martin patent, at the bottom of the attaching stud, by which the caster-housing is secured to the furniture leg, to prevent its dropping when the furniture is lifted; and it is wanting also in Martin's "rocker-formed collar-bearing," which rests upon the collar beneath it and forms one point of the axis of oscillation. The expert for the plaintiff concedes that he does not find in the Yale caster anything that in terms might be called a rocker-formed collar-bearing, except so far as the pivot-pin, being permanent in the housing, might be said to be a part thereof.

In view of the state of the art, as shown by the various patents put in evidence, the words "the rocker-formed collar-bearing, or its mechanical equivalent," in the claim of the Martin patent, cannot embrace all modes of affording vertical support between the floor-wheel housing and the furniture-plate, whereby lateral oscillation of such housing is permitted; and those words must be restricted to such a bearing resting on a collar beneath the floor-wheel housing, as is shown in the Martin patent. The housing in the Yale caster is not of a construction similar to that described by Martin; and there is not in the Yale caster any equivalent for such "rocker-formed collar-bearing;" nor is there any collar beneath the housing on which such collar-bearing can rest. The housing of the Martin patent has an opening from top to bottom, through which the vertical swiveling-stud of the furniture-plate passes, while the Yale caster has no such opening, but only a recess or cavity in the top of the housing, an arrangement which results from the use in the Yale caster of a different mode from that of Martin, of attaching the housing to the furniture-plate, by the substitution for the Martin stud and screw, and a collar held by the screw beneath the housing, of a horizontal pin passing entirely through the swiveling pintle of the housing, which pintle is thus made to revolve with the housing, and turns in the fixed furniture-plate, the horizontal pintle of the anti-friction wheels being used for the attachment of the housing.

For these reasons we concur with the circuit court in its view that infringement has not been established.

It is to be regretted that while this case was orally argued on the part of the appellant, it was not so argued on the part of the appellees,

nor have we been furnished with any brief on their part. This leads to the conclusion that, although the decree dismissing the bill states that the plaintiff claimed his appeal in open court and gave good and sufficient surety, and that the appeal was accordingly allowed, the defendants, for some reason, have not sufficient interest in the questions involved to endeavor to sustain the decree. Perhaps the case, as presented to us, is substantially a moot case; still, there is nothing to show it, and the appellant, on the record, has a right to have the questions he presents decided.

Decree affirmed.

HENRIETTA C. KELLER, *Appt.*,
v.

ISABELLA W. ASHFORD, *Ex'rx.*

(See S. C. Reporter's ed. 610-626.)

Act of Feb. 25, 1879—review of judgments of District of Columbia—Act of March 3, 1885—jurisdiction as to amount—record of deed—construction of deed—incumbrances—agreement in deed—assumption of mortgage in deed—principal and surety—contract in deed to assume mortgage—right of mortgagee—giving time—prior mortgage—mortgagor, when not necessary party.

1. Under the Act of February 25, 1879, the final judgment or decree of the Supreme Court of the District of Columbia, in any case where the matter in dispute, exclusive of costs, exceeds the value of twenty-five hundred dollars, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal.
2. The Act of March 3, 1885, only provides for appeals or writs of error thereafter allowed and does not cut off appeals taken before the passage of the Act.
3. In a suit founded upon a contract, the sum in dispute at the time of the rendition of the judg-

ment or decree appealed from, including any interest then accrued, is the test of appellate jurisdiction.

4. The original of a deed need not be produced nor its execution proved where it has been fully recorded; and, where not produced upon notice to do so, the recorder's copy is competent and sufficient evidence.
5. The clause, in a deed of land, "subject however to certain incumbrances now resting thereon, payment of which is assumed by said party of the second part," designates and comprehends all mortgages and taxes which are incumbrances as if particularly described.
6. A person claiming title by virtue of a lien created by taxes assessed against the grantor, claims under the grantor equally with one claiming by a mortgage from him.
7. One who has accepted the benefit of a conveyance cannot repudiate the burden imposed upon him by express agreement therein, and will be liable to his grantor for any breach of that agreement.
8. In equity, as at law, the contract of the purchaser to pay the mortgage, contained in the mortgagor's deed to him, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee. The mortgagee cannot sue at law; but, in equity, he may avail himself of the right of the mortgagor against the purchaser.
9. In equity a creditor may have the benefit of any obligation or security given by the principal to the surety for the payment of the debt.
10. A mortgagee may avail himself of an agreement in a deed of conveyance from the mortgagor by which the grantee promises to pay the mortgage.
11. But such right of a mortgagee to enforce payment of the mortgage debt against the grantee of the mortgagor does not rest upon any contract of the grantee with him, or with the mortgagor for his benefit.
12. Such a mortgagee has no greater right than the mortgagor has against the grantee, and therefore cannot object to the striking out by a court of equity, or to the release by the mortgagor, of such an agreement, when inserted in the deed by mistake.

NOTE.—*Assumption of payment of mortgage, in a deed; effect of; rights of the parties; conveyance subject to mortgage; principal and surety; release.*

An agreement merely to take land subject to a specified incumbrance is not an agreement to assume and pay off the incumbrance. The grantee, without words in the grant importing in some form that he assumes the payment of the mortgage, does not bind himself personally. *Elliott v. Sackett*, 108 U. S. 132 (27: 673); *Shepherd v. May*, 115 U. S. 505 (29: 456).

In the absence of the mutual agreement of the grantor, grantee and holder of the incumbrance, to that effect, the relation of principal and surety does not exist between the grantee and grantor; and the latter is not discharged from his liability by an agreement between the other parties to extend the time of payment. *Shepherd v. May*, 115 U. S. 505 (29: 456).

Where a grantee has, by mistake, assumed the payment of a mortgage by an agreement in his deed, which is recorded, and is released from the agreement by his grantor on discovery of the mistake, a court of equity will not enforce the agreement at suit of one who has purchased the notes secured by the mortgage, in ignorance of the agreement, although the grantee has paid interest on the debt. *Drury v. Hayden*, 111 U. S. 223 (28: 408).

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Where the mortgagor of a farm gave a warranty deed for the west half thereof and received pay therefor, and the mortgage was shifted on to the east half of the farm, the subsequent grantee of that part took only the title of the mortgagor, incumbered with the whole mortgage, where he took with notice, as he was bound to know of the law of contribution. *Deavitt v. Judevine*, 7 New Eng. Rep. 88, 60 Vt. 686.

A covenant in a deed in which a mortgage is assumed cannot be released without the consent of the mortgagee, and such release is ineffectual. *Gifford v. Corrigan* (N.Y.), 6 L. R. A. 610. This principle was left undecided in *Gifford v. Corrigan*, 7 Cent. Rep. 277, 105 N. Y. 223.

Where a grantee of land by deed which in fact, although covenanting to pay incumbrances, was only a mortgage, quitclaimed to the grantor's wife upon her agreement to pay the incumbrances, and thereafter bought in the premises upon foreclosure of one of such incumbrances.—*held*, that his liability on his assumption was discharged. *Garnsey v. Rogers*, 47 N. Y. 238; *Pardee v. Treat*, 82 N. Y. 385; *Lawrence v. Fox*, 20 N. Y. 268; *Wadsworth v. Lyon*, 58 N. Y. 201; *Cole v. Cole*, 12 Cent. Rep. 924, 110 N. Y. 630.

Where a purchaser of a portion of mortgaged premises assumes and agrees to pay, as part of the

13. Such an agreement does not, without the mortgagee's assent, put the grantee and the mortgagor in the relation of principal and surety towards the mortgagee, so that the latter, by giving time to the grantee, will discharge the mortgagor.
14. Where the land has been sold under a prior mortgage for a sum insufficient to pay it, leaving nothing to be applied towards the payment of the mortgage held by the plaintiff; and the plaintiff has exhausted her remedy against the mortgagor personally, by recovering judgment against him, execution upon which has been returned unsatisfied,—the plaintiff is entitled, upon such agreement, to a decree for the mortgage debt.
15. Although the mortgagor is a proper party to the bill, yet where no objection is taken on that ground at the hearing, and the omission to make him a party cannot prejudice any interest of his, or any right of either party to the suit, it affords no ground for refusing relief.

[No. 8.]

Argued Oct. 15, 16, 1888. Decided March 3, 1890.

APPEAL from a decree of the Supreme Court of the District of Columbia dismissing a suit in equity, brought by Henrietta C. Keller, the holder of a promissory note secured by mortgage on land, against Francis A. Ashford, grantee of the land subject to the mortgage, who, by the terms of the deed to him, assumed payment of incumbrances on the land, to recover the amount of the note secured by the mortgage. On motion to dismiss, as well as upon the merits. *Motion to dismiss denied, decree reversed and case remanded with directions to render a decree for the plaintiff.*

Opinion below, 8 Mackey, 444.

Statement by Mr. Justice Gray:

This was a bill in equity by Henrietta C. Keller, the holder of a promissory note for \$2,000, made by one Thompson, secured by his mortgage of land in Washington, against Francis A. Ashford, as grantee of the land subject

to this mortgage, and who by the terms of the deed to him assumed payment of incumbrances on the land. The bill prayed for a decree in the plaintiff's favor against Ashford for the amount of that note, and for general relief. The case was heard upon pleadings and proofs, by which it appeared to be as follows:

On August 17, 1875, Thompson, being seised in fee of lot 5 in square 888, in the City of Washington, conveyed it to one Rohrer, by a deed of trust in the nature of a mortgage, to secure the payment of Thompson's promissory note of that date for \$1,500, payable in three years with interest at ten per cent, held by one Harkness.

On February 21, 1876, Thompson conveyed the same lot by like deed of trust to one Gordon, to secure the payment of Thompson's note of that date for \$2,000, payable in one year, with interest at eight per cent yearly until paid, to the order of Moses Kelly; and Kelly indorsed this note for full value to the plaintiff.

On January 1, 1877, Thompson, at the instance and persuasion of Kelly, executed and acknowledged and delivered to Kelly a deed, expressed to be made in consideration of the sum of \$4,500, conveying this lot, together with lots 6, 7 and 8 in the same square (each of which three other lots was also in fact subject to a mortgage for \$2,000), to Ashford in fee, "subject, however, to certain incumbrances now resting thereon, payment of which is assumed by said party of the second part;" and containing covenants by the grantor of warranty against all persons claiming from, under or through him, and for further assurance. At the date of this deed, the only incumbrances on the land conveyed were the five mortgages above mentioned, and some unpaid taxes assessed against Thompson while owner of the land. On January 22, 1877, this deed, together with a notary's certificate of its acknowledgment by the grantor, was recorded in the registry of the District of Columbia.

At the taking of the depositions before the

purchase price, the whole mortgage, he becomes the principal debtor, the mortgagor remaining simply a surety; the portion conveyed is primarily liable for the mortgage debt, and the remainder is liable as security merely. The purchaser, therefore, is bound to protect the mortgagor and his land from any liability on account of the mortgage debt. This obligation on the part of the purchaser is not affected by its conveyance; and, if the said purchaser fails to protect the residue from sale under the mortgage, he becomes liable to the grantee thereof for the damages thus caused to him. *Wadsworth v. Lyon*, 98 N. Y. 201; *Wilcox v. Campbell*, 8 Cent. Rep. 687, 106 N. Y. 325.

The grantee of the remainder is not bound to take any steps in an action to foreclose the mortgage; it is the duty of the principal to appear therein and protect the interests of his surety; and, if he fails so to do, and the latter is, in consequence, deprived of his land, the value thereof is the fair measure of his damages. *Id.*

A grantee of premises, who has assumed payment of a mortgage thereon as part of the consideration, cannot resist liability for a deficiency arising upon a subsequent foreclosure thereof on the ground of the invalidity of his deed, where he and his later grantee have retained undisturbed possession of the premises. *Gifford v. Father Matthew T. A. B. Society*, 6 Cent. Rep. 33, 104 N. Y. 139; *Parkinson v. Sherman*, 74 N. Y. 88; *Dunning v. Leavitt*, 85 N. Y.

30; *Crowe v. Lewin*, 95 N. Y. 423; *Albany City Savings Inst. v. Burdick*, 87 N. Y. 40; *Madison Avenue Baptist Church v. Baptist Church*, 46 N. Y. 131, 139.

An agreement between a vendor and purchaser recited that a specified portion of the price was to be paid by the purchaser "by assumption of a certain mortgage," etc., and on the same day, at the purchaser's request, a deed of the property was made to his wife, expressed to be subject to the mortgage referred to in the agreement. *Held*, that, construing the agreement and the deed together, the purchaser had assumed the payment of the mortgage, and that the mortgagee could compel payment by him of the deficiency resulting upon foreclosure. *Slauson v. Watkins*, 86 N. Y. 597; *Pike v. Seiter*, 15 Hun, 402; *Lawrence v. Fox*, 20 N. Y. 298; *Burr v. Beers*, 24 N. Y. 178; *Garney v. Rogers*, 47 N. Y. 238; *Pardee v. Treat*, 82 N. Y. 385; *Bennett v. Bates*, 94 N. Y. 354; *Todd v. Weber*, 95 N. Y. 181; *Smith v. Truslow*, 84 N. Y. 660; *Vrooman v. Turner*, 69 N. Y. 280; *Booth v. Cleveland Rolling Mills Co.* 74 N. Y. 15; *Schley v. Fryer*, 1 Cent. Rep. 5, 100 N. Y. 71; *Ludington v. Low*, 21 Jones & S. 374.

Where a conveyance is made, subject to a mortgage upon the premises, which the grantee, by the terms of the deed, "assumes," he thereby becomes personally liable for the mortgage debt. Although the assumption in terms refers only to the mortgage and not the bond, the covenant to assume is the equivalent of one to pay. *Braman v. Dowse*, 12

examiner, the plaintiff, having given notice to Ashford and to Kelly to produce the original deed, and both of them having failed to do so, was permitted, against the defendant's objection, to put in evidence a copy of the deed and acknowledgment, certified by the recorder to be a true copy.

No consideration was actually paid for the conveyance. The value of the lots conveyed was, according to Thompson's testimony, \$4,000 each or \$16,000 in all, or, according to Ashford's testimony, not less than \$3,400 each or \$13,600 in all.

Thompson testified that he never had any negotiations with Ashford about the property; and that he was induced to make this deed by the assurance of Kelly that the grantee would assume the incumbrances upon the land and relieve him from liability upon the notes he had given secured by mortgage.

Ashford testified that he never had any negotiations with anyone about the purchase of the land; and that in February, 1877, Kelly, who was his father-in-law, to whom he had lent much money and for whom he had indorsed several notes, told him that, in order to secure him from loss, he had procured a conveyance to be made to him of these four lots, in which he thought "there was considerable equity;" informed him at the same time that there were incumbrances or mortgages upon the property, but did not specifically mention any of them, except the \$1,500 mortgage upon lot 5; told him that the interest on this was pressing, and that, if he would pay it, Kelly would relieve him from any further trouble as to the incumbrances; and advised him to go on and collect the rents of the property, so as to indemnify himself against that interest and pay the taxes in arrears.

It was proved that Ashford in March, 1877, entered into possession of the four lots, and paid the taxes previously assessed upon them, and

also paid interest accruing under the mortgage for \$1,500 on lot 5, and collected the rents of the four lots, until December 4, 1877, when he sold and conveyed lots 7 and 8 to one Duncan, subject to existing incumbrances thereon; and continued to collect the rents of the other two lots, and to pay the interest accruing under the mortgage for \$1,500 on lot 5, until March 14, 1878, when this lot was sold, pursuant to the provisions of that mortgage, by public auction, and conveyed to Harkness for the sum of \$1,700, which was insufficient to satisfy the amount then due on that mortgage.

On comparing Ashford's testimony with that of Boorman, the plaintiff's attorney, and with a letter written by Ashford to Boorman on October 8, 1877, it clearly appears that Ashford was informed of the clause in the deed to him, assuming payment of incumbrances, and was requested to pay the plaintiff's mortgage, as early as September, 1877, and then, as well as constantly afterwards, declined to pay it, or to recognize any personal liability to do so. There was no direct evidence that he knew of this clause before September, 1877.

The plaintiff brought an action at law upon the note against Thompson as maker and Kelly as indorser on November 18, 1877, and recovered judgment against both in December, 1877, on which execution issued and was returned unsatisfied April 15, 1878.

The present bill was filed May 13, 1878. A decree dismissing the bill was rendered in special term May 9, 1882, which, after the death of Ashford and the substitution of his executrix in his stead, was affirmed in general term February 16, 1885, upon the grounds that Ashford had never accepted the deed to him, and also that the plaintiff's remedy, if any, was at law. (3 Mackey, 455.) On the same day, as the record states, "from this decree the plaintiff appeals in open court to the Supreme Court of the United States, which appeal is allowed."

Cush. 227; Drury v. Tremont Imp. Co. 13 Allen, 168; Locke v. Homer, 181 Mass. 93; Stout v. Folger, 34 Iowa, 71; Sparkman v. Gove, 44 N. J. L. 232; Schley v. Fryer, 1 Cent. Rep. 5, 100 N. Y. 71.

A grantee in a deed who has assumed payment of a mortgage upon the conveyed property, may set up, in defense of an action to enforce his personal liability, an entire or partial failure of consideration by reason of a breach by the mortgagor of the agreement under which the assumption was made. Loeb v. Willis, 1 Cent. Rep. 324, 100 N. Y. 231.

If a senior mortgagee purchases the mortgaged premises, assuming the payment of a junior mortgage, and the amount of such mortgage is deducted from the price of the land, the senior mortgage will then be postponed in favor of the junior mortgage. Fowler v. Fay, 62 Ill. 375.

A mortgagee can derive no advantage from a covenant of assumption in a deed, if the covenant be invalid between the parties to the deed. Bull v. Tittsworth, 20 N. J. Eq. 78.

It is only where the grantor has himself paid the mortgage that he becomes subrogated to the rights of the mortgagee. Ayers v. Dixon, 78 N. Y. 318; Lappen v. Gill, 129 Mass. 349; Risk v. Hoffman, 69 Ind. 137; Pardee v. Treat, 82 N. Y. 385; Fenton v. Lord, 128 Mass. 466; Emley v. Mount, 32 N. J. Eq. 470; Strohauser v. Voltz, 42 Mich. 444; Waters v. Hubbard, 44 Conn. 340; Marshall v. Davies, 78 N. Y. 414; 3 Pom. Eq. 195.

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The acceptance of a conveyance, containing a statement that the grantee is to pay an existing mortgage, is all that is necessary to create a liability on his part. And acceptance of the conveyance imposing the liability, by a duly constituted agent of the grantee, will bind the latter. Taylor v. Whitmore, 35 Mich. 97; Trotter v. Hughes, 12 N. Y. 74; Bishop v. Douglass, 25 Wis. 606; Wales v. Sherwood, 1 Abb. N. C. 101, note; Locke v. Homer, 181 Mass. 93, 41 Am. Rep. 199; Belmont v. Coman, 22 N. Y. 438; Spaulding v. Hallenbeck, 35 N. Y. 204, 39 Barb. 79; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; Collins v. Rowe, 1 Abb. N. C. 97; Fairchild v. Lynch, 10 Jones & S. 235.

Where the contract is one merely of indemnity, and not to pay, or against liability, actual damage must be shown. Crippen v. Thompson, 6 Barb. 534; Gilbert v. Wiman, 1 N. Y. 550; Churchill v. Hunt, 3 Denio, 321; Port v. Jackson, 17 Johns. 239; Aberdeen v. Blackmar, 6 Hill, 324; Lee v. Clark, 1 Hill, 56; Thomas v. Allen, 1 Hill, 145; Collinge v. Heywood, 9 Ad. & El. 633; Reynolds v. Doyle, 1 Man. & G. 755.

As to assumption of mortgage by purchaser of premises; what constitutes; effect of; conveyance subject to mortgage,—see note to Elliott v. Sackett, Bk. 27, p. 678.

As to release of grantee by grantor from covenant to assume mortgage, see note to Drury v. Hayden, Bk. 28, p. 408.

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The appeal bond was approved February 18, and the appeal was entered in this court April 10, 1885.

The case was argued upon a motion to dismiss the appeal for want of sufficient amount in controversy to give this court jurisdiction, as well as upon the merits.

Messrs. Walter D. Davidge and **Wm. W. Boardman**, for appellant:

The deed from Thompson and wife to Ashford, with the provision therein that he should assume payment of the incumbrances resting on the property described in the deed, was accepted absolutely by Ashford.

Coolidge v. Smith, 129 Mass. 554; *Freeman's Nat. Bank v. Savery*, 127 Mass. 75.

The grantee, Ashford, having accepted the deed and entered into possession, and having, by its terms, assumed the payment of the incumbrances then resting on the property conveyed, became personally bound to pay.

Story, Eq. Jur. 12th ed. § 1016d; 8 Pom. Eq. Jur. § 1206; 2 Jones, Mort. 3d ed. § 752; *Trotter v. Hughes*, 12 N. Y. 74; *Crawford v. Edwards*, 88 Mich. 354; *Urguhart v. Brayton*, 12 R. I. 169; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Bishop v. Douglass*, 25 Wis. 696; *Ricard v. Sanderson*, 41 N. Y. 179; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Belmont v. Coman*, 22 N. Y. 438; *Locke v. Homer*, 181 Mass. 98; *Pike v. Brown*, 7 Cush. 133.

Where the purchaser of the equity of redemption covenants or promises the grantor to pay off an incumbrance upon the land, this duty or obligation inures for the benefit of the mortgagee, or creditor in the incumbrance, and he may, in some form of action, compel the purchaser to respond directly to him.

Halsey v. Reed, 9 Paige, Ch. 446; *King v. Whitely*, 10 Paige, Ch. 465; *Trotter v. Hughes*, 12 N. Y. 74; *Curtis v. Tyler*, 9 Paige, Ch. 432; *Garnsey v. Rogers*, 47 N. Y. 233; *Pardoe v. Treat*, 82 N. Y. 335; *Lawrence v. Fox*, 20 N. Y. 263; *Burr v. Beers*, 24 N. Y. 178; *Thorpe v. Keokuk Coal Co.* 48 N. Y. 253; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Ricard v. Sanderson*, 41 N. Y. 179; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Vrooman v. Turner*, 69 N. Y. 290; *Urguhart v. Brayton*, 12 R. I. 169; *Hoff's App.* 24 Pa. 200; *Moore's App.* 88 Pa. 450; *Merriman v. Moore*, 90 Pa. 78; *Townsend v. Long*, 77 Pa. 143; *Justice v. Tallman*, 86 Pa. 147; *Crawford v. Edwards*, 88 Mich. 354; *Miller v. Thompson*, 34 Mich. 10; *Strohauer v. Voltz*, 42 Mich. 444; *Booth v. Conn. Mut. L. Ins. Co.* 43 Mich. 299; *Crowell v. Currier*, 27 N. J. Eq. 152; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Klapworth v. Dressler*, 13 N. J. Eq. 62; *Norwood v. DeHart*, 30 N. J. Eq. 412; *Thompson v. Bertram*, 14 Iowa, 476; *Corbett v. Waterman*, 11 Iowa, 86; *Bishop v. Douglass*, 25 Wis. 696; *Schmucker v. Sibert*, 18 Kan. 104; *Rogers v. Herron*, 92 Ill. 583; *Gautzert v. Hoge*, 73 Ill. 80; *Coffin v. Adams*, 131 Mass. 133; *Miller v. Billingsly*, 41 Ind. 489; *Fitzgerald v. Barker*, 70 Mo. 686; 26 Am. Rep. 660, note; *George v. Andrews*, 60 Md. 26; *Lamb v. Tucker*, 42 Iowa, 118; *Bowen v. Kurtz*, 37 Iowa, 239.

In most of the cases, the right of the mortgagee or creditor to compel the purchaser to respond directly to him is based purely upon equitable principles.

King v. Whitely, 10 Paige, Ch. 465; *Curtis v. Tyler*, 9 Paige, Ch. 432; *Crowell v. St. Barnabas Hospital*, 27 N. J. Eq. 650; *Crawford v. Edwards*, 88 Mich. 354.

The original creditor cannot sue at law upon the undertaking of a third person to pay an existing debt.

Jones, Mort. 3d ed. § 761 a; *St. Louis Second Nat. Bank v. Grand Lodge*, 98 U. S. 123 (25: 75); *Mellen v. Whipple*, 1 Gray, 317; *St. Louis Exch. Bank v. Rice*, 107 Mass. 37; *Prentice v. Brimhall*, 123 Mass. 291; *Coffin v. Adams*, 131 Mass. 133; *Booth v. Conn. Mut. L. Ins. Co.* 43 Mich. 299.

Thompson was not a necessary party defendant.

Miller v. Thompson, 34 Mich. 10; *Story*, Eq. Pl. §§ 74 a, 237, 542; *Whiting v. Bank of U. S.* 38 U. S. 13 Pet. 6 (10: 33).

Miss Keller could not maintain an action at law against Ashford; her remedy was solely in equity.

Crowell v. Currier, 27 N. J. Eq. 152.

Burr v. Beers, 24 N. Y. 178, declares a different rule.

Mellen v. Whipple, 1 Gray, 317; *St. Louis Exch. Bank v. Rice*, 107 Mass. 37; *Prentice v. Brimhall*, 123 Mass. 291; *Coffin v. Adams*, 131 Mass. 133.

The sum in dispute at the time of the making of the decree below determines the jurisdiction in error.

U. S. Bank v. Daniel, 37 U. S. 12 Pet. 32 (9: 989); *Knapp v. Banks*, 43 U. S. 2 How. 73 (11: 184); *The Putapasco*, 79 U. S. 12 Wall. 451 (20: 457).

Interest accrued after the institution of a suit and before judgment may accordingly be included.

U. S. Bank v. Daniel, 37 U. S. 12 Pet. 32 (9: 989).

Messrs. George F. Appleby and **Calderon Carlisle**, for appellee:

A mortgage excepted from covenant against incumbrances is not excepted from warranty.

Estabrook v. Smith, 6 Gray, 572; *Harlow v. Thomas*, 15 Pick. 66; *Maher v. Lanfrom*, 86 Ill. 513-523.

Taxes are incumbrances.

Long v. Moler, 5 Ohio St. 270; *Mitchell v. Pillsbury*, 5 Wis. 407.

There is no proof that the deed was ever delivered to or seen by Ashford. The recording of it did not amount to a delivery nor did it charge Ashford with notice of the assumption clause.

Bull v. Titsworth, 29 N. J. Eq. 73; *Cordts v. Hargrave*, 29 N. J. Eq. 443; *Mead v. Bunn*, 32 N. Y. 277; *Jackson v. Phipps*, 12 Johns. 421; *Recording Act D. C.* 20 Stat. 40; *Higman v. Stewart*, 38 Mich. 524.

The payment of interest is not inconsistent with Ashford's not having assumed the incumbrances.

Elliot v. Sackett, 103 U. S. 132 (27: 678); *Drury v. Hayden*, 111 U. S. 223 (28: 408); *Girard L. Ins. & T. Co. v. Stewart*, 86 Pa. 89.

The transaction between Kelly and Ashford was really a mortgage, though absolute on its face.

Arnaud v. Grigg, 29 N. J. Eq. 482; *Garnsey v. Rogers*, 47 N. Y. 233.

This complaint shows no pretense of a right in a court of equity.

Phœnix Mut. L. Ins. Co. v. Bailey, 80 U. S. 13 Wall. 620, 621 (20: 502, 503); *Hendrick v. Lindsay*, 98 U. S. 143 (23: 855); *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178; *Shepherd v. May*, 115 U. S. 510 (29: 457).

Mr. Justice Gray delivered the opinion of the court:

The motion to dismiss for want of jurisdiction must be denied. This appeal was claimed and allowed February 16, 1885. At that time the Act of February 25, 1879, chap. 99, was in force, which provided that "the final judgment or decree of the Supreme Court of the District of Columbia, in any case where the matter in dispute, exclusive of costs, exceeds the value of twenty-five hundred dollars, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal." (20 Stat. 831.) The case is not affected by the Act of March 3, 1885, chap. 855, § 1, further limiting the appellate jurisdiction of this court, because that Act only provides that "no appeal or writ of error shall hereafter be allowed" from any such judgment or decree, unless the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars. (23 Stat. 448.) The change of phraseology, referring to the time when the appeal or writ of error is allowed, instead of to the time when it is entertained by this court, was evidently intended to prevent cutting off appeals taken and allowed before the passage of the Act, as had been held to be the effect of the language used in the Act of 1879. *Baltimore & P. R. Co. v. Grant*, 98 U. S. 398 [25: 281]. In a suit founded upon a contract, the sum in dispute at the time of the judgment or decree appealed from, including any interest then accrued, is the test of appellate jurisdiction. *Bank of United States v. Daniel*, 37 U. S. 12 Pet. 32, 52 [9: 989, 997]; *The Patapaco*, 79 U. S. 12 Wall. 451 [20: 457]; *New York E. R. Co. v. Fifth Nat. Bank*, 118 U. S. 608 [30: 259]; *Zeckendorf v. Johnson*, 123 U. S. 617 [31: 277]. By the express terms of the promissory note sued on in this case, it bore interest at the rate of eight per cent yearly from its date until paid. Computing interest accordingly, the sum in dispute was much more than \$2,500 at the time of the decree in general term, which was the decree from which this appeal was taken. In *Baltimore & P. R. Co. v. Trook*, 100 U. S. 112 [25: 571], cited for the appellee, as in *District of Columbia v. Gannon*, 130 U. S. 227 [32: 922], the judgment in special term was for damages in an action sounding in tort, which bore no interest, either by the general law, or by the judgment of affirmance in general term.

Nor can the objection of the defendant, that the original deed from Thompson to Ashford was not produced, or its execution proved, be sustained. The deed is admitted to have been duly recorded. There is no presumption that it was in the possession of the plaintiff, who was not a party to it; but it is to be presumed to have been in the possession, either of Ashford, the grantee named in the deed, or of Kelly, who procured the deed to be made, and to whom it was originally delivered. Both of them having failed to produce it upon notice

to do so, the recorder's copy was competent and sufficient evidence of the contents of the deed, as between the parties to the suit. Rev. Stat. D. C. §§ 440, 487; *Dick v. Balch*, 38 U. S. 8 Pet. 30 [8: 856].

But upon the merits of the case we are unable to concur with the views expressed by the court below, in its opinion reported in 8 Mackey, 455, either as to the effect of the testimony, or as to the rights of the parties. The material facts, as they appear to us upon full examination of the record, have been already stated. It remains to consider the law applicable to those facts.

The questions to be decided concern the extent, the obligation and the enforcement of the agreement created by the clause in the deed of conveyance from Thompson to Ashford of this and three other lots, "subject, however, to certain incumbrances now resting thereon, payment of which is assumed by said party of the second part."

The five mortgages made by the grantor, namely, the plaintiff's mortgage for \$2,000 and a prior mortgage for \$1,500 on lot 5, and a mortgage of \$2,000 on each of the three other lots, and some unpaid taxes which had been assessed against the grantor, were incumbrances, and were the only incumbrances existing upon the granted premises at the time of the execution of this conveyance. Rawle on Covenants (5th ed.) § 77. The clause in question, by the words "certain incumbrances now resting thereon," designates and comprehends all those mortgages and taxes as clearly as if the words used had been "the incumbrances," or "all incumbrances," or had particularly described each mortgage and each tax. We give no weight to Thompson's testimony as to Kelly's previous conversation with him to the same effect, because that conversation is not shown to have been authorized by or communicated to Ashford, and cannot affect the legal construction of the deed as against him.

It was argued that because the deed contains a covenant of special warranty against all persons claiming under the grantor, the words "certain incumbrances" cannot include the mortgages made by the grantor, but must be limited to the unpaid taxes which, it is said, would not come within the covenant of special warranty. But the answer to this argument is that any person claiming title by virtue of a lien created by taxes assessed against the grantor would claim under the grantor, equally with one claiming by a mortgage from him; and incumbrances expressly assumed by the grantee are necessarily excluded from the covenants of the grantor.

Ashford is not shown to have had any knowledge of the conveyance at the time of its execution; and a suggestion was made in argument, based upon some vague expressions in his testimony, that the conveyance was intended to be made to him, by way of mortgage only, to secure him against loss on his previous loans to and indorsements for Kelly. But his subsequent acts are quite inconsistent with the theory that the conveyance did not vest the legal estate in him absolutely.

Within a month or two after the conveyance, having been told that the four lots had been conveyed to him and were subject to incum-

branches (although perhaps not then informed of the amount of the incumbrances), he entered into possession of the lots, and thenceforth collected the rents; and within nine months after the conveyance he had notice of the clause assuming payment of incumbrances, and was requested to pay the plaintiff's mortgage, and declined to pay it or to recognize any personal liability for it; yet he afterwards sold and conveyed away two of the lots, and continued to keep possession and to collect rents of the other two. Having thus accepted the benefit of the conveyance, he cannot repudiate the burden imposed upon him by the express agreement therein, and would clearly have been liable to his grantor for any breach of that agreement. *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Coolidge v. Smith*, 129 Mass. 554; *Locke v. Homer*, 181 Mass. 98; *Muhlig v. Fiske*, 181 Mass. 110.

The case therefore stands just as if Ashford had himself received a deed by which he in terms agreed to pay a mortgage made by the grantor. In such a case, according to the general, not to say uniform, current of American authority, as shown by the cases collected in the briefs of counsel, the mortgagee is entitled in some form to enforce the agreement against the grantee; and much of the argument at the bar was devoted to the question whether his remedy should be at law or in equity.

Upon the question whether the mortgagee could sue at law there is no occasion to examine the conflicting decisions in the courts of the several States, because it is clearly settled in this court that he could not.

This case cannot be distinguished from that of *St. Louis Second Nat. Bank v. Grand Lodge*, 98 U. S. 123 [25: 75], and clearly falls within the general rule upon which the judgment in that case was founded.

It was there held that a contract by which the Grand Lodge, for a consideration moving from another corporation, agreed with it to assume the payment of its bonds, would not support an action against the Grand Lodge by a holder of such bonds; and *Mr. Justice Strong*, delivering judgment, after observing that the contract was made between and for the benefit of the two corporations, that the holders of the bonds were not parties to it, and that there was no privity between them and the Grand Lodge, said: "We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and a defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control, which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raised from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But

where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required." (98 U. S. 124.) See also *Cragin v. Lovell*, 109 U. S. 194 [27: 908].

In the earlier case of *Hendrick v. Lindsay*, 98 U. S. 148 [23: 855], cited by the defendant, a request, accompanied by a promise of indemnity, to one person to sign an appeal bond, was construed to include another person who signed it as surety, and therefore to support a joint action by the principal and the surety, both of whom had signed the bond relying upon the promise, so that the only consideration for the promise moved from them.

In the case at bar, the promise of Ashford was to Thompson and not to the mortgagees, and there was no privity of contract between them and Ashford. The consideration of the promise moved from Thompson alone. The only object of the promise was to benefit him, and not to benefit the mortgagees or other incumbrancers; and they did not know of or assent to the promise at the time it was made, nor afterwards do or omit any act on the faith of it. It is clear, therefore, that Thompson only could maintain an action at law upon that promise.

In equity, as at law, the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee. *Parsons v. Freeman*, 2 P. Wms. 664, note; *S. C. Ambler*, 115; *Orford v. Rodney*, 14 Ves. Jr. 417, 424; *Re Empress Engineering Co.* L. R. 16 Ch. Div. 125; *Gandy v. Gandy*, L. R. 80 Ch. Div. 57, 67.

But it has been held by many state courts of high authority, in accordance with the suggestion of *Lord Hardwicke* in *Parsons v. Freeman*, Ambler, 116, that in a court of equity the mortgagee may avail himself of the right of the mortgagor against the purchaser.

This result has been attained by a development and application of the ancient and familiar doctrine in equity that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt. *Maure v. Harrison*, 1 Eq. Cas. Abr. 98, pl. 5; *Bacon*, Abr. *Surety*, D. 4; *Wright v. Morley*, 11 Ves. Jr. 12, 22; *Phillips v. Thompson*, 2 Johns. Ch. 418; *Curtis v. Tyler*, 9 Paige, 432, 435; *New Bedford Savings Inst. v. Fairhaven Bank*, 9 Allen, 175; *Hampton v. Phipps*, 108 U. S. 260, 263 [27: 719, 721].

In *Hampton v. Phipps*, just cited, this court declared the doctrine to be well settled, and applicable "equally between sureties, so that securities placed by the principal in the hands of one, to operate as an indemnity by payment of the debt, shall inure to the benefit of all;" and declined to apply the doctrine to the case before it, because the mortgage in question was given by one surety to another merely to indemnify him against being compelled to pay a greater

share of the debt than the sureties had agreed between themselves that he should bear, and he had not been compelled to pay a greater share.

The doctrine of the right of a creditor to the benefit of all securities given by the principal to the surety for the payment of the debt does not rest upon any liability of the principal to the creditor, or upon any peculiar relation of the surety towards the creditor, but upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt, which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor. Where the person ultimately held liable is himself a debtor of the creditor, the relief awarded has no reference to that fact, but is grounded wholly on the right of the creditor to avail himself of the right of the surety against the principal. If the person, who is admitted to be the creditor's debtor, stands, at the time of receiving the security, in the relation of surety to the person from whom he receives it, it is quite immaterial whether that person is or ever has been a debtor of the principal creditor, or whether the relation of suretyship or the indemnity to the surety existed, or was known to the creditor, when the debt was contracted. In short, if one person agrees with another to be primarily liable for a debt due from that other to a third person, so that as between the parties to the agreement the first is the principal and the second the surety, the creditor of such surety is entitled, in equity, to be substituted in his place for the purpose of compelling such principal to pay the debt.

It is in accordance with the doctrine, thus understood, that the Court of Chancery of New York, the Court of Chancery and the Court of Errors of New Jersey, and the Supreme Court of Michigan have held a mortgagee to be entitled to avail himself of an agreement in a deed of conveyance from the mortgagor by which the grantee promises to pay the mortgage. *Halsey v. Reed*, 9 Paige, 446, 452; *King v. Whitely*, 10 Paige, 465; *Byer v. Monholland*, 2 Sandf. Ch. 478; *Klapworth v. Dressler*, 18 N. J. Eq. 62; *Hoy v. Bramhall*, 19 N. J. Eq. 74, 563; *Crowell v. Currier*, 27 N. J. Eq. 152; *S. C.* on appeal, *sub nom Crowell v. St. Barnabas Hospital*, 27 N. J. Eq. 650; *Arnaud v. Grigg*, 29 N. J. Eq. 482; *Youngs v. Trustees of Public Schools*, 31 N. J. Eq. 290; *Crawford v. Edwards*, 33 Mich. 354, 360; *Miller v. Thompson*, 34 Mich. 10; *Higman v. Stewart*, 38 Mich. 513, 523; *Hicks v. McGarry*, 38 Mich. 667; *Booth v. Connecticut Mut. L. Ins. Co.* 43 Mich. 299. See also *Pardee v. Treat*, 82 N. Y. 885, 887; *Coffin v. Adams*, 131 Mass. 133, 137; *Biddel v. Brizzolaro*, 64 Cal. 354; *George v. Andrews*, 60 Md. 26; *Osborne v. Cabell*, 77 Va. 462.

The grounds and limits of the doctrine, as applied to such a case, have been well stated by Mr. Justice Depue, delivering the unanimous judgment of the Court of Errors of New Jersey, in *Crowell v. St. Barnabas Hospital*, as follows:

"The right of a mortgagee to enforce payment of the mortgage debt, either in whole or in part, against the grantee of the mortgagor,

does not rest upon any contract of the grantee with him, or with the mortgagor for his benefit.

... The purchaser of lands subject to mortgage, who assumes and agrees to pay the mortgage debt, becomes, as between himself and his vendor, the principal debtor, and the liability of the vendor, as between the parties, is that of surety. If the vendor pays the mortgage debt, he may sue the vendee at law for the moneys so paid. . . .

"In equity, a creditor may have the benefit of all collateral obligations for the payment of the debt, which a person standing in the situation of a surety for others holds for his indemnity. It is in the application of this principle that decrees for deficiency in foreclosure suits have been made against subsequent purchasers, who have assumed the payment of the mortgage debt, and thereby become principal debtors as between themselves and their grantors.

... "But the right of the mortgagee to this remedy does not result from any fixed or vested right in him, arising either from the acceptance by the subsequent purchaser of the conveyance of the mortgaged premises, or from the obligation of the grantee to pay the mortgage debt as between himself and his grantor. Though the assumption of the mortgage debt by the subsequent purchaser is absolute and unqualified in the deed of conveyance, it will be controlled by a collateral contract made between him and his grantor, which is not embodied in the deed. And it will not in any case be available to the mortgagee, unless the grantor was himself personally liable for the payment of the mortgage debt. . . .

"Recovery of the deficiency after sale of the mortgaged premises, against a subsequent purchaser, is adjudged in a court of equity to a mortgagee not in virtue of any original equity residing in him. He is allowed, by a mere rule of procedure, to go directly as a creditor against the person ultimately liable, in order to avoid circuity of action, and save the mortgagor, as the intermediate party, from being harassed for the payment of the debt, and then driven to seek relief over against the person who has indemnified him, and upon whom the liability will ultimately fall. The equity on which his relief depends is the right of the mortgagor against his vendee, to which he is permitted to succeed by substituting himself in the place of the mortgagor." 27 N. J. Eq. 655, 656.

The decisions of this court, cited for the defendant, are not only quite consistent with this conclusion, but strongly tend to define the true position of a mortgagee, who has in no way acted on the faith of, or otherwise made himself a party to, the agreement of the mortgagor's grantee to pay the mortgage; holding, on the one hand, that such a mortgagee has no greater right than the mortgagor has against the grantee, and therefore cannot object to the striking out by a court of equity, or to the release by the mortgagor, of such an agreement when inserted in the deed by mistake (*Elliott v. Sackett*, 108 U. S. 182 [27: 678]; *Drury v. Hayden*, 111 U. S. 223 [28: 408]); and, on the other hand, that such an agreement does not, without the mortgagee's assent, put the grantee and the mortgagor in the relation of principal and surety towards the mortgagee, so

that the latter, by giving time to the grantee, will discharge the mortgagor. *Shepherd v. May*, 115 U. S. 505, 511 [29:456, 457].

The present case is a strong one for the application of the general doctrine. The land has been sold under a prior mortgage for a sum insufficient to pay that mortgage, leaving nothing to be applied towards the payment of the mortgage held by the plaintiff; and the plaintiff has exhausted her remedy against the mortgagor personally by recovering judgment against him, execution upon which has been returned unsatisfied.

Although the mortgagor might properly have been made a party to this bill, yet as no objection was taken on that ground at the hearing, and the omission to make him a party cannot prejudice any interest of his, or any right of either party to this suit, it affords no ground for refusing relief. *Alexandria Mechanics Bank v. Selon*, 26 U. S. 1 Pet. 299 [7:152]; *Whiting v. Bank of United States*, 38 U. S. 18 Pet. 6 [10:33]; *Miller v. Thompson*, 34 Mich. 10.

Decree reversed and case remanded, with directions to enter a decree for the plaintiff.

THE BOARD OF COMMISSIONERS OF
DELAWARE COUNTY, INDIANA,
Pff. in Err.,
v.

THE DIEBOLD SAFE AND LOCK COM-
PANY ET AL.

(See S. C. Reporter's ed. 473-495.)

Suits removed from state court—unnecessary parties—Indiana county commissioners—complaint in another suit, not evidence—Indiana law as to suit by assignee—contract involving personal confidence, when cannot be assigned without consent—partial assignment of contract to construct a jail not assignable without county's consent—public policy as to assignment.

1. The restriction that plaintiff cannot prosecute a suit in the circuit court, where his assignors could not have prosecuted it by reason of one of them being a citizen of same State as the defendant, does not extend to suits removed into such court from a state court.
2. Objection to nonjoinder of parties defendant does not go to the jurisdiction of the court. Persons, made parties defendant, who disclaim all interest in the suit and against whom no relief is sought, are unnecessary parties.
3. If the defendant not only had notice of the assignment to the plaintiff, but consented to that assignment, there would be a new and direct promise from the defendant to the plaintiff, and the assignors would not be necessary parties to the cause of action.
4. Under the statutes of Indiana, the proceedings of county commissioners, in passing upon claims against a county, are not a trial *inter partes*, and an appeal from their decision is tried by the circuit court of the county as an original cause; hence, the trial in the circuit court of the county is "the trial" of the case, before which at any time it may be removed into the circuit court of the United States, under clause 3 of section 639 of the Revised Statutes.

5. A complaint in another suit, not under oath, nor signed by the plaintiff, but only by its attorneys, is incompetent to prove an admission by the plaintiff that upon the facts alleged it had not a cause of action against this defendant.

6. In Indiana, the assignee of part of a contract may sue thereon jointly with his assignor, or may maintain an action alone if no objection is taken by demurrer or answer to the nonjoinder of the assignor. This rule governs the practice and pleadings in actions at law in the federal courts held within that State.

7. When rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract.

8. A partial assignment of a contract to construct a jail for a county and furnish materials therefor, at a gross sum,—that is to say, an assignment of the furnishing and putting in place the iron work of the jail,—is not binding on the county, without its assent.

9. It is against public policy to permit municipal corporations, in the administration of their affairs relating to the construction of public works, to be embarrassed by subcontracts between their contractors and third persons, to which they have never assented.

[No. 89.]

Submitted April 26, 1889. Decided March 3, 1890.

IN ERROR to the Circuit Court of the United States for the District of Indiana to review a judgment for plaintiff in an action to recover for work done and materials furnished for a jail in Delaware County, Indiana, under a subcontract with the original contractor. *Reversed.*

Statement by Mr. Justice Gray:

The original suit was commenced March 4, 1885, by the Diebold Safe and Lock Company, a corporation of the State of Ohio, against the Board of Commissioners of Delaware County in the State of Indiana, by a claim in the form of a complaint, filed with the county auditor and by him presented to the Board of County Commissioners, in accordance with the provisions of the Revised Statutes of Indiana of 1881 (which are copied in the margin*), and containing the following allegations:

That on January 20, 1882, the Board of Commissioners entered into a written contract with William H. Meyers and Edward F. Meyers, partners as W. H. Meyers & Son (a copy of

*SEC. 5740. The auditor of the county shall attend the meetings of such commissioners, and keep a record of their proceedings; and the sheriff of the county shall also, by himself or deputy, attend and execute their orders.

SEC. 5742. Such commissioners shall adopt regulations for the transaction of business; and in the trial of causes they shall comply, so far as practicable, with the rules for conducting business in the circuit court.

SEC. 5758. Whenever any person or corporation shall have any legal claim against any county, he shall file it with the county auditor, to be by him presented to the board of county commissioners.

SEC. 5759. The county commissioners shall examine into the merits of all claims so presented, and may, in their discretion, allow any claim in whole or in part, as they may find it to be just and owing.

SEC. 5760. No court shall have original jurisdiction

which was annexed), showing that Meyers & Son agreed to construct a jail for the County on or before September 4, 1882, agreeably to the plans and specifications of a certain architect, and to provide all the materials therefor, for the sum of \$20,000, which the Board of Commissioners agreed to pay, in monthly payments, on the architect's certificate, reserving on each payment twenty per cent, to be paid on the completion and acceptance of the building; Meyers & Son agreed to give bond to secure the performance of the agreement; and it was agreed that "the County will not in any manner be answerable to or accountable for any loss or damages that may happen in or to said works, or any part or parts thereof, respectively, or for any of the materials or other things used and employed in finishing and completing the said works;" and that "should the contractors fail to finish the work on or before the time agreed upon, they shall pay to the party of the first part the sum of twenty-five dollars per diem for each and every day thereafter the said works shall remain unfinished, as and for liquidated damages."

That a part of the work to be done and materials furnished under the contract consisted of iron work; and that on March 6, 1882, Meyers & Son assigned to the plaintiff so much of that contract as related to this work, by an agreement in writing as follows:

"Fort Wayne, Ind., March 6th, 1882. We, the Diebold Safe and Lock Company, at Canton, O., hereby agree to construct and place in position in the new jail to be erected in the City of Muncie, Delaware Co., Ind., all of that portion of the work for same (locks included), and described under the head of iron and chrome-steel work in specifications and according to plans delineating them, as already adopted by the Board of County Commissioners of said County, the same as though the contract for such work had been awarded us direct; the contract price for said work to be seventy-seven hundred dollars (\$7,700) for above work, completed and accepted by the superintendent of the building and the County Commissioners, to be paid by the said County Commissioners in monthly estimates, less amount retained according to law and contract between the County Commissioners and Wm. H. Meyers & Son, on completion of said work in full, as per amount named in this contract and charged by them against W. H. Meyers & Son, and in full settlement with them for such iron and chrome-steel work under their contract with the County Commissioners; and any questions that may arise on the construction of the work, or devia-

tions from the plans and specifications that may arise or be deemed advisable, to be arranged and settled wholly between ourselves and the County Commissioners and the superintendent of the building; and we, the Diebold Safe and Lock Company, in consideration of the acceptance of the foregoing proposition by the said W. H. Meyers & Son, agree to do said work, and insure the same in perfect working order, according to the terms proposed and to the acceptance of the said architect and County Commissioners, and in such quantities and time as shall not materially interfere with the completion of said building, and to complete the whole work on or before August 1st, 1882.

"Diebold Safe & Lock Co.

"We, the said W. H. Meyers & Son, named in the foregoing proposition, do hereby accept the same, and agree that the said Diebold Safe & Lock Company shall do and perform the work and labor and furnish the iron and chrome-steel work for said jail, in manner and form as proposed and agreed by them in the foregoing proposition and agreement, and that they shall receive payment therefor as proposed. Dated Fort Wayne, Ind., March 6th, 1882.

"W. H. Meyers & Son."

That the Board of Commissioners and the County had notice of and consented to this agreement and assignment when it was made, and before the jail was erected, and before any payments were made to Meyers & Son on account thereof; that the plaintiff, with the knowledge and consent of the Board, did the iron work and furnished the materials therefor, in accordance with the original contract of the Board with Meyers & Son, and to the acceptance of the architect; that such work and materials were of the value of \$7,700, and Meyers & Son did the rest of the work upon the building; and that the Board had not paid anything on account of the iron work, although the plaintiff had duly demanded payment therefor; and the plaintiff claimed payment of the sum of \$7,700.

The complaint contained a second paragraph, alleging the contract between the Board of Commissioners and Meyers & Son, its performance by Meyers & Son and its nonperformance by the Board, an assignment dated November 25, 1884, from Meyers & Son to the plaintiff of all their claims and demands against the Board on account of building the jail, and that the sum of \$10,000 was due on account thereof from the Board to the plaintiff.

The Board of Commissioners disallowed the claim. The plaintiff appealed to the Circuit Court of the County; and immediately after the entry of the appeal in that court, and before

tion of any claim against any county in this State, in any manner except as provided for in this Act.

SEC. 5761. No allowance shall be made by such commissioners, unless the claimant shall file with such commissioners a detailed statement of the items and dates of charge, nor until such competent proof thereof is adduced in favor of such claim as is required in other courts; but if the truth of such charge be known to such commissioners, it may be allowed without other proof, upon that fact being entered of record in the proceedings about the claim.

SEC. 5769. Any person or corporation, feeling aggrieved by any decision of the board of county commissioners, made as hereinbefore provided, may appeal to the circuit court of such county, as now provided by law.

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SEC. 5774. The auditor shall make out a complete transcript of the proceedings of said board relating to the proceeding appealed from, and shall deliver the same, and all the papers and documents filed in such proceeding, and the appeal bond, to the clerk of the court to which the appeal is taken.

SEC. 5777. Every appeal thus taken to the circuit court shall be docketed among the other causes pending therein, and the same shall be heard, tried and determined as an original cause.

SEC. 5778. Such court may make a final determination of the proceeding thus appealed, and cause the same to be executed, or may send the same down to such board, with an order how to proceed, and may require such board to comply with the final determination made by such court in the premises.

further proceedings there, filed a petition and bond for the removal of the case into the circuit court of the United States, on the grounds that the plaintiff was a citizen of Ohio, and the defendant a citizen of Indiana, and that by reason of prejudice and local influence the plaintiff could not have a fair trial in the state court.

The case having been entered on the equity docket of the circuit court of the United States, a motion was made by the defendant to remand the case to the state court, upon the ground that Edward F. Meyers, one of the plaintiff's assignors, was and always had been (as was admitted) a citizen of Indiana (it being also admitted that William H. Meyers was and always had been a citizen of Michigan), and that the petition for removal was filed too late, after the case had been tried and decided by the Board of County Commissioners, and been appealed to the Circuit Court of the County. The motion was denied.

The plaintiff then, by leave of the court, made William H. Meyers, and Edward F. Meyers parties defendant; and they appeared and answered, admitting the allegations of the complaint, and disclaiming all interest in the suit; and the record showed no further proceedings in regard to them.

A demurrer filed by the Board of Commissioners, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, was overruled; the motion to remand the case to the state court was renewed, and again denied; and the defendant excepted to the overruling of its demurrer and to the denial of its motion to remand.

The Board of Commissioners then filed an answer, setting up the following defenses:

1st. A denial of all the allegations of the complaint.

2d. Payment.

3d. Payment to Meyers & Son without notice of the pretended assignment of the contract to the plaintiff.

4th. Payment, before the assignment mentioned in the second paragraph of the complaint, to Meyers & Son, upon a settlement of accounts, and deducting damages for delay in the work.

5th. That, by the laws of Indiana, no contract for the building of a jail shall be let without giving notice by publication for at least six weeks in some newspaper of general circulation in the county; the board of county commissioners is prohibited from entering into any contract for such building until the contractors have filed a bond with surety for the faithful performance of the work; and all laborers or materialmen may have an action on the bond for work done or materials furnished; that the Board took such a bond from Meyers & Son, which remained on file in the auditor's office, subject at all times to be sued upon by the plaintiff or any other laborer or materialman engaged in the construction of the jail; that before the commencement of the suit, and long before the Board had any notice of the assignment set out in the second paragraph of the complaint, the Board fully settled its account with Meyers & Son, including the value of the work claimed to have been performed by the plaintiff, and paid the amount found to be due

to Meyers & Son, after deducting damages for delay in completing the building; that the Board could not by law enter into the contract which it was alleged in the first paragraph of the complaint to have entered into, or lawfully consent or agree to treat the plaintiff's agreement with Meyers & Son as an assignment of so much of their contract with the County, and never did in fact recognize or assent to it, or promise to pay the plaintiff, but always treated Meyers & Son as the only contractors with whom it had anything to do; and that the plaintiff, having full knowledge of all the facts aforesaid, elected to rely wholly upon the responsibility of Meyers & Son for their pay in doing the work mentioned in the complaint, and on June 30, 1884, brought an action of assumpsit against Meyers & Son on the same cause of action, which was still pending.

6th. That the circuit court of the United States had no jurisdiction, because the plaintiff was a citizen of Ohio, the Board of Commissioners and Edward F. Meyers citizens of Indiana, and William H. Meyers a citizen of Michigan.

By agreement of the parties, and order of the court, the case was transferred to the law docket. A demurrer to the last three paragraphs of the answer was sustained, and the defendant excepted to the ruling. The plaintiff filed a replication, denying the allegations in the second and third paragraphs of the answer. The second paragraph of the complaint was dismissed by the court upon the plaintiff's motion; and a trial by jury was had upon the issues of fact open upon the pleadings.

At the trial, the plaintiff introduced in evidence the original contract of January 20, 1882, the bond given and taken therewith, and the agreement of March 6, 1882.

The plaintiff also introduced evidence tending to show that shortly after the execution of its agreement with Meyers & Son, and before any work had been done or money paid out on account of the construction of the jail, and while the Board was in lawful session, engaged in transacting county business, oral notice was given to it by the plaintiff of the execution and provisions of this agreement, and the Board made no objection to the agreement or assignment; that on December 6, 1882, the plaintiff's agent filed in the office of the auditor of the County a written copy of this agreement, together with a written notice to the Board that the plaintiff expected to do the iron work, and to receive pay therefor directly from the Board, in the same manner as Meyers & Son would have been entitled to do under their contract with the Board, and that it would demand payment from the Board of the sum of \$7,700 out of the contract price to be paid by the Board for the construction of the jail, and that in April or May, 1883, before the plaintiff did the iron work and furnished the materials, the Board, while in session, was notified orally by the plaintiff's agent and others of the execution and provisions of the agreement between Meyers & Son and the plaintiff.

On the other hand, the Commissioners severally testified that they had no notice or knowledge of that agreement, or of the plaintiff's claim, until December 6, 1883. The auditor testified that there was no such notice in his

office, and he had no recollection of any such notice having been filed there or brought to his knowledge. But the deputy auditor testified that a written claim, for \$7,700, presented by the plaintiff on account of said work and contract, was in the office before that date, and had been returned by him to the plaintiff by order of a member of the Board.

It was proved, and not denied, that at all times prior to April and May, 1883, the Board of Commissioners had in the county treasury, of the fund provided for the erection of the jail and the payment of the contract price therefor, after deducting all payments made on account thereof, about \$12,000, not taking into consideration any damages accruing to the County by reason of delay in completing the jail; that the value of the work then done did not exceed \$7,000 or \$8,000; that the plaintiff did all the iron work and furnished all the materials therefor according to the original contract, and to the acceptance of the Board of Commissioners, and to the value of more than \$7,700, but not within the time stipulated in that contract; and that neither the plaintiff nor any person on his behalf had ever received anything in payment therefor, either from the Board of Commissioners or from Meyers & Son.

The plaintiff introduced evidence tending to show that the Board of Commissioners never paid to Meyers & Son or to their order, or to anyone for their benefit, more than the sum of \$13,000, on account of the construction of the jail.

The defendant introduced evidence tending to show that it had so paid out more than \$18,000; that in the spring of 1883, after the work on the jail had progressed for some time, and about \$8,800 had been paid by the defendant to Meyers & Son, but before any of the iron work had been done, the defendant refused to pay any more money to Meyers & Son, and put one Parry in charge of the work; and that on September 5, 1883, the jail being then in a forward state of completion, a settlement was had between the Board of Commissioners and Meyers & Son, as a part of which it was agreed that the sum of \$4,500 should be considered as the damages sustained by the County for delay in completing the jail, and be deducted from the contract price, and the amount necessary to complete the jail was estimated, and the balance found to be due Meyers & Son was paid to them by the County, and the jail was taken off their hands by the Board of Commissioners; that at the time of that settlement the amount actually necessary to complete the jail, together with the aforesaid sum of \$4,500, exceeded by more than \$2,000 the contract price of the jail; and that the plaintiff had then been engaged upon the iron work for a week, and completed that work on September 24, 1883.

The plaintiff introduced evidence tending to show that at the time of that settlement the defendant agreed in writing with Meyers & Son to pay them the sum of \$2,000, as part of the aforesaid sum of \$4,500, in case one Secrist, who was then prosecuting a claim against the County for stone furnished to Meyers & Son for the jail, should not finally recover the same against the County, and that Secrist's suit was finally determined against him and in favor of the County by the judgment of the Supreme

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Court of Indiana, reported in 100 Ind. 59, yet no part of the said sum of \$2,000 had ever been paid to Secrist or to anyone else; that the actual damages sustained by the County on account of the delay in completing the jail did not exceed the sum of \$25; and that the \$4,500 deducted from the contract price on account of such delay was not intended to be enforced against Meyers & Son.

The defendant offered evidence tending to show "that the settlement was made in good faith, and that the two thousand dollars which the defendant promised to pay Meyers & Son in case the Secrist claim was defeated was not intended as a sham."

The complaint, signed by the plaintiff's attorneys, in an action brought June 30, 1884, by the plaintiff against Meyers & Son, setting forth the same facts as the complaint in the present case, and seeking to recover against Meyers & Son the sum of \$7,700 for work done upon the jail, was offered in evidence by the defendant, as tending to show that at that time the plaintiff did not claim to have any such demand as it now asserted against the present defendant. This evidence was objected to by the plaintiff, and excluded by the court; and to the ruling excluding it the defendant excepted.

The defendant requested the court to instruct the jury that, by the statutes of Indiana, contracts for the construction of county jails and other public buildings must be advertised and let by the board of county commissioners as an entirety, and not in parts; and that the contract between the Board of Commissioners and Meyers & Son was not so divisible and assignable by the latter, that an assignment of a part thereof by them, and mere notice given by the assignee to the Board of Commissioners of the assignment, obliged the Board to recognize the assignment and to account and settle with and pay the assignee for work done and materials furnished by the assignee.

The court refused to give the instructions requested; and instructed the jury that the effect of the agreement between Meyers & Son and the plaintiff was to put the plaintiff into a position of being entitled to do the iron work and to get the pay therefor from the County; that Meyers & Son made no agreement to pay the plaintiff, and the plaintiff by doing that work acquired no right of action against Meyers & Son, but was entitled simply to look to the County; and that if the Board of Commissioners had notice of the agreement between Meyers & Son and the plaintiff before the settlement with Meyers & Son, the defendant was bound by that agreement, and obliged to withhold from Meyers & Son money enough to pay the plaintiff, and the plaintiff might maintain this action; and that if a copy of the contract was presented by the plaintiff and received by the auditor at his office, that was legal notice to the Board of Commissioners.

To this instruction, as well as to the refusal to give the instructions requested, the defendant duly excepted.

The court further instructed the jury that if the defendant, before and at the time of the settlement with Meyers & Son, had no notice of the plaintiff's claim, the plaintiff could not recover if the settlement was made in good faith; but that if the settlement was a sham,

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not intended as between the parties to be a settlement, the plaintiff might recover in this suit the sum in the defendant's hands owing to Meyers & Son under the original contract. No exception was taken to this instruction at the trial.

The jury returned a verdict for the plaintiff in the sum of \$8,739.50, upon which judgment was rendered; and the defendant sued out this writ of error.

Messrs. Addison C. Harris and William H. Calkins, for plaintiff in error:

Unless the contrary appears affirmatively from the record, the presumption upon writ of error or appeal is that the court below was without jurisdiction.

King Bridge Co. v. Otoe County, 120 U. S. 226 (30: 624); *Robinson v. Anderson*, 121 U. S. 522 (30: 1021); *Cameron v. Hodges*, 127 U. S. 322 (32: 132); *Hegler v. Faulkner*, 127 U. S. 458 (32: 210).

The petition for removal was silent as to the citizenship of the assignors.

Sheldon v. Sill, 49 U. S. 8 How. 449 (12: 1151); *Bradley v. Rhine*, 75 U. S. 8 Wall. 393 (19: 467).

One of the assignors, or both, being citizens of Indiana, and necessary parties, the suit was not removable. Not being parties, it had not been properly commenced in the state court, and the federal court did not acquire jurisdiction.

Jefferson v. Driscor, 117 U. S. 272 (29: 897); *Cambria Iron Co. v. Ashburn*, 118 U. S. 54 (30: 54); *Hancock v. Holbrook*, 119 U. S. 586 (30: 588); *Cameron v. Hodges*, 127 U. S. 326 (32: 134); *Blacklock v. Small*, 127 U. S. 103 (32: 73); *Bliss*, Code Pl. §§ 65, 118; *Groves v. Ruby*, 24 Ind. 418; *Lapping v. Duffy*, 47 Ind. 51; *Rev. Stat. Ind.* 1881, § 812.

Any proceeding in a court, by which a person pursues that remedy which the law affords for the enforcement of his civil demands against another, is a suit.

Weston v. Charleston, 27 U. S. 2 Pet. 449, 464 (7: 481); *Gaines v. Fuentes*, 92 U. S. 19 (23: 527); *Searl v. School District No. 2*, 124 U. S. 197 (31: 415); *Kohl v. U. S.* 91 U. S. 387, 375 (23: 449, 452); *Mississippi & R. R. Boom Co. v. Patterson*, 98 U. S. 403 (25: 206); *Hess v. Reynolds*, 118 U. S. 78 (28: 927).

When the commissioners' court was required to decide upon the validity of a demand against the County, it acted judicially.

State v. Washington County Comrs. 101 Ind. 69; *Warren County Comrs. v. Gregory*, 42 Ind. 82, 89; *Orange County Comrs. v. Ritter*, 90 Ind. 368; *Knox County Comrs. v. Montgomery*, 108 Ind. 519; *Fountain County Comrs. v. Wood*, 35 Ind. 72; *Weston v. Lumley*, 33 Ind. 490.

The entry of a charge to a particular person in an account book, or the making out a bill in his name, is an admission that the goods were furnished on his credit.

Sorr v. Scott, 6 Car. & P. 241; *Thompson v. Davenport*, 9 Barn. & C. 78; *Wood*, Pr. Ev. 582.

In Indiana, public buildings and improvements are not subject to mechanics' liens. They are exempt by the rule of public policy, although not excepted by statute.

Fatout v. Indianapolis School Comrs. 102 Ind.

228; *Secrist v. Delaware County Comrs.* 100 Ind. 59; *Lowe v. Howard County Comrs.* 94 Ind. 553; *Parke County Comrs. v. O'Conner*, 86 Ind. 531; *Pike County Comrs. v. Norrington*, 82 Ind. 190; *Klein v. New Orleans*, 99 U. S. 149 (25: 430).

Public policy seems to prevent the assignment of contracts against a government.

U. S. v. Robeson, 34 U. S. 9 Pet. 325 (9: 144); *U. S. v. Gillis*, 95 U. S. 412 (24: 504); *Spofford v. Kirk*, 97 U. S. 484 (24: 1032); *Goodman v. Niblack*, 102 U. S. 559 (26: 230); *Arkansas V. Smelting Co. v. Belden Min. Co.* 127 U. S. 887 (32: 248).

A municipal corporation should not be subjected to the embarrassments, responsibilities and costs of adjudicating contracts to which it was not a party.

Erie v. Knapp, 29 Pa. 173; *Bulkley v. Eckert*, 3 Pa. 868; *Secrist v. Delaware County Comrs.* 100 Ind. 62; *Wallace v. Lawyer*, 54 Ind. 501; *Chicago v. Hasley*, 25 Ill. 595; *Merwin v. Chicago*, 45 Ill. 133; *McLellan v. Young*, 54 Ga. 399; *Shankland v. Washington*, 80 U. S. 5 Pet. 394 (8: 167); *Kendall v. U. S.* 74 U. S. 7 Wall. 113 (19: 85); *Geist's App.* 104 Pa. 351.

A single executory contract cannot be parted into various fragments, without the consent of the debtor.

Tiernan v. Jackson, 80 U. S. 5 Pet. 580 (8: 234); *Mandeville v. Welch*, 18 U. S. 5 Wheat. 277 (5: 87); *Quincy First Nat. Bank v. Hall*, 101 U. S. 43 (25: 822); *Papeneau v. Naumkeag S. C. Co.* 126 Mass. 373; *Pipp v. Reynolds*, 20 Mich. 88; *Turner v. McCarty*, 22 Mich. 265; *Gibson v. Cooke*, 20 Pick. 15; *St. Louis Fourth Nat. Bank v. Noonan*, 88 Mo. 372; *Potter v. Gronbeck*, 117 Ill. 404.

When the board acts as a judicial tribunal, it is a court, and when it exercises administrative functions it is a corporation.

Platter v. Elkhart County Comrs. 103 Ind. 360; *McCabe v. Fountain County Comrs.* 46 Ind. 380; *Cass County Comrs. v. Ross*, 46 Ind. 404; *State v. Tippecanoe County Comrs.* 45 Ind. 505.

The auditor cannot contract for the board. *Chapin v. Steuben County Comrs.* 21 Ind. 12; *Potts v. Henderson*, 2 Ind. 827.

Notice to a clerk of a municipality is not notice to the corporation.

Nichols v. Boston, 98 Mass. 44; *Leavenworth County Comrs. v. Hamlin*, 81 Kan. 105; *Paola & F. R. R. Co. v. Anderson County Comrs.* 16 Kan. 302; *Harrington v. Alburgh Sixth School Dist.* 80 Vt. 155; *Board v. Eeroyd*, 2 Victorian Law Rep. (Eq.) 45, cited in 27 Moak, Eng. Rep. 156, note; *Whart. Agency*, § 184; *Dill. Mun. Corp.* § 237, note 1 (3d. ed.) 262; *Wade*, Notice (2d ed.) § 1813.

Messrs. Levi Ritter, R. F. Ritter and B. W. Ritter, for defendants in error:

On removal in law cases pure and simple, no repleader is necessary; but when the relief sought is both legal and equitable, plaintiff must replead in the federal court.

Green v. Custard, 64 U. S. 23 How. 484 (16: 471); *Thompson v. Central Ohio R. Co.* 73 U. S. 6 Wall. 184 (18: 765); *Hurt v. Hollingsworth*, 100 U. S. 100 (25: 569); *Akerly v. Vilas*, 2 Biss. 110; *Fisk v. Union Pac. R. Co.* 8 Blatchf. 299; *Dart v. McKinney*, 9 Blatchf. 359; *Sands v. Smith*, 1 Dill. 290; *La Mothe Mfg. Co. v. Nat. Tube Works Co.* 15 Blatchf. 432.

A law action must proceed as such, although brought in the name of the real party in interest instead of the party holding the bare legal title.

Thompson v. Central Ohio R. Co. 78 U. S. 6 Wall. 184 (18: 765); *Weed Sewing Mach. Co. v. Wicks*, 8 Dill. 261; *Bushnell v. Kennedy*, 76 U. S. 9 Wall. 591 (19: 788); *Knapp v. Troy & B. R. Co.* 87 U. S. 20 Wall. 117 (22: 328); *Wood v. Davis*, 59 U. S. 18 How. 467 (15: 460); *Suydam v. Ewing*, 2 Blatchf. 859.

The restrictions of the Judiciary Act as to the jurisdiction of the federal courts do not apply to cases brought into those courts under the Removal Act.

Warner v. Pennsylvania R. Co. 18 Blatchf. 231; *Waterbury v. Laredo*, 8 Woods, 371; *Barclay v. Leves Comrs.* 1 Woods, 254; *Barney v. Globe Bank of Boston*, 5 Blatchf. 107; *DeLaueaga v. Williams*, 5 Sawy. 574; *Leutze v. Butterfield*, 7 Daly, 24; *Ayres v. Western R. Corp.* 45 N. Y. 260, 264; *Bushnell v. Kennedy*, 76 U. S. 9 Wall. 387 (19: 786); *Lexington v. Butler*, 81 U. S. 14 Wall. 282 (20: 809); *Gaines v. Fuentes*, 92 U. S. 10 (23: 524); *Bell v. Noonan*, 19 Fed. Rep. 225; *Meyer v. Construction Co.* 100 U. S. 457 (25: 593).

The Board of Commissioners is not a court within the meaning of the term as used in the Removal Act.

Fuller v. Colfax County, 14 Fed. Rep. 177; *Brown v. Otoe County*, 6 Neb. 111, 116; *State v. Buffalo County*, 6 Neb. 454; *Rathbone Oil Tract Co. v. Rauch*, 5 W. Va. 79; *Kellogg v. Hughes*, 8 Dill. 357; *Johnson v. Monell*, 1 Woolw. 390; *Brooklyn Home L. Ins. Co. v. Dunn*, 86 U. S. 19 Wall. 214 (22: 66).

The courts of law will recognize and protect the equitable assignment.

Jones v. Witter, 13 Mass. 304; *Conway v. Cutting*, 51 N. H. 407; *Garland v. Harrington*, 51 N. H. 409; *Parsons v. Woodward*, 22 N. J. L. 196; *Carr v. Waugh*, 28 Ill. 418, 423; *Morris v. Cheney*, 51 Ill. 454; *Myers v. South Feather Water Co.* 10 Cal. 579; *Walker v. Brooks*, 125 Mass. 241.

If the right is a legal right, he has a full remedy in an action at law in the name of his assignor.

Hayward v. Andrews, 106 U. S. 672 (27: 271); *New York Guaranty Co. v. Memphis Water Co.* 107 U. S. 205 (27: 484); *Corser v. Craig*, 1 Wash. C. C. 424; *Thompson v. Central Ohio R. Co.* 78 U. S. 6 Wall. 184 (18: 765).

The rule that a part of a chose in action cannot be assigned is the rule of law, but it is not the rule in equity.

McFadden v. Wilson, 96 Ind. 258; *Harrison v. Wright*, 100 Ind. 515, 531; *Bartholomew County Comrs. v. Jameson*, 86 Ind. 154, 165; *Louisville, E. & St. L. R. Co. v. Caldwell*, 98 Ind. 245; *Wood v. Wallace*, 24 Ind. 226; *Lapping v. Duffy*, 47 Ind. 51; *Groves v. Ruby*, 24 Ind. 418; *Hays v. Branham*, 36 Ind. 219; *Laughlin v. Fairbanks*, 8 Mo. 387, 371; *Anderson v. Van Aken*, 12 Johns. 343; *Russell v. Fillmore*, 15 Vt. 130; *Moody v. Kyle*, 34 Miss. 506; *Corser v. Craig*, 1 Wash. C. C. 424; *Patten v. Wilson*, 34 Pa. 299; *Lyon v. Summers*, 7 Conn. 399; *Leese v. Sherwood*, 21 Cal. 151.

It was within the power of Meyers & Son to assign an interest in the contract with the

County, together with a portion of the money due therefor.

Field v. Mayor, 6 N. Y. 179; *Devlin v. Mayor*, 63 N. Y. 8; *People v. Comptroller*, 77 N. Y. 48; *Parker v. Syracuse*, 31 N. Y. 376, 379; *Horne v. Wood*, 23 N. Y. 350; *Taylor v. Palmer*, 31 Cal. 240; *Crocker v. Whitney*, 10 Mass. 319; *Cochran v. Collins*, 29 Cal. 129, 131; *Morse v. Gilman*, 18 Wis. 374; *Gee v. Swain*, 12 Wis. 451; *St. Louis v. Clemens*, 42 Mo. 69; *Ernet v. Kunkle*, 5 Ohio St. 521; *Bradley v. Root*, 5 Paige, Ch. 632; *Beal v. McVicker* (St. L. Ct. App. 1876) 4 Cent. L. J. 262; *Lutly v. Woods*, 1 Mo. App. 167; *Pendleton v. Perkins*, 49 Mo. 565; *Brackett v. Blake*, 7 Met. 385; *Bartholomew County Comrs. v. Jameson*, 86 Ind. 154; *Smith v. Flack*, 95 Ind. 116; *Coquillard v. French*, 19 Ind. 274.

Mr. Justice Gray delivered the opinion of the court:

Before proceeding to consider the merits of this case, it is necessary to dispose of the objections taken to the jurisdiction assumed by the circuit court of the United States.

1. It was contended that that court had not cognizance of the suit, because the plaintiff's assignors could not have prosecuted it, inasmuch as one of them was a citizen of the same State as the defendant. But that restriction was applicable only to suits commenced in the federal court, and did not extend to suits removed into it from a state court. Act of March 3, 1875, chap. 137, §§ 1, 2 (18 Stat. 470); *Claphin v. Commonwealth Ins. Co.* 110 U. S. 81 [28: 76].

2. It was further objected that the assignors were necessary parties to the suit, because they had assigned to the plaintiff part only of their original contract with the defendant; and because the statutes of Indiana, while they require every action arising out of contract to be prosecuted by the real party in interest, provide that "when any action is brought by the assignee of a claim arising out of a contract, and not assigned by indorsement in writing, the assignor shall be made a defendant, to answer as to the assignment or his interest in the subject of the action." Indiana Rev. Stat. of 1881, §§ 251, 276. But this objection was rather to the nonjoinder of defendants than to the jurisdiction of the court, and presented no valid reason why the court should not proceed. The assignors were not parties to the suit at the time of the removal into the circuit court; and as soon as they were made parties in that court, they disclaimed all interest in the suit; and, as no further proceedings were had, or relief sought or granted, against them, their presence was unnecessary. *Walden v. Skinner*, 101 U. S. 577 [25: 963]; *Morrison v. Ross*, 118 Ind. 186. Besides, the first paragraph or count of the complaint (upon which alone the trial proceeded) alleged that the defendant not only had notice of the assignment to the plaintiff, but consented to that assignment. If that were so, there would be a new and direct promise from the defendant to the plaintiff, and the assignors would be in no sense parties to the cause of action.

3. It was also objected that the petition for removal was filed too late, after the case had been tried and determined by the Board of

County Commissioners. But under the statutes of Indiana then in force, although the proceedings of county commissioners, in passing upon claims against a county, are in some respects assimilated to proceedings before a court, and their decision, if not appealed from, cannot be collaterally drawn in question, yet those proceedings are in the nature, not of a trial *inter partes*, but of an allowance or disallowance, by officers representing the county, of a claim against it. At the hearing before the commissioners there is no representative of the county, except the commissioners themselves; they may allow the claim, either upon evidence introduced by the plaintiff, or without other proof than their own knowledge of the truth of the claim; and an appeal from their decision is tried and determined by the circuit court of the county as an original cause, and upon the complaint filed before the commissioners. Indiana Rev. Stat. §§ 5758-5761, 5777; *State v. Washington County Comrs.* 101 Ind. 69; *Orange County Comrs. v. Ritter*, 90 Ind. 362, 368. It follows, according to the decisions of this court in analogous cases, that the trial in the Circuit Court of the County was "the trial" of the case, at any time before which it might be removed into the circuit court of the United States, under clause 3 of section 639 of the Revised Statutes. *Mississippi & R. R. Boom Co. v. Patterson*, 98 U. S. 408 [25: 206]; *Hess v. Reynolds*, 118 U. S. 73 [28: 927]; *Union Pac. R. Co. v. Kansas City*, 115 U. S. 1, 18 [29: 319, 325]; *Searl v. School District No. 2*, 124 U. S. 197, 199 [31: 415, 416].

The only ruling upon evidence which is excepted to is to the exclusion of the complaint in an action brought by the present plaintiff against its assignors. But there is no material difference between the facts stated in that complaint and those stated in the complaint in the present suit; and the former complaint, not under oath, nor signed by the plaintiff, but only by its attorneys, was clearly incompetent to prove an admission by the plaintiff that upon those facts it had not a cause of action against this defendant. *Combs v. Hodge*, 62 U. S. 21 How. 297 [16: 115]; *Pope v. Allis*, 115 U. S. 363 [29: 393]; *Dennie v. Williams*, 135 Mass. 28.

We are then brought to the main question of the liability of the defendant to the plaintiff, depending upon the validity and effect of the partial assignment to the plaintiff from the original contractors of their contract with the defendant.

By the law of Indiana, the assignee by a valid assignment of an entire contract, not negotiable at common law, may maintain an action thereon in his own name against the original debtor; and the assignee by valid assignment of part of a contract may sue thereon jointly with his assignor, or may maintain an action alone if no objection is taken by demurrer or answer to the nonjoinder of the assignor. Indiana Rev. Stat. § 251; *Groves v. Ruby*, 24 Ind. 418. These rules govern the practice and pleadings in actions at law in the federal courts held within the State. Rev. Stat. § 914; *Thompson v. Ohio Cent. R. Co.* 78 U. S. 6 Wall. 134 [18: 765]; *Albany & R. Iron and Steel Co. v. Lundberg*, 121 U. S. 451 [30: 982]; *Arkansas V. Smelting Co. v. Belden Min. Co.* 127 U. S. 379, 387 [32: 246, 248]. The case at bar was there-

fore rightly treated by the court below as an action at law; and the real question in controversy is not one of the form of pleading, but whether the plaintiff has any beneficial interest as against the defendant in the contract sued on.

A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But when rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract. *Arkansas V. Smelting Co. v. Belden Min. Co.* 127 U. S. 379, 387, 388 [32: 246, 248]. And the fact that that party is or represents a municipal corporation may have a bearing upon the question whether the contract is assignable, in whole or in part, without its assent.

By the Revised Statutes of Indiana, it is the duty of the county commissioners to cause jails and other county buildings to be built and furnished, and to keep them in repair. Indiana Rev. Stat. § 5748. But they are forbidden to contract for the construction of any building, the cost of which exceeds \$500, except upon public advertisement for bids and to the lowest responsible bidder, and taking from him a bond with sureties to faithfully perform the work according to the contract, and to promptly pay all debts incurred by him in the prosecution of the work, including labor and materials furnished; and any laborer or materialman having a claim against the contractor may sue upon that bond. Indiana Rev. Stat. §§ 4244, 4247.

It has been held by the Supreme Court of Indiana that the only remedy of laborers and materialmen is against the contractor, or upon his bond, and that they have no lien upon the building, or right of action against the county; as well as that a county cannot be charged by process in the nature of garnishment or foreign attachment for the debts of its creditors to third persons; and the reason assigned in each class of cases is, that it would be contrary to public policy that a county should be involved in controversies and litigations between its contractors and their creditors. *Parke County Comrs. v. O'Conner*, 86 Ind. 531; *Sechrist v. Delaware County Comrs.* 100 Ind. 59; *Wallace v. Lawyer*, 54 Ind. 501.

In *Bass Foundry & Mach. Works v. Parke County Comrs.* 115 Ind. 284, where a contractor, to whom the county commissioners had let a contract for the construction of a court-house and jail, sublet the iron work to the plaintiff, and, after partially completing the building, abandoned the work and declared his inability to resume it, and it was alleged in the complaint, and admitted by demurrer, that the commissioners agreed with the plaintiff to pay it for such work, it was held that it was within the incidental power of the commissioners, without letting a new contract, to take charge of the work and complete the building, and to bind the county to pay the plaintiff the actual and reasonable value of

iron work done by him at their request; but that they had no power to assume, on behalf of the county, debts due from the contractor to the plaintiff; and the court, after referring to the Statutes above cited, said: "In the event that a contractor should abandon his contract when the work was at such an incipient stage as that to complete it would amount practically to the construction of a court-house by county commissioners, without regard to the contract previously let, it might be a question whether the contracts made by them for labor and materials would be binding as such upon the county." 115 Ind. 248.

In *Bartholomew County Comrs. v. Jameson*, 86 Ind. 154, cited for the plaintiff, the assignment was of an entire sum due to the assignor for personal services. In *Smith v. Flack*, 95 Ind. 116, likewise cited for the plaintiff, the municipality was not a party to the suit, nor were its rights or liabilities brought in question; but the controversy was upon the effect of an assignment as between the parties to it and persons claiming under them.

In the case at bar, by the original contract between Meyers & Son and the County Commissioners, the contractors agreed to construct a jail for the County, and to provide all the materials therefor, for a gross sum of \$20,000, which the Commissioners agreed to pay, partly in monthly payments, on their architect's certificate, and the rest upon the completion and acceptance of the building; and it was expressly agreed that the County should not in any manner be answerable or accountable for any materials used in the work; and also that, if the contractors should fail to finish the work by the time agreed on, they should pay to the Commissioners, as and for liquidated damages, the sum of twenty-five dollars for every day the work should remain unfinished. Meyers & Son executed a bond for their faithful performance of the contract, as required by the Statute.

By the subsequent assignment, to which neither the County nor the Board of Commissioners was a party, Meyers & Son undertook to assign to the plaintiff the obligation to construct and put in place in the jail all the iron work required by the original contract, as if the contract for such work had been awarded directly by the Commissioners to the plaintiff; and undertook to fix the contract price for such work at \$7,700, to be paid by the Commissioners at the times mentioned in the original contract.

The plaintiff in fact did the iron work according to the original contract and to the acceptance of the Commissioners, and to the value of more than \$7,700, but not within the time stipulated in that contract. Soon after the plaintiff began to do that work, the Commissioners made a settlement with the original contractors, which, if valid, left in their hands much less than that sum.

The court declined to instruct the jury, as requested by the defendant, that the statutes of Indiana required contracts for the construction of jails and other county buildings to be advertised and let by the Board of Commissioners as an entirety, and not in parts; and that the contract between Meyers & Son and the Board of Commissioners was not divisible

and assignable by the contractors, and their assignment of part of the contract to the plaintiff and mere notice thereof to the Board did not impose any obligation upon the Board to recognize the assignment, and to account and settle with and pay the plaintiff for work done and materials furnished by the latter.

There was conflicting evidence upon two points: 1st. Whether the Commissioners before the settlement had notice of the assignment to the plaintiff; 2d. Whether the settlement was made in good faith. The judge instructed the jury that the plaintiff was entitled to recover, either if the defendant had such notice, or if the settlement was in bad faith. Exceptions were taken to the refusal to give the instruction requested, and to the instruction given upon the first alternative only. But it cannot be known on which alternative the jury proceeded in coming to their verdict. Upon the evidence before them and the instructions given, they may have concluded that the settlement between the defendant and the original contractors was in perfect good faith, and left in the defendant's hands much less than the sum claimed by the plaintiff, and that the defendant never assented to any assignment or division of the contract, and may have found for the plaintiff upon the single ground that they were satisfied that the defendant had notice of the assignment. The decision of the case therefore turns on the correctness of the instructions refused and given upon the effect of the assignment and notice.

This case does not require us to consider whether an assignment of the entire contract for the construction of the jail would have been consistent with the intention of the parties as apparent upon the face of the contract, or with the intention of the Legislature as manifested by the Statutes under which the contract was made. The plaintiff claims under no such assignment.

Those Statutes and the judicial exposition of them by the Supreme Court of the State, as well as the terms of the contract itself, are quite inconsistent with the theory that the original contractors can, at their pleasure, and without the assent of the county commissioners, split up the contract and assign it in parts, so as to transfer to different persons or corporations the duty of furnishing different kinds of material and labor, and the right of recovering compensation for such material and labor from the county commissioners.

Both the Statutes and the contract contemplate that the county commissioners shall be liable only to the contractors for the whole work, and not to any persons doing work or supplying materials under a subcontract with them.

The original contract of the County Commissioners was for the construction by Meyers & Son of the building as a whole by a certain date; for the payment to them by the Commissioners of a gross sum of \$20,000 for such construction, upon an accounting with them from time to time; and for the payment by the contractors of twenty-five dollars, as liquidated damages, for every day that the building should remain unfinished beyond that date.

The assignment was not in the nature of a mere order for the payment of a sum of money,

but it was of that part of the contract which related to the iron work, and required the assignee to perform this part of the work, and assumed to fix at the sum of \$7,700 the compensation for this part, which the assignee should receive from the Commissioners. There is nothing, either in the original contract, or in the evidence introduced at the trial, to show what proportion the iron work bore to the rest of the work requisite for the construction and completion of the jail, or that any separate estimate of the cost or value of the iron work was contemplated by the original contract, or ever made by the defendant, or by any officer or agent of the County.

In short, the only agreement which the County Commissioners were proved to have made was with Meyers & Son, to pay them a gross sum of \$20,000 for the whole work upon an accounting with them, and Meyers & Son paying damages as agreed for any delay in its completion. The agreement of Meyers & Son with the plaintiff assumed to compel the Commissioners to pay the plaintiff, for its performance of part of the work, a definite sum of \$7,700, and made no provision for damages for delay, and thus undertook to fix a different measure of compensation from the original contract.

The facts that the iron work was done by the plaintiff to the acceptance of the Commissioners, though after the time stipulated in the original contract, and was of the value of more than \$7,700, did not conclusively prove, as matter of law, that the Commissioners, on behalf of the County, made or recognized any contract with or liability to the plaintiff, in the place and stead of its assignors and employers; or preclude the Commissioners from insisting on the right to pay no more than the amount due, according to the original contract, for the whole of this and other work necessary to complete the building, and to ascertain the amount so due by an accounting and settlement with Meyers & Son, in which the sum due for all kinds of work, as well as the stipulated damages for any delay in completing the building, could be taken into consideration.

The County Commissioners could not, without their consent, and at the mere election of the original contractors and their subcontractors and assignees, be compelled to account with the latter separately, or be charged with a separate obligation to pay either of them a part of the entire price, instead of accounting for and settling the whole matter with the original contractors.

It might be within the authority of the Commissioners, upon becoming satisfied that Meyers & Son, after having performed a substantial part of their original contract, were unable to complete it, to give their consent to such an agreement with the plaintiff as was described in the assignment; and it is possible that the jury would have been authorized upon the evidence to find such a consent.

But the difficulty with the instructions given to the jury is, that no question of such consent was submitted to or determined by them; and that they were in effect instructed, in direct opposition to the request of the defendant, that mere notice to the defendant of the assignment to the plaintiff would prevent the defendant

from afterwards making a settlement with the original contractors in good faith and according to the sums justly due by the terms of the contract from either party to the other, without retaining in its hands enough to pay the plaintiff's claim. This instruction held the defendant bound by a contract to which it was not proved to have ever assented, and requires a new trial to be granted.

The cases in other States, cited for the plaintiff, in which municipal corporations have been held liable to an assignee of a contract, upon notice of the assignment, without proof of their consent, expressed or implied, are distinguishable from the case before us, and quite consistent with our conclusion.

In some of them, the assignments were of the whole or part of money already due, or to become due, to the contractor; in other words, assignments of a fund, and not of any obligation to perform work. *Brackett v. Blake*, 7 Met. 385; *Field v. Mayor*, 6 N. Y. 179; *Hall v. Buffalo*, 1 Keyes, 193; *Parker v. Syracuse*, 31 N. Y. 376; *People v. Comptroller*, 77 N. Y. 45. In others, the assignments were of entire contracts for the labor of convicts, or for work upon streets, which were held, from the nature of the subject, to imply no personal confidence in the contractor. *Horner v. Wood*, 23 N. Y. 350; *Devlin v. Mayor*, 63 N. Y. 8; *Ernst v. Kunkle*, 5 Ohio St. 520; *St. Louis v. Clemens*, 42 Mo. 69; *Taylor v. Palmer*, 81 Cal. 241.

The plaintiff much relied on a decision of the Supreme Court of Pennsylvania, in a case in which a contractor to build a school-house for a city assigned his right to all moneys due or to become due under it; the city, with notice of the assignment, and after the school-house had been built by the assignees and accepted and occupied by the city, paid the last installment of the price to the original contractor. There was no controversy as to the performance of the work, or as to the amount to be paid, but only as to the person entitled to receive payment; and the court, treating the assignment as one of money only, held the assignee entitled to recover against the city. *Philadelphia v. Lockhardt*, 73 Pa. 211, 216.

On the other hand, that court, speaking by the same judge, in a case decided within five years afterwards, and more nearly resembling the one now before us, where a contractor for building a bridge assigned all his interest in the contract, "except the item of superstructure," to one who had expended money upon the bridge, held that such a partial assignment of the contract, though notified to the city, did not make it liable to the assignee, because "the policy of the law is against permitting individuals, by their private contracts, to embarrass the financial affairs of a municipality." *Philadelphia's Appeal*, 86 Pa. 179, 182. See also *Geist's Appeal*, 104 Pa. 351, 354.

It thus appears that the Supreme Court of Pennsylvania has taken the same view as the Supreme Court of Indiana, as already shown, holding it to be against public policy to permit municipal corporations, in the administration of their affairs relating to the construction of public works, to be embarrassed by subcontracts between their contractors and third persons, to which they have never assented.

Judgment reversed, and case remanded with

directions to set aside the verdict and order a new trial, and to take such further proceedings as may be consistent with this opinion.

THE ST. LOUIS AND SAN FRANCISCO
RAILWAY COMPANY, *Appt.*,

v.

WALTER S. JOHNSTON.

(See S. C. Reporter's ed. 566-578.)

Bank check, refusal to pay—acceptance of deposit by bank after it is insolvent constitutes fraud—responsibility of bankers—necessary averments—suit for proceeds of draft—liability of bank for proceeds of draft fraudulently received.

1. The holder of a bank check cannot sue the bank for refusing payment without proof that it was accepted by the bank or charged against the drawer; but the depositor can sue for the breach of the contract to honor his checks.
2. The acceptance of a deposit of drafts by a bank, irrevocably insolvent, constitutes such a fraud as entitles the depositor to reclaim his drafts or their proceeds.
3. Bankers are held to rigid responsibility for good faith and honest dealing; a banker who is, to his own knowledge, hopelessly insolvent, cannot honestly continue his business and receive the money of his customers; and, although having no actual intent to cheat and defraud a particular customer, he will be held to have intended the inevitable consequence of his act, which is to cheat and defraud all persons whose money he receives, and whom he fails to pay before he is compelled to stop business.
4. There must be sufficient equity apparent on the face of a bill to warrant the court in granting the relief prayed; and the material facts on which the complainant relies must be so distinctly alleged as to put them in issue. And if fraud is relied on, it is not sufficient to make the charge in general terms.
5. Where a bill alleged the insolvency of the bank to the knowledge of its officers, and a wrongful neglect to disclose its insolvency to complainant; that by continuing in business it represented itself to be solvent; that complainant, on the faith of such representation and believing the bank solvent, deposited with it a draft; that next morning the bank closed its doors and the draft was thereafter collected, and that by reason of the premises the draft did not become the property of the bank, and the receiver of the bank denied these allegations,—the issue thus framed was sufficient to enable the court to proceed to a decree.
6. The fraudulent intention flowed from the guilty knowledge, and the bank must be held to the consequences of a representation which it knew to be contrary to the fact, and upon which the complainant innocently acted.

[No. 41.]

Argued Dec. 19, 1889. Decided March 3, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York dismissing a suit in equity against the receiver to obtain the proceeds of a draft deposited in the Marine National Bank. *Reversed.*

Opinion below, 23 Blatchf. 489, 27 Fed. Rep. 248.

188 U. S.

Statement by Mr. Chief Justice Fuller:

For more than five years prior to the 6th day of May, 1884, the St. Louis and San Francisco Railway Company had an account with the Marine National Bank of the City of New York. On the 5th day of May of that year it drew a sight draft on the Atchison, Topeka and Santa Fé Railroad Company at Boston, Massachusetts, payable to the order of the Marine Bank, for the sum of \$17,835, an amount due from the latter company, and sent the same to the Marine Bank with a deposit ticket filled up by the assistant treasurer of the San Francisco Company, in the following words and figures:

"Deposited by the St. Louis & San Francisco Railway Co. in the Marine National Bank May 5th, 1884.

Dollars. Cents.

"Bills
"Checks \$17,835."

The messenger who took the draft and deposit ticket to the bank had no special instructions, and handed them to an assistant of the receiving teller, who was absent at the time. The Railway Company's pass-book was then, and had been since April 30, 1884, in the possession of the bank, and no entry was made in it until some days afterwards, and then not by direction of the Railway Company. The assistant receiving teller applied to the assistant cashier for instructions, and was by him directed to receive the draft as cash, and it was so entered on the credit ledger of dealers with the bank, but not with the knowledge or by the request of the Railway Company. The Marine Bank sent the draft to the Atlantic National Bank of Boston for collection and credit, and it was by that bank presented to the Atchison Company on the 6th of May, 1884, and that company at five minutes before one o'clock P. M. of that day delivered its check on the National Bank of North America to the Atlantic Bank, which was presented for payment and paid to the Atlantic Bank on May 7, 1884. The Marine Bank was insolvent when it received the draft, and closed its doors at twenty minutes before eleven o'clock on the morning of the 6th of May, 1884, and never resumed business.

Walter S. Johnston was appointed receiver of the bank on the 13th of May, 1884, and thereupon a correspondence ensued between the receiver and the San Francisco Company, which resulted in an agreement between them that the receiver might retain the proceeds, subject to the right of the San Francisco Company to assert its claim thereto, which it does in this action. It is conceded that the Marine Bank never paid or advanced anything to the San Francisco Company on the draft, and that the latter, at the time the draft was sent to the bank, or at any time since, was not indebted to it. The balance to the credit of the Railway Company in the Marine Bank at nine o'clock A. M. on May 6, 1884, not including the draft, was \$117,981.72, besides some checks it had drawn and which it was obliged to take up.

The treasurer and assistant treasurer of the Railway Company testified that there was no arrangement or understanding, verbal or written, or dealing, to their knowledge, with the Marine Bank, by which the San Francisco Company was authorized or entitled to draw against

out-of-town paper before actual collection, and that no drafts were ever so drawn; that they knew of no such agreement, verbal or in writing; that they drew on what they had and not on what they did not have; that the Railway Company had no occasion to draw against drafts or checks before collection, and did not do so; and that the Company was allowed interest on its daily balances. Four deposits of out-of-town paper, other than that in question, were proven to have been made under the dates of August 23, August 27 and November 8, 1883, and April 10, 1884. The deposit tickets in each case referred to the deposit as "checks." The deposits of August 23, August 27 and November 8 were made up of two items each, but neither was marked on the tickets as cash, and there was no evidence that either of them was. The receiving teller testified that generally foreign paper (paper outside of the City of New York), of large amount, when received, was marked "F," and such a mark in red pencil appeared on the deposit tickets of November 8, 1883, for \$17,860; of April 10, 1884, for \$18,930; and of May 5, 1884, for \$17,835, being the deposit in controversy. The witness said this was done, so "that if any of the officers should ask what certain checks consisted of—if a large deposit—we would be able to tell." These drafts or checks on banks outside of the city were kept on a slip called "Foreign and general office slip," and put in a different pigeon hole from that where domestic paper was placed.

The assistant note-teller had charge of the transmission of paper drawn on banks or persons outside of the City of New York, and testified thus: "Q. And all that you had to do, as it was out-of-town paper, was to transmit it for collection, was it not? A. And see that we got the money back again. Q. Those were all your duties in regard to it? A. Well, I had other duties. Q. What were they? A. To see that the St. Louis and San Francisco Railway Company did not deposit too many large foreign checks as cash. Q. Why did you do so? A. Because I had entire charge of the foreign checks. The foreign checks are usually out five days, and that is five days' interest, and unless those concerned kept a large balance we charged them exchange, and where we paid interest on the balances we then charged interest and exchange where they kept large balances, and for that reason we watched all foreign checks deposited. . . . Q. What were the instructions you received in regard to the St. Louis and San Francisco Railway Company? A. To see whether they were depositing many large foreign checks and how much it cost, and whether it was advisable to get exchange from them. . . . Q. Do you recollect what officer it was who gave you those instructions? A. No, sir. Q. Did you ever after that enforce them? A. I do not understand the meaning of the word 'enforce.' I notified the officers of all large checks deposited by the St. Louis and San Francisco Railway Company. Q. How frequently? A. I don't remember; as often as they came in."

This particular draft was marked "F," and put in the foreign pigeon-hole, and credited as cash by direction of the assistant cashier. The form of letter universally used in transmitting foreign paper for collection was put in by

defendant, and contained this paragraph: "Please return as promptly as possible all unpaid collections protested, unless marked thus X, when please return without protest." In the five instances of the deposit of these out-of-town drafts, they were credited to the San Francisco Company on the bank's books, and the San Francisco Company entered and added their amount on the margin of its check-book.

It appeared from the evidence that the bank had been insolvent for a year, and that it was hopelessly so on Saturday, the third day of May, and until its doors were closed. The receiver said that he got judgment for over \$730,000 on the over-drafts of a firm doing business with the bank, which over-drafts occurred in the last two or three days in one account, and had been running for two or three weeks in the other account; that the over-draft in the individual account of one of the partners amounted to \$140,000; in the firm account, to \$300,000; and in the firm special account, to \$350,000, most of which was before Saturday, the third of May. Estimating the assets of the bank at what they were actually worth, and not at their face value, the deficit, according to the receiver's judgment when he took charge, was over a million and a half of dollars. The bank was really insolvent from the time the indebtedness from the firm in question, which was insolvent, grew to such a point, that, if called and not paid, the bank could not meet its obligations. The president of the Marine Bank was a partner of that firm.

The bill in this case was filed to obtain the proceeds of the draft as the property of the San Francisco Company, and among other things alleged:

"On the said 5th day of May it was well known to the said bank and to its officers, and so the said fact was, that the said bank was insolvent, and, well knowing the fact, the said bank wrongfully neglected to disclose the same to your orator, but by continuing business with open doors, and otherwise representing to your orator and all other persons dealing with it that the said bank was solvent, and, on the faith of such representations, your orator believed the said bank to be solvent, and had no knowledge or suspicion or means of knowing that it was insolvent or in danger of becoming so, and, acting upon such representations and relying on the solvency of said bank, your orator delivered the said draft to it, and the bank received the same for collection, as aforesaid. Thereafter, and on the same day, the said bank, by its cashier, indorsed the said draft as follows: 'Pay Atlantic National Bank of Boston or order, for collection, for account of Marine National Bank of the City of New York,' and transmitted the said draft, so indorsed, to the said Atlantic National Bank for collection."

And "that, by reason of the premises, the said draft, when delivered as aforesaid to the said bank, did not become the property of the said bank, and that your orator did not part with its title to or interest in the said draft, but that it remained the property of your orator, and that the proceeds of the said draft, when collected, likewise did not become the property of the said bank, or of the defendant, but re-

mained always, and still are, the property of your orator, and your orator is entitled to follow them specifically into the hands of the defendant and to recover them from him." Upon final hearing the bill was dismissed, and the opinion of the Circuit Court will be found reported in 28 Blatchf. 489, and in 27 Fed. Rep. 248.

Mr. John E. Burrill, for appellant:

Property in paper received by a banker to be credited to the dealer vests in the banker only when he has become absolutely responsible for the amount to the depositor.

Scott v. Ocean Bank, 28 N. Y. 289; *Dickerson v. Wason*, 47 N. Y. 439; *Metropolitan Nat. Bank v. Loyd*, 25 Hun, 101, 90 N. Y. 581; *Giles v. Perkins*, 9 East, 12; *Thompson v. Giles*, 2 Barn. & C. 422; *Clark v. Merchants Bank*, 2 N. Y. 388; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 688; *National Gold Bank & T. Co. v. McDonald*, 51 Cal. 66; *National Commercial Bank v. Miller*, 77 Ala. 178; *Louisiana v. Bank*, 1 McGloin (La.) 185; *Ex parte Barkworth*, 2 De G. & J. 195; *Ex parte Sargeant*, 1 Rose, 153; *Ex parte Buchanan*, Id. 280; *Story, Agency*, § 228, note 3.

Entry made in the pass-book at the time of the deposit is not sufficient.

National Gold Bank & T. Co. v. McDonald, 51 Cal. 66; *National Commercial Bank v. Miller*, 77 Ala. 178; *Louisiana v. Bank*, 1 McGloin (La.) 185; *Ex parte Barkworth*, 2 De G. & J. 195.

The appellant was not at the time a debtor to the bank and had not drawn against the draft.

Thompson v. Giles, 2 Barn. & C. 422; *Story, Agency*, § 228, note 3.

The appellant is not bound by entries made on the books of the bank.

Mechanics & F. Bank v. Smith, 19 Johns. 115.

There is no dealing between the parties from which an agreement can be implied.

Scott v. Ocean Bank, 28 N. Y. 289.

A trader who has become embarrassed, yet has reasonable hopes that by continuing in business he may retrieve his fortunes, may buy goods on credit.

Nichols v. Pinner, 18 N. Y. 295; *Brown v. Montgomery*, 20 N. Y. 287; *Johnson v. Monell*, 2 Keyes, 655; *Chaffee v. Fort*, 2 Lans. 81; *Cragie v. Hadley*, 99 N. Y. 184; *Furber v. Stephens*, 35 Fed. Rep. 17.

The combination of three circumstances is sufficient to entitle the injured party to relief at law or in equity; first, that the representation is contrary to the fact; secondly, that the party making it knew it to be contrary to the fact; thirdly, that it should be this false representation which gave rise to the contracting of the other party.

Oberlander v. Spiess, 45 N. Y. 175; *Atwood v. Smaller*, 6 Clark & F. 444; *Henderson v. Lacom*, L. R. 5 Eq. 249; *Ship v. Crosskill*, L. R. 10 Eq. 73, 85; 2 Pom. Eq. § 880; *Bayard v. Malcolm*, 2 Johns. 550; *Thomas v. Beebe*, 25 N. Y. 244.

Mr. Charles E. Miller, for appellee:

The deposit of a check in a bank, accepted by it and credited to the depositor, creates a debt and vests the property in the check in the bank.

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Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530; *Cragie v. Hadley*, 99 N. Y. 181; *National Bank of the Republic v. Millard*, 77 U. S. 10 Wall. 152 (19: 897) *Scammon v. Kimball*, 92 U. S. 362, 370 (23: 483, 486); *Libby v. Hopkins*, 104 U. S. 303, 308 (26: 769, 771).

Fraud cannot be imputed to a party who contracts a debt, knowing that he is insolvent, merely from the fact of his insolvency and his omission on a purchase of property on credit to disclose that fact to his vendor.

Nichols v. Pinner, 18 N. Y. 295; *Wright v. Brown*, 67 N. Y. 9; *People's Bank v. Bogart*, 81 N. Y. 108; *Morris v. Talcott*, 96 N. Y. 100.

There is no evidence that the directors of the bank had any knowledge of its condition. Such knowledge cannot be presumed where fraud is charged.

Wakeman v. Dalley, 51 N. Y. 27; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 688.

Mr. Chief Justice Fuller delivered the opinion of the court:

This was not the deposit of a check on the Marine Bank itself. In such a case it was held in *Oddie v. National City Bank*, 45 N. Y. 785, that the check, if received and credited, could not be charged back for want of funds. Nor was it a check on another bank, as to which Church, *Ch. J.*, remarks, a different principle would be applied, as the presumption of agency might arise. It was a sight draft drawn by the San Francisco Company on its debtor in Boston, and collected through the Marine Bank's correspondent at that place. Neither it, nor the money collected upon it, passed into the hands of any third person for value. The collection was made after the Marine Bank had closed its doors. It is not claimed that there was any express arrangement or understanding between the San Francisco Company and the bank that the deposits of out-of-town paper should be treated as cash. Can such an understanding be implied from the mere fact that the San Francisco Company was credited with the draft upon the books of the bank, as if the deposit were of money, although the deposit ticket named it under the head of checks, and that the Company itself added on the stubs of its check-book such deposits to the current amount, coupled with an alleged commercial usage to allow good customers to draw against a credit thus created? In five years of business between them, the San Francisco Company had never drawn against such paper. The evidence of the bank's clerks leaves no doubt that, as to out-of-town drafts for large amounts, the bank kept track of them and reserved the right to charge exchange and also interest for the average time taken in collection, notwithstanding its agreement to pay interest on the daily balances. This was not consistent with the theory of an understanding between the bank and the Company that the title to this and similar drafts should pass absolutely to the bank. If the draft had not been paid, the bank could have canceled the credit, as it clearly accepted no risk on the paper. The draft was entered at its full value, which indicated that it was not discounted, but credited for convenience and in anticipation of its payment.

It is settled law in this court that the holder

of a bank check cannot sue the bank for refusing payment, in the absence of proof that it was accepted by the bank or charged against the drawer (*National Bank of the Republic v. Millard*, 77 U. S. 10 Wall. 152 [19:597]; *First National Bank v. Whitman*, 94 U. S. 843, 844 [24:229,230]; *Laclede Bank v. Schuler*, 120 U. S. 511, 514 [30:704,705]); but the depositor can sue for the breach of the contract to honor his checks. If, under the circumstances disclosed in this case, the only balance the San Francisco Company had was made up of the deposit of this draft, and it had drawn against it, and the bank had declined to honor the check, could the San Francisco Company have sustained an action on the ground of a general commercial usage, when by the course of dealing for five years it had never drawn against paper so deposited? Because banks often let good customers overdraw, do the latter thereby get the right to do so when the bank deems it improper to permit it? Undoubtedly if the San Francisco Company had overdrawn, and this draft had been credited to cover the over-draft, or if the Company had drawn against the draft, the bank could hold the paper until the account was squared. And if the bank had transferred the draft to one occupying the position of a bona fide holder, such transfer would have conferred title on its transferee by reason of its reputed ownership, so far as the latter was concerned. *Metropolitan National Bank v. Loyd*, 90 N. Y. 530.

In that case, as reported in 25 Hun, 101, which was affirmed in 90 N. Y. 530, the court of appeals remarking in reference to the opinion that it "so fully reviews the evidence and the authorities that we should be content with simply expressing our concurrence, if the case had not been sent here by that court as involving a question of law which ought to be reviewed," the supreme court says "that the intention that the check should be received as cash is to be inferred from the fact that the check was due immediately and was drawn on a bank, and for all purposes of the parties was equivalent to so much money, . . . and such intention is confirmed by preceding transactions, admitted by the depositor, in which checks were deposited and entered as cash in his bank book, and that the custom of the bank in its dealings with him was to credit him with all checks as money."

And in *Scott v. Ocean Bank*, 28 N. Y. 289, it was held that "the property in notes or bills transmitted to a banker by his customer to be credited the latter, vests in the banker only when he has become absolutely responsible for the amount to the depositor," and that "such an obligation, previous to the collection of the bill, can only be established by a contract to be expressly proved or inferred from an unequivocal course of dealing."

"Every man who pays bills not then due into the hands of his banker," said Lord Ellenborough in *Giles v. Perkins*, 9 East, 11, 14, "places them there as in the hands of his agent to obtain payment of them when due. If the banker discount the bill or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance."

If there be no bargain that the property

should be changed, the relation resembles that of principal and agent. Mere liberty to draw does not make out such a bargain, particularly where interest is allowed by the banker upon the bills only from the time when their amount is received. *Ex parte Barkworth*, 2 De. G. & J. 194; *Thompson v. Giles*, 2 Barn. & C. 422; *Ex parte Sargeant*, 1 Rose, 153.

The question was one of fact rather than of law, and we think there should be something more in the evidence tending to establish that the San Francisco Company understood that the bank had become owner of the paper, than these mere credits for convenience, before that can be held to be the fact, notwithstanding it may be a recognized usage to allow a customer to draw. So far from there being shown an unequivocal course of dealing tending to support that conclusion, it seems to us the tendency of the evidence is otherwise.

But if there could be any question on that branch of the case, we are unable to see that there could be on the other. This bank was hopelessly insolvent when the deposit was made, made so apparently by the operations of a firm of which the president of the bank was a member. The knowledge of the president was the knowledge of the bank. *Martin v. Webb*, 110 U. S. 7, 15 [28:49, 52]; *Manhattan Bank v. Walker*, 130 U. S. 267 [32:959]; *Crayle v. Hadley*, 99 N. Y. 131. In the latter case it was held that the acceptance of a deposit by a bank irretrievably insolvent constituted such a fraud as entitled the depositor to reclaim his drafts or their proceeds. And the *Anonymous Case*, 67 N. Y. 598, was approved, where a draft was purchased from the defendants, who were bankers, when they were hopelessly insolvent, to their knowledge, and the court held the defendants guilty of fraud in contracting the debt, and said their conduct was not like that of a trader "who has become embarrassed and insolvent, and yet has reasonable hopes that by continuing in business he may retrieve his fortunes. In such a case he may buy goods on credit, making no false representations, without the necessary imputation of dishonesty. *Nichols v. Pinner*, 18 N. Y. 295; *Brown v. Montgomery*, 20 Id. 287; *Johnson v. Monell*, 2 Keyes, 655; *Chaffee v. Fort*, 2 Lans. 81. But it is believed that no case can be found in the books holding that a trader who was hopelessly insolvent, knew that he could not pay his debts and that he must fail in business and thus disappoint his creditors, could honestly take advantage of a credit induced by his apparent prosperity and thus obtain property which he had every reason to believe he could never pay for. In such a case he does an act the necessary result of which will be to cheat and defraud another, and the intention to cheat will be inferred." And it was decided that "in the case of bankers, where greater confidence is asked and reposed, and where dishonest dealings may cause widespread disaster, a more rigid responsibility for good faith and honest dealing will be enforced than in the case of merchants and other traders;" and that "a banker who is, to his own knowledge, hopelessly insolvent, cannot honestly continue his business and receive the money of his customers; and although having no actual intent to cheat and defraud a particular customer, he

will be held to have intended the inevitable consequences of his act; i. e., to cheat and defraud all persons whose money he receives, and whom he fails to pay before he is compelled to stop business."

The circuit court did not, in the present case, express any different view, but held that the bill was not properly framed to present the question. Certainly there must be sufficient equity apparent on the face of a bill to warrant the court in granting the relief prayed; and the material facts on which the complainant relies must be so distinctly alleged as to put them in issue. *Harding v. Handy*, 24 U. S. 11 Wheat. 103 [6: 429]. And if fraud is relied on, it is not sufficient to make the charge in general terms. "Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud or a breach of trust, for which a court of chancery can give relief." *Van Weel v. Winston*, 115 U. S. 228, 237 [29: 384]; *Ambler v. Choteau*, 107 U. S. 558, 591 [27: 322, 324]. The defendant should not be subjected to being taken by surprise, and enough should be stated to justify the conclusion of law, though without undue minuteness.

The bill alleged that the bank was insolvent on the 5th day of May; that this was well known to its officers; that it wrongfully neglected to disclose its insolvency to complainant, and, by continuing business and otherwise, represented to complainant and all other persons dealing with it that it was solvent; that complainant, on the faith of these representations, believed such to be the fact, without suspicion that the bank was, or was in danger of becoming, insolvent; that, acting upon the representations, and relying on the bank's solvency, complainant delivered the draft; that next morning the bank closed its doors, and the draft was collected thereafter; and that, by reason of the premises, the draft or its proceeds did not become the property of the bank. The receiver in his answer specifically denied these averments. We think the issue thus framed was sufficient to enable the court to proceed to a decree. The fraudulent intention flowed from the guilty knowledge, and the bank must be held to the consequences of a representation which it knew to be contrary to the fact, and upon which the complainant innocently acted. Granted that the mere omission to disclose the insolvency, if there had been ground for the supposition that the bank might continue in business, would not be sufficient, there is nothing for such a belief to rest on here. As a matter of pleading, the averment was that the bank wrongfully neglected to make the disclosure; as a matter of fact the condition of the bank was so hopeless that it was its duty to make it. The omission to specifically state in the pleading the degree of insolvency which rendered the bank's conduct fraudulent was not fatal, as the conclusion asserted showed the intention of the pleader, and the particular contention could fairly be tested on the hearing.

The decree is reversed, and the cause remanded with directions to enter a decree in favor of the complainant according to the prayer of the bill
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and to take further proceedings in conformity with this opinion.

Mr. Justice Brewer was not a member of the court when this case was argued, and took no part in its decision.

THE WISCONSIN CENTRAL RAILROAD COMPANY, *Plff. in Err.*,

PRICE COUNTY ET AL.

(See S. C. Reporter's ed. 496-514.)

Property of United States not taxable—taxation of lands to which purchaser is entitled to patent—public lands, when they become private property—grant of land to railroad—present title—location of road—identification of land—when land subject to taxation—issue of patent—indemnity lands—when title to vests—Land Department.

1. A State has no right to tax the property of the United States within its limits.
2. When the donee or purchaser of public lands has complied with the conditions upon the performance of which he is entitled to a patent, and to their use, and the government has ceased to have any interest therein which will justify it in withholding a patent, then the donee or purchaser is the beneficial owner of the lands and they are subject to taxation as his property.
3. After public lands have been entered at the land office and a certificate of entry obtained they are private property, the government agreeing to make a conveyance as soon as it can, and in the mean time holding the naked legal fee in trust for the purchaser, who has the equitable title.
4. Congress, by a grant of land to a Railroad to aid in its construction, conferred a present title to the designated sections along its route, with such restrictions upon their use and disposal as to secure them for the purposes of the grant.
5. The title conferred by the grant was imperfect until the land was identified by the location of the road; but when the route of the road was fixed, the sections granted became susceptible of identification and the title attached to them and took effect as of the date of the grant, so as to cut off all intervening claims.
6. When the road has been built according to the terms of the grant, the company has to the granted lands, designated along its route, an indefeasible title, and the lands are subject to taxation against the company, although patents for them have not been issued.
7. The subsequent issue of the patents by the United States was not essential to the right of the company to the designated and granted lands, although useful as evidence that the grantee had complied with the conditions of the grant.
8. Indemnity lands are those which are, by the grant in aid of the railroad, allowed to be selected in lieu of parcels lost from the designated or granted lands by previous disposition or reservation.
9. No title to indemnity lands becomes vested in any company until the selections are made and they have been approved of, as provided by statute, by the Secretary of the Interior; until which time such indemnity lands are not subject to taxation.

10. The refusal of the Land Department, after the decision of the *Leavenworth Case*, 92 U. S. 733 (23:334), to allow deficiencies, arising in the designated or granted sections before the date of the Act, to be supplied by selections from the indemnity lands and to issue patents for them, was erroneous.

[No. 76.]

Argued Nov. 6, 7, 1889. Decided March 3, 1890.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment reversing a judgment of the State Circuit Court in favor of the Wisconsin Central Railroad Company, plaintiff, restraining defendants from collecting certain taxes upon land. *Reversed, with directions to enter a decree enjoining collection of taxes for indemnity lands and dismissing complaint as to the granted lands.* Reported below, 64 Wis. 579.

Statement by Mr. Justice Field:

In April, 1884, the plaintiff in this suit, the Wisconsin Central Railroad Company, a corporation created under the laws of Wisconsin, was the owner of certain lands situated in the Town of Worcester, in the County of Price, in that State, and had a patent for them from the State bearing date on the 25th of February, 1884, upon which taxes had, in the year 1888, been assessed by that County, although, as claimed by the plaintiff, the title to a part of these lands was at that time in the United States, and to the remainder of them in the State of Wisconsin. Upon a claim that the lands were thus exempt from taxation, the plaintiff, in April, 1884, brought the present suit in a circuit court of the State, to obtain its judgment that the state taxes were illegal, and to enjoin proceedings for their enforcement.

The facts, out of which this claim that the lands were exempt from taxation arose, are briefly these: On the 5th of May, 1864, Congress passed an Act making a grant of lands to the State of Wisconsin to aid in the construction of three distinct lines of railway between certain designated points. (18 Stat. 66.) One of this lines is now held by the plaintiff. The grant in aid of it is in the third section of the Act, the language of which is as follows:

"That there be, and is hereby, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Portage City, Berlin, Doty's Island or Fond du Lac, as said State may determine, in a northwestern direction, to Bayfield, and thence to Superior, on Lake Superior, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, upon the same terms and conditions as are contained in the Act granting lands to said State to aid in the construction of railroads in said State, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved or otherwise disposed of any sections or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, that it shall be lawful for any agent or agents of said State, appointed by the governor thereof, to select, subject to the approval of the Secretary of the Interior, from the lands

of the United States nearest to the tier of sections above specified, as much public land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold and to which the right of pre-emption or homestead has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said State, or by the company to which she may transfer the same, and for the use and purpose aforesaid: *Provided*, that the lands to be so located shall in no case be further than twenty miles from the line of said road."

The seventh section enacted: "That whenever the companies to which this grant is made, or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroads, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed: *Provided, however*, That no patents shall issue for any of said lands unless there shall be presented to the Secretary of the Interior a statement verified on oath or affirmation by the president of said company, and certified by the governor of the State of Wisconsin, that such twenty miles have been completed in the manner required by this Act, and setting forth with certainty the points where such twenty miles begin and where the same end; which oath shall be taken before a judge of a court of record of the United States."

The ninth section declared: "That if said road mentioned in the third section aforesaid is not completed within ten years from the time of the passage of this Act, as provided herein, no further patents shall be issued to said company for said lands, and no further sale shall be made, and the lands unsold shall revert to the United States."

By the Act of Congress of April 9, 1874, the time for the completion of the road and for the reversion of the lands was extended to December 31, 1876. (18 Stat. 28, chap. 82.)

All the lands embraced by section three of the Act of 1864 were granted in 1866 by the State of Wisconsin to the Portage and Lake Superior Railroad Company and to the Winnebago and Superior Railroad Company, respectively, companies which had been incorporated under the laws of that State. (Private and Local Laws of Wisconsin of 1866, chap. 314, sec. 8; chap. 362, sec. 9.) In 1869 the consolidation of these two companies, under the name of the Portage, Winnebago and Superior Railroad Company, was authorized by the State, and, in 1871, the name of the consolidated company was changed to the Wisconsin Central Railroad Company, the plaintiff in this suit.

The Portage, Winnebago and Superior Railroad Company duly filed the location of its road from Stevens' Point to Bayfield on October 7, 1869; and in December following the commissioner of the General Land Office withdrew from sale, pre-emption and homestead entry the odd-numbered sections of land within the twenty-miles limit along the line of the location. The road was built in sections of twenty miles each. Section six and portions of sections five and seven fell within Price County. Section five was completed in February, 1874, section six in December, 1876, and section seven in June, 1877.

The whole number of acres in the odd-numbered sections along the line of the railroad within the ten-mile limits was 1,377,888.98. Of this number 789,622 acres had been disposed of by the United States before the Act of May 5, 1864, was passed, and 161,659.53 were disposed of after its passage and before the line of the road was located in October, 1869.

The plaintiff, the Wisconsin Central Railroad Company, received from the United States, prior to November 16, 1877, patents for the 240,868.54 acres within the place limits, that is, within ten miles on either side, of the line of the road as located, and patents for 203,459.62 acres within the indemnity limits, that is, between ten and twenty miles of the line of the road. On January 9, 1878, the Company received from the United States a patent for 162,622.89 acres, and on August 10, 1878, a patent for 29,396.51 acres, both of these patents covering land within the place limits. No other patents were issued by the United States to the Company previous to the commencement of this suit, and the patents issued did not include the land upon which the taxes were assessed, to restrain the collection of which the suit is brought. Of the lands in question, eleven parcels of forty acres each lay within the place limits. The remainder of the lands lay within the indemnity limits. A list of selections of lands within the place limits claimed by the Company, on account of the sixth section of the road from Stevens' Point to Bayfield, was filed in the local land office on December 5, 1876; they included, among other lands, the eleven forties mentioned. A list of selections of land within the indemnity limits claimed by the Company, on account of the same section of railway, was filed in that office on the 9th and 15th of December, 1876; they included the remainder of the lands referred to in the complaint. Repeated demands were made by the Railroad Company, from the time these lists were filed until after the trial of this cause, for patents covering the lands referred to, but no patents were granted for any of them. A full statement of the efforts to secure patents is given in the testimony of the vice-president and general legal manager of the Company.

It appears from this statement, the accuracy of which is not questioned in any particular, that up to the time of the decision of this court in *Leavenworth, Lawrence & Galveston R. Co. v. United States*, 92 U. S. 733 [23: 634], which was rendered in April, 1876, it had been the practice of the Land Department to allow grantees by the United States of land to aid in

the construction of railroads, whose grants were similar in their terms to the one under consideration here, to take land from the indemnity limits in lieu of lands sold or otherwise disposed of by the United States prior to the passage of the Act, and of lands to which a pre-emption or homestead right had previously attached; but that this practice was subsequently changed in consequence of the language of the court in that case and its supposed decision that indemnity could be allowed only for such lands as were sold or reserved or otherwise disposed of, or to which the right of pre-emption or homestead had attached, between the passage of the Act and the time the line or route of the road was definitely fixed.

The commissioner of the General Land Office, in a letter addressed to the Secretary of the Interior, under date of November 16, 1877, contained in the record, stated that this practice had existed since the inauguration of the railroad land-grant system, but that it would appear from the decision in question that the practice was erroneous; that indemnity could only be allowed for lands sold or disposed of after the passage of the Granting Act, and applying that rule to the grant under consideration the Company had received patents for 41,820.09 acres in excess of the indemnity authorized. The Secretary of the Interior, in answer to this letter, under date of December 26, 1877, referred to the decision of the supreme court, and held in pursuance of it that lands sold or disposed of by the United States prior to the passage of the Act granting lands to the State of Wisconsin were excepted from the operation of the grant, and that indemnity could not be obtained for the lands thus lost—citing from the opinion of the court to show that such was its decision. The Secretary concluded by stating that in accordance with that rule the Company had already received 41,820.09 acres in excess of what it was entitled to, and instructed the commissioner to call upon the Company to relinquish its claim to that quantity of land, in order that it might be restored to the public domain. Repeated efforts were afterwards made by the agents of the Company to induce the Secretary of the Interior to change his views upon that point, but without success. Accordingly no selections of indemnity lands for lands lost from the grant within the place limits along the line of the constructed road known as section six were ever approved by him, and no patents of the United States were issued for such lands, or for any lands within the place limits along that section, until after this suit was commenced.

Having failed to secure any patent from the United States the plaintiff made application in February, 1884, to the State of Wisconsin for a patent, and, on the 25th of that month, a patent by the State was issued to it embracing the lands mentioned in the complaint. When application was thus made to the officials of the State, a careful examination was had by them of the selections in order to determine whether any of the parcels were swamp lands.

There was no controversy concerning the facts of the case, and the trial court found substantially as follows:

1. That the lands described in the complaint were all wild, unoccupied and unimproved

and situated in the Town of Worcester in the County of Price, and were a portion of the lands granted to the State by the third section of the Act of Congress of May 5, 1864, for the purpose of constructing what is now the plaintiff's railroad.

2. That 11 forties of the land described were situated within the ten-mile limits of said grant, and all the rest within the indemnity limits, and all in odd-numbered sections.

3. That all of said lands were assessed in that town in 1888 and put on the tax-roll, and the amount of tax carried out against each respective piece, but were not assessed to the plaintiff by name, or to anyone else, or to "unknown owners," and that none of the real estate included in the assessment-roll for that year was assessed to the owners thereof; that a warrant was attached to said tax-roll, and the roll with said warrant attached placed in the hands of the town treasurer for collection; that the taxes were unpaid thereon, and the town treasurer returned the same to the county treasurer as delinquent.

4. That on the 25th of February, 1884, the plaintiff received a patent from the State for all said lands, and thereby acquired the absolute title in fee to the same; that until then the plaintiff could get no title to the lands and had no right to sell or convey the same; that until they were segregated and identified and the grant applied thereto, the grant was "a float."

5. That the plaintiff's right to the lands was in dispute between the State and the United States; that said lands and others were withheld from the State and the plaintiff by the Secretary of the Interior, and thereby the issue of patents therefor by the United States was delayed; that the plaintiff did not in any manner cause the delay, but, on the contrary, was diligent and persistent in its efforts to procure the patents; that the delay in their issue was caused entirely by the government of the United States and the General Land Office, against the protest of both the plaintiff and the State, and in spite of continued and unintermitted efforts made by both to obtain their issue by the Interior Department.

6. That the lands described had at the time the taxes were levied and assessed thereon in 1888 been selected as lands to which said land grant applied, but said selections had not been approved by the Secretary of the Interior and had not been certified to the State, or in any manner identified as lands for which the plaintiff would eventually receive patents, but, on the contrary, the Secretary of the Interior refused to recognize the right of the State to the lands or to approve the selections made.

As conclusions of law the court found, in effect:

1. That it was not the intent and meaning of the Act of Congress that said lands should be subject to taxation until they had been earned by the plaintiff and patented by the United States; that while they had been in truth earned by the plaintiff before they were assessed for taxation, yet the plaintiff's right to the same and to patents therefor had been denied by the Secretary of the Interior; that the plaintiff could not exercise control over them until it should be determined whether it

was entitled to receive patents for them as part of the lands granted.

2. That the lands were "a float" as long as the plaintiff's right thereto was not admitted and recognized by the Secretary of the Interior, but denied and disputed by him and patents therefor withheld by him against the will and request of the plaintiff, and hence during such time the lands were not subject to taxation by the State.

3. That said lands were not subject to taxation in 1888, and that the taxes levied and assessed thereon for that year were illegal and void for the reason that said lands were then exempt from taxation.

4. That said tax was a cloud upon the plaintiff's title to said lands, and it was therefore entitled to the relief prayed for in the complaint.

Upon these findings judgment in favor of the plaintiff perpetually restraining the defendants from collecting said taxes was entered. The defendants appealed to the Supreme Court of the State, by which the judgment below was reversed, and the cause remanded to the circuit court with directions to dismiss the complaint. To review this latter judgment the cause is brought to this court on writ of error.

Messrs. Edwin H. Abbot, Louis D. Brandeis and Jeremiah Smith, for plaintiff in error:

A State has no power to tax the property of the United States within its borders.

Van Brocklin v. Tennessee, 117 U. S. 151 (29: 845).

All of the public domain within the State remains exempt from taxation, except so far as the United States has voluntarily parted with its title to the same, which act of segregation is ordinarily evidenced by the issue of a patent.

McGoon v. Scates, 78 U. S. 9 Wall. 23 (19: 545).

The only exception to this proposition is found in the rule that where the United States has by contract or statute undertaken to grant away its interest in any part of the public domain, and the land has been identified, all acts have been done to entitle the grantee to a conveyance, and his right thereto has been recognized by the United States, so that he is at liberty to enter upon the full enjoyment thereof, then the mere fact that there has been delay in the issue of a patent will not prevent the land from becoming taxable as property of the grantee.

Carroll v. Safford, 44 U. S. 8 How. 441, 460 (11: 671, 680); *Witherspoon v. Duncan*, 71 U. S. 4 Wall. 210, 218, 219 (18: 389, 343); *Astrom v. Hammond*, 8 McLean, 107; *Carroll v. Perry*, 4 McLean, 25, 27; *Coleman v. Peshtigo Lumber Co.* 30 Fed. Rep. 817; *Wallace v. Seymour*, 7 Ohio, 156; *Gwynne v. Niewanger*, 15 Ohio, 367; *S. C.* 20 Ohio, 556; *Mattheus v. Rector*, 24 Ohio St. 439; *Stockdale v. Webster County*, 12 Iowa, 536; *Iowa Homestead Co. v. Webster County*, 21 Iowa, 221; *Dubuque & P. R. Co. v. Webster County*, 21 Iowa, 235; *Chicago, B. & Q. R. Co. v. Holdsworth*, 47 Iowa, 20; *Iowa R. L. Co. v. Fitchpatrick*, 52 Iowa, 244; *Vinton v. Cerro Gordo County*, 72 Iowa, 155; *People v. Shearer*, 80 Cal. 645; *Donovan v. Kioke*, 6 Neb. 124.

Unless the land be identified and thus segre-

gated from the mass of public land, it will not be taxable, although the other conditions to the vesting of the right to it have been performed.

Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co. 117 U. S. 406, 408 (29:928, 929); *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720 (28:872); *Barney v. Winona & St. P. R. Co.* 117 U. S. 228, 232 (29:858, 860); *Cedar Rapids & M. R. Co. v. Woodbury County*, 29 Iowa, 247; *Cedar Rapids & M. R. Co. v. Carroll County*, 41 Iowa, 153.

Unless every act made a condition to the perfect right to the land has been performed, the land will not be taxable, although the grantee have the full enjoyment of it, and the delay in the performance of the condition be attributable to him.

Kansas P. R. Co. v. Prescott, 88 U. S. 16 Wall. 603 (21:873); *Union P. R. Co. v. McShane*, 89 U. S. 22 Wall. 444 (22:747); *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600 (29:477); *Hunnewell v. Cass County*, 89 U. S. 22 Wall. 464 (22:752); *Central Colo. Imp. Co. v. Pueblo County*, 95 U. S. 259 (24:495); *Lamborn v. Dickinson County*, 97 U. S. 181 (24:926); *Union P. R. Co. v. Dodge County*, 98 U. S. 541 (25:196); *People v. Shearer*, 30 Cal. 645; *Central P. R. Co. v. Howard*, 51 Cal. 229; *Long v. Culp*, 14 Kan. 412; *White v. Burlington & M. R. R. Co.* 5 Neb. 398; *Elling v. Theuton*, 7 Mont. 330; *Musser v. McKee*, 38 Minn. 409.

Unless the claimant's right to the land has remained undisputed and the beneficial enjoyment was undisturbed by the United States, the land was not taxable, although it be subsequently established that the full right in the claimant to the legal conveyance of the land by the government at all times existed.

Dickerson v. Yetzer, 58 Iowa, 681; *Doe v. Iowa R. Land Co.* 54 Iowa, 657; *Grant v. Iowa R. Land Co.* 54 Iowa, 678; *Iowa R. Land Co. v. Fitchpatrick*, 52 Iowa, 244; *Central P. R. Co. v. Howard*, 52 Cal. 227.

The plaintiffs had such an interest in the land as to justify them in applying to a court of equity to prevent a sale for taxes.

Pike v. Wassell, 94 U. S. 711, 715 (24:307, 310).

The tax proceedings not being void upon their face, the facts present a proper case for the application of the doctrine of removal of clouds upon title.

Union P. R. Co. v. Cheyenne, 118 U. S. 516, 525, 527 (28:1098, 1100, 1101); *Kansas P. R. Co. v. Prescott*, 88 U. S. 16 Wall. 603 (21:873); *Union P. R. Co. v. McShane*, 89 U. S. 22 Wall. 444, 448 (22:747, 751); *Northern P. R. Co. v. Traill County*, 115 U. S. 600 (29:477).

The indemnity lands were exempt from taxation because their selection was not approved by the Secretary of the Interior.

Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co. 117 U. S. 406, 408 (29:929); *St. Paul R. Co. v. Winona R. Co.* 112 U. S. 720 (28:872); *Barney v. Winona & St. P. R. Co.* 117 U. S. 228, 232 (29:858, 860); *Cedar Rapids & M. R. Co. v. Woodbury County*, 29 Iowa, 247; *Cedar Rapids R. Co. v. Carroll County*, 41 Iowa, 153; *Botiller v. Dominguez*, 130 U. S. 238 (32:926); *Pinkerton v. Ledoux*, 129 U. S. 346 (32:706); *Bouldin v. Phelps*, 30 Fed. Rep. 547.

The court cannot dispense with the prerequisite.

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site of approval by declaring the refusal arbitrary.

Kihlberg v. U. S. 97 U. S. 398 (24:1106); *Worsley v. Wood*, 6 T. R. 710; *Scott v. Liverpool Corp.* 3 DeG. & J. 334; *Johnson v. Phoenix Ins. Co.* 112 Mass. 49; *Sweeney v. U. S.* 109 U. S. 618 (27:1058); *Martinsburg & P. R. Co. v. March*, 114 U. S. 549 (29:255); *Baldwin v. Starks*, 107 U. S. 463 (27:526); *Gaines v. Thompson*, 74 U. S. 7 Wall. 847 (19:62); *Secretary v. McGarrahan*, 76 U. S. 9 Wall. 298, 315 (19:579, 584); *Litchfield v. Register*, 76 U. S. 9 Wall. 575, 577 (19:681, 682); *U. S. v. Jones*, 181 U. S. 1 (33:90); *Bagnell v. Broderick*, 38 U. S. 18 Pet. 436, 448 (10:235, 241); *Lesieur v. Price*, 58 U. S. 12 How. 59, 74 (18:898, 899); *Rector v. Ashley*, 73 U. S. 6 Wall. 142, 151 (18:738, 735); *Mackay v. Easton*, 86 U. S. 19 Wall. 619, 634 (22:211, 215); *Hot Springs Cases*, 92 U. S. 698, 713 (23:690, 696).

Neither lieu lands nor place lands were taxable because plaintiff's claim to them was disputed and the enjoyment of them denied to it by the United States.

Carroll v. Safford, 44 U. S. 8 How. 441 (11:671); *Witherspoon v. Duncan*, 71 U. S. 4 Wall. 210 (18:339); *Doe v. Iowa R. Land Co.* 54 Iowa, 657; *Grant v. Iowa R. Land Co.* 54 Iowa, 678; *Iowa R. Land Co. v. Fitchpatrick*, 52 Iowa, 244; *Central P. R. Co. v. Howard*, 52 Cal. 227; *Smith v. Ewing*, 23 Fed. Rep. 741.

Messrs. Willis Hand, M. Barry and J. C. Spooner, for defendants in error:

The Act of Congress was a grant *in praesenti*, passing the equitable title to all the lands within the granted limits immediately to the State of Wisconsin. The legal title remained in the United States, to be conveyed by patent to the beneficiary of the grant whenever the terms of the Granting Acts should be fully complied with.

Rutherford v. Greene, 15 U. S. 2 Wheat. 196 (4:218); *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426 (26:578); *Swann v. Lindsey*, 70 Ala. 507; *Wood v. Burlington & M. R. R. Co.* 104 U. S. 329 (26:772); *Tarboreck v. Burlington & M. R. R. Co.* 2 McCrary, 407; *Grinnell v. Chicago, R. I. & P. R. Co.* 108 U. S. 739 (26:456).

In the following cases this court also holds the grant to be *in praesenti* as to lands in the granted limits.

Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 112 U. S. 414 (28:794); *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720 (28:872); *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 406 (29:928).

As to lands within the granted limits an interest passed by virtue of the Act.

St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426 (26:578).

After the United States have parted with the title to lands the courts will determine who has the true title.

Marquez v. Frias, 101 U. S. 473 (25:800); *Johnson v. Townley*, 80 U. S. 13 Wall. 72 (20:485); *Shepley v. Cowan*, 91 U. S. 330 (23:424); *Moore v. Robbins*, 96 U. S. 530 (24:848); *Gaines v. Thompson*, 74 U. S. 7 Wall. 847 (19:62); *Litchfield v. Register*, 76 U. S. 9 Wall. 575 (19:681).

The absolute right in the plaintiff to the lands as against the government was and is

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property: the equitable title was fully vested.

Carroll v. Safford, 44 U. S. 8 How. 441 (11: 671); *Kansas P. R. Co. v. Prescott*, 88 U. S. 16 Wall. 608 (21: 373); *Union P. R. Co. v. McShane*, 89 U. S. 22 Wall. 444 (22: 747).

A State may be estopped, either by its action or failure to act.

State v. Milk, 11 Fed. Rep. 889; *Cahn v. Barnes*, 5 Fed. Rep. 326; *Com. v. Andre*, 3 Pick. 224; *Com. v. Pejepscut*, 10 Mass. 155; *People v. Society for Propagation of Gospel*, 2 Paine, 545; *State v. Bailey*, 19 Ind. 452; *People v. Maynard*, 15 Mich. 463.

The title related back to the date of the grant.

U. S. v. Arredondo, 81 U. S. 6 Pet. 691 (8: 547); *Winona & St. P. R. Co. v. Barney*, 118 U. S. 618 (28: 1109); *St. Joseph & D. C. R. Co. v. Baldwin*, 108 U. S. 426 (26: 578); *Missouri, K. & T. R. Co. v. Kansas P. R. Co.* 97 U. S. 491 (24: 1095); *Schulenberg v. Harriman*, 88 U. S. 21 Wall. 44 (22: 551); *Wood v. Burlington & M. R. R. Co.* 104 U. S. 829 (26: 772); *Tarboreck v. Burlington & M. R. R. Co.* 2 McCrary, 407; *Wheeler v. Merriman*, 30 Minn. 372; 3 Wash. Real Prop. 8d ed. 180, and cases cited, note 4; *Grinnell v. Chicago, R. I. & P. R. Co.* 108 U. S. 789 (26: 456); *Gibson v. Chouteau*, 80 U. S. 13 Wall. 92 (20: 584); *Landes v. Brant*, 51 U. S. 10 How. 348 (18: 449); 5 Cruise, Real Prop. 510, 511.

The taxing power of a State is one of its attributes of sovereignty.

Nathan v. Louisiana, 49 U. S. 8 How. 73 (12: 998); *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 87; *Providence Bank v. Bellings*, 29 U. S. 4 Pet. 514 (7: 939); *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 420 (9: 773); *Carroll v. Perry*, 4 McLean, 25.

Every species of title to and interest in property, whether inchoate or complete, when vested in an individual, is taxable, unless expressly exempted.

Forbes v. Gracey, 94 U. S. 763 (24: 318); *As-trom v. Hammond*, 3 McLean, 107; *Carroll v. Perry*, 4 McLean, 25; *Union P. R. Co. v. McShane*, 89 U. S. 22 Wall. 444 (22: 747); *Witherspoon v. Duncan*, 71 U. S. 4 Wall. 210 (18: 839); *McGoon v. Seales*, 77 U. S. 9 Wall. 23 (19: 545); *Levi v. Thompson*, 45 U. S. 4 How. 19 (11: 837); 1 Desty, Taxation, 318, 340, 342; *Whitney v. Gunderson*, 31 Wis. 859-878; *Stockdale v. Webster County Treas.* 12 Iowa, 586; *Stryker v. Polk County*, 22 Iowa, 131; *Litchfield v. Hamilton County*, 40 Iowa, 66; *Iowa Homestead Co. v. Webster County*, 21 Iowa, 221; *Hale & N. G. & S. Min. Co. v. Storey County*, 1 Nev. 104; *People v. Taylor*, 1 Nev. 109; *State v. Real Del Monte G. & S. Min. Co.* 1 Nev. 523; *State v. Moore*, 12 Cal. 56; *People v. Shearer*, 30 Cal. 645; *People v. Frisbie*, 81 Cal. 146; *People v. Black Diamond Coal M. Co.* 37 Cal. 54; *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 159; *Beltinger v. White*, 5 Neb. 399; *Iowa R. Land Co. v. Fitchpatrick*, 52 Iowa, 244; *Wheeler v. Merriman*, 30 Minn. 372; *Missouri River, Ft. S. & G. R. Co. v. Morris*, 13 Kan. 302; *Prescott v. Beebe*, 17 Kan. 320; *Ross v. Outagamie County*, 12 Wis. 29; *Cooley, Taxation*, 2d. ed. 88, and note 1.

Mr. Justice Field delivered the opinion of the court:

It is familiar law that a State has no power

to tax the property of the United States within its limits. This exemption of their property from state taxation—and by state taxation we mean any taxation by authority of the State, whether it be strictly for state purposes or for mere local and special objects—is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency. If the property of the United States could be subjected to taxation by the State, the object and extent of the taxation would be subject to the State's discretion. It might extend to buildings and other property essential to the discharge of the ordinary business of the national government, and in the enforcement of the tax those buildings might be taken from the possession and use of the United States. The Constitution vests in Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise. *Van Brocklin v. Tennessee*, 117 U. S. 151, 168 [29: 845, 851].

This doctrine of exemption from taxation of the property of the United States, so far as lands are concerned, is in express terms affirmed in the Constitution of Wisconsin, which ordains that the State "shall never interfere with the primary disposition of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to bona fide purchasers thereof, and no tax shall be imposed on land the property of the United States." (Constitution of 1848, art. II. sec. 2.)

It follows that all the public domain of the United States within the State of Wisconsin was in 1883 exempt from state taxation. Usually the possession of the legal title by the government determines both the fact and the right of ownership. There is, however, an exception to this doctrine with respect to the public domain, which is as well settled as the doctrine itself, and that is that, where Congress has prescribed the conditions upon which portions of that domain may be alienated, and provided that upon the performance of the conditions a patent of the United States shall issue to the donee or purchaser, and all such conditions are complied with, the land alienated being distinctly defined, it only remaining for the government to issue its patent, and until such issue holding the legal title in trust for him, who in the meantime is not excluded from the use of the property—in other words, when the government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser, and it does not exclude him from the use of the property—then the donee or purchaser will be treated as the beneficial owner of the land, and the same be held subject to taxation as his property. This exception to the general doctrine is founded upon the principle that he who has the right to property and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation.

Thus, in *Carroll v. Safford*, 44 U. S. 8 How. 441, 460 [11: 671, 680], the complainant had entered certain lands belonging to the United States in the local land office, paid for them the required price, and received from the office a land certificate. Patents were issued for them, but, before their issue, the lands were assessed for taxation and sold for the taxes. The question whether they were subject to taxation by the State after their entry and before the patents were issued was answered in the affirmative. Said the court: "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be canceled by the United States than a patent;" and again: "It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators;" and again: "Lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent-certificate as fully as under the patent. Suppose the officers of the government had sold a tract of land, received the purchase money, and issued a patent-certificate; can it be contended that they could sell it again, and convey a good title? They could no more do this than they could sell land a second time which had been previously patented. When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser; and any second purchaser would take the land charged with the trust."

In *Witherspoon v. Duncan*, 71 U. S. 4 Wall. 210, 218 [18: 339, 342], a similar question arose and was in like manner answered. Said the court: "In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer, and is a void act;" and again: "The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the mean time holds the naked legal fee in trust for the purchaser, who has the equitable title." See also *Kansas P. Railway Co. v. Prescott*, 83 U. S. 16 Wall. 603, 608 [21: 378, 374]; *Union P. Railway Co. v. McShane*, 89 U. S. 22 Wall. 444, 461 [22: 747, 751].

In the light of these decisions, it will be necessary, in order to determine the liability of the property held by the plaintiff to taxation in 1888, to consider the nature and extent of its interest in the property at that time acquired under the grant of Congress of May, 1864, and by its subsequent construction of the road.

Numerous grants of land were made by Congress between 1860 and 1880 to aid in the con-

struction of railroads; some directly to incorporated companies, others to different States, the lands to be by them transferred to companies by whom the construction of the roads might be undertaken. The different Acts making these grants were similar in their general provisions, and so many of them have been, at different times, before this court for consideration, that little can be said of their purport and meaning, the title they transfer, and the conditions upon which the lands could be used and disposed of, which has not already and repeatedly been said in its decisions. Each grant gave a specified quantity of lands, designated by sections along the route of the proposed road, with the exception of such as might, when the line of the road should be definitely fixed, have been disposed of or reserved by the government, or to which a pre-emption or homestead right might then have attached. For these excepted sections, which otherwise would have been taken from those designated along the line of the road, other lands beyond those sections within a specified distance were allowed to be selected. The title conferred was a present one, so as to insure the donation for the construction of the road proposed against any revocation by Congress, except for nonperformance of the work within the period designated, accompanied, however, with such restrictions upon the use and disposal of the lands as to prevent their diversion from the purposes of the grant. It was the practice of the Land Department, as shown by the evidence in this record, up to the decision of *Leavenworth, Lawrence & Galveston Railroad Co. v. United States*, in April, 1876, 92 U. S. 733 [23: 634], to allow deficiencies in the quantity of land intended to be granted, arising from sales or other disposition made before the date of the grant, as well as those made subsequently, and those arising from the attachment of pre-emption or homestead rights, to be supplied from lands lying beyond the original sections, within what were termed the indemnity limits. This practice was held, in *Winona & St. Peter R. Co. v. Barney*, to have been correct. (113 U. S. 618, 625 [28: 1109, 1111].) As the court there said, "the policy of the government was to keep the public lands open at all times to sale and pre-emption, and thus encourage the settlement of the country, and, at the same time, to advance such settlement by liberal donations to aid in the construction of railways. The Acts of Congress, in effect, said: 'We give to the State certain lands to aid in the construction of railways, lying along their respective routes, provided they are not already disposed of, or the rights of settlers under the laws of the United States have not already attached to them or they may not be disposed of or such rights may not have attached when the routes are finally determined. If at that time it be found that of the lands designated any have been disposed of, or rights of settlers have attached to them, other equivalent lands may be selected in their place, within certain prescribed limits.' The encouragement to settlement by aid for the construction of railways was not intended to interfere with the policy of encouraging such settlement by sales of the land, or the grant of pre-emption rights." The court accordingly held that the indemnity clause covered losses

from the grant by reason of sales and the attachment of pre-emption rights previous to the date of the Act, as well as by reason of sales and the attachment of pre-emption rights between that date and the final determination of the route of the road.

After the decision of the court in the *Leavenworth Case* the Land Department changed its practice and refused to allow the deficiencies, arising from sales or other disposition made or from the attachment of pre-emption or homestead rights before the date of the Act, to be made up from selections within the indemnity limits. But that decision did not warrant the change. The question in that case was not, for what deficiencies indemnity could be had, but what lands could be taken for deficiencies which existed. If what was then said indicated that deficiencies which could be supplied were limited to such as might arise after the passage of the Act, it was a mere dictum not essential to the decision, and therefore not authoritative and binding. The refusal of the Land Department, therefore, to allow the deficiencies arising in the sections within the place limits in this case to be supplied by selections from the indemnity lands, and to issue patents of the United States for them, was erroneous.

The question now arises as to how far this refusal affected the legal or equitable title of the Company to the lands taxed in 1883, for which it only obtained a patent in 1884. The lands taxed amounted to eleven parcels of forty acres each lying within the original sections named in the grant, that is, within the ten-miles limit from the line of the road, and the remainder were within the indemnity limits. Neither were allowed, because, by excluding the deficiencies arising before the date of the grant from indemnity, the whole amount of the lands granted had already been patented. So far as the eleven parcels of forty acres each are concerned, the right of the plaintiff to them and to a patent for them had as early as 1877 become complete under the terms of the Granting Act. The line of the railroad had been definitely fixed on the 7th of October, 1869; and the three twenty-mile sections, numbers five, six and seven, were all completed in June, 1877, and supplied with the buildings and appurtenances specified in the Act to entitle the Company to a patent for them from the United States. The title conferred by the grant was necessarily an imperfect one, because, until the lands were identified by the definite location of the road, it could not be known what specific lands would be embraced in the sections named. The grant was therefore, until such location, a float. But when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title attached to them and took effect as of the date of the grant, so as to cut off all intervening claims. *Schulenberg v. Harriman*, 88 U. S. 21 Wall. 44, 60 [22: 551, 554]; *Leavenworth, Lawrence & Galveston R. Co. v. United States*, 92 U. S. 733, 741 [23: 684, 687]; *Missouri, Kansas & Texas R. Co. v. Kansas Pacific R. Co.* 97 U. S. 491, 496 [24: 1095, 1096]; *St. Joseph & Denver City R. Co. v. Baldwin*, 103 U. S. 426, 429 [26: 578, 579]. The road having been built as early as June, 1877, and supplied, as required, with

the appurtenances specified, the Company was entitled to have the restrictions upon the use of the land released. It had then, to the eleven forty-acre parcels which were capable of identification, an indefeasible right or title; it matters not which term be used. The subsequent issue of the patents by the United States was not essential to the right of the Company to those parcels, although in many respects they would have been of great service to it. They would have served to identify the lands as co-terminous with the road completed; they would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved of possibility of forfeiture for breach of them; they would have obviated the necessity of any other evidence of the grantee's right to the lands; and they would have been evidence that the lands were subject to the disposal of the Railroad Company with the consent of the government. They would have been in these respects deeds of further assurance of the patentee's title, and therefore a source of quiet and peace to it in its possessions.

There are many instances in the Reports where such effect as is here stated has been given to patents authorized or directed to be issued to parties, notwithstanding they had previously received a legislative grant of the premises, or their title had been already confirmed. In *Langdeau v. Hanes*, 88 U. S. 21 Wall. 521, 529 [22: 606, 608], we have one of that kind. There this court said: "In the legislation of Congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously-existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously-existing rights because it also embodies words of release or transfer from the government." We are of opinion, therefore, that these eleven forty-acre parcels were in 1883 subject to taxation by the State of Wisconsin. The lands had become the property of the Railroad Company, and there was nothing to hinder their use and enjoyment. For that purpose it is immaterial whether it be held that the Company then had a legal and indefeasible title to the lands, or merely an equitable title to them to be subsequently perfected by patents from the government.

But as to the remainder of the lands taxed, which fell within the indemnity limits, the case is different. For such lands no title could pass to the Company, not only until the selections were made by the agents of the State appointed by the governor, but until such selections were approved by the Secretary of the Interior. The agent of the State made the selections, and they had been properly authenticated and forwarded to the Secretary of the Interior. But that officer never approved of them. Nor can such approval be inferred from his not formally rejecting them. He refused, as already stated, to issue to the Company any patents for any more lands, insisting that it had already received over 40,000 acres

too much, and he directed the commissioner of the General Land Office to require the Company to restore this excess to the government. The approval of the Secretary was essential to the efficacy of the selections, and to give to the Company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the Company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and, if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the Company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts. The doctrine, that until selection made no title vests in any indemnity lands, has been recognized in several decisions of this court. Thus in *Ryan v. Pacific R. Co.* 99 U. S. 382, 386 [25: 305, 306], in considering a grant of land by Congress, in aid of the construction of a railroad, similar in its general features to the one in this case, the court said: "Under this Statute, when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed." And again, speaking of a deficiency in the land granted, it said: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose." The selection had been approved by the Secretary.

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In *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 731 [28: 872, 876], the court, speaking of a previous decision, said: "The reason of this is that, as no vested right can attach to the lands in place—the odd-numbered sections within six miles of each side of the road—until these sections are ascertained and identified by a legal location of the line of the road, so in regard to the lands to be selected within a still larger limit, their identification cannot be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections, or parts of sections, within the primary limits have been lost by sale or pre-emption. It may be still longer before a selection is made to supply this loss."

In *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.* 117 U. S. 408, 408 [29: 928, 929], where the railroad grant as to indemnity lands was substantially similar to the one in this case, and one of the questions was as to the title to the indemnity lands, the court said: "No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the Secretary of the Interior."

In *Barney v. Winona & St. P. R. Co.* 117 U. S. 223, 232 [29: 852, 860], the court said: "In the construction of Land-Grant Acts, in aid of railroads, there is a well-established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department, as of the date of the Act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection."

The same view has been held by different Attorney-Generals of the United States, in their official communications to heads of the departments, where selections of the public lands have been granted, subject to the approval of the Secretary of the Interior (*Cape Mendocino Lighthouse Site*, 14 Ops. Atty-Gen. 50; *Portage Land Grant*, Id. 645), and such has been the consistent practice of the Land Department. The uniform language is, that no title to indemnity lands becomes vested in any company or in the State until the selections are made; and they are not considered as made until they have been approved, as provided by statute, by the Secretary of the Interior.

It follows from these views that the indemnity lands described in the complaint were not subject to taxation as the property of the Railroad Company in 1883. *The judgment of the Supreme Court of Wisconsin must therefore be reversed, and the cause remanded with directions to enter a decree perpetually enjoining the collection of the taxes levied in the year 1883 upon the indemnity lands, and dismissing the complaint as to the eleven parcels of forty acres each; and it is so ordered.*

WILLIAM H. PETERS, Receiver of the
EXCHANGE NATIONAL BANK OF
NORFOLK, VA., *Appl.*,

v.
ROBERT T. K. BAIN ET AL.

JOHN T. GRIFFIN ET AL., Trustees, *Appts.*,

v.
WILLIAM H. PETERS, Receiver of the
EXCHANGE NATIONAL BANK OF
NORFOLK, VA.

(See S. C. Reporter's ed. 670-697.)

Fraudulent conveyances—decisions of state court—Virginia law—assignment, construction of—void in part—bidding on property—previous acts of assignors—shareholder of national bank—confusion of property—right of party—doctrine of election—rights of bank under assignment—notice to trustees.

1. In controversies arising under the Statute of Elizabeth against fraudulent conveyances, involving, as they do, the rights of creditors locally, and a rule of property, this court accepts the con-

clusions of the highest judicial tribunal of the State as controlling.

2. In Virginia, provisions in a deed of trust are not sufficient to justify the inference of a fraudulent intent, except where the inference is so absolutely irresistible as to preclude indulgence in any other.
3. An assignment which includes all the property of the grantors as partners and individually, for the benefit of partnership and individual creditors, should be construed distributively, and the partnership assets be applied to the payment of partnership debts and the individual assets to individual liabilities.
4. As respects fraud in law, where that which is valid in an assignment can be separated from that which is invalid, without defeating the general intent, the maxim, "void in part, void in toto," does not necessarily apply, and the instrument may be sustained notwithstanding the invalidity of a particular division.
5. Fraudulent intent is not a necessary deduction from the permission to the creditors in the second class to avail themselves of their claims in bidding on property sold at auction.

NOTE.—*Confusion of goods.*

The rule that he who produces a confusion of goods shall lose his own is carried no further than necessity requires. When the articles can be easily distinguished and separated, no change of property takes place, but the burden is on the guilty party to distinguish his property or lose it. *Queen v. Wernwag*, 97 N. C. 383.

One who willfully places the property of another in the situation where it cannot be recovered or its true amount or value ascertained, by mixing it with his own, or in any other manner, will be compelled to surrender the whole if his share cannot be distinguished, or respond in damages for the property. *Little Pittsburgh Con. Min. Co. v. Little Chief Con. Min. Co.* 11 Colo. 223.

Where the owner of goods wrongfully mixes them with another's, so that they cannot be identified and separated, he thereby relinquishes them to the other, and is entitled to no part of the intermixture. For he can derive no advantage from his own wrong, and the party without fault is under no duty to surrender any of his goods to prevent loss to the tort-feasor. *The Idaho*, 93 U. S. 575, 585 (23: 978, 981); *Ryder v. Hathaway*, 21 Pick. 298; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Stearns v. Herrick*, 132 Mass. 114; *Adams v. Wildes*, 107 Mass. 123; *Beach v. Schmultz*, 20 Ill. 185; *Brackenridge v. Holland*, 2 Blackf. 377; *Lehman v. Kelly*, 68 Ala. 192; *Seavy v. Dearborn*, 19 N. H. 351; *Robinson v. Holt*, 29 N. H. 557; *Brakeley v. Tuttle*, 3 W. Va. 86; *Ward v. Eires*, 1 Rolle, 133; *Weil v. Silverstone*, 6 Bush, 696; *Sims v. Glazener*, 14 Ala. 695.

But where the goods are distinguishable or the intermingling occurred without the owner's fraud or fault, he will be protected in such way as the circumstances permit. Thus, if the logs of two owners become innocently intermingled past identification, each may have his proportion of the lumber they produce. *Goff v. Brainerd*, 2 New Eng. Rep. 612, 58 Vt. 468; *Smith v. Sanborn*, 6 Gray, 184; *Queen v. Wernwag*, 97 N. C. 383; *Pratt v. Bryant*, 20 Vt. 338; *Wetherbee v. Green*, 22 Mich. 311; *First Nat. Bank v. Dunbar*, 6 West. Rep. 530, 118 Ill. 625; *Martin v. Mason*, 3 New Eng. Rep. 265, 78 Me. 462; *Clark v. Nelson Lumber Co.* 34 Minn. 289.

Or if, for storage, the grain of different persons is by the warehouseman put together pursuant to a usage not objected to, the mass will be treated by the law as their common property, owned in proportion to their respective deposits. *Dole v. Olm-*

stead, 36 Ill. 150; *Brown v. Northcutt*, 14 Or. 529; *Inglebright v. Hammond*, 19 Ohio, 337.

Different owners whose wood is mingled without the fault of either become tenants in common, each entitled to the quantity which he owned before the confusion. *Moore v. Erie R. Co.* 7 Lans. 36.

The doctrine of estoppel by causing or permitting a confusion of goods has never been carried so far as to apply to a case where the goods consisted of distinct articles capable of separation and identification. *Frost v. Willard*, 9 Barb. 440; *Anonymous*, Popham, 38; *Silsbury v. McCoon*, 3 N. Y. 389; *Samson v. Rose*, 65 N. Y. 411; *Brush v. Batten*, 15 N. Y. State Rep. 548.

Whatever alteration in form property may have undergone, the original owner may take it, in its new shape, if he can identify the original materials. 5 Hen. VII. 15; 12 Hen. VIII. 10; *Fitzh. Abr. Bar.* 144; *Bro. tit. Property*, 23; *Betts v. Lee*, 5 Johns. 348; *Brown v. Sax*, 7 Cow. 95; *Curtiss v. Groat*, 6 Johns. 168.

Where a thief or a willful trespasser takes material from the owner and manufactures it,—*e. g.*, makes corn into whiskey,—the title to the property is not changed, but the whiskey belongs to the owner of the original material, and his creditor may sell it on execution against him. *Just. Dig. lib. 10, tit. 4, leg. 12, § 8*; *Vinn. Inst. tit. 1, pl. 25*; *Puffend. Bk. 4, chap. 7, § 10*; *Wood, Inst. § 2*; *Brown, Civ. and Ad. L. 240*; *Betts v. Lee*, 5 Johns. 349; *Curtiss v. Groat*, 6 Johns. 169; 2 Kent, Com. 363; *Snyder v. Vaux*, 2 Rawle, 427; *Ryder v. Hathaway*, 21 Pick. 304; *Wingate v. Smith*, 20 Me. 237; *Willard v. Rice*, 11 Met. 493; *Silsbury v. McCoon*, 3 N. Y. 379, *rev'g* 4 Denio, 382, and overruling 6 Hill, 425; *Rockwell v. Saunders*, 19 Barb. 478; *Dunning v. Stearns*, 9 Barb. 630.

If two persons voluntarily mingle their wheat in a common bin, they become tenants in common; and the sale of the entire mass by one subjects him to an action of trover by the other. *Inst. lib. 2, tit. 1, § 28*; *Vin. Abr. tit. Property, E*; *White v. Osborn*, 21 Wend. 72; *Nowlen v. Colt*, 6 Hill. 461.

Though the form of personal property has been rightfully or wrongfully changed, while the owner has not parted with his title, he may have it wherever found, in its new shape. *Betts v. Lee*, 5 Johns. 348; *Curtiss v. Groat*, 6 Johns. 168; *Babcock v. Gill*, 10 Johns. 287; *Freeman v. McLennan*, 26 Kan. 151; *Stevens v. Briggs*, 5 Pick. 177; *Worth v. Northam*, 4 Ired. L. 102; *Gallup v. Josselyn*, 7 Vt. 384; *Riddle v. Driver*, 12 Ala. 590. The last case was where wood was converted into coal.

6. The violation by the assignors of their fiduciary relations to the bank, of which they were officers, or their treatment of the depositors in the banking firm of which they were members, does not render the assignment of all their property for the benefit of their creditors therefore fraudulent.
7. A shareholder of a national bank cannot transfer his shares when the corporation is failing, or manipulate a release therefrom so as to escape his individual liability for its debts; but the existence of this liability does not prevent assignors from a lawful disposition of their property for the benefit of their creditors.
8. Confusion of property does not destroy the equity to follow misapplied property, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor.
9. Purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose.
10. The doctrine of election means that where two inconsistent rights are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, he must accept or reject one or the other; and so one cannot take a benefit under an instrument and then repudiate it.
11. Creditors have no equity which can estop the bank from receiving what may come to it under the assignment, and in doing so it will not occupy inconsistent positions. That it sought to have the deed set aside does not deprive it of its rights under it, upon the failure of its attack.
12. While, in Virginia, the trustees and beneficiaries in a deed of trust to secure bona fide debts occupy the position of purchasers for a valuable consideration, yet they cannot hold with notice of the fraudulent intent of their grantor, or of the fraud rendering his title void; and notice to the trustees is notice to the beneficiaries. The trustees are chargeable with a knowledge of all the facts that inquiry would have disclosed.

[Nos. 87, 198.]

Argued Nov. 7, 8, 1889. Decided March 3, 1890.

APPEALS from a decree of the Circuit Court of the United States for the Eastern District of Virginia refusing to set aside a deed of assignment as fraudulent and void and decreeing that the receiver of the bank is entitled to the property in the hands of the assignee paid for with moneys of the bank. *Affirmed.*

Statement by Mr. Chief Justice Fuller:

These are appeals from a final decree of the Circuit Court of the United States for the Eastern District of Virginia, entered on the fifteenth day of June, 1886, upon a bill in equity brought by William H. Peters, receiver of the Exchange National Bank of Norfolk, against Robert T. K. Bain, George M. Bain, Jr., and James G. Bain, late partners under the name and style of Bain & Brother, survivors of themselves and Thomas A. Bain, deceased; and John T. Griffin, William W. Old and John B. Jenkins, trustees under a deed of assignment from Bain & Brother; and upon a cross bill filed by said trustees. The cause, after being brought to issue, was referred to a special master, who took evidence and reported thereon, and was heard by Mr. Chief Justice Waite and the circuit judge.

The opinion of the court was delivered by the chief justice, and is as follows:

"This is a suit in equity begun by the receiver of the Exchange National Bank of Norfolk, an insolvent national bank, for a two-fold purpose, that is to say: (1) to set aside an assignment made by the partnership firm of Bain & Bro. and the several members thereof for the benefit of their creditors, and to subject the assigned property to the payment of debts due the bank; and (2) to charge property in the hands of the assignees with the trust in favor of the bank because it was bought with moneys of the bank, which certain members of the firm, who were officers of the bank, had wrongfully used for that purpose.

"The material facts are these: The Exchange National Bank was organized May 18, 1865, with a capital of \$100,000, which was increased November 13, 1866, to \$150,000. Its place of business was Norfolk, Va.

"The firm of Bain & Bro., composed originally of R. T. K. and James G. Bain, began business in Portsmouth, Va., as brokers and private bankers in September, 1865, with an assumed capital of \$5,000, placed to the credit of the two partners on the books. George M. Bain, Jr., was admitted as a partner soon after the business was started and Thomas A. Bain in 1868 or 1869, but he died in 1877. The capital was never increased, but, on the contrary, the drafts of the partners soon exhausted the original credits and much more besides. At the time of the failure the balances against the partners respectively were as follows:

"James G. Bain.....	\$54,796 73
"R. T. K. Bain.....	47,369 23
"George M. Bain, Jr.....	7,146 39
"Thomas A. Bain's estate.....	20,028 41

"In all..... \$129,340 76

"Portsmouth is separated from Norfolk by the Elizabeth River, one place being on one side of the river and the other immediately opposite on the other. On the 7th of July, 1870, the firm became shareholders in the bank, and the next day George M. Bain, Jr., was elected cashier. This office he held until April 2d, 1885. R. T. K. Bain was elected a director January 2, 1872, and he served in that capacity all the time thereafter during the existence of the bank. James G. Bain was elected assistant cashier August 11, 1873, and he held that office until January 11, 1881, when he was made vice-president, in which capacity he acted until the end. Thomas A. Bain was elected a director January 11, 1876, and this office he held until his death.

"On the 9th of September, 1873, the capital stock of the bank was increased from \$150,000 to \$200,000. The names of the subscribers are not given and no money was paid on that day, but the whole amount of \$50,000 was carried in the receiving teller's cash as a cash item until October 14, 1873, when the following parties gave their checks on the bank for the following amounts:

"Bain & Bro.....	\$25,000
"John B. Whitehead.....	15,000
"James H. Toomer.....	5,000
"George M. Bain, Jr.....	5,000

"In all..... \$50,000

"Certificates of stock were issued to these

parties, respectively, for the shares represented by their several checks. On the 10th of May, 1874, the stock was increased to \$300,000, R. H. McDonald, of California, taking and paying for the whole of the additional amount.

"At the time of the failure of the bank the following persons held shares as follows:

"Bain & Bro.....	582 shares-
"George M. Bain, Jr.....	232 do.
"James G. Bain.....	91 do.
"R. T. K. Bain.....	91 do.
"Thomas A. Bain's estate.....	91 do.
"George M. Bain, Jr., and John B. White-head.....	100 do.

"In all.....1,187 do.

"Very soon after Bain & Bro. became connected with the bank they began to absorb its funds. As they wanted money they got it with or without security, as was most convenient for them. They had no direct connection in their own private banking business with the bankers' clearing-house at Norfolk, but they were represented in that association by the Exchange Bank, which paid all balances against them, and these at some times amounted to very large sums. The commercial and business paper which they took at their banking-house in Portsmouth was largely rediscounted for them at the bank, and on the 31st of March, 1885, their indebtedness to the bank has been stated approximately as follows:

"Bain & Bro's notes, etc., undorsored and unsecured.....	\$300,000 00
"Notes of others indorsed by them.....	593,251 99
"Cash tickets.....	211 00
"Bain & Bro's notes indorsed by bank and discounted in New York.....	50,000 00

"In all.....\$1,443,462 99

"In addition to this George M. Bain, Jr., and James G. Bain each owed the bank very considerable sums. Such being the condition of affairs, the comptroller of the currency required the bank to reduce at once the unsecured debt of Bain & Bro. and to make good the deficiency in its reserve fund. In consequence of this the firm on the 31st of March sold to the bank the following stocks and bonds:

"Seaboard Compress Company stocks.....	\$300,000
"Meherrin Valley Railroad bonds.....	200,000
"Southern Telegraph bonds, of the par value of \$140,000, at.....	70,000

"In all.....\$570,000

—and guaranteed that the same should yield the amount for which they were taken whenever put on the market and sold. This guarantee was secured by a transfer of the interest of the firm in the Richmond Cedar Works, and also in \$80,000 of Southern Telegraph bonds held as collateral security. This being done, and the firm also agreeing not to assign their other property for the benefit of creditors with preferences against the bank, notes of the firm and other indebtedness to the amount agreed on as the value of the stocks and bonds were surrendered and the unsecured debt thereby nominally reduced. While some of the stocks and bonds thus transferred had been before that time in the possession of the bank or some of its officers, the evidence does not establish the fact that they had been in any way pledged, or that they could be legally held by the bank as security. They were all, so far as appears, the property of the firm, free of any specific claim of the bank. The value of the stocks and

bonds thus transferred falls between two and three hundred thousand dollars short of the amount for which they were taken, and the Richmond Cedar Works stock and Southern Telegraph bonds, held as collateral to the guaranty against this deficiency, are of but little value.

"What was thus done did not satisfy the comptroller, and on the 2d of April, 1885, he took possession of the bank for the purpose of winding up its affairs. The banking-house in Portsmouth closed its doors at the same time. This produced great excitement both in Portsmouth and Norfolk, and resulted in the assignment which is now attacked. Mr. Old, one of the assignees, is an attorney-at-law, and was retained as counsel for the firm. He advised them in all their matters and drafted the assignment. He was informed of the agreement which had been made not to assign with preferences against the bank, and knew generally of the large indebtedness of the firm and of its members to the bank. He also knew of the transaction between the bank and the firm on the 31st of March, and, hearing that it was the intention of the creditors of the bank to enjoin the assignment, he made haste to have it executed and recorded before anything of that kind was done.

"The actual value of the property which passed by the assignment does not exceed five hundred thousand dollars. The property consists very largely of real estate in Portsmouth and Norfolk County, the title to most of which was in R. T. K. Bain. The books of the firm are entirely unreliable. In fact, no general ledger was ever kept, and transactions to enormous amounts can only be traced by memoranda on slips of paper with the help of the explanations of R. T. K. Bain, who was the principal manager. No accounts at all were kept with the bank, and everything, so far as Bain & Bro. were concerned, was found in the greatest confusion.

"After the death of Thomas A. Bain the business of the firm was conducted in all respects as it had been before. The indebtedness of the firm to depositors and otherwise at the time of the failure has not been accurately determined, but claims of depositors have already been proved against the trust to more than \$750,000, and it is not unlikely that the entire indebtedness, other than that to the bank, may approach a million of dollars.

"The money received by the firm from the bank was generally mingled with that which was got from other sources, and it has been impossible to trace it directly into property now in the hands of the assignees, except in the following cases:

"Real Estate.

"1. Inventory No. 22, bought May, 1876.....	\$650 00
"2. Inventory No. 50, bought September, 1881.....	500 00
"3. Inventory No. 58, bought April, 1884.....	1,137 45
"4. Inventory Nos. 65, 66, 67, bought August, 1881, and October, 1882, \$768.34 and \$1,865.16.....	2,633 50

"Colorado Mines.

"5. Boomerang, bought August 30, 1884.....	16,333 00
"6. Laura Dunmore, bought August 4, 1884.....	5,000 00

"Personalty.

"7. Dismal Swamp Canal bond, bought December, 1880.....	2,100 00
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*8. Seaboard and Roanoke Railroad Co's stock, 1 share, bought about 1879.....	90 00
*9. Ocean View Railroad and Hotel stock, 122 shares, bought October, 1880.....	6,100 00
*10. Chesapeake and Idaho Gold and Silver Mining Co's stock, 625 shares, bought after 1881.....	7,812 00
*11. Guano 'ex. Mt. Edgecomb,' paid for by Exchange National Bank February 15, 1884. \$59,725.97, part thereof on hand April 6th, 1885, and other parts in open accounts due for sales thereof.....	15,084 51
*12. Norfolk and Ounay Mining Co's stock, 6,114 shares, whereof the assignees hold 3,602 shares, which cost \$25 per share.....	90,050 00
*13. Personal estate of Jas. G. Bain.....	1,931 25

"1. As to the trust resulting to the bank by reason of the wrongful and unlawful use of its funds by its officers in the purchase of property for the firm or the several members thereof, this branch of the case divides itself into two parts, the first relating to property which was purchased with moneys that can be identified as belonging to the bank; and, second, to that which was bought and paid for by the firm out of the general mass of moneys in their possession, and which may or may not have been made up in part of what had been wrongfully taken from the bank.

"As to the first of these classes of property we entertain no doubt that the trust exists, and that it may be enforced by the receiver unless the assignees of Bain & Bro. occupy the position of bona fide purchasers for a valuable consideration without notice. The evidence shows beyond doubt that the affairs of the bank were managed almost exclusively by the members of the firm. The funds of the bank were under the immediate control of its officers and agents, and consequently as its trustees. These funds were converted by them, regardless of their duty as trustees, into this particular property, which still exists *in specie*. No money was used in these purchases other than such as was taken directly from the bank for that purpose. Under these circumstances the property stands in the place of the money used, and it might have been reclaimed by the bank at its election any time before the rights of innocent third parties intervened. This is elementary. The receiver succeeded to the rights of the bank in this particular.

"The property in the second class, however, occupies a different position. There the purchases were made with moneys that cannot be identified as belonging to the bank. The payments were all, so far as now appears, from the general fund then in the possession and under the control of the firm. Some of the money of the bank may have gone into this fund, but it was not distinguishable from the rest. The mixture of the money of the bank with the money of the firm did not make the bank the owner of the whole. All the bank could in any event claim would be the right to draw out of the general mass of money, so long as it remained money, an amount equal to that which had been wrongfully taken from its own possession and put there. Purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose. Nothing of the kind has been attempted here, and it has not even been shown that when the property in

this class was purchased the firm had in its possession any of the moneys of the bank that could be reclaimed *in specie*. To give a *cestui que trust* the benefit of purchases by his trustees, it must be satisfactorily shown that they were actually made with the trust funds.

"In Virginia an assignee for the benefit of creditors is deemed a purchaser for a valuable consideration. This, it is conceded, has been established by a long line of judicial decisions, and is now a rule of property in that State. As such it is binding on us as authority, but we think in this case the assignees are chargeable with notice of the equities of the bank. They may not have had actual knowledge of the wrongful conversion of the moneys of the bank into the property which has now been identified as such, but it is clear that Mr. Old, who alone of the assignees was present during the negotiations which preceded the assignment, had full notice of the confusion which existed in the affairs of the bank, as well as those of the firm, and of the intimate relations which for a long time existed between the two institutions. The assignment was hastened to prevent further complications, and we have no hesitation in holding that the assignees took title subject to any equities that might be found to exist in favor of the bank. They were put on inquiry, which they avoided to save what they could. Under these circumstances we hold that the receiver is entitled to a surrender by the assignees of such of the property which it is found had actually been purchased with the moneys of the bank as he elects to take, but of no other.

"2. As to the assignment. By a Statute of Virginia a creditor may file a bill to set aside a conveyance by his debtor on the ground of fraud without having first obtained a judgment. This suit was therefore properly brought. We find no evidence whatever of any actual fraudulent intent on the part of the firm, or either of the partners, to hinder and delay their creditors. They devoted all their property, partnership and individual, of every kind, to the payment of their debts. Nothing whatever was kept back. It is true some creditors were preferred over others, but this is allowable in Virginia. From the case of *Skipwith v. Cunningham*, 8 Leigh, 271, decided in 1837, until now such has been the recognized law of the State, and this was conceded in the argument.

"It is a matter of no importance in this connection that the debt to the bank was created by fraud or that the assignors were shareholders in the bank and liable as such to assessments by the comptroller of the currency to meet its debts. Fraud in the creation of an unpreferred debt is not ground for setting aside an assignment for the benefit of creditors which is otherwise valid, and the shareholder of an insolvent bank is no more prohibited from preferring creditors as against his liability in that capacity than he is as against anyone else that he owes. The assignment does not in any respect change the liability of the shareholders; that was fixed on the failure of the bank before the transfer was made. As has already been shown, so much of the property assigned as is charged with a trust in favor of the bank can be reached in the hands of the assignees. The

promise not to assign with preferences against the bank does not of itself avoid such an assignment for fraud.

"It is claimed, however, that the deed is fraudulent and void on its face—(1) because it appropriates partnership assets to the payment of individual debts in preference to the debts of the partnership; and (2) because of the peculiar provision which is made for bidding by the creditors of the second class at any public sale that may be made of the assigned property.

"As to the first of these objections it is sufficient to say that as early as 1837 the Supreme Court of Appeals of Virginia decided, in the case of *McCullough v. Sommerville*, 8 Leigh, 418, that a provision like that contained in this deed did not vitiate the assignment, but that a court of equity would, if required, so control the administration of the trust as to apply the partnership property to the payment of the partnership debts in preference to those of the individual partners, and the individual property to individual debts. This ruling was followed in *Gordon v. Cannon*, 18 Gratt. 887, decided in 1868, and its authority was recognized by all the judges, though there was some difference of opinion as to its applicability to the particular facts of the latter case. We see no reason to depart from what seems now to be the recognized rule of decision in the State, and we have no hesitation in saying that if there ever can be a case where such an assignment ought to be sustained it should be in this.

"The evidence discloses such a mingling of partnership and individual assets, and of partnership and individual debts, as to make it difficult in some cases to separate the one from the other. After a long and careful investigation of the whole matter, a separation may now have been made which approximates correctness, but when the assignment was made it is not probable that this could easily have been done. All the property, including that of the firm and that belonging to the several partners individually, has been put into the trust, and in the administration may, if necessary, be so marshalled as to prevent the creditors of the individual partners from getting an illegal advantage over those of the partnership, and *vice versa*; at any rate, we find nothing which, under the circumstances of this case, viewed in the light of the decisions of the highest court of Virginia, will render the whole assignment fraudulent and void as to the bank, and subject the property to the payment of its debt in preference to all others, as it is claimed should be done.

"It will be time enough to consider in what way the trust ought to be administered when a case is made for that purpose.

"This brings us to the consideration of the bidding clause of which complaint is made, and as to this it may be said there is no provision which can in any manner result to the advantage of the assignors in opposition to the creditors, for until the creditors are all paid in full the assignors can get nothing. If payment is made, it matters not to the creditors how it is done. In no event can any but the first and second class creditors be affected injuriously, and they are not here complaining. Although the bank is named as a creditor in each of the classes, the object of the present suit is not to

control the administration of this branch of the trust, but to set aside the assignment altogether.

"The only question we have now to consider, therefore, is whether this particular provision is fatal to the whole assignment. There is nothing whatever in the instrument to show that if it had been supposed this direction to the assignees could not legally be followed, the assignment would not have been made in its present form with this provision left out. On the contrary, everything looks the other way, for the assignees are authorized to sell at either public or private sale, according to their discretion, and it is only when the sale is public that the bidding clause becomes operative. The evident purpose was to stimulate bidding, not to give one creditor an unconscionable preference over another, nor to secure any special advantage to the assignors. It is not such an essential part of the scheme of the trust as to make it vital.

"At most it is a mere appendage which may be lopped off without injury to the main purpose of the instrument. Its only effect, so far as the deferred creditors are concerned, must be for their advantage, because the more the property sells for the greater will be the chances of paying those preferred in full and leaving something for those who are unpreferred.

"No creditor can have an assignment for the benefit of creditors set aside at his suit, except it be on the ground that he has been defrauded. If this particular provision operates as a fraud upon those who are affected by it, relief can undoubtedly be had in some appropriate proceeding for that purpose, but that is not, as has been seen, the purpose of the present suit.

"Our conclusion is that the assignment is valid, but that the receiver is entitled to the surrender to him by the assignees of such of the property in their hands bought and paid for with the moneys of the bank as he elects to take."

A decree in accordance with the opinion was thereupon entered, and from it the receiver and the trustees respectively appealed.

The receiver assigns errors as follows: That the court erred (1) in refusing to set aside the deed of assignment of Bain & Bro. as fraudulent in fact; (2) in failing to declare the assignment void because executed in fraud of sections 5151 and 5234 of the Revised Statutes of the United States; (3) in holding that the receiver was entitled "to a surrender by the assignees of such of the property which it is found had actually been purchased with the moneys of the bank, but of no other;" (4) in holding that the assignment "was made and executed without any actual fraudulent intent on the part of the said grantors or either of them to hinder and delay their creditors;" (5) in holding "that the said deed of assignment is not fraudulent and void on its face."

The trustees assign as error that the court erred (1) in finding that the trustees were to be considered as affected by constructive notice, as to certain of the property held by them, that it had been purchased with the money of the bank, and that the receiver was entitled to receive so much thereof as he elected to take, and was not, by making such election and receiving

such property, estopped from receiving the benefit of the said deed of trust in favor of the Exchange National Bank; (2) in the amount of property decreed to have been traced; (3) in decreeing that as to property purchased with the money of the Exchange National Bank, and traced into such property, there was a resulting trust in favor of the bank, of which the trustees were to be considered as having had constructive notice; (4) in decreeing that the costs of the suit be paid out of the trust funds in the hands of the trustees.

Messrs. Theodore S. Garnett and William J. Robertson, for receiver:

It was plainly proper to set aside the deed as fraudulent in fact and altogether void.

Russell v. Winne, 87 N. Y. 591; *Grover v. Wakeman*, 11 Wend. 194.

If a man mixes trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his own.

Frith v. Cartland, 2 Hem. & M. 417, 420.

The capital stock of a moneyed corporation is a fund for the payment of its debts.

Upton v. Tribilcock, 91 U. S. 47 (23: 203).

Unpaid stock is a part of the assets of the company.

Sanger v. Upton, 91 U. S. 60 (23: 221); *Bowden v. Santos*, 1 Hughes, 161.

Any arrangement which disperses this fund, or even converts it into common assets, is void as against creditors who have given credit on the faith of it.

Thompson, Liability of Stockholders, § 237; *Savoy v. Hoag*, 84 U. S. 17 Wall. 610 (21: 731); *Adler v. Milwaukee Pat. Brick Mfg. Co.* 13 Wis. 60; *Hightower v. Thornton*, 8 Ga. 495; *Allen v. Montgomery R. Co.* 11 Ala. 437; *Ward v. Griswoldville Mfg. Co.* 16 Conn. 599; *Nevitt v. Port Gibson Bank*, 6 Smedes & M. 513; *Wood v. Dummer*, 3 Mason, 309.

Confusion does not destroy the equitable right to follow misapplied property, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor.

Frelinghuysen v. Nugent, 36 Fed. Rep. 229; *Pennell v. Deffell*, 4 DeG. M. & G. 872; *Frith v. Cartland*, 2 Hem. & M. 417; *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696; *McLeod v. Evans*, 66 Wis. 401; *Baltimore Cent. Nat. Bank v. Conn. Mut. L. Ins. Co.* 104 U. S. 54 (26: 693); *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *People v. City Bank of Rochester*, 96 N. Y. 32; *Farmers Nat. Bank v. King*, 57 Pa. 202; *Peak v. Elliott*, 30 Kan. 156; *Arnold v. Robbins*, 40 N. J. Eq. 723; *Metzner v. Bauer*, 98 Ind. 428.

When conveyances are attacked for fraud, the defendants should be prepared to meet the allegations of unfairness.

Bishop, Insolvent Debtors, § 20, p. 227; *Newman v. Cordell*, 43 Barb. 448.

The deed is fraudulent in law, because it contains the "bidding clause," and appropriates partnership assets to pay individual debts.

Boardman v. Halliday, 10 Paige, 223; *Barnum v. Hempstead*, 7 Paige, 568; *Averill v. Loucks*, 6 Barb. 470; *Sheldon v. Dodge*, 4 Denio, 217; *Strong v. Skinner*, 4 Barb. 546; *Kercheis* 133 U. S.

v. Schloss, 49 How. Pr. 284; *Grover v. Wakeman*, 11 Wend. 187, 25 Am. Dec. 624.

Messrs. Richard Walke, Leigh R. Page and James Alfred Jones, for Griffin et al., Trustees:

In Virginia, trustees in a deed of trust to secure debts, or in a deed of general assignment for the benefit of creditors, are purchasers for value, and do not occupy the position of the grantor towards the subject matter.

Wickham v. Lewis, 18 Gratt. 427; *Evans v. Greenhow*, 15 Gratt. 153, 156; *Exchange Bank v. Knox*, 19 Gratt. 789, 747; *Sipe v. Earman*, 26 Gratt. 563, 570; *Shurtz v. Johnson*, 28 Gratt. 657, 666, 667; *Williams v. Lord*, 75 Va. 390, 404; *Gordon v. Rizey*, 70 Va. 691, 698.

This court will be governed by Virginia law in construing the deed in question.

Fairfield v. Gallatin County, 100 U. S. 47, 54, 55 (25: 544, 546); *Burgess v. Seligman*, 107 U. S. 20, 88, 84 (27: 859, 865); *New Orleans C. & B. Co. v. Montgomery*, 95 U. S. 16 (24: 346); *Kesner v. Trigg*, 98 U. S. 50, 53 (25: 83).

The deed is to be construed distributively; the partnership assets are to be applied to the payment of partnership liabilities, and the individual assets to individual liabilities.

McCullough v. Sommerville, 8 Leigh, 415; *Gordon v. Cannon*, 18 Gratt. 388.

Where an honest intent on the part of the debtor is shown, to devote his whole property, without reservation or secret trust, for the benefit of his creditors, the deed will be upheld.

Sipe v. Earman, 26 Gratt. 563-567; *Dance v. Seaman*, 11 Gratt. 778; *Cochran v. Paris*, 11 Gratt. 348; *Lewis v. Caperton*, 8 Gratt. 148; *Kewan v. Branch*, 1 Gratt. 274; *Wickham v. Lewis*, 18 Gratt. 427; *Brockenbrough v. Brockenbrough*, 31 Gratt. 590, 591; *Williams v. Lord*, 75 Va. 390, 400; *Young v. Willis*, 82 Va. 293-297, 298.

In constructive fraud, if the part of the instrument constructively fraudulent be severable, it will not vitiate and annul the whole.

Darling v. Rogers, 22 Wend. 483; *Salmon v. Stuyvesant*, 16 Wend. 328-333; *Parks v. Parks*, 9 Paige, 108, 116; *Curtis v. Leavitt*, 15 N. Y. 12; *Harrison v. Harrison*, 36 N. Y. 543; *Kane v. Gott*, 24 Wend. 641; *Hartun v. Corse*, 2 Barb. Ch. 506; *Lang v. Ropke*, 5 Sandf. 871; *Van Schuyver v. Mulford*, 59 N. Y. 432; *Manice v. Manice*, 43 N. Y. 304; *Kilpatrick v. Johnson*, 15 N. Y. 322; *Leavitt v. Wolcott*, 65 How. Pr. 57; *Denny v. Bennett*, 123 U. S. 496 (32: 494); *U. S. v. Bradley*, 35 U. S. 10 Pet. 344 (9: 448).

He who accepts a benefit under a deed or will must adopt the whole of the instrument, renouncing every right inconsistent with it.

Gregory v. Gates, 30 Gratt. 84; *Gibson v. Gibson*, 17 Eng. L. & Eq. 849; *Penn. v. Guggenheimer*, 76 Va. 346; *Watson v. Watson*, 128 Mass. 154, 155; 2 Herman, Estoppel, § 1028; *Irwin v. Tabb*, 17 Serg. & R. 423; *Adlum v. Yard*, 1 Rawle, 170; *Chapin v. Thompson*, 89 N. Y. 278; *Moore v. Butler*, 2 Sch. & Lef. 267; *Burrill, Assignments*, § 479.

Mr. Chief Justice Fuller delivered the opinion of the court:

The opinion of the late chief justice clearly delineates the grounds upon which the circuit court proceeded and minimizes our labors in the disposition of this case.

The deed of assignment was attacked as fraudulent in law and in fact.

The Statute of Elizabeth, chap. 5, against fraudulent conveyances, has been universally adopted in American law as the basis of our jurisprudence on that subject (Story, Eq. Jur. § 353), and re-enacted in terms, or nearly so, or with some change of language, by the Legislatures of the several States.

In Virginia the Statute reads as follows: "Every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor." Virginia Code 1873, chap. 114, § 1, p. 896.

In controversies arising under this Statute, involving, as they do, the rights of creditors locally, and a rule of property, we accept the conclusions of the highest judicial tribunal of the State as controlling. *Jaffray v. McGehee*, 107 U. S. 361, 364 [27: 495, 496]; *Lloyd v. Fulton*, 91 U. S. 479, 485 [23: 363, 365]; *Allen v. Massey*, 84 U. S. 17 Wall. 351 [21: 542].

We understand counsel to contend that the deed contains certain provisions which must so hinder, delay and defraud creditors that fraud in its execution is to be conclusively presumed without regard to the intention of the parties.

The doctrine in Virginia, settled by a long and uninterrupted line of decisions, is that while there may be provisions in a deed of trust of such a character as of themselves to furnish evidence sufficient to justify the inference of a fraudulent intent, yet this cannot be so except where the inference is so absolutely irresistible as to preclude indulgence in any other. Hence provisions postponing the time of the sale and reserving the use of the property to the grantor meanwhile, though perishable and consumable in the use; permitting sales on credit, for the payment of surplus after satisfaction of creditors secured; the omission of a schedule or inventory,—and the like,—have been regarded as insufficient to justify the court in invalidating the deed for fraud in point of law. The fraudulent intent is held not to be presumed even under such circumstances, and in its absence the fact that creditors may be delayed or hindered is not of itself sufficient to vacate the instrument, while the right to prefer one creditor over another is thoroughly established. *Dance v. Seaman*, 11 Gratt. 778; *Brockenbrough v. Brockenbrough*, 31 Gratt. 590; *Young v. Willis*, 82 Va. 293.

When, then, it is claimed in this case that the deed is fraudulent in law, "because it appropriates partnership assets to pay individual debts in preference to the debts of the partnership," we should naturally expect to find that the supreme court of appeals had held that where, as here, the conveyance included all the property of the grantors, as partners and

individually, for the benefit of partnership and individual creditors, it should be construed distributively, and the partnership assets be applied to the payment of partnership debts and the individual assets to individual liabilities. And such is the fact. *McCullough v. Somerville*, 8 Leigh, 415; *Gordon v. Cannon*, 18 Gratt. 888. And, as pointed out by Mr. Chief Justice Waite, the difficulty, at the time the assignment was made, attendant upon any attempt to separate the partnership and individual assets, and the partnership and individual debts, would be considered, under the view of the state courts, in passing upon the question of intent to defraud in failing to specifically distinguish between them.

The only other ground of objection on this branch of the case relates to the following clause in the deed:

"And the said trustees, for the purpose of executing this trust, shall at once take charge of all the property and effects hereby conveyed, and make an inventory thereof, and proceed to collect the choses in action and all evidences of indebtedness, and to convert the real and personal property into cash as soon as possible; and they may make sale of the real and other personal estate hereby conveyed, at public auction or private sale, at such time or times and place or places and after such notice as to them shall seem best; and they may make such sale upon such terms and conditions as to them shall seem best, except that at any sale of said property, real or personal, at public auction, any creditor secured by this deed in the second class above enumerated shall have the right to purchase any part or parcel of said property so sold and pay the said trustees therefor at its full face value the amount found due such purchaser secured by this deed, or so much thereof as may be necessary to enable such creditor to complete the payment of his purchase money; and, to enable as many creditors as possible to become bidders on these terms, the said trustees may have the real estate hereby conveyed, or any part thereof, laid off into lots or parcels, as they may think best. And upon the conversion of the said property hereby conveyed into money the said trustees shall distribute the same to the creditors hereby secured in the order hereinbefore named with all diligence, and in the distribution between those creditors who may have purchased property and paid for the same under the provisions of this deed with a part of the money found due them respectively, and those who made no purchase, the trustees shall observe such rule of equality as will be just and proper."

But can it be properly concluded that this provision is irreconcilable with any other inference than that of fraud? And even if so much of it as allows the creditors in the second class to bid and use their claims as purchase money were invalid, ought the whole instrument to be therefore declared of no effect? We agree with the circuit court that, as respects fraud in law as contradistinguished from fraud in fact, where that which is valid can be separated from that which is invalid, without defeating the general intent, the maxim, "void in part, void *in toto*," does not necessarily apply, and that the instrument may be sustained

notwithstanding the invalidity of a particular provision. *Denny v. Bennett*, 128 U. S. 489, 496 [32: 491, 494]; *Cunningham v. Norton*, 125 U. S. 77 [31: 624]; *Muller v. Norton*, 132 U. S. 501 [33: 897]; *Darling v. Rogers*, 22 Wend. 483; *Howell v. Edgar*, 4 Ill. 417, 419.

Nor are we able, in view of the current of decisions in Virginia and all the terms of the deed taken together, to concur with the receiver's counsel that fraudulent intent is a necessary deduction from the permission to the creditors in the second class to avail themselves of their claims in bidding in the manner prescribed. The deed expressly stated that it was given to secure the costs and expenses, and then the payment of the indebtedness enumerated in the first class; "and after the payment of the hereinbefore mentioned sums and claims, to secure, secondly, the following creditors to be paid equally and ratably if the property hereby conveyed shall be insufficient to pay them all, but with the privilege as to bidding on such property as may be sold at auction as hereinafter provided." This contemplates the payment of the creditors in the first class before the bidding clause could take effect, and precludes the operation of that clause to the prejudice of those creditors. The record discloses that the total amount secured in the first class was less than fifty thousand dollars, of which the bank held more than four fifths, and that the cash assets were much more than enough to cover the costs and expenses and this amount, without any sales; so that the facts correspond with the intention deducible from the language of the deed. The first-class creditors are to be paid before the second-class creditors can exercise the right to bid if sales by public auction ever take place. The bank is a creditor in the first and second classes and the sole creditor in the third class, but it has no ground of complaint as a third-class creditor, as the operation of the clause can only be for its benefit as such.

The second-class creditors are all treated alike, and, as the counsel for the trustees say, are placed in exactly the same legal relation to the subject matter. If it could be said that the clause might operate to create a preference as between them, the grantors had a right to prefer; but inasmuch as each can bid, and the trustees have power to divide the property into parcels to enable as many creditors as possible to become bidders, and are charged with the duty to observe such rule of equality, between those who purchase and those who do not, as will be just, it is not easy to see how a preference could be obtained. The question is not whether the trustees might prove unfaithful—a contingency of which there is no intimation here—but whether the provisions of the deed, if carried out according to their apparent intent, would be fraudulent in their operation. It seems to us, as it did to the circuit court, that such is not the reasonable inference, and that the manifest object was to stimulate bidding, prevent a sacrifice of the property, and benefit the creditors, and this without any advantage to the assignors other than that involved in having their assets go as far as possible in payment of their debts. It is not they who reap a pecuniary benefit, but their creditors.

Without further elaboration, we are of opinion
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ion that the deed is not void in law because of the insertion of the provision in question.

It should also be observed that the trustees are rendering their reports under the direction of the court, and ask in their cross-bill "the aid and direction of this honorable court in the ascertainment of all and every the copartnership property and the individual property standing in the names of the individual members of the said copartnerships, or any of said members, and in the application of the trust funds to the payment of the debts secured, and in the administration of this their trust; and they are advised that it is their right and privilege to file this their bill, and to apply to this honorable court as a court of equity for the purpose aforesaid." So that the receiver, having invoked the interposition of a court of equity, can find there, either on his own application or that of his adversary, a remedy for any injurious results he may apprehend in the administration of the trust. The court will see to it that, as far as practicable, partnership assets are applied to partnership liabilities and individual assets to individual liabilities, and that the bidding clause shall not be put into operation unless in consonance with equity and good conscience.

It is earnestly argued, however, that the deed should be set aside because fraudulent in fact. We have patiently, but without success, examined this record in the effort to discover what specific acts are made out by the proofs, establishing, in connection with the deed itself, actual fraud in its execution. The inquiry is not whether the grantors had been previously guilty of fraud or embezzlement, but whether this particular conveyance was made with a fraudulent intent known to the trustees or beneficiaries. *Evans v. Greenhow*, 15 Gratt. 153; *Emerson v. Senter*, 118 U. S. 3 [30: 49]. It appears that the Bains were indebted to the bank and also to their depositors in several hundred thousand dollars. It is said that they indulged in wild speculations in real and personal estate, stocks, bonds, mines, railroads, etc.; but that applies as well to the squandering of the seven hundred thousand dollars and upwards of deposits with them as a banking firm, as it does to the money that they absorbed from the bank; and in any view, the violation of their fiduciary relations to the bank of which they were officers, or their treatment of the depositors in the banking firm of which they were members, does not render the assignment of all their property for the benefit of their creditors therefore fraudulent.

The bank and the banking house suspended on the second day of April, 1885, and the assignment was made on the sixth day of April. On the 31st day of March preceding, Bain & Bro. transferred to the bank certain securities of the estimated value of \$570,000 in reduction of their indebtedness, and some other assets, as collateral to their guaranty of any deficiency which might result when the securities were realized on. When they transferred all their property, partnership and individual, of every kind, by the deed in controversy, they provided for the payment in the first instance of some \$49,881.61, of which the bank held \$42,288.49, and then for the payment in full, or ratably, of their own depositors, and certain

notes aggregating \$102,000, held by the bank; and they put the remaining indebtedness to the bank in a third class. They had a right to make preferences, and it is evident that their effort in the assignment was to equalize as between what they owed their own depositors and what they owed the bank, taking into consideration what the bank had already obtained. There was no fraud in this, of which the bank could complain, as between it and the other creditors.

Counsel contends that the deed was in contravention of sections 5151 and 5284 of the Revised Statutes of the United States, which provide that the shareholders of every national banking association shall be held individually responsible for its debts to the extent of the amount of their stock, and additional thereto, and that the comptroller may enforce that individual liability. It is insisted that the capital stock is a trust fund of which the directors are the trustees, and that the creditors have a lien upon it in equity; that this applies to the liability upon the stock of a national bank; and that no general assignment of his property for the payment of his debts can lawfully be made by a shareholder, certainly not when he is a director. Undoubtedly unpaid subscriptions to stock are assets, and have frequently been treated by courts of equity as if impressed with a trust *sub modo*, in the sense that neither the stockholders nor the corporation can misappropriate such subscriptions so far as creditors are concerned. *Richardson v. Green*, 138 U. S. 80, 44 [38: 516, 522]. Creditors have the same right to look to them as to anything else, and the same right to insist upon their payment as upon the payment of any other debt due to the corporation. The shareholder cannot transfer his shares when the corporation is failing, or manipulate a release therefrom, for the purpose of escaping his liability. And the principle is the same where the shares are paid up, but the shareholder is responsible in respect thereof to an equal additional amount. There was, however, no attempt here to avoid this liability, and the fact of its existence did not operate to fetter these assignors in the otherwise lawful disposition of their property for the benefit of their creditors.

Some other transactions are referred to in the bill as indicating fraud in fact, but they are not insisted upon in argument and require no special consideration. One of them relates to a deed of Wallace & Son to Bain & Bro., executed April 6, 1886, and referred to by counsel in another connection.

We think the circuit court was right in finding "no evidence whatever of any actual fraudulent intent on the part of the firm, or either of the partners, to hinder and delay their creditors."

The argument is pressed that the trustees were neither bona fide purchasers for value nor purchasers without notice, because they must have had knowledge, for the reasons given, of the previous conduct of Bain & Bro. But, as we have already seen, that previous conduct did not render the assignment in itself fraudulent, although it is quite true that all the circumstances should be taken into consideration in passing on that question. It is urged that the trustees knew that Bain & Bro. had no

right to make the deed, because on the 31st of March, when they transferred to the bank certain stocks and bonds of the face value of \$640,000 and an estimated value of \$570,000, a member of the concern verbally promised that they would not make an assignment giving preferences against the bank. The transfer of these securities rendered the bank just so much better off, and counsel for the receiver concedes that the advice of the bank's former counsel in regard to it, "in the condition of the affairs of the bank at that date, . . . was wise and proper, and did secure to the bank whatever can be realized from the sale of the securities delivered under the agreement of March 31, 1885." The verbal promise not to make preferences constituted no lien upon Bain & Bro.'s property, and its disregard did not affect the validity of the deed. Nor is any issue in regard to it made upon the pleadings. It is noticeable that Bain & Bro. declined to incorporate that pledge in the written agreement transferring the securities, and we are not called upon to examine into the circumstances under which the promise so given failed to be carried out. The receiver assigns for error that the circuit court held that he was entitled to a surrender of such of the property which it was found had "actually been purchased with the moneys of the bank as he elects to take, but of no other." In other words, it is insisted that the receiver is entitled to a charge upon the entire mass of the estate, with priority over the other creditors of Bain & Bro.

It was said by *Mr. Justice Bradley* in *Frelinghuysen v. Nugent*, 36 Fed. Rep. 229, 239: "Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it, the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried. The difficulty of sustaining the claim in the present case is, that it does not appear that the goods claimed—that is to say, the stock on hand, finished and unfinished—were either in whole or in part the proceeds of any money unlawfully abstracted from the bank." The same difficulty presents itself here, and while the rule laid down by *Mr. Justice Bradley* has been recognized and applied by this court (*Baltimore Cent. National Bank v. Conn. Mut. L. Ins. Co.* 104 U. S. 54, 67 [26: 698, 699], and cases cited), yet, as stated by the chief justice, "purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose." And this the evidence fails to establish as to any other property than that designated in the decree, although it is

claimed, on behalf of the receiver, that the sum of \$105,000 due to the bank upon certain notes of Wallace & Son, which had been discounted by Bain & Bro., and which were re-discounted for the latter by the bank, should have been traced into certain property conveyed by Wallace & Son to Bain & Bro. The circumstances, so far as necessary to elucidate this claim, are as follows; Bain & Bro. owed the Richmond Cedar Works \$31,885.71. The Exchange National Bank held the interest of Bain & Bro. in these works under the transfer of Bain & Bro. to the bank, of March 31, 1885. The Richmond Cedar Works owed the Exchange National Bank \$140,000, upon which Wallace & Son were indorsers. Wallace & Son owed Bain & Bro. over \$300,000. By a deed dated April 3, 1885, Wallace & Son conveyed certain property to the Richmond Cedar Works for \$55,000, receiving in payment the Cedar Works' check on Bain & Bro. for \$31,885.71, due from them to it, and the notes of the Cedar Works for the balance, which were turned over to Bain & Bro. By this transaction the indebtedness of Bain & Bro. to the Cedar Works was extinguished, and Wallace & Son's indebtedness to Bain & Bro. reduced by the sum of \$55,000. This left Wallace & Son still debtors of Bain & Bro. to the extent of over \$245,000, and on the 6th day of April, 1885, they executed a deed of their remaining property to Bain & Bro., for the expressed consideration of \$151,800, which property has passed under the assignment in this case. None of this property, so far as appears, was purchased with the money of the bank, but counsel for the receiver contends that because Bain & Bro. had rediscounted the notes of Wallace & Son to the amount of \$105,000 at the bank, and because the deed of Wallace & Son to Bain & Bro. was in payment of their indebtedness to the latter, in whole or in part, therefore it ought to be held that the bank's money purchased Wallace & Son's property for the benefit of Bain & Bro. We do not understand that the bank was entitled to the assets of Bain & Bro.'s debtors, and can perceive no ground for holding that Bain & Bro., in receiving the deed from Wallace & Son, were purchasing property with the money of the bank.

This disposes of the errors assigned on behalf of the receiver, and leaves for consideration those assigned on behalf of the trustees upon their cross-appeal. The principal contention is that it was error to decree that the receiver could take "such of the property hereinafter set out and found to have been actually purchased with the moneys of the said bank as he elects to take; and by making said election and receiving such property the said receiver is not to be estopped from receiving the full benefit of the said deed of trust, or the provisions thereof, in favor of the Exchange National Bank." We do not concur in that view.

The doctrine of election rests upon the principle that he who seeks equity must do it, and means, as the term is ordinarily used, that where two inconsistent or alternative rights or claims are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so, in 188 U. S.

other words, that one cannot take a benefit under an instrument and then repudiate it.

It cannot be assumed that there was an intention on the part of Bain & Bro. to dispose of that which was not theirs, or, even if they lawfully could, to cut the bank off from participating in the property assigned, in the order mentioned, by imposing the condition that the bank should purchase its share by parting with its own property; nor does any equitable implication to that effect arise. The other creditors cannot claim compensation for being deprived of what did not belong to Bain & Bro., or of anything transferred in lieu thereof. There existed no equity on their part which can be held to estop the bank from receiving what may come to it under the assignment, and in doing so it will not occupy inconsistent positions. That it sought to have the deed set aside does not deprive it of its rights under it, upon the failure of its attack.

It was entirely competent for the court to adjust this matter upon equitable principles, and this it has done in its decree. Under the assignment the bank gets a preference of something over \$42,000, and then ranks with other creditors to the extent of \$102,000, while the balance of a very large indebtedness due to it is relegated to the third class; and it appears to be entirely just that it should have in addition the benefit of that which belongs to it, and to which the other creditors have no claim. And this, though amounting on its face to \$149,372.21, we are informed by counsel for the trustees, has only an actual value of \$20,177.18, to three items of which, amounting to \$6,840, the objection is made of failure of proof of their having been purchased with the bank's money.

We have examined the record with care, and are satisfied with the conclusion arrived at by the special master and the court as to these items, and shall not disturb the decree in that regard.

The trustees also demur to being held affected with notice as to the traced property, principally because the affairs of the debtors were in such a state as to render the task of disentanglement exceedingly onerous. As inquiry would have conducted the trustees to the same conclusion as that now reached, the fact that the conduct of the Bains rendered it difficult to accurately distinguish between one class of property and another should not absolve them from the operation of the rule as to notice, if otherwise applicable.

While it is well settled in Virginia that the trustees and beneficiaries in a deed of trust to secure bona fide debts occupy the position of purchasers for a valuable consideration (*Wickham v. Lewis*, 18 Gratt. 427; *Evans v. Greenhow*, 15 Gratt. 156; *Keener v. Trigg*, 98 U. S. 50, 58 [25: 88]), yet they cannot hold with notice of the fraudulent intent of their grantor, or of the fraud rendering his title void. And it is equally well settled in the States of West Virginia and Virginia that notice to the trustees is notice to the beneficiaries. *Fidelity Ins. T. & S. D. Co. v. Shenandoah Valley R. Co.* 32 W. Va. 244; *Beverly v. Brooke*, 2 Leigh, 448; *French v. Loyal Co.* 5 Leigh, 641.

The knowledge of the situation possessed by Mr. Old, one of the trustees, who was the

Bains' attorney at the time of the assignment, and by whom it was drawn, was quite comprehensive, and was obtained in such a manner and under such circumstances that he must be presumed to have communicated it. It was knowledge obtained in the particular transaction. *The Distilled Spirits*, 78 U. S. 11 Wall. 356, 366 [20: 167]. There can be no doubt, also, respecting the duty of the trustees to inquire as to the rights of the bank, and that they are chargeable with a knowledge of all the facts that inquiry would have disclosed.

The decree directs that the costs of the suit be paid out of the trust funds in the hands of the defendant trustees, and, as we agree with the results arrived at by the circuit court, we are of opinion that this direction was correct. *The decree will be in all things affirmed.*

Mr. Justice Brewer was not a member of the court when this case was argued, and took no part in its decision.

ALEXANDER R. SHEPHERD ET AL.
Appts.,
v.

GEORGE S. PEPPER.

(See S. C. Reporter's ed. 626-655.)

Filing bond on appeal nunc pro tunc—decree, when a nullity and no bar—receiver—rents and profits—sale of entire incumbered property—incumbrances all due—property omitted from trust deed by accident—decree for deficiency—law of District of Columbia—receiver, when proper—interest, rate of—new trustee in place of one dead.

1. Where the appeal was taken in open court and no citation was necessary, and the record has been

NOTE.—As to powers and duties of receivers, see note to *Davis v. Gray*, Bk. 21, p. 447.

As to right of mortgagor to income and products of mortgaged premises, see note to *Gilman v. Ill. & Miss. Tel. Co.*, Bk. 23, p. 406.

As to when waste by the mortgagor will be restrained by injunction, see note to *Hutchins v. King*, Bk. 17, p. 544.

As to strict foreclosure of mortgage, see note to *Clark v. Reyburn*, Bk. 19, p. 354.

As to order of sale of mortgaged premises, see note to *Orvis v. Powell*, Bk. 25, p. 238.

The following are late decisions on the subject of receivers, their appointment, powers and duties, receiver's certificates and discharge of receivers:

A receiver *pendente lite* of mortgaged premises may be appointed without notice where the mortgagor has refused to deliver the crops and other personal property, and there are prior liens, and the mortgagor is insolvent, and the crops are in danger of being lost or destroyed. *Ashurst v. Lehman*, 86 Ala. 370.

The appointment of a receiver is authorized when the party seeking the appointment shows prima facie a title or a lien upon the subject matter, and that it is in danger of loss from waste, misconduct or insolvency. *Ibid.*; *Elwood v. Greenleaf First Nat. Bk.* 41 Kan. 475; *Durant v. Crowell*, 97 N. C. 367.

Where the whole scheme of a bill is to set aside trust deeds executed by a corporation, which are found to be valid, and to distribute the proceeds of

duly filed, appellant may be allowed on the hearing to file a bond *nunc pro tunc*.

2. A party is not bound by a prior decree which is so uncertain in describing property as to be inoperative and void; the sale under such a decree is a nullity, and therefore no cloud on the title. Such a decree is no bar to a second suit.
3. Wherever property subject to a lien has been brought within the domain of a court of equity, and a receiver of it is appointed, the rents and profits in the hands of the receiver will be applied, along with the corpus of the fund, to satisfy the lien, after paying charges, such as taxes and insurance.
4. A court of equity, on the application of a junior incumbrancer, will provide for the sale of the entire incumbered property, if the circumstances of the case show that the interests of the mortgagor and of the incumbrancers require the sale.
5. This authority is properly exercised in the case of deeds of trust, where all the incumbrances are due, and where the plaintiff has a first lien on some of the property sought to be sold and a second lien on the other property, and where all the incumbrancers are parties to the suit.
6. Property omitted by accident from one of the trust deeds, when both parties supposed the deed covered it, may be reached and sold in such a suit.
7. A decree for a deficiency is a necessary incident of a foreclosure suit in equity.
8. Section 806 of the Revised Statutes, relating to the District of Columbia, authorizes a decree *in personam* against the debtor for the balance remaining due after the proceeds of the sale of lands covered by a mortgage or a deed of trust in the nature thereof has been applied to the satisfaction of the debt.
9. The court properly appointed a receiver to take possession of the rents, in order to preserve them for that party to the suit who should ultimately be found to be equitably entitled to them, under the facts of this case, the property itself being inadequate security and the debtor being insolvent.

the property among the creditors pro rata, and the property will not pay the several creditors under the trust, a receiver will not be appointed. *Pyles v. Riverside Furniture Co.* 30 W. Va. 123.

After a decree to sell real estate to satisfy liens, and an appeal from that decree, the court below may appoint a receiver to rent out the real estate. *Adkins v. Edwards*, 83 Va. 316.

In an injunction suit, where the right to subject land to sale for the purchase money is in litigation, the court may appoint a receiver to rent the land. *Ibid.*

Creditors are not estopped, by their acts done under an assignment which is afterwards declared void, from petitioning for a receiver of the debtor's property. *Re Walker*, 37 Minn. 243.

A receiver should not be granted where a bond, properly secured, to account for and pay over the proceeds as the court might thereafter direct, would furnish sufficient security. *Stith v. Jones*, 101 N. C. 360.

In an action for the dissolution of a partnership, the court has no power to appoint a receiver, *pendente lite*, of alleged assets of the firm, of which the ownership by the firm is in issue and denied by the answer. *Brush v. Jay*, 113 N. Y. 482.

The right of a mortgagor to the rents and profits *pendente lite* is a substantial one under the laws of Michigan and the courts cannot appoint a receiver to take the rents and profits to apply on the mortgage prior to the completion of foreclosure by sale and confirmation, although the security is inadequate.

10. Under the Revised Statutes relating to the District of Columbia, parties may contract in writing for the payment of interest at the rate of 10 per cent per annum.
11. The court properly fixed the amount due according to the terms of the contract, as to interest on the payment of which, before the day fixed, the decree would not go into effect, but the case would be dismissed.
12. Where one of the trustees appointed by the decree of the special term to make the sale has died, the court below has power to appoint a new one in his place.

[No. 136.]

Argued Nov. 26, 27, Dec. 2, 1889. Decided March 3, 1890.

APPEAL from a decree of the Supreme Court of the District of Columbia, in a suit for foreclosure, decreeing that the property be sold and applied to the payment of certain liens thereon in the order named therein and for payment of a deficiency. *Affirmed*.

The facts are stated in the opinion.

Opinion below, 4 Mackey, 269.

Messrs. Wm. F. Mattingly, Enoch Totten and Henry Wise Garnett, for appellants:

Mrs. Gray was not a necessary party to the first suit, and the decree is not for that reason any less effective.

Story, Eq. Pl. § 193; *Carpentier v. Brenham*, 40 Cal. 234; *Iowa County Supra. v. Mineral Point R. Co.* 24 Wis. 123; *Howard v. Milwaukee & St. P. R. Co.* 101 U. S. 848 (25: 1084).

The fact that Mrs. Gray is a party to this suit does not affect the question of the estoppel of the former suit as between Shepherd and his trustees and Pepper.

Thompson v. Roberts, 65 U. S. 24 How. 241 (16: 650).

The record shows that complainant has made his election to take under his deeds of trust ac-

cording to their description with full knowledge of the alleged mistake.

Bigelow, Estoppel, 503, 514; *Rennick v. Chillicothe Bank*, 8 Ohio, 529; *Rapalee v. Stewart*, 27 N. Y. 310; *Duff v. Wynkoop*, 74 Pa. 300; *Swanson v. Turkington*, 7 Heisk. 612; *Tuite v. Stevens*, 98 Mass. 805; *Grymes v. Sanders*, 93 U. S. 55 (23: 798).

Rights and demands cannot be split up and tried piecemeal.

Rodgers v. Higgins, 57 Ill. 244; *Stockton v. Ford*, 59 U. S. 18 How. 420 (15: 395).

That the property would sell to better advantage as a whole is no legal reason which would give the court the right and power so to decree against the objections of those interested in lot A.

McLaughlin v. Barnum, 81 Md. 444, 445.

The complainant does not give the court jurisdiction of the entire case, and therefore should not be heard.

Eastman v. Amoskeag Mfg. Co. 47 N. H. 71, 80; *Prothero v. Phelps*, 35 Eng. L. & Eq. 518.

The court below erred in passing a personal decree against Shepherd for deficiency. Pepper is not a mortgagee seeking foreclosure. There is no averment in the bill of any such liability and no prayer asking any such relief. Complainant had the right to interpose the Statute of Limitations.

Angell, Lim. § 390; *Dudley v. Price*, 10 B. Mon. 84; *Christmas v. Mitchell*, 3 Ired. Eq. 535; *Miller v. McIntyre*, 81 U. S. 6 Pet. 61-64 (8:320, 821); *Miller v. Bealler*, 100 Pa. 583.

A party secured by a deed of trust has no interest in the land itself, and the rents not being granted he has no right to a receiver.

Neilson v. Lagow, 83 U. S. 12 How. 98 (13: 909).

And no right to the rents and profits after default.

Wager v. Stone, 36 Mich. 364; *Gilman v.*

quate. *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.* (Mich.) 3 L. R. A. 90.

To justify the appointment of a receiver in foreclosure, on the ground of waste, the waste must be serious and the danger of destruction or impairment of the security imminent. *Ibid*.

Where more than a million dollars is in default in interest upon a mortgage on a railroad, and there are different factions between the real owners as to its management, a receiver may properly be appointed in foreclosure proceedings. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 1 L. R. A. 397, 36 Fed. Rep. 221.

Where it is not shown that the mortgagor is insolvent, or that the mortgaged property is not sufficient to fairly pay all the incumbrances, a receiver should not be appointed. *Paine v. McElroy*, 73 Iowa, 81.

A court of equity may call in the assets of the estate from the personal representative and place them in a receiver's hands. *Davis v. Chapman*, 83 Va. 67.

A receiver in supplementary proceedings against a judgment debtor acquires no title to the property which subsequently becomes due to the debtor for erecting a building which is unfinished at the time of the appointment. *Willison v. Salmon*, 45 N. J. Eq. 257.

Where the property of an insolvent corporation liable to taxation under the N. Y. Corporation Tax, Act 1889, chap. 542, as amended by N. Y. Laws 1881, chap. 361, has been sequestered, and is in the hands 133 U. S.

of a receiver appointed in foreclosure, a direct application for an order on him for payment of the taxes may be made to the court in the foreclosure proceeding, by the attorney-general. *Central Trust Co. v. N. Y. City & N. R. Co.* 1 L. R. A. 260, 13 Cent. Rep. 404, 110 N. Y. 250.

The power of courts to authorize the issue of receivers' certificates, and to make them a charge upon railroads and their property superior to the liens of mortgages and statutory liens, is to be exercised with great caution, and if possible with the consent or acquiescence of the parties interested in the funds. *Investment Co. v. Ohio & N. W. R. Co.* 36 Fed. Rep. 48.

Receivers' certificates issued under an order made after a decree of foreclosure and sale of property, containing on their face a provision authorized by the order making them a lien on the property, will constitute a first lien thereon, if the order is not appealed from. *Re Farmers Loan & Trust Co.* 129 U. S. 206 (32: 656).

A receiver of an insolvent bank, authorized to prosecute and defend suits for the corporation, has a right to bring a suit in equity to foreclose a mortgage given to the bank. *Comer v. Bray*, 83 Ala. 217.

Notice of proceedings for the discharge of a receiver need not be given to creditors in the action. A creditor injured by such discharge may apply to the court to vacate the order. *N. Y. & W. U. Tel. Co. v. Jewett*, 115 N. Y. 166.

Illinois & M. Teleg. Co. 91 U. S. 617 (23: 410); *Florida C. R. Co. v. Schutte*, 103 U. S. 148 (26: 326); *Kountze v. Omaha Hotel Co.* 107 U. S. 392, 393 (27: 614, 615); *Teal v. Walker*, 111 U. S. 242 (28: 415); *Grant v. Phoenix L. Ins. Co.* 121 U. S. 105 (30: 905).

Messrs. Nathaniel Wilson and Walter D. Davidge, for appellee:

None of the questions involved in this cause was involved in or adjudicated in the former cause.

Strong v. Grant, 2 Mackey, 224, 225; *Mobile County v. Kimball*, 102 U. S. 705 (26: 242); *Gould v. Evansville & C. R. Co.* 91 U. S. 584 (23: 419).

The decree in that case would not operate to bar a foreclosure under the pending bill.

Gardner v. Sharp, 4 Wash. C. C. 609; *Wells, Res Adjudicata*, § 199; *Walden v. Bodley*, 39 U. S. 14 Pet. 161 (10: 399); *Hughes v. U. S.* 71 U. S. 4 Wall. 287 (18: 304).

The former decree is too uncertain to operate as an estoppel.

Russell v. Place, 94 U. S. 606-608 (24: 214, 215); *Wells, Res Adjudicata*, §§ 216, 224, 280.

The opinion of the court may be referred to, to ascertain the real point decided and the extent of the estoppel.

Cromwell v. Sac County, 94 U. S. 351, 358, 354, 356 (24: 195, 198, 199); *Graham v. La Crosse & M. R. Co.* 70 U. S. 3 Wall. 704, 710, 711 (18: 247, 250); *Davis v. Brown*, 94 U. S. 428, 429 (24: 206, 207); *Russell v. Place*, 94 U. S. 606, 609 (24: 215); *Strong v. Grant*, 2 Mackey, 218, 223-225.

A deficiency decree is the rule in this jurisdiction, and is by statute a necessary part of every foreclosure decree.

Rev. Stat. U. S. §§ 406, 808, relating to the District of Columbia; *Dodge v. Freedmans S. & T. Co.* 106 U. S. 445 (27: 206).

A receiver should be appointed.

Grant v. Phoenix L. Ins. Co. 121 U. S. 105 (30: 905); *Keyser v. Hitz*, 4 Mackey, 179.

One of the trustees appointed by the court below to sell the real estate under the decree appealed from has died, and it is requested that this court now substitute in his place some suitable person.

Holden v. Freedmans S. & T. Co. 100 U. S. 72, 74 (25: 567, 568).

Mr. Justice Blatchford delivered the opinion of the court:

On the 1st of June, 1874, Alexander R. Shepherd and his wife made a deed of trust to Andrew C. Bradley and William H. Philip, conveying to them real estate situated in the City of Washington, in the District of Columbia, described in the deed as follows: "Part of lot numbered two (2) in square numbered one hundred and sixty-four (164), and bounded and described as follows, viz.: Beginning, at a point on North K Street forty-three feet and nine inches (43 $\frac{3}{4}$ ft.) east of the southwestern corner of said square, and running thence west on K Street forty-three feet and nine inches (43 $\frac{3}{4}$ ft.), to said southwestern corner of said square; thence northwesterly along the line of Connecticut Avenue about eighty feet and ten inches (80 $\frac{1}{2}$ ft.), to the south line of original lot numbered three (3) in said square; thence northeasterly and at right angles with said ave-

nue and along the line of said lot three (3), about eighty-five (85) feet, to intersect a line drawn due north from the point of beginning, and thence due south to the point of beginning." The deed recited that Shepherd was indebted to George S. Pepper in the sum of \$35,000, evidenced by a promissory note executed to Pepper, dated June 1, 1874, and payable in 5 years after date, with interest, payable semi-annually at the rate of 9 per cent per annum, until paid, accompanied by 10 coupon notes for \$1,575 each, representing the interest; and it conveyed the land in trust to secure the payment of the notes. It gave power to the trustees to sell the premises at public auction, on a default in the payment of the notes or any installment of interest, and to convey the property in fee simple to the purchaser. Shepherd covenanted in the deed to keep the buildings on the land insured during the continuance of the trust in the sum of \$25,000, and to have the policies assigned to the trustees; and that, on his failure to do so, Pepper might do it and the premium he should pay should be considered secured by the trust deed.

On the 22d of March, 1875, Shepherd and his wife executed to William F. Mattingly and the said Andrew C. Bradley another deed of trust, covering the same premises by the same description as in the first deed, to secure the payment to the said Pepper of a promissory note dated March 22, 1875, for \$10,000, payable 5 years after date, with interest payable semi-annually, at the rate of 9 per cent per annum, until paid, accompanied by 10 coupon notes of \$450 each, representing the interest. The other provisions of this trust deed were in terms like those of the first one, except that the insurance against fire was to be \$10,000.

On the 15th of May, 1876, Shepherd and his wife executed a deed of trust to James E. Fitch and Lewis J. Davis, covering premises described as follows: "All that certain piece or parcel of ground situated and lying in the City of Washington, District of Columbia, and known and described upon the ground plat or plan of said city as lot No. three (3), in A. R. Shepherd's subdivision of square number one hundred and sixty-four (164), said lot number three (3) fronting forty-three feet and nine inches (43 ft. 9 in.) on K Street N. W., and one hundred and nine feet and one-half inch (109 ft. $\frac{1}{2}$ in.) on Connecticut Avenue." The deed was made to secure the payment of a promissory note for \$35,000, made by Shepherd, dated May 15, 1876, given to Mercy Maria Carter, payable 3 years after date, with interest at the rate of 9 per cent per annum, payable quarterly. This deed covered the same premises embraced in the first two deeds of trust, and an additional piece of land in the rear of those premises, having a frontage on Connecticut Avenue of 28 feet 2 $\frac{1}{2}$ inches, and running eastward across the rear part of the premises covered by the first two deeds of trust.

On the 15th of November, 1876, Shepherd and his wife executed an assignment, for the benefit of the creditors of Shepherd, to George Taylor, Henry A. Willard and Samuel Cross, which assignment covered "lot 3 in square 164." Willard refused to accept the trust, and Peter F. Bacon was duly appointed assignee in his place.

On the 11th of April, 1878, Pepper filed a bill in equity, in the Supreme Court of the District of Columbia, making as defendants Shepherd and his wife, Bradley, Philip, Mattingly, Taylor, Cross and Bacon. The bill set forth the making and contents of the two deeds of trust in favor of Pepper and of the assignment by Shepherd; that Pepper was still the holder of the note for \$35,000 and the note for \$10,000, and the coupon notes belonging thereto; that there were large arrears of interest due thereon; that the property was largely incumbered with taxes, and had been sold for the taxes for the year ending June 30, 1877; that Shepherd had failed to keep the property insured, and Pepper had advanced the amount of the premiums of insurance; that Pepper had, in writing, requested the trustees, under the deeds of trust, to advertise the property for sale, but the defendant Bradley, a trustee under each of the deeds, had refused to do so, by a letter to Pepper, in which he also stated "that the trust does not cover the entire area of the house, cutting off about twenty feet of the rear."

There was and is a dwelling-house on the land, which covers the entire width on K Street, and at least a part of it extends the entire depth of the land embraced in the first two deeds of trust; and a part of the rear part of it is built upon the land covered by the deed of trust in favor of Mercy Maria Carter which is not embraced in the two deeds of trust in favor of Pepper.

The bill averred that at the time the two loans were negotiated by Pepper he was informed and believed that the two deeds of trust covered the whole of the house and lots; that he had nothing to do with the preparation of those deeds, but they were prepared by Shepherd or his attorney; that Pepper never saw them until after the negotiations were concluded and the money paid; that Shepherd alone was responsible for any mistake or omission; that at the dates of the deeds of trust the house was completed and occupied by Shepherd as a dwelling; that sub-plot A in square 164, being the premises not covered by the two deeds of trust in favor of Pepper, was at that time owned by Shepherd; that it was understood that the two deeds of trust in favor of Pepper would and did cover the whole area occupied by the house and grounds; that the part of the house not included in those two deeds of trust was what is known as the "picture gallery;" that the rear end of it could be detached without marring or lessening the value of the property; that the plaintiff was entitled to enforce the collection of the moneys due to him, irrespective of any injury which the sale might do to Shepherd or anyone holding under him; and that, in any event, the plaintiff had the right to enforce the sale of so much of the property as was covered by the two deeds of trust in his favor.

The prayer of the bill was that a trustee might be appointed by the court in place of the trustees under the two deeds of trust, with directions and authority forthwith to execute the trusts of the two deeds.

Answers to this bill were put in by Mattingly, Bradley and Shepherd, the answer of Shepherd setting up that the loans to him by Pepper were usurious and void under the laws of

the State of Pennsylvania, which governed the contracts. Issue was joined, proofs were taken and the case was heard at special term, which, on the 12th of May, 1879, entered a decree overruling the defense of usury, and further decreeing as follows: "That James M. Johnston be, and is hereby, appointed trustee in the place and stead of Andrew C. Bradley, in the deed of trust, & recorded in Liber —, folio —, of the land records for the District of Columbia, and referred to in the record in this cause. This decree is without prejudice to all other rights of defendant." Shepherd, on the 14th of May, 1879, appealed from this decree to the general term; but, after the sale to Pepper hereinafter mentioned, he dismissed his appeal.

Johnston and Philip, claiming and purporting to act under the deed of trust of June 1, 1874, and regarding Johnston as having been appointed trustee in the place of Bradley, under that deed, by virtue of the decree of May 12, 1879, advertised for sale at public auction the premises described in that deed, by the description contained in it. The sale took place on the 23d of October, 1879, and the property was sold to Pepper, at such auction, for \$50,000; and Philip and Johnston, as trustees, executed and delivered to Pepper a deed of the property.

On the 14th of November, 1879, Shepherd filed a bill in equity in the Supreme Court of the District of Columbia, against Philip, Johnston and Pepper, setting forth the sale and the deed to Pepper, and alleging that Johnston and Philip acted without authority in selling the property, inasmuch as Johnston was not a trustee under the deed of trust, and the decree of May 12, 1879, did not confer upon him any power under that deed, nor substitute him in the place of Bradley under it, nor remove Bradley from his office of trustee under it; that it was announced at the sale by the auctioneer that the sale was made subject to taxes estimated at \$2,700, and that the lot sold did not include the rear part of the building; that the property was knocked down to Pepper for \$50,000 and the said taxes; that the price was grossly inadequate; that Shepherd, at the time of the sale, was the owner of a valuable equitable interest in the property; and that the sale was void.

The prayer of the bill was that the sale be set aside and the deed to Pepper canceled; that the defendants be restrained from interfering with the property, or attempting to enforce at law any legal right claimed as a consequence of the sale or the deed; and for general relief.

Philip and Johnston answered the bill, as also did Pepper. Pepper also filed a cross-bill against Shepherd, Philip and Johnston, setting forth the contents of the original bill and of the answers to it, and praying that the sale to Pepper be decreed to be legal and valid, and the deed to him effectual to convey to him an unincumbered fee-simple title to the real estate; for a writ of assistance to put him in possession of the premises; for a receiver to collect the accruing rents; for an injunction to restrain Shepherd and all persons claiming under him from interfering with the plaintiff in respect of the premises; and for general relief.

A replication was filed to the answers to the

original bill, and Shepherd, and also Philip and Johnston, answered the cross-bill. Issue was joined on such answers and proofs were taken. The case was heard at special term, and a decree was made, on the 30th of October, 1880, dismissing the bill, with costs, the decree being made by *Mr. Justice James*. It stated that Shepherd appealed to the general term from the decree.

On the 24th of December, 1880, *Mr. Justice James* filed an opinion in the suit, in which he stated that the decree of May 12, 1879, in the suit of Pepper against Shepherd, was inoperative and void for uncertainty. He added: "It purports to substitute a trustee in one of two deeds mentioned in the pleadings, without designating which of them. It is true that it can be inferred, from the comparative effects of the substitution in the one or the other case, that the court was not likely to intend to substitute Mr. Johnston for Mr. Bradley in the deed which conveyed only an equitable title, but I do not think that I am at liberty to explain and give certainty to the decree by reference to such considerations. It has been suggested that a decree may be explained by reference to the pleadings on which it is based, and this undoubtedly may be done in a proper case, but I do not find that the uncertainty of the decree in this case can be cleared up in that way. It follows that, if the decree is uncertain on its face, the alleged title of Pepper, through Mr. Johnston as substituted trustee, is not a cloud upon the title of the complainant, and consequently this court cannot take jurisdiction to grant the relief prayed. Therefore, the decree must be that the bill be dismissed."

On the 14th of January, 1881, the defendants in the suit of Shepherd against Pepper entered an appeal from the decree of October 30, 1880. On the 11th of February, 1881, Shepherd dismissed his appeal from that decree. A motion by Shepherd to dismiss the appeal from that decree taken by the defendants therein appears to have been granted by default; and they, on the 25th of February, 1881, filed petitions praying the court in general term to reinstate their appeal. The ground of these petitions was, that the opinion of *Mr. Justice James* found as a fact that the trustees, Philip and Johnston, had no power to make a sale, which finding did not appear in the decree of October 30, 1880. The court acted upon the petitions for reinstating, by making an order, on the 17th of June, 1881, striking from the files of the court the opinion of *Mr. Justice James*. This left the decree of the special term, made October 30, 1880, to stand as a decree merely dismissing the bill of Shepherd.

On the 20th of July, 1881, Pepper began the present suit by filing in the Supreme Court of the District of Columbia a bill in equity against Shepherd and his wife; Mercy Maria Carter, who had been married and become Mercy Maria Carter Gray; Fitch and Davis, the trustees in the deed of trust for the benefit of Mrs. Gray; Bradley, Mattingly and Johnston, trustees (Philip having died); David R. Bartlett, Bacon and Cross, assignees under the deed of assignment of November 15, 1876 (Bartlett having been appointed assignee in the place of Taylor); and John Alexander and George M.

Barker, two of the creditors secured by that assignment, as representatives of that class of creditors.

The bill sets forth the two deeds of trust in favor of Pepper and the deed of trust in favor of Mrs. Gray. It avers that Pepper owns and holds the promissory note for \$35,000 and the one for \$10,000; that they are both overdue; that a large amount of interest is due upon them; that Pepper has advanced moneys on account of taxes and insurance on the premises covered by the three deeds of trust, which moneys are secured by the two deeds of trust in his favor; that Mrs. Gray still holds her promissory note for \$35,000, which is overdue, with interest from May 15, 1877; and that the parties who claim to be secured by the assignment of November 15, 1876, a copy of which is annexed to the bill, are very numerous and cannot without inconvenience and delay be brought before the court. It then sets forth the filing of the former bill by Pepper; the contents of the decree of May 12, 1879; the appeal by Shepherd from that decree; the sale of the property to Pepper by Philip and Johnston, trustees; the filing of the bill by Shepherd, the proceedings thereunder, and the entry of the decree of October 30, 1880; the filing of the opinion of *Mr. Justice James*; and the order striking that opinion from the files.

The bill further alleges that it is competent to show at any time the grounds upon which the decree of October 30, 1880, was placed by the opinion of the court; that, as that opinion states that the decree of May 12, 1879, did not give to Johnston any power to sell, the decree of October 30, 1880, was in effect an adjudication upon, and favorable to, the averments in the bill filed by Shepherd, that the sale to Pepper was made without authority, and that the deed of Philip and Johnston to Pepper was null and void; that, as Shepherd had always insisted that the decree of May 12, 1879, was void and the sale to Pepper a nullity, and to the end that said lot 8 may be sold as a whole, Pepper files his bill in order that an undisputed title to the whole property may be obtained by means of foreclosure proceedings under the decree of the court; that the lot numbered 3 in Shepherd's subdivision of square 164, fronting 43 feet 9 inches on K Street and 109 feet $\frac{1}{4}$ inch on Connecticut Avenue, being the property described in the deed of trust in favor of Mrs. Gray, is improved by an expensive dwelling-house, erected thereon by Shepherd; that the portion of that lot 3 contained in the descriptive clauses of the two deeds of trust given by Shepherd to secure the moneys loaned to him by Pepper, does not embrace all the ground covered by and appurtenant to the dwelling-house, the portion omitted from those two deeds of trust being a lot designated as sub-lot A, fronting about 28 feet $2\frac{1}{4}$ inches on Connecticut Avenue, and running back with that width; that the omission of that strip from those two deeds of trust was either by accident or fraud on the part of Shepherd or his agents; that in either case Pepper is entitled to have the description of the ground in those deeds corrected, so as to include that strip; that by the agreement of Pepper with Shepherd it was provided that Shepherd should grant to trustees, to secure Pepper, all of the real estate covered by

his residence on the corner of K Street and Connecticut Avenue, and all the property to be used as appurtenant and connected therewith, and which is designated on the plat books of the city as lot 3 of Shepherd's subdivision of square 164; that, relying upon the fact that the first deed of trust embraced all the property now described as lot 3 in square 164, Pepper agreed to make a second loan on the same property, and therefore the second deed of trust was executed as now found; that, relying upon the belief that both of the deeds of trust embraced all of the real estate used or to be used by Shepherd for his residence and appurtenant thereto, Pepper advanced the \$45,000, and relied upon the deeds as his security for the loan, believing that they conformed to his contracts with Shepherd and embraced all the real estate owned at that point by Shepherd and all the land covered by the house and appurtenant thereto; that he would not have loaned any money to Shepherd if he had known that the deeds of trust did not embrace all of such real estate and the improvements made or to be made at that point by Shepherd, with the yard now belonging thereto; that, after the execution of the deeds and the advance of the \$45,000, Pepper discovered that sub-lot A, constituting the rear 28 feet 2½ inches of lot 3 in square 164, was omitted entirely from the deeds, thereby cutting off a portion of the improvements and seriously impairing the security; that the omissions were made by the fraud of Shepherd or his agents, and without any suspicion of the omission on the part of Pepper; that Shepherd states that he fully intended to embrace in the two deeds all the said real estate, and executed the deeds with the belief that all of said property was so included, but that the omission to include all of it was due to accident or mistake on the part of himself or of his agents who prepared the deeds, and without fraud on his or their part; that it was well understood by Mrs. Gray, when and before she loaned the \$35,000 to Shepherd, that the two prior deeds of trust in favor of Pepper constituted prior liens on all the real estate embraced in the deed of trust to secure her, that is, lot 3 in square 164; that she made her loan with the belief on her part that both of the prior deeds of trust actually embraced all of the said real estate, and with the belief that Pepper and Shepherd understood that all of said real estate was so embraced; that she had actual notice that Pepper and Shepherd fully intended to embrace in the first and second deeds of trust all the real estate embraced in the third one; that the lien of Pepper under his two deeds of trust is paramount to that of Mrs. Gray, as to all of the real estate referred to in her deed of trust, and ought to be enforced, either by reforming the first two deeds by including therein all of the real estate embraced in the deed in favor of Mrs. Gray, or by enforcing the lien of Pepper on lot 3 as an equitable mortgage prior to any rights of Mrs. Gray therein; that, after Pepper had so advanced to Shepherd the \$45,000, he learned for the first time that Shepherd, when he executed the first two deeds, had only a tax title to sub-lot A, in square 164; that Shepherd had, since said loans were made to him, perfected his title to sub-lot A, by buying in all adverse

claims, and had paid the money therefor from his own means; that such sub-lot A was conveyed either to Shepherd or to some friend as trustee for him; and that in either case the perfected title will inure to the benefit of Pepper and of Mrs. Gray.

The bill further alleges that the said principal sums, with large arrears of interest, are due to Pepper and to Mrs. Gray, respectively, and sums are also due to Pepper for premiums of insurance and taxes paid by him; that Shepherd had been receiving \$6,000 per annum as rent for the premises and the furniture in the house; that the incumbrances on the real estate in favor of Pepper and Mrs. Gray, with the arrears of taxes, amount to about \$120,000, and are increasing at the rate of about \$9,000 a year; that the real estate is an inadequate security for the sums charged upon it, and cannot be sold for a sum sufficient to meet even the existing liens on it, and will not yield from rents an adequate income on the sum charged upon it; that Shepherd is insolvent, and there are unsatisfied judgments of record against him in the Supreme Court of the District of Columbia, besides unsecured debts estimated by Shepherd to amount to \$310,000; that Shepherd is unwilling and unable to make good the deficiency due to Pepper, after properly applying the net proceeds of the sale of the property; and that Bradley refused to sell the property vested in him as trustee under the first deed of trust, and has endeavored to delay and prevent its sale.

The prayer of the bill is for the appointment of a receiver to receive the rents due and to become due for lot 3 and the improvements upon it; for the appointment of a trustee or trustees to sell the whole of such lot and improvements; that the rents and the proceeds of the sale of lot 3 be applied first to pay said indebtedness to Pepper, with all interest, costs, charges and expenses due to him by reason of the premises; that Shepherd may discover the name of the holder of the legal title to said sub-lot A, and be restrained from receiving or disposing of any part of the rent paid or to become due for lot 3 and the improvements thereon; and for general relief.

A restraining order against Shepherd, as prayed for, was issued on the filing of the bill.

Bradley answered the bill, and took the ground that in the first bill filed by Pepper the latter had insisted upon his right to the sale of the property as described in the two deeds of trust made in his favor, and did not ask to have the defective description corrected, and had procured the property to be sold, and had purchased it and received a deed for it, and claimed title to it, by the description contained in those two deeds of trust. Bradley's answer also set up that Pepper had brought a suit at law, on the 20th of April, 1880, against Shepherd, to recover on the several promissory notes mentioned in the first two deeds of trust.

The bill was taken as confessed by Fitch, Mattingly, Alexander and Barker.

Mrs. Gray answered the bill, alleging that at the time the deed of trust in her favor was made she was informed and believed that the two prior deeds of trust covered only the property described in them, and that the deed of trust given to secure her was a second lien on the

part of lot 3 described in those deeds of trust, and the first lien on the remaining part of that lot; that, relying on that information, which was true, she loaned to Shepherd the \$85,000 on the security of that lot; that she had no knowledge or information that Pepper claimed that there was any accident, mistake or fraud in connection with the first two deeds of trust, or that they should have covered any property beyond what they actually covered; and that Pepper has no right to have the first two deeds of trust amended, extended or changed, as against her, or any right to any lien on any part of lot 3, as against her, except that part described in the first two deeds of trust. She objects to a sale of lot 3.

Cross and Bacon put in an answer to the bill; and the court, on the 1st of December, 1881, on a hearing, granted an injunction as prayed, against all of the defendants except Alexander and Barker, and appointed a receiver of the rents accrued and to become due. The order states that each of the defendants enjoined appealed from it. Johnston afterwards withdrew his appeal; and on the motion of Pepper the appeal of the other defendants was dismissed by the general term.

Shepherd put in an answer to the bill, on the 1st of June, 1882, denying that the bill filed by him was dismissed for want of jurisdiction; denying that the omission of sub-lot A from the first two deeds of trust was an accident or a fraud on his part or on that of his agents; and denying that Pepper has the right to have the deeds corrected so as to include sub-lot A; but admitting that he (Shepherd) executed the first two deeds of trust in the belief that the whole property covered by the house was embraced in them. The answer sets up that Pepper has no right to the rents of the house or to the rent of the furniture contained in it, and no interest in the premises except to have them sold and his claims paid out of the proceeds of sale; that the subject matter of the bill is embraced in the prior suit brought by Pepper, which is still pending; and that, if Pepper has any right to relief, he must seek it in that suit, by bill of review or otherwise.

On the 21st of July, 1882, Pepper amended his bill by averring that lot 3 was wholly insufficient security for the debt admitted by Shepherd to be due to Pepper and charged thereon, and could not be sold for a sum sufficient to meet the debt so admitted, and would not yield in rents an adequate income on the value of the same, even assuming such value to be equal to the amount of the debt admitted to be due to Pepper and charged on the lot. The amendment also stated that Philip died intestate, leaving surviving him a widow and four children, infants, whose names were given, and added the names of such children as defendants. It also stated that Pepper was willing to surrender, and did thereby surrender, for the purpose of a resale of the said real estate, any title in fee simple which he might have thereto by reason of the deed to him from Philip and Johnston, trustees; and that, for the purpose of reselling such real estate, he waived any interest, claim or title vested in him by that deed, and offered to make any conveyance which the court might deem proper or necessary to accomplish the purpose indicated.

The bill and amendments were answered by Davis, Fitch and Barker, and the amendments were answered by Cross, Bacon, Bradley and Mrs. Gray. The answer of Mrs. Gray alleged that it was not in the power of Pepper to make or carry out the offer contained in the amendments; that, if any title passed to him by the sale and the deed to him by Philip and Johnston, he had no right to bring this suit; and that if, on the contrary, no title passed to him by the sale, the offer contained in the amendments was a vain and useless form.

Shepherd also answered the amendments, alleging that the proposed offer by Pepper was no actual surrender of any interest or waiver of any right.

The order *pro confesso* as to Mattingly having been vacated, he put in a plea, setting up the sale and the deed to Pepper, the filing of the bill by Shepherd and of the cross-bill by Pepper, and the decree of October 30, 1880, and averring that Pepper, ever since the deed to him, had claimed to be the owner of the property in fee simple, and still so claimed.

The bill was taken as confessed against the wife of Shepherd; a guardian *ad litem* was appointed for the infant children of Philip, who put in an answer to the bill; Johnston and Bartlett also answered it and the amendments; issue was joined as to all the defendants who had answered; and the plea of Mattingly was ordered to stand as his answer.

Proofs were taken on both sides, the cause was heard by the court in special term, and afterwards, on the 24th of March, 1885, Shepherd presented to the court two petitions, wherein he set forth the bringing of a suit at law against him by Pepper, on the 20th of May, 1882, upon the promissory notes; that at the hearing he learned for the first time that Pepper claimed a personal decree against him, under the prayer in the bill for general relief; that, when the claim to such personal decree was made at the hearing, his personal liability upon the notes was barred by the Statute of Limitations, because the notes were all of them then more than three years overdue; and that he ought to be allowed to interpose that objection to a personal decree. He therefore prayed for a hearing on the subject of the right of Pepper to a personal decree against him, and to be allowed to take proof as to the fact of the pendency of the action at law; that the plaintiff might be required to elect between the pending action at law and his claim for a personal decree for a deficiency; that, if he elected to claim such personal decree, he might be required by amendment to make his bill a bill for that purpose, and Shepherd be allowed to answer or plead to it; that Shepherd be allowed a rehearing on the questions as to the disposition of the funds in the hands of the receiver, and as to interest upon the coupon notes; and that he be allowed to interpose by plea or answer the defense of the Statute of Limitations to a claim for a personal decree. These petitions were dismissed by the court.

On the 26th of March, 1885, the court in special term made a decree that, unless Shepherd should pay to Pepper, on or before the 1st of July, 1885, \$35,000, with interest thereon at the rate of 9 per cent per annum from the 1st day of June, 1879, until paid and the further

sum of \$9,450, being the amount of six coupon notes, all dated June 1, 1874, signed by Shepherd, and representing six semi-annual installments of interest due by him on the principal sum of \$35,000, with interest upon them at the rate of 6 per cent per annum until paid, namely, upon six sums of \$1,575 each, one from December 1, 1876, one from June 1, 1877, one from December 1, 1877, one from June 1, 1878, one from December 1, 1878, and one from June 1, 1879, and also the sum of \$10,000 due to Pepper, with interest thereon at the rate of 9 per cent per annum from March 22, 1880, until paid, and the further sum of \$3,150, being the amount of seven coupon notes, all dated March 22, 1875, signed by Shepherd and representing seven semi-annual installments of interest due by him on the principal sum of \$10,000, with interest on them at the rate of 6 per cent per annum until paid, namely, upon seven sums of \$450 each, one from March 22, 1877, one from September 22, 1877, one from March 22, 1878, one from September 22, 1878, one from March 22, 1879, one from September 22, 1879, and one from March 22, 1880, and also the taxed costs of the suit, lot 3 in Shepherd's subdivision of square 164, with the buildings and improvements thereon, be sold at public auction, by Henry W. Garnett and John F. Hanna, as trustees. The decree prescribed what notice of sale was to be given and the terms of sale, and directed the proceeds to be brought into court. It also provided that the trustees, before July 1, 1885, should examine witnesses before the auditor of the court, to ascertain the relative values of the real estate covered by the first two deeds of trust, with the buildings and improvements thereon, and of the part described as sub-lot A in square 164, being the rear 28 feet 2½ inches of lot 3, with the buildings and improvements upon such sub-lot A; that, notwithstanding such inquiry, the sale should proceed; that the net proceeds of the sale which should appear to represent the value of that part of the real estate described in the first two deeds of trust, with the buildings and improvements thereon, after deducting therefrom the aliquot parts of the costs, commissions, expenses and charges of the suit chargeable against such part, should be applied toward the payment of the claims of Pepper, and the residue of such net proceeds should be applied toward the claims of Mrs. Gray; that, if the net proceeds of the property described in the first two deeds of trust should exceed the amount of the claims of Pepper, the excess should be applied towards paying the claims of Mrs. Gray, if the same should remain unsatisfied after applying the net proceeds of sub-lot A; that the net amount of rents in the hands of the receiver, after deducting costs, commissions, expenses and repairs, should be applied to the payment of the taxes theretofore paid by Pepper and the insurance premiums properly paid by him, and to the payment of taxes due and unpaid, and the residue of the receipts from rents should await the further order of the court; and that, if the net proceeds of the sale applicable to the claims of Pepper should prove insufficient to discharge them, he should recover from Shepherd whatever amount might remain due of the claims so decreed to be due by Shepherd to Pepper, after the application thereto of the net

proceeds of sale, and should have execution therefor as at law.

Shepherd, Bartlett, Bacon and Cross appealed to the general term from this decree; Mrs. Gray appealed from so much of it as directed the sale of sub-lot A; and Pepper also appealed from it.

The court in general term, on the 29th of October, 1885, affirmed the decree of the special term of March 26, 1885, with these modifications: It directed that the inquiry as to the relative values of the two parcels of property should take place after the sale had been made; that, if the debt due to Mrs. Gray should be satisfied otherwise than by applying thereto her proper share of the proceeds of the sale, the entire proceeds of the sale of lot 3 should be applied to the payment of Pepper's debt and interest, or if the proportion of such proceeds set apart by the decree to satisfy Mrs. Gray's debt should more than suffice to satisfy it, then any surplus of such proceeds should be paid over to Pepper on account of his debt and interest; and that the balance of rents remaining in the receiver's hands, after deducting the payments to be made out of such rents as specified in the decree, and after paying interest to Pepper on the sums advanced by him for taxes and insurance premiums, should be paid by the receiver to Pepper on account of any balance of principal and interest, as decreed, that should remain due after applying the proceeds of lot 3, as directed by the decree to be apportioned and applied. It also affirmed the orders dismissing the two petitions filed by Shepherd on the 24th of March, 1885, and charged Shepherd with the costs of the appeal.

Shepherd, Cross, Bacon, Bartlett and Mrs. Gray appealed in open court to this court from the decree of October 29, 1885, the appeal was allowed, and the amount of the supersedeas bond on behalf of the defendants other than Mrs. Gray was fixed at \$1,000, and that on her behalf at \$100. The appeal of Pepper was abandoned. The defendants other than Mrs. Gray gave the bond required of them. Mrs. Gray did not give the necessary bond; and, although the record was filed in this court on the 9th of October, 1886, she took no action to perfect her appeal to this court until the case came on for hearing, on the 26th of November, 1889, when she offered to the court to be filed a proper bond in the sum of \$100. No citation was necessary on her appeal, as she had taken it in open court, the record had been duly filed in this court, on October 9, 1886, and, under the circumstances, we will permit the bond on behalf of Mrs. Gray to be filed *nunc pro tunc* as of the 26th of November, 1889, and her appeal to stand as perfected.

At the time the loans were made by Pepper to Shepherd, Shepherd claimed to own, and agreed to give as security therefor, the land and improvements situated at the northeast corner of Connecticut Avenue and K Street, fronting 48 feet 9 inches on K Street and 109 feet ¾ inch on Connecticut Avenue, containing 8,466.23 square feet, known as lot No. 3 in Shepherd's subdivision of lots in square No. 164. The improvements covered nearly the whole of that lot, the portion not so covered being enclosed and used in connection with the house. It was the intention of both Pepper and Shep-

herd that the whole of this property should be included in the deeds of trust; and if Pepper had any knowledge, information or suspicion to the contrary, he would not have loaned any of the money. Shepherd testifies that when he executed the deeds of trust he supposed that they embraced the whole property. On the piece of land known as sub lot A, being that part of lot 8 which fronts 28 feet 2½ inches on Connecticut Avenue, and has such a depth that it contains 3,656 square feet, there had been actually constructed at the time a portion of the dwelling-house, which includes the coal-vaults, the laundry, the servants' apartments and a portion of the picture gallery.

It is not denied by Shepherd that the debts due by him to Pepper are bona fide debts, and are overdue; and their existence and amounts are satisfactorily proved. The sole defense of Shepherd amounts to this, that by the uncertainty and delay of the law, and by mistakes in the legal proceedings, Pepper has lost all right to the execution of the trusts created for his benefit; and it is urged that, by reason of the proceedings in the prior suit brought by Pepper, he is estopped from maintaining the present bill.

The opinion of the court in general term, delivered by *Mr. Justice Merrick*, is reported in 4 Mackey, 269. It states that when the decree of May 12, 1879, in the suit brought by Pepper, came to be made, there was by inadvertence an error in the description of the property in the decree, by leaving a blank in the designation of the trust deed, the result of which was that the decree was uncertain in itself and practically void on account of the uncertainty in its description of the property. As Bradley was trustee in each of the first two deeds of trust, and as the decree appointed Johnston to be trustee in the place and stead of Bradley in but one deed of trust, which was so described that it could not be identified, the whole transaction became uncertain and void. It resulted from this, as the opinion states, that there was no effective appointment of a trustee, and no effective sale; and the bill in the suit brought by Shepherd was dismissed on the ground that there was no cloud upon the title, because the sale itself was a nullity. The opinion further states that, while Shepherd averred in his answer that the sale to Pepper was a nullity and passed no title, and Mrs. Gray by her answer averred the same thing, they were now taking the ground that Pepper had no right to have a second sale of the property, because, having bought under the first sale, he must abide thereby; in other words, that, although he acquired no title under the first sale, he is estopped by that sale from having it sold again. The opinion adds that this is a defense which a court of equity cannot entertain. It also considers the point taken by Mrs. Gray, that inasmuch as she is the first incumbrancer on sub-lot A, Pepper cannot have the whole property sold without first discharging her entire claim, and says that the two pieces of property had been held in a general ownership; that the testimony showed that to sever them would be destructive of the value of both; that, although Pepper had not brought home to the knowledge of Mrs. Gray the equitable mortgage as between him and Shepherd, yet the fact of the building being

upon the two lots, and the further fact that, if there is to be a sale, the whole property ought to be sold together, because the value of both would be decreased if they were sold separately, constituted a case where a court of equity ought to order all the property to be sold together; that it would be inequitable to compel Pepper to redeem the whole of the debt to Mrs. Gray as a condition of the sale of sub-lot A, because Mrs. Gray is entitled to only an inconsiderable portion of the incumbered premises, except in subordination to the claims under the first two trust deeds; and that the decree of the special term, in giving to Mrs. Gray such portion of the proceeds of sale as should be determined to be the value of her interest in sub-lot A, upon testimony as to the relative values of the two properties, gave to her all that she was entitled to in equity. As to the rents and profits, the opinion said that wherever property subject to a lien has been brought within the domain of a court of equity, and a receiver of it is appointed, the rents and profits in the hands of the receiver will be applied, along with the *corpus* of the fund, to satisfy the lien, after paying charges, such as taxes and insurance; that the special term properly directed the application of the rents to pay off premiums of insurance and taxes which had accrued; but that the decree ought to be modified by directing that the residue of the rents should go to make up any deficiency in the proceeds of the sale of the two properties to satisfy the *corpus* of the debts, recognizing the right of Mrs. Gray to her share of the proceeds of sale according to the apportionment before indicated, but dedicating the rents primarily to the satisfaction of the debts due to Pepper, together with the proceeds of the sale of the primary property upon which the house is built. We concur in these views of the general term.

The bill in the first suit brought by Pepper was a bill merely to substitute a trustee in the place of the trustees in the first two deeds of trust. The prayer of the bill was that such trustee be appointed, with directions and authority forthwith to execute all the trusts reposed by the first two deeds of trust in the trustees mentioned therein. It does not pray that an officer of the court shall make the sale, or that the trustee to be appointed by the court shall make the sale under any power to be given to him by the court; but it prays that he may execute the trusts under the deeds of trust. Moreover, the decree of May 12, 1879, declares that it is made "without prejudice to all other rights of defendant." This reserved the right of Shepherd to be heard on the question of the right of Pepper to foreclose under the deeds of trust. The present suit is a suit for foreclosure, and in it all defenses to the claims of Pepper were open to be made by Shepherd. In respect of parties, in respect of subject matter, and in respect of the relief prayed for, the two bills brought by Pepper are different; and none of the questions involved in the pleadings in the present suit were involved in or adjudicated in the first suit brought by Pepper. Still further, the uncertainty and inoperative character of the decree of May 12, 1879, make the whole suit fruitless and of no more effect than if it had never been commenced.

For the same reason, Pepper cannot be regarded as having made any election, in the first suit brought by him, to enforce a sale of the property described in the first two deeds of trust aside from a sale with it of sub-lot A, so as to be estopped from now asserting a lien upon sub-lot A. When the first bill was filed by Pepper, he knew that Shepherd had merely a tax title to sub-lot A; and Shepherd, in his answer to that bill, averred that the title to sub-lot A never belonged to him, and that he theretofore purchased what is called a tax title to sub-lot A, but it turned out to be void and of no effect. Therefore, Pepper could not at that time have attempted to reform the first two deeds of trust so as to include sub-lot A, because Shepherd then had no title to that sub-lot. But the fact that both Pepper and Shepherd agree that it was intended by them that the first two deeds of trust should include sub-lot A, gave Pepper a right to assert an equitable mortgage against that sub-lot; so that afterwards, when Shepherd bought in the proprietary title to it, as the evidence shows he did, Pepper was for the first time in a position to assert a lien against it.

It is, we think, very plain that Pepper acquired no title by the deed to him under the sale by the trustees, and that the decree dismissing the bill filed by Shepherd had no effect to establish any legal title in Pepper to the real estate in question. Even if resort may not be had to the opinion of *Mr. Justice James*, still it is manifest that the propositions stated in that opinion are sound, namely, that if the decree of May 12, 1879, was uncertain on its face, in the respects and to the extent before mentioned, the alleged title of Pepper, through the deed from the trustees to him, was not a cloud upon the title of Shepherd, and therefore the court could not grant Shepherd the relief he prayed for in the bill filed by him, and that bill was properly dismissed.

This view of the case is taken by Pepper, in his bill in the present suit, because he says therein, in regard to the decree of May 12, 1879, and the opinion of *Mr. Justice James*, "that, as it appears by the said opinion of the court that the said decree did not give to the said Johnston any power to sell, said decree was in effect an adjudication upon and favorable to the averments in said Shepherd's bill of complaint in said court that said sale was made without authority and the deed of said Philip and Johnston was null and void, and, as the said Shepherd has always averred and insisted that said decree was void and said sale a nullity, and to the end that said lot 3 of said Shepherd's subdivision may be sold as a whole, the complainant files this bill in order that an undisputed title to the whole property may be obtained by means of foreclosure proceedings under the order and decree of this court." Then the bill prays accordingly, "that a trustee or trustees may be appointed by this court to sell the whole of lot 3, in A. R. Shepherd's subdivision of square numbered 164, with the improvements thereon." Therefore, it is not true that Pepper is still asserting a legal title in himself.

We think that Pepper is entitled to have the whole of lot 3 sold. It was omitted at least by accident from the first two trust deeds, when

both parties supposed they covered it. Lot 3 embraces not only sub-lot A, but the property covered by the first two deeds of trust. Shepherd, in his answer to the first bill filed by Pepper, said "that, in his opinion, it would be impossible to make a sale and division of the said property under the said deed of trust without irreparable injury to, if not total destruction of, a large portion of the dwelling-house which is erected upon the said lot; . . . that the said dwelling-house would be entirely incomplete without the addition of that portion called the 'picture-gallery,' that the servants' apartments and the laundry and drying room, etc., etc., are underneath the said portion of said dwelling-house, as well as the heating apparatus for a large portion of the house; and that, if the said lot A, which is not included in the deed of trust of the said complainant, shall be separated from that portion which is included in the said deed of trust to the complainant, a dividing line would not only take off the said 'picture-gallery,' but would take off and destroy a portion of the back part of the main dwelling-house."

In regard to Mrs. Gray, the letter to her, written by Mr. Brown, of the firm of Fitch, Fox & Brown, who were negotiating for her the loan to Shepherd, the letter being dated April 18, 1876, speaks of the loan as one "to be secured by a second mortgage, the prior mortgage being for \$45,000." Besides this, the first two deeds of trust were recorded respectively June 8, 1874, and March 24, 1875, and they conveyed, to secure Pepper, the premises described in them, "together with all the improvements, ways, easements, rights, privileges and appurtenances to the same belonging or in anywise appertaining, and all the estate, right, title, interest and claim whatsoever, whether at law or in equity, of the said parties of the first part, of, in, to or out of the said piece or parcel of land and premises." The improvements and easements in question were visibly necessary for the dwelling-house as then constructed, and were visibly upon, or required the use of, sub-lot A, as stated by Shepherd as before recited.

Mrs. Gray is only a mortgagee, and not the owner in fee, of sub-lot A; and her interest in the property is subject to the prior and subsequent interests of other parties, as those interests are usually ascertained and administered by a court of equity for the benefit of all concerned. It is not equitable that she should be allowed to use her mortgage on sub-lot A to prevent a sale of the entire lot 3. Her only right can be to have the proceeds of sub-lot A applied first to the payment of her debt; and that right is secured by the decree appealed from.

The present bill is one to obtain a decree for the sale of incumbered premises and the application of the proceeds of sale to discharge the incumbrances according to priority. The debts to Pepper and to Mrs. Gray are overdue; and under such circumstances a court of equity, on the application of a junior incumbrancer, will provide for the sale of the entire incumbered property, if the circumstances of the case show that the interests of the mortgagor and of the incumbrancers require the sale.

Finley v. Bank of the United States, 24 U. S.

11 Wheat. 304, 306 [6: 490]; *Hagan v. Walker*, 55 U. S. 14 How. 29, 87, 88 [14: 312, 316]; *Jerome v. McCarter*, 94 U. S. 784, 785, 786, 740 [24: 136, 137, 138]; *Hill v. Farmers & M. National Bank*, 97 U. S. 450, 453, 454 [24: 1051, 1053]; *Woodworth v. Blair*, 112 U. S. 8 [28: 615]; *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 754 [31: 309, 312]; *Vanderkemp v. Shelton*, 11 Paige, 28. This authority is properly exercised in the case of deeds of trust, where all the incumbrances are due, and where the plaintiff has a first lien on some of the property sought to be sold, and where all the incumbrancers are parties to the suit. Here Pepper has a first lien on the bulk of the property sought to be sold, and a second lien, as decreed, on the small remaining portion; and the debts secured by the first two deeds of trust were all overdue when the bill in this case was filed, as well as the debt due to Mrs. Gray. Under such circumstances, the mere non-assent of Mrs. Gray ought not to prevent the court from doing what is equitable in regard to the claims of Pepper, as well as those of herself.

There was no error in the dismissal of the two petitions of Shepherd, filed in March, 1885, nor in entering a personal decree against him for any deficiency which should remain after exhausting the property covered by the deeds of trust.

The fact of the bringing of the suit at law upon the notes, by Pepper against Shepherd, in April, 1880, was set up in the answer of Bradley to the bill in the present suit, and was therefore in issue; but it was not shown in defense that Shepherd had ever been served with process in any such suit at law, or had appeared in it, voluntarily or otherwise. Moreover, the principal notes given to Pepper were not barred by limitation when the bill in this case was filed. As to the interest notes or coupons, although some of the unpaid ones for each of such two principal notes had been overdue more than three years, when the bill was filed, yet it makes a claim to recover all the interest, and Shepherd does not, in his answer, set up the Statute of Limitations as a bar to any part of the principal or interest claimed.

The bill in this suit prays for general relief, and a decree for a deficiency is a necessary incident of a foreclosure suit in equity. It is provided as follows by section 808 of the Revised Statutes relating to the District of Columbia: "The proceeding to enforce any lien shall be by bill or petition in equity, and the decree, besides subjecting the thing upon which the lien has attached to the satisfaction of the plaintiff's demand against the defendant, shall adjudge that the plaintiff recover his demand against the defendant, and that he may have execution thereof as at law." This provision was interpreted by this court in the case of *Dodge v. Freedman's Savings and Trust Co.* 106 U. S. 445 [27: 206], where it was held that it authorized a decree *in personam* against the debtor for the balance remaining due after the proceeds of the sale of lands covered by a mortgage or a deed of trust in the nature thereof had been applied to the satisfaction of the debt. The present cause is of the same character of foreclosure proceeding as that involved in the case cited. It was proper for the court,

under the bill as it stands and the Statute on the subject, to make a personal decree against Shepherd for a deficiency; and the matter of granting the prayers of his petitions filed in March, 1885, was a question of discretion in the court below, and not reviewable.

As to the question of the disposition of the rents in the hands of the receiver, we think the action of the court below was proper. The pecuniary condition of Shepherd, his failure to pay taxes, premiums of insurance or interest, the inadequacy of the property to pay the claims of Pepper and Mrs. Gray, and the diversion of the income from rents, from making such payments, to the use of Shepherd, up to the time of the appointment of the receiver, were adequate grounds for the appointment of the receiver. *Kountze v. Omaha Hotel Co.* 107 U. S. 378, 395 [27: 609, 616]; *Grant v. Phoenix Life Insurance Co.* 121 U. S. 105 [30: 905]. The court, through its receiver, took possession of the rents in order to preserve them for that party to the suit who should ultimately be found to be equitably entitled to them. *Hitz v. Jenks*, 123 U. S. 297, 306 [31: 156, 159]. The various reports of the receiver contained in the record, as to his payment of taxes, premiums of insurance, and the expenses of repairs on the building, show the necessity of his appointment. It would be grossly unjust, on the facts developed in this case, to appropriate the rents in the hands of the receiver to the use of Shepherd.

It is contended on behalf of Shepherd that the decree appealed from is erroneous, because it allows interest at the rate of 9 per centum per annum on the principal of the notes, from June 1, 1879, and March 22, 1880, respectively, until paid; and it is urged that the interest should have been fixed at the rate of 6 per cent from the date of the decree, March 26, 1885, on the ground that that was the rate of interest fixed by the Statute on judgments and decrees.

Section 713 of the Revised Statutes relating to the District of Columbia provides as follows: "The rate of interest upon judgments or decrees, and upon the loan or forbearance of any money, goods or things in actions, shall continue to be six dollars upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter term, except as provided in this chapter." Section 829 of said Revised Statutes provides as follows: "Upon all judgments rendered on the common-law side of the court in actions founded on contracts, interest at the rate of six per centum per annum shall be awarded on the principal sum due until the judgment shall be satisfied, and the amount which is to bear interest and the time from which it is to be paid shall be ascertained by the verdict of the jury sworn in the cause." Section 714 authorizes parties to contract in writing for the payment of interest at the rate of 10 per cent per annum.

It is urged that the decree is a decree which fixes the amount of each of the debts due by Shepherd, and says that those sums are "hereby decreed to be due and payable" by Shepherd to Pepper, with interest, etc.; that this is the language of a judgment; and that almost the same language is employed in reference to the accrued interest. The decree provides that,

if the net proceeds of the sale shall prove insufficient to discharge the claims of Pepper, he shall have and recover of Shepherd whatever amount may remain due of the claims decreed to be due by Shepherd to him, after the application thereto of the net proceeds of sale, and shall have execution therefor as at law. It is contended, therefore, that as the decree ascertained the amount of the debt still due, and fixed the rate of interest on it, it thereafter drew interest by virtue of the decree, and not by virtue of the terms of the contract, because the contract was merged in the decree.

We think, however, that on the face of the decree the court did not intend to, and did not, merge the contract in the decree; but merely fixed the amount due according to the terms of the contract, on the payment of which, before the day fixed, the decree would not go into effect, but the case would be dismissed. The Statute has no application, except as to the rate of interest charged on the deficiency which shall be found to exist after applying the net proceeds of sale to the debt; and the decree does not provide for interest in excess of six per cent per annum on such deficiency.

In regard to allowing interest on the principal of the notes at the rate of 9 per cent per annum until paid, it is to be said that such was the contract in each note.

It was stated at the bar that Hanna, one of the trustees appointed by the decree of the special term to make the sale, had died. If so, the court below will have power to appoint a new one in his place.

The decree in general term is therefore affirmed.

Mr. Justice Miller :

I dissent from so much of the judgment of the court in this case as requires the entire property to be sold together and makes provision afterwards for dividing the proceeds according to the valuation that may be made to ascertain how much of the money should go to appellant, Maria Gray.

I am of opinion that she has a right to have the piece of ground, on which her mortgage is declared to be the first lien, sold separately, so that she can bid whatever sum she may see proper in satisfaction of her mortgage. If this sum should be more than would satisfy the mortgage, of course the excess would go to the satisfaction of Pepper's debt. If it should sell for less, then Pepper has no interest in it, and I see no reason why she should be compelled to compete with Pepper or anybody else in purchasing the entire property, which is worth four or five times as much as her single piece is worth, in order to make that piece bring its full value on the sale.

STEPHEN C. MILLS, *Plff. in Err.*,
v.

MONTRESSOR T. ALLEN, *Adm'r. of*
STEPHEN DOW, *Deceased.*

(See S. C. Reporter's ed. *Mills v. Dow's Administrator*, 423-433.)

Lex loci—recital in deed—consideration, when may be contradicted—proof of separate contract—demand and notice—agreement to as-

sume payment, when an agreement to pay—absolute agreement.

1. The law of the State where the subject of the contract is situated, and where defendant, the contracting party, resides, and where the contract was made and the suit to enforce it is brought, governs in expounding and enforcing the contract and as to the rule of damages for a breach of it.
2. In Massachusetts, a recital in a deed, acknowledging payment of the consideration stated, is only prima facie proof, and is subject to be controlled or rebutted by other evidence.
3. An acknowledgment in an instrument of \$15,000 as the consideration, "which said sum of fifteen thousand dollars the said Dow and Pratt have this day advanced and paid to said Mills," is ambiguous, and does not show actual prior or simultaneous payment.
4. Evidence of a promise by defendants, as a part of such consideration of the instrument, to pay the debts which the plaintiff owed to the persons named in it, is admissible; and the refusal of the defendants to pay those debts on demand was a breach of their contract.
5. The issue being whether the consideration had been paid and whether the obligation of the defendants was broken, it was competent for the plaintiff to show by parol that, after such persons had become entitled to payment, they demanded payment from him; that he notified the defendants and made demand on them; and that they neglected to pay.
6. The agreement of the defendants to assume the contract between the plaintiff and the company, and that they would save him harmless from any and all liability by reason of his contracts with the persons named, was broken by a failure to pay such parties, to whom the plaintiff was liable, and it was not necessary to a breach that the plaintiff should show that he had first paid those parties.
7. The agreement is not merely one to indemnify the plaintiff from damage arising out of his liability, but is also one to assume his contracts and to discharge him from his liability, and is an absolute personal agreement.

[No. 161.]

Submitted Dec. 9, 1899. Decided March 3, 1890.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment for defendant, in an action to recover moneys on a contract of guaranty and assignment, etc. *Reversed.*

The facts are stated in the opinion.

Messrs. Geo. S. Hale and A. G. Stanchfield, for plaintiff in error:

The subject matter of the assignment was in Massachusetts, the defendant a resident in that State, the contract made there, the suit pending there, and the law of Massachusetts is to govern in enforcing and expounding it and to be the rule of damages for breach.

Cox v. U. S. 31 U. S. 6 Pet. 172, 202, 203 (8: 359, 370); *Consequa v. Willing*, Pet. C. C. 225.

The plaintiff is not precluded from showing the facts as to the consideration.

Galvin v. Thompson, 13 Me. 367; *Paige v. Sherman*, 6 Gray, 511, 513.

A grantor is not absolutely bound by the consideration or the acknowledgment of its payment expressed in his deed. These are recitals merely, which afford only prima facie

proof, which is subject to be controlled or rebutted by other evidence.

An action will lie against the grantee for a part of the consideration which he has failed in fact to secure or pay, although payment of the whole may be acknowledged by the terms of the deed.

Wilkinson v. Scott, 17 Mass. 249; *Carr v. Dooley*, 119 Mass. 294, 296; 1 Greenl. Ev. § 26, note 2, § 285; *Schillinger v. McCann*, 6 Me. 364; *Beach v. Packard*, 10 Vt. 96; *Shepherd v. Little*, 14 Johns. 210; *M'Crea v. Purnort*, 16 Wend. 460; *Pritchard v. Brown*, 4 N. H. 397; *Belden v. Seymour*, 8 Conn. 304, 312; *Watson v. Blaine*, 12 Serg. & R. 181, 187; *Gully v. Grubbs*, 1 J. J. Marsh. 887, 889; *Goldshede v. Swan*, 1 Exch. 154.

Evidence of a promise to pay the debts the plaintiff owed Hall & Co., as part of the consideration of said instrument, was clearly admissible; and the refusal to pay on demand was a breach of the contract.

Clark v. Deshon, 12 Cush. 589, 591; *Clifford v. Turrill*, 9 Jut. 638.

And not within the Statute of Frauds.

Hubon v. Park, 116 Mass. 541; *Aldrich v. Ames*, 9 Gray, 76; *Braman v. Donse*, 12 Cush. 227; *Carr v. Roberts*, 5 Barn. & Ad. 78; *Stout v. Folger*, 84 Iowa, 71; *Lathrop v. Atwood*, 21 Conn. 117, 125.

To assume a debt is an undertaking to pay it as the proper debt of the party who enters into the undertaking.

Drury v. Tremont Imp. Co. 13 Allen, 168, 171; *Stewart v. Clark*, 11 Met. 884; *Preble v. Baldwin*, 6 Cush. 549; *Smith v. Pond*, 11 Gray, 284; *Paper Stock Disinfecting Co. v. Boston Disinfecting Co.* 6 New Eng. Rep. 606, 147 Mass. 818.

A covenant to save harmless from liability is broken when the liability is incurred, without other proof of damages.

Gilbert v. Wiman, 1 N. Y. 550; *Calvo v. Davies*, 8 Hun, 222; *Noble v. Arnold*, 23 Ohio St. 264, 271; *Spark v. Heslop*, 28 L. J. N. S. Q. E. 197, 200; *Carr v. Roberts*, 5 Barn. & Ad. 78; *Chace v. Hinman*, 8 Wend. 452; *Rockefeller v. Donnelly*, 8 Cow. 628.

On a breach of a warranty by A to B, B may recover what he is liable for to C on a like sub-warranty of the same article, although unpaid.

Randall v. Roper, 27 L. J. N. S. Q. B. 266; *Warwick v. Richardson*, 10 Mees. & W. 284; Com. Dig. Condition, 1; *Hodgson v. Wood*, 2 Hurlst. & C. 649; *Port v. Jackson*, 17 Johns. 239, cited in *Wicker v. Hoppock*, 78 U. S. 6 Wall. 94 (18: 752); *Wood v. Wade*, 2 Starkie, 167; *Lathrop v. Atwood*, 21 Conn. 125.

The court was not authorized, upon the evidence admitted and offered, to withdraw the case from the jury and order a verdict for the defendant.

Greenleaf v. Birth, 84 U. S. 9 Pet. 292 (9: 132); *Schuchardt v. Allen*, 68 U. S. 1 Wall. 359 (17: 642); *Hickman v. Jones*, 76 U. S. 9 Wall. 197 (19: 551); *Farnum v. Davidson*, 8 Cush. 282; *U. S. v. Tillotson*, 25 U. S. 12 Wheat. 180 (6: 594); *Gibbons v. Farwell*, 6 West. Rep. 120, 68 Mich. 344; *Doane v. Lockwood*, 3 West. Rep. 76, 115 Ill. 490; *Jones v. Vanandt*, 2 McLean, 596, 601; *Battis v. McCord*, 70 Iowa, 46; *Galvin v. Thompson*, 13 Me. 367.

Messrs. Stillman B. Allen and Montrossor T. Allen, for defendant in error:

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Under the power of proving by parol the consideration of a written contract, you cannot establish an independent agreement, otherwise within the Statute of Frauds.

Howe v. Walker, 4 Gray, 818; *Mlynn v. Bourneuf*, 8 New Eng. Rep. 343, 148 Mass. 277.

This recital that the \$15,000 has been paid is an estoppel upon the plaintiff to deny that fact.

Leddy v. Barney, 189 Mass. 394; *Southeastern R. Co. v. Warton*, 6 Hurlst. & N. 520; *Horton v. Westminster Imp. Comrs.* 7 Exch. 780; *Lucy v. Gray*, 61 N. H. 151; *Mann v. Williams*, 8 New Eng. Rep. 872, 143 Mass. 394; *Hudson v. Green Hill Seminary*, 113 Ill. 618; *Lainson v. Tremere*, 1 Ad. & El. 792; *Bowman v. Taylor*, 2 Ad. & El. 278.

Where a receipt embodies a contract it cannot be rebutted.

Baker v. Nachtrieb, 60 U. S. 19 How. 126 (15: 528); *Moore v. Stinson*, 4 New Eng. Rep. 654, 144 Mass. 594; *Hildreth v. O'Brien*, 10 Allen, 104.

Until it be shown that as trustees the defendants have not administered the trust faithfully, or that they have in their hands trust funds which they have failed to pay over, the law will not imply a contract to pay the formal considerations.

Shoe & Leather Bank v. Dix, 128 Mass. 148; *Twomey v. Crowley*, 187 Mass. 184.

The writing is the only evidence of the intent of the parties, and on the whole writing there is no personal liability.

Goodenough v. Thayer, 182 Mass. 152; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Carpenter v. Farnsworth*, 106 Mass. 561; *Terry v. Brightman*, 132 Mass. 818; *Ellis v. Pulsifer*, 4 Allen, 165; *Cutler v. Ashland*, 121 Mass. 588; *Cook v. Gray*, 133 Mass. 106; *Blanchard v. Blackstone*, 102 Mass. 848; *Whitford v. Laidler*, 94 N. Y. 145.

The distinction between an agreement or covenant of indemnity and an agreement to pay has been recognized in *Locke v. Homer*, 131 Mass. 93-109, and *Wilson v. Bryant*, 134 Mass. 291-294.

This case is one of indemnity alone.

Cutler v. Southern, 1 Saund. 116, note.

So far as this oral agreement is prior or contemporaneous, other evidence than the written contract is excluded.

Vass v. Wales, 129 Mass. 38; *Hagan v. Sartwell*, 5 New Eng. Rep. 539, 146 Mass. 33; *Simanovich v. Wood*, 5 New Eng. Rep. 190, 145 Mass. 180; *Munde v. Lambie*, 122 Mass. 386; *Spurr v. Andrews*, 6 Allen, 420; *Kelley v. Saltmarsh*, 6 New Eng. Rep. 206, 146 Mass. 585; *Knowlton v. Keenan*, 5 New Eng. Rep. 589, 146 Mass. 86; *Carr v. Hays*, 9 West. Rep. 183, 110 Ind. 408; *Burns v. Scott*, 117 U. S. 582 (29: 991); *Exhaust Vent. Co. v. Chicago, M. & St. P. R. Co.* 69 Wis. 454; *Corse v. Peck*, 3 Cent. Rep. 671, 102 N. Y. 513; *Brown v. Russell*, 2 West. Rep. 666, 105 Ind. 46; *Myers v. Munson*, 65 Iowa, 423; *Frost v. Brigham*, 139 Mass. 43.

Mr. Justice Blatchford delivered the opinion of the court:

On the 23d of October, 1878, the following instrument in writing was executed by Stephen C. Mills on the one part, and Stephen Dow and Nathan P. Pratt on the other:

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"Whereas Stephen C. Mills, of Stark, in the State of Maine, is the contractor for the building of the Boston and Mystic Valley Railroad Company's railroad bed, bridges, etc., etc.; and whereas the said railroad company has agreed to purchase and cause to be canceled the said contract, but said company has found it inconvenient or impossible to pay me the agreed price for such purchase; and whereas Stephen Dow, of Woburn, and Nathan P. Pratt, of Reading, have agreed to purchase of me the said contract in the interest of said railroad company and for the said company's benefit and profit, and to receive of me an assignment of said contract in trust for said company—that is to say, as collateral security for payment to them by said company of the sum of fifteen thousand dollars, the purchasing price, and interest thereon at the rate of six per centum per annum, for such time as the same shall remain unpaid, which said sum of fifteen thousand dollars the said Dow and Pratt have this day advanced and paid to said Mills for said contract and all sums that may hereafter become due thereunder; and whereas the said Mills has sublet some of the work, as per contracts marked 'B,' 'C,' 'D,' 'E,' and hereto annexed, with Hall and Burgess, J. M. Ellisland Savage and McCabe; and whereas the said Dow and Pratt assume said contract in their capacities aforesaid; and whereas by the terms of said contract 'A' ten per cent of the monthly estimate is retained in the hands of the company; the said Dow and Pratt as aforesaid accept the assignment of said contract, with the understanding and agreement that they will and shall well and truly save harmless the said Mills from any and all liability by reason of said contracts, the ten per cent reserved, and any claim by reason of said Ellis, Hall and Burgess and Savage and McCabe agreements before mentioned: Now, know all men that I, Stephen C. Mills, of Stark, in the State of Maine, the person named in the contract hereto annexed, marked 'A,' in consideration of fifteen thousand dollars to me paid by Stephen Dow, of Woburn, in the County of Middlesex and Commonwealth of Massachusetts, and Nathan P. Pratt, of Reading, in said County of Middlesex, in their capacity aforesaid, have assigned and do hereby assign, sell, convey and set over to the said Dow and Pratt as aforesaid, and their assigns, all my interest in the within and before-mentioned contract marked 'A,' and every clause, article or thing therein contained, and I do hereby constitute and appoint them, the said Dow and Pratt, trustees as aforesaid, my attorney or attorneys, in my name, but to their own use as aforesaid, to take all legal means which may be proper for the complete recovery and enjoyment of the assigned premises, with power of substitution. In witness whereof I have hereunto set my hand and seal this twenty-third (23) day of October, A. D. 1878.

"S. C. Mills & Co.

"Stephen C. Mills. [L. s.]

"Signed, sealed and delivered in the presence of—

"Henry B. Nottage.

"P. Webster Loche.

"We, the said Stephen Dow and Nathan P.

Pratt, hereby accept the above assignment and the conditions preceding, the same for the purposes aforesaid.

"Witness: Stephen Dow.
"P. Webster Loche. Nathan P. Pratt."

The contract of Mills with the Boston and Mystic Valley Railroad Company, to build and equip the road of that company from Somerville to Wilmington, was made on the 4th of May, 1878. On the 6th of May, 1878, the plaintiff, under the name of S. C. Mills & Co., made a sub-contract with H. C. Hall and J. H. Burgess, being the Hall and Burgess named in the instrument of October 23, 1878, to grade the road-bed of the railroad from Wilmington to Somerville. The road had not been completed on the 23d of October, 1878. Dow and Pratt were stockholders and directors in the company. Of the \$15,000 mentioned in the instrument of October 23, 1878, they paid to Mills only \$10,000. They did not pay any part of \$11,048.08, which was due to Hall and Burgess for work done under their contract, partly before and partly after the instrument of October 23, 1878, was executed. Mills brought this suit against Dow and Pratt, in the Circuit Court of the United States for the District of Massachusetts, to recover those sums. Issue was joined by Dow. Pratt did not appear and was defaulted. At the trial before a jury the court directed a verdict for the defendant Dow, and a judgment accordingly was entered, to review which the plaintiff has brought a writ of error. Since the writ was brought, Dow has died, and his administrator has been substituted as defendant in error in his stead.

Dow was president of the railroad company, and as such executed the contract between the company and Mills for the construction and equipment of the road. The sub-contractors named in the instrument of October 23, 1878, continued work on the road under their contracts up to the middle of December, 1878, and furnished the labor and materials set forth in the declaration and in the accounts annexed thereto, so that there was a balance exceeding \$6,000 due from Mills to Hall and Burgess, partly for work done prior to October 23, 1878, and partly for work done subsequently to that date. Dow was informed of the amount so due to the sub-contractors, and that the same had never been paid.

The bill of exceptions, after stating the foregoing facts, sets forth that the plaintiff offered to show by Hall, for the purpose of proving an independent oral contract based on an alleged liability of Dow as stockholder, that Dow repeatedly promised Hall, in 1879 and subsequently, that he would pay the amount claimed to be due to Hall and Burgess, but the court refused to admit the evidence at that stage of the case, on the ground that there was no evidence of a consideration for the promise, and that the liability, and the fact that Dow was a stockholder, must first be shown; that the plaintiff offered to show, by his own evidence, that the consideration of the instrument of October 23, 1878, was the payment of \$15,000; that the defendants promised to pay him that sum as such consideration and had paid only \$10,000 of it, the plaintiff claiming that, by

the terms of the instrument, the defendants were bound to pay the whole of such consideration, and that, on proof that the consideration was \$15,000, and was partially unpaid, he would be entitled to recover; that the court ruled that the inquiry was irrelevant, on the pleadings and proofs as they then stood; that the plaintiff offered further to show that, as a part of the consideration of the instrument, the defendants promised to pay the debts the plaintiff owed to Hall and others named in the instrument; and that the court refused to admit the evidence.

The bill of exceptions states, also, that there was evidence tending to show that the defendants were stockholders and directors of the company, and Dow was its president, from May 1, 1878, to June 1, 1879; that Hall had authority from the plaintiff to collect from the defendants the amounts due to the sub-contractors; that Dow, at the request of the plaintiff, paid to one or more of the sub-contractors, subsequently to October 23, 1878, the amount due them for work done on the road, and had also paid to the plaintiff the amount of a judgment recovered against the latter by Savage and McCabe, in a suit brought by them subsequently to October 23, 1878, for work done by them under their sub-contract, which amount the plaintiff never paid to Savage and McCabe, and no claim is made for it in this suit; that, before this suit was brought, the sub-contractors demanded their pay from the plaintiff, showing him a statement of their account, and also made a demand on the defendants, and the plaintiff made a like demand on them; that, as between the plaintiff and the sub-contractors, there was no dispute as to the amount due; that the company voted to stop the work of construction on the road about the middle of December, 1878, and never resumed the work of construction after that date; that Hall and Burgess did not complete their contract within the time stipulated in it, for the reason, among others, that the company did not meet its payments and never secured the right of way for the portion not constructed by it; and that no evidence was introduced by the plaintiff that he had paid any portion of the sums due the sub-contractors named in the instrument of October 23, 1878. The plaintiff having closed his case, the defendant Dow contended that the plaintiff could not recover without first showing some actual payment or injury other than his liability to Hall and Burgess, so due and made known to the defendants; and that the same had not been paid. The court ruled that there was no competent evidence to sustain the plaintiff's case, and directed a verdict for the defendant Dow.

The bill of exceptions further states that the plaintiff duly excepted at the trial to such rulings, refusals to rule, and direction of the court.

The plaintiff alleges as error (1) the refusal of the court to admit the evidence offered as to the consideration of \$15,000, as to the promise to pay the balance of it, and as to the promise to pay the debts due to Hall and Burgess; (2) the ruling that the plaintiff could not recover without showing some actual payment or injury, other than his liability to Hall and Burgess so due and made known to the defendants; (3) the ruling that there was no

competent evidence to sustain the plaintiff's case; and (4) the withdrawal of the case from the jury and the direction of a verdict for the defendant Dow.

As the subject matter of the instrument of October 23, 1878, was in Massachusetts, and the defendant Dow was a resident there, and the contract was made there, and the suit was brought there, the law of that State is to govern in expounding and enforcing the contract and in determining the rule of damages for a breach of it.

It is contended by the defendant that the instrument contains an admission of the receipt of the entire \$15,000; and the question on this branch of the case is whether the plaintiff is precluded from showing the true state of facts. It is well settled in Massachusetts that a recital in a deed, acknowledging payment of the consideration stated, is only prima facie proof and is subject to be controlled or rebutted by other evidence. *Paige v. Sherman*, 6 Gray, 511, 513; *Wilkinson v. Scott*, 17 Mass. 249; *Carr v. Doolley*, 119 Mass. 294, 296.

Independently of this, the expression in the instrument which is claimed to be an acknowledgment of the receipt of the \$15,000, namely, "which said sum of fifteen thousand dollars the said Dow and Pratt have this day advanced and paid to said Mills," is ambiguous, and does not show actual prior or simultaneous payment. *Goldshede v. Swan*, 1 Exch. 154.

So, too, the evidence of a promise by the defendants, as a part of the consideration of the instrument, to pay the debts which the plaintiff owed to Hall and others named in it, was admissible; and the refusal of the defendants to pay those debts on demand was a breach of their contract. *Clark v. Deahon*, 12 Cush. 589, 591.

The issue being whether the consideration had been paid and whether the obligation of the defendants was broken, it was competent for the plaintiff to show by parol that, after Hall and Burgess had finished their work under their sub-contract, they stated their account to the plaintiff and demanded payment from him; that he notified the defendants and made demand on them; and that they neglected to pay. Such demand, and a neglect on their part to pay, tended to support the case of the plaintiff.

The balance due by the plaintiff to Hall and Burgess was \$11,048.08, with interest from January 1, 1879; and that was the amount of the liability of the plaintiff to them under his contract with them. The agreement of the defendants, in the instrument of October 23, 1878, is that they assume the contract between the plaintiff and the company, and that they will well and truly save the plaintiff harmless from any and all liability by reason of his contracts with Hall and Burgess, Ellis, and Savage and McCabe, "the ten per cent reserved," and any claim by reason of such contracts.

The agreement to assume the contract, in connection with the further agreement to save the plaintiff harmless from liability, was broken by a failure to pay the parties to whom the plaintiff was liable, and it was not necessary to a breach that the plaintiff should show that he had first paid those parties. *Braman v. Douse*, 12 Cush. 227; *Locke v. Homer*, 131

Mass. 98; *Drury v. Tremont Improvement Co.* 13 Allen, 168, 171; *Stewart v. Clark*, 11 Met. 884; *Preble v. Baldwin*, 6 Cush. 549; *Smith v. Pond*, 11 Gray, 284; *Paper Stock Disinfecting Co. v. Boston Disinfecting Co.* 147 Mass. 318, 6 New Eng. Rep. 606.

By the instrument in question, the defendants took the place of the plaintiff, and became, after the instrument was executed, principals in the work of constructing the railroad; and their acceptance of the assignment and the conditions preceding it included the sub-contracts and what was due and to become due upon them. The contract is not merely one to indemnify the plaintiff from damage arising out of his liability, but is an agreement to assume his contracts and to discharge him from his liability. *Gilbert v. Wiman*, 1 N. Y. 550; *Noble v. Arnold*, 23 Ohio St. 264, 271; *Carr v. Roberts*, 5 Barn. & Ad. 78; *Chace v. Hinman*, 8 Wend. 452; *Rockefeller v. Donnelly*, 8 Cow. 623; *Randall v. Roper*, 27 L. J. N. S. Q. B. 266; *Warwick v. Richardson*, 10 Mees. & W. 284; *Port v. Jackson*, 17 Johns. 289; *Wicker v. Hoppock*, 73 U. S. 6 Wall. 94 [18: 752]; *Lathrop v. Atwood*, 21 Conn. 117, 125.

The case is not open to the objection that the plaintiff endeavored to extend and enlarge by parol the provisions of a written instrument, under the guise of proving its consideration; and the cases on that subject do not apply.

Although the instrument in question states that the defendants have agreed to receive from the plaintiff an assignment of the plaintiff's contract with the railroad company "in trust for said company;" that the defendants "assume said contract in their capacities aforesaid;" that they have paid the \$15,000 "in their capacity aforesaid," and the assignment is made to them "as aforesaid;" and that the plaintiff appoints them, "trustees as aforesaid," his attorneys; and although they "as aforesaid accept the assignment," their agreement to save the plaintiff harmless from any and all liability by reason of the contracts named is an absolute personal agreement on their part.

The judgment is reversed, and the case is remanded to the Circuit Court with a direction to award a new trial.

JOSIAH FOGG, Appt.,

v.

DEWITT C. BLAIR, Trustee.

(See S. C. Reporter's ed. 534-541.)

Judgments, when liens—property of railroad company, not subject to trust—rights of creditor—transfer, when not illegal—notice to bondholders—bonds of railroad negotiable—trust property—mortgage and sale.

1. Judgments become liens only from the time they are rendered, or notice thereof is filed in the register's office of the county where the property is situated. They are subordinate to any prior mortgage upon the property.

NOTE.—As to negotiability of railroad bonds, see note to *White v. Vermont & Mass. R. Co.* 16: 221. As to lien of a mortgage on after-acquired property, see note to *Pennock v. Coe*, 16: 436.

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2. The property of a railroad company is not held under any such trust to apply it to the payment of its debts as to restrict its use for any other lawful purpose, it matters not how meritorious the demand of the creditor may be.
3. The creditor must obtain a lien upon the property of the company, or security in some other form, or he will have to take his chances with all other creditors to obtain payment in the ordinary course of legal proceedings for the collection of debts.
4. The objection that the transfer by the old company of its entire property to the new company was illegal and *ultra vires*, and therefore to be disregarded, cannot be availed of by the appellant, for he has proceeded against the new company and obtained, upon the assumed validity of such transfer, a decree that it pay his judgment, which is founded upon a demand that company agreed to assume as part of the consideration of the transfer.
5. If the parties who took the bonds issued by the St. Louis, Hannibal and Keokuk Railroad Company had notice, actual or constructive, of the demand of the complainant, it would not have affected their rights as that demand was not then in judgment, and created no lien upon the property of the company, nor any restriction upon the company's right to use it for any lawful purpose.
6. The bonds given to raise the necessary funds to complete the road of the company, and secured by the mortgage, were negotiable instruments, and in the hands of the purchasers cannot be impeached for any neglect of the company issuing them to pay the demands of other creditors.
7. The doctrine that the property of a railroad company is a trust fund for the payment of its debts only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders.
8. The doctrine that the property is so affected by the indebtedness of the company that it cannot be sold, transferred or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness, has no existence.

[No. 188.]

Argued Jan. 24, 27, 1890. Decided Mar. 3, 1890.

APPEAL from a judgment of the Circuit Court of the United States for the Eastern District of Missouri dismissing a cross-bill, filed to obtain priority for a judgment over a mortgage, in a suit for the foreclosure of the mortgage. *Affirmed.*

Reported below, 25 Fed. Rep. 684, 27 Fed. Rep. 176.

Statement by Mr. Justice Field:

On the 16th of February, 1867, the St. Louis and Keokuk Railroad Company was incorporated by the Legislature of Missouri to construct and operate a railroad from some suitable point on the North Missouri Railroad, not exceeding thirty miles west of St. Charles, in St. Charles County, to some point near the mouth of the Des Moines River, on the northern boundary of the State. Under its charter the company located its road between the points

As to when a lien or right to lien is assignable, see note to *Davis v. Bilaland*, 21: 269.

How waived; when taking other security waives lien.—see note to *Grant v. Strong*, 21: 859.

designated and constructed a portion of it and graded other portions, and in this work expended several hundred thousand dollars.

The appellant, Josiah Fogg, held a demand against this company for work and advances on its account, and on the 22d of September, 1870, an adjustment and settlement of the amount was had between them, and it was found that the company was indebted to him in the sum of \$9,547.75.

Afterwards, on the 18th of June, 1872, a corporation known as the St. Paul, Hannibal and Keokuk Railroad Company was formed under the General Law of Missouri, to construct and operate a railroad, with one or more tracks, from the City of St. Louis to a point near the northeast corner of the State opposite to Keokuk in Iowa, with a branch, in Lincoln County, to its coal fields, from a point near Troy, and a branch up the valley of Mill Creek, from a point where the line crosses the creek.

To this new corporation the old corporation, upon the request and direction of the holders and owners of a majority of its stock, on the 4th of March, 1873, sold and transferred its entire road and all the branches, buildings, machinery and appurtenances belonging to or connected with it.

In consideration of the transfer, the new corporation, that is, the St. Louis, Hannibal and Keokuk Railroad Company, among other things, agreed to assume, pay and satisfy all the debts and liabilities incurred by the first company or legally imposed upon it, for right of way, station grounds, ties and bridging, and also to perform various contracts of that company which are specially mentioned. The new corporation was composed principally of the same persons and the same officers as the old corporation, and among the contracts assumed was one with the Missouri and Iowa Construction Company for building the road, and it stipulated that in payment of this work bonds of the company should be issued secured by a first mortgage on its property.

Pursuant to this contract, the new company, on the first of October, 1872, executed to Dewitt C. Blair, of New Jersey, and Clarence C. Mitchell, of New York, a mortgage or deed of trust of its railroad, then constructed or that might thereafter be constructed, with its right of way, buildings and appurtenances then existing or which might afterwards be acquired, its rolling stock and machinery of every kind, and all its franchises and property, to secure bonds of the company issued on that day, in sums of \$1,000 each, to the amount of \$4,200,000.

Afterwards this mortgage was taken up and canceled, and on the first of August, 1877, a new mortgage or deed of trust was executed by the company to Dewitt C. Blair, of all its property situated between the Cities of St. Louis and Hannibal in Missouri, and its franchises, to secure the payment of its bonds issued of that date, amounting to \$1,680,000. The interest was not paid upon these bonds, and the trustee, on the 6th of February, 1884, commenced a suit in the Circuit Court of the United States for the Eastern District of Missouri, to foreclose the mortgage and sell the property. The bill not only made the mortgagor a party defendant, but also certain per-

sons named, of whom Josiah Fogg was one, representing that they claimed to have liens, as judgment creditors, incumbrancers or otherwise, upon the mortgaged premises, but alleging that their interest, if any, accrued subsequently to the lien of the mortgage and was subordinate thereto.

As mentioned above, on the 22d of September, 1870, Josiah Fogg had a settlement with the St. Louis and Keokuk Railroad Company, by which the amount due him by the company on that date was agreed to be \$9,547.75. For this amount and interest he brought suit in the circuit court of the United States in April, 1881, and on the 3d day of October, 1882, he recovered judgment for \$16,489.68. Execution issued thereon having been returned unsatisfied, in May, 1883, he brought suit, on the equity side of the court, against the St. Louis, Hannibal and Keokuk Railroad Company to have that judgment declared a lien upon its property, and to compel that company to pay the judgment, and to enjoin it from selling or incumbering its property until such payment was made. The suit was brought against both the old and new company, and resulted in a decree entered on the 5th of May, 1884, adjudging that the two companies were liable jointly and severally for the judgment and interest, which amounted then to \$18,365.11, the payment of which was decreed against them. The judgment was not declared to be a lien upon the property of the company, nor was the use or disposition of its property enjoined.

To the suit for the foreclosure of the mortgage brought by Dewitt C. Blair, trustee, Josiah Fogg appeared and answered the bill, and also filed a cross-bill. By his cross-bill he seeks to obtain priority for his judgment over the demands of the trustee, acting for and representing the bondholders. He sets forth the origin of his demand, the recovery of judgment for the amount against both the first and second corporations, and founds his claim to priority over the mortgage on the theory that the old corporation could not transfer its property to the new corporation without the new corporation becoming trustee for all the creditors of the old company; that its property was thus affected with a trust, and could not be subjected to a mortgage so as to give priority to the bonds secured over the demands of creditors existing at the time of such transfer; and that the trustee, Dewitt C. Blair, took the bonds of the company for John I. Blair and the executors of Moses Taylor, deceased; and charges, upon information and belief, that he took them with full notice of the claim of the complainant against the old corporation; and that the suit to foreclose the mortgage was a scheme designed to cut him off from enforcing his demand, and to have the railroad and its appurtenances sold under a decree of foreclosure and bought in by said John I. Blair and the executors of Moses Taylor, at a price greatly under their actual value. To this cross-bill the trustee, Dewitt C. Blair, as defendant, answered, denying its allegations, some of them positively and others upon information and belief—positively the allegations that the transfer of the property of the first corporation was made in fraud of the rights of the complainant, and that the second corporation took the property with

knowledge and notice of the debt owing to him by the first corporation. A replication was filed to the answer and proofs were taken. Upon the hearing the court dismissed the cross-bill, holding that the claim of the complainant was not entitled to priority over the bonds secured by the mortgage. (25 Fed. Rep. 684, and 27 Fed. Rep. 176.) From this decree the case is brought by appeal to this court.

Messrs. James Carr, Geo. D. Reynolds and E. A. Sumner, for appellant:

The assets of a corporation are a trust fund for the payment of its debts.

Wood v. Dummer, 8 Mason, 308; *Curran v. Arkansas*, 56 U. S. 15 How. 907 (14: 706); *Chicago, R. I. & P. R. Co. v. Howard*, 74 U. S. 7 Wall. 392 (19: 117); *Union Nat. Bank v. Douglass*, 1 McCrary, 86; *Jones v. Arkansas Mechanical & Agricultural Co.* 38 Ark. 17.

The transfer made by the St. Louis and Keokuk Railroad Company of its franchises, completed railroad and all other property to the St. Louis, Hannibal and Keokuk Railroad Company, on the 4th day of March, 1873, was *ultra vires*, and consequently null and void.

Abbott v. American Hard Rubber Co. 38 Barb. 578; *Thomas v. West Jersey R. Co.* 101 U. S. 71 (25: 950); *Hurt v. Salisbury*, 55 Mo. 310.

The new company took said franchises and property with notice of the appellant's claim against the old company, because the directors of both companies were the same.

Cumberland Coal & I. Co. v. Sherman, 80 Barb. 558; *Hunt v. Bay State Iron Co.* 97 Mass. 279; *Pierce v. Emery*, 32 N. H. 484; *Haven v. Emery*, 38 N. H. 66.

The officers and directors of the old company were incapacitated from transferring the franchises and property of that company to the new company on account of their being the officers and directors of the new company. They could not deal with themselves.

Wardell v. Union P. R. Co. 103 U. S. 651 (26: 509).

The new company was not a bona fide purchaser for value of the franchises and property of the old company; it took the franchises and property of the old company clothed with a trust in favor of the creditors of the old company.

Perry, Trusts, §§ 38, 217, 828; *Jones v. Arkansas Mechanical & Agricultural Co.* 38 Ark. 17.

Said franchises and property being a trust fund, and the St. Louis and Keokuk Railroad Company being insolvent, the appellant, as a creditor of said company, can pursue its assets into the hands of all other persons, except bona fide creditors or purchasers.

Hibernia Ins. Co. v. St. Louis & N. O. T. Co. 13 Fed. Rep. 516; *Curran v. Arkansas*, 56 U. S. 15 How. 304 (14: 705); *Mobile v. Watson*, 116 U. S. 289 (26: 620); *Blair v. St. Louis, H. & K. R. Co.* 22 Fed. Rep. 36, 24 Fed. Rep. 148; *Taylor v. Bowker*, 111 U. S. 110 (28: 368); *Terry v. Anderson*, 95 U. S. 628 (24: 365); *Baltimore Cent. Nat. Bank v. Conn. Mut. L. Ins. Co.* 104 U. S. 54 (26: 693); *Harrison v. Union P. R. Co.* 13 Fed. Rep. 522; *Fogg v. St. Louis, H. & K. R. Co.* 17 Fed. Rep. 871.

The appellee was bound to take notice of the 133 U. S.

recitals in the deed of transfer from the old company to the new company, although said deed was not recorded.

Brush v. Ware, 40 U. S. 15 Pet. 93 (10: 672); *Jones, Mortgages*, § 205; *Manich v. Shearer*, 49 Ala. 226; *De Cordova v. Hood*, 84 U. S. 17 Wall. 1 (21: 587); *Harris v. Fly*, 7 Paige, 421; *Ketchum v. St. Louis*, 101 U. S. 815 (25: 1002). See also *Jones on Mortgages*, § 205.

Mr. Walter C. Larned, for appellee:

No other or further defenses will be allowed in a foreclosure suit brought by bona fide purchasers of bonds to foreclose a mortgage securing them than would be allowed if an action were brought in a court of law upon the bonds. The bondholders stand in the same position as bona fide assignees for value before maturity of negotiable promissory notes.

Kenicott v. Wayne County, 83 U. S. 16 Wall. 452 (21: 319); *Carpenter v. Logan*, 83 U. S. 16 Wall. 271 (21: 313); *Kelly v. Green Bay & M. R. Co.* 5 Fed. Rep. 846.

Mr. Justice Field delivered the opinion of the court:

The claim of the appellant, that his demand, which passed into judgment May 5, 1884, against both the St. Louis and Keokuk Railroad Company and the St. Louis, Hannibal and Keokuk Railroad Company, is entitled to payment prior to the bonds secured by the mortgage or trust deed, would seem to be answered by the dates of the judgment and mortgage, respectively. The judgment was not rendered against the original company until October 3, 1882, and not against both companies until May 5, 1884. The mortgage was executed on the 1st day of August, 1877, five years before the first judgment and nearly seven years before the second.

It does not appear in the record precisely what the services were which were rendered by the complainant, or for what purposes advances by him were made. This is not material, however, as no claim is made, because of the nature of those services and advances, to a lien on the property of the original company, under the Statute of the State. It does not appear that any proceedings were taken to establish such a lien. Independently of that Statute, there was no lien upon any property of the railroad company for the demand of the complainant. It stood like any ordinary debt against a corporation, which could only be enforced by legal proceedings establishing its validity and amount by judicial determination, and then by process upon the judgment obtained, in subordination to any previously existing liens upon the property.

In some States—and this is the case in Missouri—statutes make judgments of their courts liens upon the real property of the judgment debtor, and the same rule applies in such States to judgments in the courts of the United States. But in all cases the judgments become liens only from the time they are rendered, or notice thereof is filed in the register's office of the county where the property is situated. They are subordinate to any prior mortgage upon the property. This doctrine is so familiar that it is surprising that any other can be supposed to exist. The property of a railroad company is

not held under any such trust to apply it to the payment of its debts as to restrict its use for any other lawful purpose, it matters not how meritorious the demand of the creditor may be. He must obtain a lien upon the property of the company, or security in some other form, or he will have to take his chances with all other creditors to obtain payment in the ordinary course of legal proceedings for the collection of debts.

In *Thompson v. White Water Valley R. Co.*, decided at the present term (132 U. S. 68 [83: 256]), it was held that the claim of bondholders of the company secured by a mortgage upon its railroad, and all property then appertaining thereto, or which the company might afterwards acquire, had priority over a claim of contractors to a lien upon the rents and profits of a portion of the road constructed by them subsequently to the mortgage. It was earnestly contended that they had an equitable lien upon the earnings of that portion of the road because with their moneys it was constructed. But the court replied that the work was not done at the request of the mortgagees, but upon a contract with the lessee of the road, by which the latter stipulated, as one of the considerations of the lease, to construct that part of the line, and that with those contractors the bondholders secured by the mortgage had no relations, and therefore incurred to them no obligation. In the opinion of the court reference was made to the case of *Galveston, H. & H. R. Co. v. Coudrey*, 78 U. S. 11 Wall. 459, 481 [20: 199, 206]. In that case there were several creditors, and it was contended that priority should be given to the last creditor, for he had aided in preserving the property. But the court answered that this rule had never been introduced into our laws, except in maritime cases, which stood on a particular reason; that by the common law whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, which did not affect the question; that rails put down upon the company's road become a part of the road, and that the rule also applies to those permanent fixtures which are essential to the successful operation of the road; they become the property of the company, as much so as if they existed when the mortgage was executed. The case of *Thompson v. White Water Valley R. Co.* was much stronger than the one now before us; for there a special contract existed between the lessee company and the contractors that such lien should exist; while here there was no contract that the complainant's claim should be a lien upon any property.

In *Dunham v. Cincinnati, P. & C. R. Co.* 68 U. S. 1 Wall. 254, 267 [17: 584, 588], it was held that a mortgage by a railroad company of its road "built and to be built" took precedence, even as regards the unbuilt portion, over the claim of a contractor who had himself finished it under an agreement with the company that he should retain its possession and apply its earnings to the liquidation of the debt to him, and who had in accordance with such agreement taken possession of the road and retained it. The mortgage was executed and recorded before the contract for the completion of the

road was made; and the court said: "All of the bonds, except those subsequently delivered to the contractor, had, long before that time, been issued, and were in the hands of innocent holders. The contractor under the circumstances could acquire no greater interest in the road than was held by the company. He did not exact any formal conveyance, but if he had, and one had been executed and delivered, the rule would be the same. Registry of the mortgage was notice to all the world of the lien of the complainant, and in that point of view the case does not even show a hardship upon the contractor, as he must have known, when he accepted the agreement, that he took the road subject to the rights of the bondholders."

We do not attach any weight to the objection that the transfer by the old company of its entire property to the new company was illegal and *ultra vires*, and therefore to be disregarded. However such a transfer might be considered in a suit to set it aside, the objection does not lie in the mouth of the appellant, for he has proceeded against the new company and obtained, upon the assumed validity of such transfer, a decree that it pay his judgment, which is founded upon a demand that company agreed to assume as part of the consideration of the transfer.

There is no evidence in the record before us that the parties who took the bonds issued by the St. Louis, Hannibal and Keokuk Railroad Company had any notice, actual or constructive, of the demand of the complainant. But if they had, it would not have affected their rights. That demand was not then reduced to judgment, and created no lien upon the property of the company, nor any restriction upon the company's right to use it for any lawful purpose. The bonds were given to raise the necessary funds to complete the road of the company, and the mortgage was executed to secure their payment. They were negotiable instruments, and in the hands of the purchasers cannot be impeached for any neglect of the company issuing them to pay the demands of other creditors. We are unable to perceive any ground upon which their priority over the claim of the appellant can be in any way impaired.

We do not question the general doctrine invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders; it does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence. The cases of *Curran v. Arkansas*, 50 U. S. 15 How. 304, 307 [14: 705, 706], and *Wood v. Dummer*, 3 Mason, 808, give no countenance to anything of the kind.

Judgment affirmed.

ASAHEL GAGE, *Appt.*,

v.

ELLIS V. KAUFMAN.

(See S. C. Reporter's ed. 471-473.)

Tax deeds, as clouds upon title—no taxes due—tax deed, how shown to be invalid—bill in equity.

1. In a suit to set aside tax deeds as clouds on the title of lands, the allegation that the plaintiff is seised in fee simple is a sufficient allegation that he has possession as well as the title. The allegation that he has no adequate remedy at law is dispensed with by Equity Rule 21.
2. If no taxes were due upon which the lands could be sold, the plaintiff was not bound to pay any taxes as a condition of relief.
3. By the law of Illinois, the tax deed is no more than prima facie evidence in favor of the purchaser, and may be shown to be invalid, by proof either that there was no advertisement of sale, no judgment or precept, no taxes unpaid, or no notice to redeem given or recorded.
4. Where tax deeds appear upon their face to be clouds upon the plaintiff's title, a bill in equity is the proper form of obtaining relief.

[No. 189.]

Submitted Jan. 27, 1890. Decided March 3, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois to review a decree for the plaintiff in a suit in equity to remove a cloud upon a title to lands. *Affirmed.*

The facts are stated in the opinion.

Mr. Augustus N. Gage, for appellant:

It must appear that the complainant is either in possession of the property, or that the property is vacant and unoccupied.

Hamilton v. Quimby, 46 Ill. 90; *Comstock v. Henneberry*, 66 Ill. 212; *Harding v. Jones*, 86 Ill. 813; *Gage v. Abbott*, 99 Ill. 366; *Gage v. Griffin*, 103 Ill. 41.

The bill in this case does not offer to repay, and the decree does not require the repayment of the taxes paid by appellant, and which have inured to the benefit of appellee.

Farwell v. Harding, 96 Ill. 32; *Smith v. Hutchinson*, 108 Ill. 662; *Gage v. Nichols*, 112 Ill. 269.

The bill is insufficient as a bill of discovery. *Hyde v. Heath*, 75 Ill. 381; *Gage v. Reid*, 104 Ill. 509.

To show that he is entitled to the discovery of such matters as refer entirely to the defendant's case, the complainant must annex to his bill an affidavit stating that he does not know what they are, and has no means of obtaining them.

1 Dan. Ch. Pl. 392; *Story*, Eq. Pl. §§ 288, 289.

The defendant is not bound to discover the evidence of the title under which he claims.

1 Dan. Ch. Pl. 579; *Story*, Eq. Pl. §§ 571, 572, 858.

No collateral attack can be made upon a judgment in tax proceedings where the owner appeared and resisted the entry of the judgment; the only case in which such a judgment can be attacked collaterally is when the judgment is entered by default.

Graceland Cemetery Co. v. People, 92 Ill. 619.

Mr. Edward Roby, for appellee:

The bill was sufficient.

Morgan v. Smith, 11 Ill. 200, 201; *Wescott v. Wicks*, 72 Ill. 524; *Cooper*, Eq. Pl. 6; *Henry County v. Winnebago Drainage Co.* 52 Ill. 302; *Story*, Eq. Pl. § 255; *Finch v. Martin*, 19 Ill. 105, 112; *Reynolds v. Crawfordville Bank*, 112 U. S. 410, 411 (28: 783).

Chancery practice and jurisdiction is the same in Illinois as in the courts of the United States.

Alexander v. Pendleton, 12 U. S. 8 Cranch, 462 (3: 624); *Gage v. Ewing*, 107 Ill. 15.

This practice and jurisdiction to remove clouds from titles was fully settled and established in *Gage v. Rohrbach*, 56 Ill. 266, 267; *Gage v. Billings*, Id. 268; *Reed v. Tyler*, Id. 288, 290-292; *Barnett v. Cline*, 60 Ill. 205; *Reed v. Reber*, 62 Ill. 240; *Lee v. Ruggles*, Id. 427; *Pettit v. Shepherd*, 5 Paige, Ch. 501; *Ward v. Dewey*, 16 N. Y. 525-532; *Barnard v. Hoyt*, 63 Ill. 341; *Brooks v. Kearns*, 86 Ill. 550.

Sale without advertisement is void.

Charles v. Waugh, 35 Ill. 322, 323; *Spellman v. Curtentus*, 12 Ill. 418; *Thompson v. McLaughlin*, 66 Ill. 409; *Senichka v. Lowe*, 74 Ill. 275, 276.

Sale without judgment, or sale without precept, is void.

Atkins v. Hinman, 7 Ill. 437; *Hinman v. Pope*, 6 Ill. 131; *Baily v. Doolittle*, 24 Ill. 577; *Holbrook v. Dickinson*, 46 Ill. 235; *Ogden v. Bemis*, 14 West. Rep. 359, 125 Ill. 106; *Bell v. Johnson*, 111 Ill. 381; *Gage v. Caraher*, 14 West. Rep. 923, 125 Ill. 454.

An issue of tax deeds fair on their face, where there has been no foundation for them, presents a case for appeal to chancery to remove the cloud.

Gage v. Graham, 57 Ill. 146.

There were no taxes unpaid upon said land for which sale could on that day have been made. Sale was therefore void.

Mason v. Chicago, 48 Ill. 420; *Gage v. Rohrbach*, 56 Ill. 265; *Rorer*, Judicial Sales, §§ 720-727; *Hinman v. Pope*, 6 Ill. 138.

For want of notice to redeem, the deed was void.

Williams v. Underhill, 58 Ill. 139, 140; *Holbrook v. Fellows*, 38 Ill. 440.

The deed was procured by Gage in fraud of the owner's rights.

NOTE.—As to power of States to tax, see note to *Dobbins v. Erie County*, Bk. 10, p. 1022.

Taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations. See note to *Providence Bank v. Billings*, Bk. 7, p. 939.

As to exemption from taxation; whether a contract or not; not implied.—see note to *Tucker v. Ferguson*, Bk. 22, p. 306.

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As to sale of lands for taxes; strict compliance with statute necessary.—see note to *Williams v. Peyton*, Bk. 4, p. 518.

As to when an injunction to restrain the collection of a tax will be granted, see note to *Dows v. Chicago*, Bk. 20, p. 65.

As to when taxes illegally assessed can be recovered back, see note to *Ersoline v. Van Arsdale*, Bk. 21, p. 63.

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Dalton v. Lucas, 63 Ill. 387; *Bowman v. Wetzig*, 39 Ill. 427, 428.

No notice, or evidence thereof, was filed or recorded by the county clerk, and the issue, as well as the procurement of the deed, was fraudulent.

Dalton v. Lucas, 63 Ill. 389; *Bowman v. Wetzig*, 39 Ill. 427, 428.

And the deed was wholly void.

Dukes v. Rowley, 24 Ill. 231.

The deed, with the judgment and precept, is only prima facie evidence.

Spellman v. Curtentus, 12 Ill. 411; *Ransom v. Henderson*, 114 Ill. 531; *Belleville Nail Co. v. People*, 98 Ill. 399; *Riverside Co. v. Howell*, 113 Ill. 262, 263.

In Illinois, a deed void on its face, or a paper without seal, and therefore no deed, may be cloud upon title to be removed by bill.

Stout v. Cook, 37 Ill. 283; *Campbell v. McCahan*, 41 Ill. 45, 49; *Fitts v. Davis*, 42 Ill. 391; *Hodgen v. Guttery*, 58 Ill. 438; *Gage v. Graham*, 57 Ill. 144, 146-148.

Where such instrument may be made good by extrinsic evidence, or where it appears good upon its face, and can be made to appear void by extrinsic evidence, a bill to remove the cloud and quiet title, in the nature of a bill *quia timet*, will lie.

Reynolds v. Crawfordville First Nat. Bank, 112 U. S. 410, 411 (28: 736).

The averments of the bill were sufficient.

Morgan v. Smith, 11 Ill. 200, 201; *Henry County v. Winnebago Drainage Co.* 52 Ill. 302; *Cooper, Eq. Pl. 6*; *Story, Eq. Pl. § 255*.

Mr. Justice Gray delivered the opinion of the court:

This was a bill in equity by a citizen of Illinois against a citizen of New Jersey to remove a cloud upon the title of lands in Chicago of the value of \$10,000.

The bill alleged that the plaintiff was seised in fee simple of the lands; that the defendant claimed title to them under two pretended tax deeds to him from the county clerk, recorded in the office of the county recorder (copies of the records of which were set forth in the bill, showing deeds in the form prescribed by § 221 of chap. 120 of the Revised Statutes of Illinois of 1874); and further alleged that there was no advertisement of any public sale for nonpayment of taxes on the day mentioned in either deed; that there was no judgment or precept on which the lands could have been sold; that there were no taxes unpaid on which the sale could have been made; that no notice to redeem the lands from such pretended sale was given by the holder of any certificate of such sale, as required by the Constitution and statutes of Illinois; and that no such notice or evidence thereof was filed or recorded by the county clerk.

The defendant demurred to the bill, because it did not show who was in possession of the lands, or that the defendant was not in possession, or that the plaintiff had not an adequate remedy at law; because the plaintiff did not offer to do equity and to repay the taxes paid by the defendant; because the grounds alleged in the bill for setting aside the defendant's title were insufficient to overcome the prima facie

evidence of the tax deeds set forth in the bill; and for want of equity.

The court overruled the demurrer, and, the defendant electing to stand by it, entered a decree for the plaintiff. The defendant appealed to this court.

The grounds of demurrer are untenable. The allegation that the plaintiff is seised in fee simple is a sufficient allegation that he has the possession as well as the title. 1 Dan. Ch. Pr. chap. 6, § 5. The allegation that he has no adequate remedy at law is dispensed with by Equity Rule 21. If, as the bill alleges, no taxes were due upon which the lands could be sold, he was not bound to pay any taxes as a condition of relief. By the law of Illinois, the deed is no more than prima facie evidence in favor of the purchaser, and may be shown to be invalid by proof of either of the facts alleged in the bill and admitted by the demurrer, namely, that there was no advertisement of sale, no judgment or precept, no taxes unpaid, or no notice to redeem given or recorded. Illinois Rev. Stat. of 1874, chap. 120, §§ 177, 182, 191, 194, 216, 217, 224; *Senichka v. Lowe*, 74 Ill. 274; *Bell v. Johnson*, 111 Ill. 374; *Gage v. Rohrbach*, 56 Ill. 262; *Williams v. Underhill*, 58 Ill. 187; *Dalton v. Lucas*, 63 Ill. 337.

Upon general principles, and by the Illinois decisions, as the tax deeds appear upon their face to be clouds upon the plaintiff's title, a bill in equity is the proper form of obtaining relief upon the various grounds alleged.

Decree affirmed.

THE INHABITANTS OF THE TOWNSHIP OF BERNARDS, IN THE COUNTY OF SOMERSET, *Piffs. in Err.,*

THOMAS H. MORRISON ET AL.

(See S. C. Reporter's ed. 523-529.)

Town bonds, unavailing defenses to—necessary proofs—recitals in bonds—compliance with statute—presumptions—officers represent municipality—estoppel by recital.

1. Where it is conceded that the commissioners to issue town bonds in aid of a railroad were duly appointed; that the issue of bonds was no larger than authorized by statute; that a paper purporting to contain the consent of the requisite number of taxpayers, duly certified, was filed with

NOTE.—Municipal bonds as affected by change in the ruling of the highest court in a State, or by change in the Constitution. See note to *Mitchell v. Burlington*, Bk. 18, p. 360.

As to negotiability of railroad bonds, see note to *White v. Vermont & M. R. Co.* Bk. 16, p. 221.

As to suits on coupons detached from bonds, see note to *Kenosha v. Lamson*, Bk. 19, p. 725.

As to overdue coupons; rights of holders of; effect of, on bonds to which they are attached,—see note to *Texas v. White*, Bk. 19, p. 839.

As to mandamus to compel city, town or county to levy tax to pay bonds or interest on bonds, see note to *Davenport v. U. S. Bk.* 19, p. 704.

As to recitals in negotiable bonds or securities, as

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the county clerk, and that the plaintiffs were bona fide holders,—the defenses that the consent roll did not in fact contain the requisite number of taxpayers, and that the verifying affidavit was false, and that the commissioners did not borrow money on the bonds, but disposed of them without consideration, are unavailing against such bona fide holders.

2. Where the Act gave the commissioners power, under certain conditions, to issue the bonds, and the recitals therein show that they were issued "in pursuance" of the Act; and the bonds were all duly registered as required, plaintiff is only bound to show, to entitle him *prima facie* to judgment, the due appointment of the commissioners and the execution by them in fact of the bonds.
3. It is not necessary that he should, in the first instance, prove either that he paid value, or that the conditions preliminary to the exercise by the commissioners of the authority conferred by statute were in fact performed before the bonds were issued.
4. The one was presumed from the possession of the bonds, and the other was established by the Statute authorizing an issue of bonds, and by proof of the due appointment of the commissioners, and their execution of the bonds, with recitals of compliance with the Statute.
5. Officers appointed, such as commissioners appointed by the circuit court, represent the municipality as fully as officers elected. When the Legislature has declared how an officer is to be selected, and the officer is selected in accordance with that declaration, his acts, within the scope of the powers given him by the Legislature, bind the municipality.
6. Although the Act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet it is enough that full control in the matter is given to the officers named, and the town is estopped

by their certificate in the bonds from asserting, as against a bona fide holder, that the conditions were not complied with.

[No. 195.]

Argued Jan. 30, 31, 1890. Decided March 3, 1890.

IN ERROR to the Circuit Court of the United States for the District of New Jersey to review a judgment against a Township in an action on township bonds. *Affirmed.*

The facts are stated in the opinion.

Messrs. Alvah A. Clark and James R. English, for plaintiffs in error:

The commissioners are special and not general agents, and only had power to do the especial thing authorized by the Act.

Morrison v. Bernards, 26 N. J. L. 224.

It was gross carelessness to take the bonds without any examination, and gross carelessness warrants the inference of bad faith.

Hamilton v. Vought, 24 N. J. L. 187

Mere recitals by the officers of a municipal corporation do not preclude an inquiry as to the existence of legislative authority to issue them, even where the rights of a bona fide holder are involved.

Toledo Northern Bank v. Porter, 110 U. S. 609 (28: 458); *Dixon County v. Field*, 111 U. S. 44 (28: 360); *Carroll County v. Smith*, 111 U. S. 557 (28: 517).

Messrs. Cortlandt Parker and Wayne Parker, for defendants in error:

Defendants cannot set up against the recovery upon these bonds, in their character negotiable, and purchased before due for valuable consideration, without notice, the absence of prescribed formalities.

Knox County v. Aspinwall, 62 U. S. 21 How. 539, 546 (16: 208, 210); *Moran v. Miami County*

evidence of the fact rectified and as an estoppel, see note to *Mercer County v. Hackett*, Bk. 17, p. 548.

As to municipal bonds, reference to statute in, see note to *Ogden v. Daviess County*, Bk. 26, p. 263.

Municipal bonds issued in aid of railroad.

In an action against a town to recover on bonds issued in aid of a railroad, no question growing out of its liability for subscription to the stock can be inquired into. *Norton v. Dyersburg*, 127 U. S. 160 (32: 85).

Railroad-aid bonds issued by a county are not invalidated by a consolidation of the railroad with another after notice of the election at which the bonds were voted, under a statute passed before the election. *Nelson v. Haywood County*, 87 Tenn. 731.

Where it is within the power of the Legislature, after the issuance of town railroad-aid bonds, to correct irregularities of official action, it has power to pass an Act before the issuance of such bonds authorizing a change in their form, without impairing the consent of the taxpayers. *Brownell v. Greenwich*, 24 N. Y. S. R. 6.

A proceeding to authorize the issue of bonds by a town being in derogation of the common law, the statute must be strictly pursued. *Solon v. Williamsburg Sav. Bank*, 23 N. Y. S. R. 138.

The mistake or failure of the commissioners to affix their seals to bonds of a town does not defeat the enforceable validity of the bonds where there are no negative words in the statute declaring or necessarily implying such effect of the omission of the seal. *Id.*

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Town bonds issued under the New York Act of 1871, in regard to the New York & Oswego Midland Railroad Company, without any previous action of the company designating all the counties through which would pass the road, are issued without authority of law. *Purdy v. Lansing*, 128 U. S. 557 (32: 531).

In Illinois, under the Act of April 16, 1869, any condition imposed by a vote of a county as a condition precedent to the issuing of its bonds in payment of its subscription to the capital stock of a railroad company must have been complied with, in order to make such bonds valid and binding. *German Sav. Bank v. Franklin County*, 128 U. S. 526 (32: 519).

Where the bonds were not signed by an officer who was in office when they were signed, but by a person who was in office on the antedated day on which they bore date, and who was, when he signed them, a private citizen, they are not valid. *Coler v. Cleburne*, 131 U. S. 162 (33: 146).

Where the statute provides that it shall be the duty of the mayor, whenever any bonds are issued, to forward them to the comptroller of public accounts of the State for registry, the comptroller can receive them lawfully for registry only from such mayor. *Id.*

The rights of a bona fide holder of municipal bonds which have been unlawfully issued and negotiated pass by transfer of the bonds, even to one having full knowledge of such illegality. *Verbeck v. Scott*, 71 Wis. 59; *Suffolk Sav. Bank v. Boston*, 149 Mass. 364, 4 L. R. A. 516.

Even bona fide purchasers of municipal bonds must take the risk of the official character of those

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67 U. S. 2 Black, 732-732 (17: 842-845); *Mercer County v. Hackett*, 68 U. S. 1 Wall. 83, 97 (17: 548, 553); *Coloma v. Eaves*, 92 U. S. 484, 494 (23: 579, 582); *Humboldt v. Long*, 92 U. S. 642-651 (23: 752-755); *Douglas County v. Bolles*, 94 U. S. 104-110 (24: 46-48); *Warren County v. Marcy*, 97 U. S. 96-110 (24: 977-982); *Pompton v. Cooper Union*, 101 U. S. 196, 204 (25: 803, 805); *Harter v. Kernochan*, 103 U. S. 562-574 (26: 411-415); *American L. Ins. Co. v. Bruce*, 105 U. S. 328-338 (26: 1121-1123); *Carrier v. Shawangunk*, 10 Fed. Rep. 220-223; *Pana v. Bowler*, 107 U. S. 529 (27: 424); *Montclair v. Ramsdell*, 107 U. S. 147 (27: 431); *Sherman County v. Simonds*, 109 U. S. 739 (27: 1094); *Green County v. Conness*, 109 U. S. 104 (27: 872); *Toledo Northern Bank v. Porter Twp.*, 110 U. S. 608 (28: 258); *Dixon County v. Field*, 111 U. S. 83 (28: 360); *Merchants Bank v. Bergen County*, 115 U. S. 390 (29: 432); *New Providence v. Halsey*, 117 U. S. 338 (29: 905); *Oregon v. Jennings*, 119 U. S. 74, 92 (30: 323, 329); *Livingston County v. Portsmouth Bank*, 128 U. S. 127 (31: 367); *San Antonio v. Mehaffy*, 96 U. S. 812 (24: 816).

Mr. Justice Brewer delivered the opinion of the court:

This is an action on township bonds. Judgment was rendered against the Township, and it alleges error. The bonds were issued under an Act approved April 9, 1868, and found in the Session Laws of New Jersey for that year, pages 915. etc. Outside of the obligatory words, this was the form of the bond.

"This bond is one of a series of like tenor,

who execute them. *Coler v. Cleburne*, 181 U. S. 162 (38: 146).

Where the Legislature has created a board authorized to determine whether the law has been complied with, its finding is conclusive as to a bona fide purchaser. *Lake County v. Graham*, 130 U. S. 674 (32: 1065).

The purchaser of municipal bonds is held to know the constitutional provisions and the statutory restrictions on the authority to issue them; also the recitals of the bonds he buys; but if he acts in good faith and pays value, he is entitled to the protection of such recitals of facts as the bonds may contain. *Lake County v. Graham*, 130 U. S. 674 (32: 1065); *Lewis v. Comanche County*, 35 Fed. Rep. 343.

Where a county issues bonds to aid a railroad, under authority of law, and delivers them to the railroad company and pays interest on them for fifteen years, it is thereafter estopped from setting up an irregularity in the election at which it was decided to issue the bonds, as against an innocent purchaser for value. *Nelson v. Haywood County*, 37 Tenn. 781.

Conditions not fixed by a statute authorizing the issuance of county bonds in aid of railroads cannot be set up by the county to defeat the bonds in the hands of a bona fide purchaser for value. *Id.*

Bonds of the County of San Luis Obispo, negotiable in form and purporting to be issued under the Act of April 4, 1870, as amended March 14, 1874, are void even in the hands of a bona fide purchaser for value and before maturity, in so far as they exceed the amount limited by the Act; and refunding bonds subsequently issued by the county, in lieu of such overissue, are also void. *Sutro v. Pettit*, 74 Cal. 332.

Parties who purchase bonds at a merely nominal

amounting in the whole to the sum of one hundred and twenty-seven thousand dollars, issued on the faith and credit of said Township in pursuance of an Act entitled 'An Act to Authorize Certain Towns in the Counties of Somerset, Morris, Essex and Union to Issue Bonds and Take Stock in the Passaic Valley and Peapack Railroad Company,' approved April 9, 1868.

"In testimony whereof, the undersigned commissioners of the said Township of Bernards, in the County of Somerset, to carry into effect the purposes and provisions of the said Act, duly appointed, commissioned and sworn, have hereunto set our hands and seals the first day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

"John H. Anderson, [L. s.]

"John Guerin, [L. s.]

"Oliver R. Steele, [L. s.]

"Commissioners.

"Registered in the county clerk's office.

"William Ross, Jr.,

"County Clerk."

The first section of the Act provides that, upon the application in writing of 12 or more resident freeholders, the Circuit Court of the County shall appoint three resident freeholders to be commissioners.

Section two reads as follows:

"That it shall be lawful for said commissioners to borrow, on the faith and credit of their respective townships, such sums of money, not exceeding ten per centum of the valuation of the real estate and landed property of such township, to be ascertained by the assessment

price, to which unpaid coupons nearly equal in amount to the face value of the bonds are attached, cannot be held bona fide purchasers. *Simmons v. Taylor*, 38 Fed. Rep. 682; *Lansing v. Lytle*, 38 Fed. Rep. 204.

A man who makes a purchase of bonds of a town in a distant State without any inquiry as to their history or value and without taking notice of the fact that he is getting \$10,000 or \$12,000 of coupons for nothing, cannot be held, merely on his own testimony, to be a bona fide purchaser. *Lansing v. Lytle*, 38 Fed. Rep. 204.

A purchaser of municipal bonds issued ostensibly for general purposes, with knowledge of the fact that the city council intended to expend the money obtained from them in aid of a railroad company, is not a bona fide purchaser. *German Am. Bank v. Brenham*, 35 Fed. Rep. 185.

Mere irregularities in the calling and holding of an election for the purpose of authorizing the issue of negotiable bonds by a county will not validate the bonds in the hands of bona fide holders, where no question as to such irregularities was raised until after the bonds were issued and had passed into the hands of such holders. *State v. Kiowa County*, 39 Kan. 657; *State v. Hordey* (Kan.) 18 Pac. Rep. 942.

A recital in county bonds that they were issued in compliance with the statute regarding the election for the purpose of voting on them is conclusive against the county. *Lewis v. Comanche County*, 35 Fed. Rep. 343.

Bonds and coupons reciting that they are upon the terms and conditions set forth in a mortgage securing them charge the holder with notice of the provisions in the mortgage. *McClelland v. Norfolk S. R. Co.* 1 L. R. A. 290, 110 N. Y. 469.

rolls thereof respectively for the year eighteen hundred and sixty-seven, for a term not exceeding twenty-five years, at a rate of interest not exceeding seven per centum per annum, payable semi-annually, and to execute bonds therefor under their hands and seals respectively; the bonds so to be executed may be in such sums and payable at such times and places as the said commissioners and their successors may deem expedient; but no such debt shall be contracted or bonds issued by said commissioners of or for either of said townships, until the written consent shall have been obtained of the majority of the taxpayers of such township or their legal representatives appearing upon the last assessment roll as shall represent a majority of the landed property of such township (including lands owned by nonresidents) appearing upon the last assessment roll of such township; such consent shall state the amount of money authorized to be raised in such township, and that the same is to be invested in the stock of the said railroad company, and the signatures shall be proved by one or more of the commissioners; the fact that the persons signing such consent are a majority of the taxpayers of such township, and represent a majority of the real property of such township, shall be proved by the affidavit of the assessor of such township indorsed upon or annexed to such written consent, and the assessor of such township is hereby required to perform such service; such consent and affidavit shall be filed in the office of the clerk of the county in which such township is situated, and a certified copy thereof in the town clerk's office of such township, and the same or a certified copy thereof shall be evidence of the facts therein contained, and received as evidence in any court of this State, and before any judge or justice thereof."

By section three these commissioners were authorized to dispose of the bonds, and invest the money in railroad stock in the name of the township, to subscribe for and purchase stock in the railroad company, and to act at stockholders' meetings.

Section fourteen provides "that all bonds issued in accordance with the provisions of this Act shall be registered in the office of the county clerk of the county in which the township is situated issuing the same, and the words 'registered in the county clerk's office' shall be printed or written across the face of each bond, attested by the signature of the county clerk when so registered, and no bond shall be valid unless so registered."

It is conceded that the commissioners were duly appointed; that the issue of bonds was not in excess of the amount authorized by the Statute; that a paper purporting to contain the consent of the requisite number of taxpayers, duly verified by the affidavit of the township assessor, was filed in the office of the clerk of the county; and that the plaintiffs were bona fide holders. But the contention is that the consent roll did not in fact contain the requisite number of taxpayers, and that the affidavit of the assessor was not true; also that the commissioners did not borrow any money on the bonds, but disposed of them without lawful consideration. The circuit court held that

these defenses were unavailing against bona fide holders of the bonds; and with that ruling we concur. Indeed, all the questions which were earnestly presented and argued by counsel for plaintiffs in error have been often considered and decided by this court. The Act gave the commissioners power, under certain conditions, to issue the bonds. The recitals therein show that they were issued "in pursuance" of the Act; and the bonds were all duly registered as required. The case of *Montclair Twp. v. Ramsdell*, 107 U. S. 147, 158 [27: 431, 434], was a suit on bonds in form like the ones in suit, and issued under a statute practically identical. The validity of those bonds was sustained; and in the course of his opinion, speaking for the court, Mr. Justice Harlan says: "Legislative authority for an issue of bonds being established by reference to the statute, and the bonds reciting that they were issued in pursuance of the statute, the utmost which plaintiff was bound to show, to entitle him prima facie to judgment, was the due appointment of the commissioners and the execution by them in fact of the bonds. It was not necessary that he should, in the first instance, prove either that he paid value, or that the conditions preliminary to the exercise by the commissioners of the authority conferred by statute were in fact performed before the bonds were issued. The one was presumed from the possession of the bonds, and the other was established by the statute authorizing an issue of bonds, and by proof of the due appointment of the commissioners, and their execution of the bonds, with recitals of compliance with the statute." See, also, the cases of *Bernards Twp. v. Stebbins*, 109 U. S. 341 [27: 956], and *New Providence v. Halsay*, 117 U. S. 336 [29: 904], in which bonds issued either under the Act before us, or that referred to in 107 U. S. *supra*, were considered by the court. Reference also may be made to two New Jersey cases, *Cotton v. New Providence*, 47 N. J. L. 401, and *Mutual Ben. Life Ins. Co. v. Elizabeth*, 42 N. J. L. 235.

It were useless to refer to the long list of cases in which recitals like these have been held sufficient to sustain bonds in the hands of bona fide holders. It is urged that these commissioners were not elected by the people; that they were not the general officers of the Township, but were special officers appointed by the circuit court—special agents, as it were, for the specific purpose; that the Statute does not in terms give them authority to determine whether the preliminary conditions have been complied with; and that this case is, therefore, to be distinguished in these respects from those cases where similar recitals have been held conclusive. But though not the ordinary officers of the Township, they were the ones to whom by legislative direction was given full authority in the matter of issuing bonds. The organization of townships, the number, character and duties of their various officers, are matters of legislative control; and it is not doubtful that officers appointed represent the municipality as fully as officers elected. When the Legislature has declared how an officer is to be selected, and the officer is selected in accordance with that declaration, his acts, within the scope of the powers given him by the Legislature, bind the municipality. But these special commis-

sioners were not the only officers of the Township whose acts gave currency to these bonds. If inquiry had been directed to the county and township records, the affidavit of the township assessor to the consent required would have been found; and on the face of the bonds it appears that the county clerk of the county has added his official certificate to their validity; so that the acts of general as well as of special officers and agents of the Township are the foundation upon which rests the validity of these bonds.

While it is true that the Act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet such express direction and authority is seldom found in Acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named. In the case of *Oregon v. Jennings*, 119 U. S. 74, 92 [30: 323, 329], the rule is thus stated by Mr. Justice Blatchford: "Within the numerous decisions by this court on the subject, the supervisor and the town clerk, they being named in the statute as the officers to sign the bonds, and the 'corporate authorities' to act for the town in issuing them to the company, were the persons intrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a bona fide holder, that the conditions prescribed by the popular vote were not complied with."

Whatever may be the hardships of this particular case, to sustain the defenses pressed would go far towards destroying the market value of municipal securities. We see no error in the ruling of the Circuit Court, and its judgment is therefore affirmed.

Mr. Justice Field took no part in the decision of this case.

THE CALIFORNIA INSURANCE COMPANY, *Plff. in Err.*,

v.

THE UNION COMPRESS COMPANY.

(See S. C. Reporter's ed. 387-423.)

Insurable interest—insurance of goods held in trust—for whose benefit—right of bailor to insurance effected by bailee—clause in policy—insurable interest, how acquired—negligence of employes, carriers can insure against—possession of bailee—phrase "direct loss or damage by fire"—expression of opinion by court in its charge—parol evidence as to person insured—

notice—estoppel—double insurance—contingent liability.

1. Where a Company received cotton to press and issued receipts therefor, which were exchanged with a railroad company for its bills of lading for the transportation of the cotton, agreeing to deliver it at an address specified in the bill of lading, the railroad company has an insurable interest in the cotton, which may be covered by a policy issued to the Compress Company.
2. A person may insure in his own name goods held in trust by him and he can recover for their entire value, holding the excess over his own interest in them for the benefit of those who have intrusted the goods to him.
3. The words "held by them in trust," in this policy, cannot properly be limited to a holding in trust merely for an absolute owner, when it clearly appears that the railroad companies had an insurable interest in the cotton, and the plaintiff held the property in trust exclusively for those companies.
4. A bailor who has an insurable interest in the property can, to the extent of his insurable interest, claim the benefit of insurance effected in his favor by his bailee.
5. The case is not varied or affected by the clause in the receipts given by the plaintiff, "not responsible for any loss by fire," because the relation of the plaintiff to the property intrusted to it, and its duty to the bailor, determine the legal propriety of the insurance for the benefit of the latter.
6. Nor is it material whether the cotton was originally deposited by the railroad companies, or whether their interest accrued through the subsequent transfer to the railroad companies of receipts given by the plaintiff on a deposit of cotton made by other parties.
7. The exception of loss by fire, contained in the receipts given by the plaintiff, and in the bills of lading given by the railroad companies, did not free them from responsibility for damages occasioned by their own negligence or that of their employes.
8. Common carriers can insure themselves against loss proceeding from the negligence of their own servants.
9. The railroad companies, by acquiring the receipts of the plaintiff and issuing bills of lading for the cotton, took only constructive possession of it; and the actual and physical possession of plaintiff gave it the right to effect insurance for its own benefit, and, as bailee or agent, for the protection of the railroad companies.
10. The words of the policy, "direct loss or damage by fire," mean loss or damage occurring directly from fire as the destroying agency, in contradistinction to the remoteness of fire as such agency.
11. The judge, in submitting a case to a jury, may comment upon the evidence and express his opinion upon the facts; and the expression of

NOTE.—Parol insurance, when valid. See note to *Bellef Fire Ins. Co. v. Shaw*, Bk. 24, p. 291.

As to agreement for insurance by letter, see note to *Taylor v. Merchants F. Ins. Co.* Bk. 13, p. 187.

Misrepresentation or fraud vitiates policy. See note to *M'LANABAN v. Universal Ins. Co.* Bk. 7, p. 98; also note to *Columbian Ins. Co. v. Lawrence*, Bk. 7, p. 335.

As to effect of agent's filling in untrue answers in application for insurance, without knowledge of assured, see note to *Un. Mut. L. Ins. Co. v. Wilkinson*, Bk. 20, p. 617.

As to different kinds of policies; valued policy,—see

note to *Virginia Valley Ins. Co. v. Mordecai*, Bk. 16, p. 329.

As to insurable interests of mortgagor, mortgagee, trustee, vendor, vendee, carrier, etc., see note to *Carpenter v. Providence Washington Ins. Co.* Bk. 10, p. 1044.

As to policy "for whom it may concern;" effect of; who may recover upon,—see note to *Hooper v. Robinson*, Bk. 25, p. 219.

As to insurance; breach of conditions by third parties; when policy invalidated,—see note to *Liverpool & L. & G. Ins. Co. v. Gunther*, Bk. 29, p. 875.

such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error.

12. Where a policy is issued on property "held in trust," parol evidence is admissible to show who are the owners or who were intended to be insured thereby.
13. Having issued the policy with notice that it was intended to cover the interest of the railroad companies, the defendant is estopped from asserting that the policy was intended to protect only the legal owners of the cotton.
14. Marine policies issued to the respective owners of the cotton were no bar to and did not have any effect upon the fire policy; the marine policies, in order to have any effect, must amount to double insurance. Double insurance exists only in the case of risks upon the same interest in property and in favor of the same person.
15. The plaintiff's right of action against the Insurance Company on the policy is not contingent upon the payment by the railroad companies of the value of the cotton burned, but it is contingent only upon the destruction of the cotton by fire under circumstances which impose a liability upon the railroad companies.

[No. 1051.]

Submitted Oct. 30, 1889. Decided March 3, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas to review a judgment for plaintiff in an action on a policy of insurance against fire. *Affirmed.*

The facts are stated in the opinion.

Messrs. E. W. McGraw and E. W. Kimball, for plaintiff in error:

The beneficiaries under the policy are the owners of the cotton; the possible interest of no common carrier is covered thereby.

Newson, Shipping and Marine Ins. 229; *Davis v. Boardman*, 12 Mass. 85; *Graves v. Boston Marine Ins. Co.* 6 U. S. 2 Cranch, 419 (2: 324); *Hodgson v. Marine Ins. Co.* 9 U. S. 5 Cranch, 100 (3: 48); *Seamans v. Loring*, 1 Mass. 128; *Buck v. Chesapeake Ins. Co.* 26 U. S. 1 Pet. 151 (7: 90); *Sadlers Co. v. Badcock*, 2 Atk. 554; *Ellis, Ins.* 21, 22; *De Forest v. Fulton Fire Ins. Co.* 1 Hall (N. Y.) 134; 1 Parsons, Marine Ins. 49.

The words "held in trust by them" are defined as goods of which they had the care and custody and for which they are responsible to the owner.

Stillwell v. Staples, 19 N. Y. 401; *Waring v. Indemnity F. Ins. Co.* 45 N. Y. 606; *Siter v. Morris*, 13 Pa. 218; *Lee v. Howard F. Ins. Co.* 11 Cush. 824; *Phoenix Ins. Co. v. Favorite*, 49 Ill. 259; *Home Ins. Co. v. Favorite*, 46 Ill. 270; *Reideman v. Powell*, 10 Mo. App. 280; *Thomas v. Cumiskey*, 108 Pa. 861.

The policy is without ambiguity, and no evidence was admissible to prove that railroad companies, and not the owners of the cotton, were intended as beneficiaries.

Home Ins. Co. v. Baltimore Warehouse Co. 98 U. S. 541 (23: 868); *Lamatt v. Hudson R. F. Ins. Co.* 17 N. Y. 199, note; *Rwer v. Washington Ins. Co.* 16 Pick. 502; *Finnay v. Bedford C. Ins. Co.* 8 Met. 348; *Lippincott v. Louisiana Ins. Co.* 2 La. 399; *Illinois Mut. F. Ins. Co. v. O'Neale*, 13 Ill. 89; *Holmes v. Charleston M. F. Ins. Co.* 10 Met. 211; *Cheriot v. Barker*, 2 Johns. 846; *Bishop v. Clay F. & M. Ins. Co.* 45 Conn. 455; *Russell v. Russell*, 64 Ala. 500;

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Bolton v. Bolton, 73 Me. 299; *Burnham v. Boston M. Ins. Co.* 139 Mass. 899; *Snowden v. Guion*, 2 Cent. Rep. 447, 101 N. Y. 459; *Elliott v. Whedbee*, 94 N. C. 115; *Hough v. People's Fire Ins. Co.* 86 Md. 398; *Home Ins. Co. v. Baltimore Warehouse Co.* 98 U. S. 542 (23: 869); *Lucas v. Liverpool & L. & G. Ins. Co.* 23 W. Va. 274.

Under the evidence, the railroad companies were not and could not be the beneficiaries of the insurance.

May, Ins. 783, 787; *Angell, Ins. Appendix IV. VI.*; *Hammond, Ins.* 171, 173; *Lewis v. Post*, 1 Ala. 72; *Butler v. Patterson*, 13 N. Y. 294; *Fire Ins. Assn. v. Merchants & M. Transp. Co.* 66 Md. 840.

When a court instructs the jury as to facts, its narration of, or allusion to, facts should be fair. It should not select and dwell on isolated facts which might be construed favorably to one side, and make no allusion to other facts which militate against that side.

Evans v. George, 80 Ill. 51; *Newman v. McComas*, 43 Md. 70; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Jones v. Jones*, 67 Mo. 138; *Chase v. Bull Iron Works*, 55 Mich. 139; *Chesapeake & O. Canal Co. v. Knapp*, 34 U. S. 9 Pet. 556 (9: 226); *Smith v. Conroy*, 42 U. S. 1 How. 85 (11: 81); *Conn. Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 614 (28: 536).

Messrs. U. M. Rose, G. B. Rose and J. F. Dillon, for defendant in error:

The language of the written part of the contract is general, on cotton "their own, or held by them in trust, or on commission."

Grandin v. Rochester G. Ins. Co. 107 Pa. 26; *Wolfe v. Security F. Ins. Co.* 89 N. Y. 49.

The railway companies had an insurable interest. Then to that extent they were owners. 1 Hare, Am. Const. Law, 855.

The evidence as to the ownership of the cotton was clearly admissible.

Home Ins. Co. v. Baltimore Warehouse Co. 98 U. S. 543 (23: 869).

The policy embraced all cotton left with the Compress Company by the two railway companies.

Johnson v. Campbell, 120 Mass. 453; *Stillwell v. Staples*, 19 N. Y. 408; *Hanshaw v. Mut. S. Ins. Co.* 2 Blatchf. 99; *Buck v. Chesapeake Ins. Co.* 26 U. S. 1 Pet. 151 (7: 90); *Hodgson v. Marine Ins. Co.* 9 U. S. 5 Cranch, 100 (3: 48); *Phoenix Ins. Co. v. Hamilton*, 81 U. S. 14 Wall. 506 (20: 729); *Hooper v. Robinson*, 98 U. S. 586 (25: 222); *Howard F. Ins. Co. v. Chase*, 72 U. S. 5 Wall. 512 (18: 525); 1 Phil. Ins. §§ 384, 385; *Waters v. Monarch F. & L. Assur. Co.* 5 El. & Bl. 870; *Lucas v. Liverpool & L. & G. Ins. Co.* 23 W. Va. 258.

Carriers may insure against loss proceeding from negligence of their servants.

Phoenix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 324 (29: 877); *Patapsco Ins. Co. v. Coulter*, 28 U. S. 3 Pet. 237 (7: 671); *Columbia Ins. Co. v. Lawrence*, 35 U. S. 10 Pet. 507 (9: 512); *Waters v. Merchants L. Ins. Co.* 36 U. S. 11 Pet. 220 (9: 72); *Orient Ins. Co. v. Adams*, 123 U. S. 72 (31: 66).

Insurance policies are to be construed most strongly against the underwriters.

Orient M. Ins. Co. Wright, 68 U. S. 1 Wall. 468 (17: 508); *Kansas City First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673 (24: 568);

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Noonan v. Bradley, 76 U. S. 9 Wall. 407 (19:760).

Mr. Justice Blatchford delivered the opinion of the court:

This is an action at law, brought in the Circuit Court of the United States for the Eastern District of Arkansas, by the Union Compress Company, an Arkansas corporation, against the California Insurance Company, of San Francisco, a California corporation, to recover on a policy of insurance against fire, issued by the latter Company to the former Company on the 2d of November, 1887.

By the policy the California Company insures the Compress Company, for the term of thirty days from November 2, 1887, at noon, to December 2, 1887, at noon, "against all direct loss or damage by fire except as hereinafter provided, to an amount not exceeding ten thousand dollars, to the following-described property while located and contained as described herein, and not elsewhere, to wit: *Form of cotton policy.* \$10,000 on cotton, in bales, their own or held by them in trust or on commission, while contained in the frame shed 112 to 122, inclusive, & in b'ck shed & yard 115 to 123, inclusive, North Main Street, & on platforms adjoining & in street immediately between the sheds, Sanborn's map of Little Rock, Ark's; & it is agreed and understood to be a condition of this insurance that this policy shall not apply to or cover any cotton which may at the time of loss be covered in whole or part by a marine policy; & it is further agreed to be a condition of this policy that only actual payment by bank check or otherwise for cotton purchased shall constitute a delivery of cotton from the seller to the buyer; and it is further agreed that this Company shall be liable for only such proportion of the whole loss as the sum hereby insured bears to the cash value of the whole property hereby insured at the time of fire; and it is further agreed that tickets, checks or receipts delivered to bearer shall not be considered as evidence of ownership. Other insurance permitted without notice until required. . . . In case of loss or damage to the property insured, it shall be optional with the Company, in lieu of paying such loss or damage, to replace the articles lost or damaged with others of the same kind and quality. . . . This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if any change . . . take place in the . . . possession of the subject of insurance. . . . In case of any other insurance upon the property hereby insured, whether to the same party or upon the same interests therein or otherwise, whether valid or not, and whether prior or subsequent to the date of this policy, the insured shall be entitled to recover from this Company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether such other insurance be by specific or by general or floating policies, or by policies covering only in excess of specified loss; and it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured, or any part thereof, subject to the conditions of average, this policy shall be subject to average in like manner . . .

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If this Company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this Company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this Company by the insured on receiving such payment. . . . In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth" [in the proofs of loss] "to-gather with their respective interests therein."

The complaint alleges that on the 14th of November, 1887, the plaintiff was engaged in the business of compressing cotton, which it received or held on its own account or on commission or in trust for others, as its warehouses and compress buildings and adjoining sheds and platforms situated at the foot of Main Street in the City of Little Rock, Arkansas; that it had on hand, at that date, about 2,800 bales of cotton, delivered to it to be compressed and belonging to divers parties, the value of which equalled the sum total of the insurance thereon; and that such cotton, whether owned by the plaintiff or held by it on commission or in trust for others, was insured against loss or damage by fire in 28 insurance companies, which are named, in the several amounts stated opposite their respective names, amounting in the aggregate to \$142,500, which included the defendant for the sum of \$10,000. It then sets forth the issuing of the policy by the defendant to the plaintiff, a copy of which is annexed to the complaint, and that on the 14th of November, 1887, all the cotton in bales, contained on said premises and so insured, was destroyed by fire, "together with a large quantity of other cotton in possession of plaintiff at said place, which was not insured by plaintiff."

The complaint then proceeds as follows: "[That at the time that said cotton came to the possession of the plaintiff it was engaged in the business of compressing cotton at its compress in the Town of Argenta, opposite Little Rock, and on the north side of the Arkansas River, and that said cotton was deposited with the plaintiff for compression by various owners thereof, who delivered the same at the sheds and yards and adjacent grounds in the said City of Little Rock, as described in said policy, with directions that the same should be transported to said compress by the plaintiff or some carrier employed for that purpose by it, and that on the receipt of any bales of said cotton by said plaintiff it gave a receipt for the same to the owner thereof, and that, according to a custom known to said depositors, to the plaintiff, and to the St. Louis, Iron Mountain & Southern Railway Co. and the Missouri Pacific Railway Co., of which it was a part, and the Little Rock & Memphis Railroad Company, which were common carriers having and operating railroads of which both Argenta and Little Rock were stations, said owners transferred said receipts to either one or the other of said carriers and received from said carriers bills of lading for the transportation by said carriers of said cotton to various places to which said cotton was then and there shipped by said owners, with an agreement with said railway

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companies that said cotton should not be shipped until it had been compressed by the plaintiff. There was a standing and continuing agreement between said plaintiff and said railway companies that the plaintiff should proceed to compress said cotton and all cotton thus received and should insure the same, after notice of the execution of said bills of lading by said railway companies, against loss by fire during the time that said cotton should be in the hands of the plaintiff, for the purpose aforesaid, for a price averaging from sixty to sixty-five cents per bale, to be paid by said railway companies, respectively, when said cotton should be compressed and delivered to said railway companies on their cars at Argenta for transportation under said bills of lading, at which time said carriers should surrender to plaintiff the said receipts issued as aforesaid at the time that said cotton was deposited with the plaintiff for compression by the owners, as above stated; that all of said cotton was in the custody of plaintiff, at the time of said loss, under and by virtue of said custom and agreement, and that it was lost by the negligence of the servants, agents and employes of said railway companies, and that since said loss said St. Louis, Iron Mountain & Southern Railway Company has been sued in this court by two of said consignees for the value of part of said cotton above named, to wit, the York Manufacturing Company and Hazard & Chapin, and said railway company defended said actions on the ground that said loss was not occasioned by the negligence of said railway company or its servants and employes, and on a trial of said first-named cause it was adjudged by this court that said York Manufacturing Company and said Hazard & Chapin recover from said railway company the value of said cotton sued for as aforesaid, and that since said adjudication said railway company has paid said judgment and the value of a large part of the cotton for which it had issued bills of lading as aforesaid, and that several suits are now pending in this court against said Little Rock & Memphis Railroad Company, brought by the consignees of portions of said cotton, for the recovery of damages for the loss of said cotton by reason of the negligence of said railroad company, which said suits are now pending and undetermined. On said 14th day of November, 1887, the plaintiff had in its possession at its sheds and premises above mentioned, for purposes of compression, a large amount of cotton, to wit, over 3,000 bales; that of this number 2,700 bales of cotton were held by this plaintiff for the St. Louis, Iron Mountain & Southern Railway Company and the Little Rock & Memphis Railroad Company. By said contract and agreement between plaintiff and said railroads this plaintiff took out the policies of insurance above set out for the purpose of indemnifying this plaintiff against loss and liability, and the said railroad companies against loss and liability, by reason of the destruction of said cotton while it was being held by plaintiffs for purposes of compression. The St. Louis, Iron Mountain & Southern Railway has been adjudged as aforesaid to pay a large sum of money, to wit, \$—, and in addition has paid a still larger amount because of its liability for such loss, amounting in all up to this date to

\$72,209.58, and has made demand therefor against the plaintiff for reimbursement of said losses.]” It also avers that the loss by fire on the cotton equalled the insurance on it, and that the plaintiff has performed all the conditions of the policy; and prays judgment for \$10,000, with interest.

The defendant moved to strike from the complaint the words “together with a large quantity of other cotton in possession of plaintiff, at said place, which was not insured by plaintiff,” and also the foregoing part included in brackets. It also demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action; and also demurred separately to that part of it which is so included in brackets, on the ground that the facts therein stated did not tend to constitute a cause of action. The court overruled the said motion and also the demurrer, and the defendant excepted to both of those rulings.

The defendant then filed its answer, admitting the issuing of the policy, and that at the fire 112 bales of cotton, belonging to one Hanger and held by the plaintiff in trust for Hanger, were burned, for the loss of which the insurance companies named in the complaint had paid the plaintiff \$4,826.59, in full satisfaction thereof, and of which sum the defendant paid its full portion of the loss. The answer denies the material allegations of the complaint, and avers that the greater portion of the cotton alleged to have been lost at the fire was received by the plaintiff from the owners thereof after the issuing of the policy; that the cotton burned was first delivered by its owners to the plaintiff, and the plaintiff gave to the owners receipts for it, which provided that the plaintiff should not be liable for the loss of it by fire; that afterwards, and after the policy was issued, the cotton was sold to various persons who became its owners, and the Missouri Pacific Railway Company, the Little Rock & Memphis Railroad Company and the Little Rock, Mississippi River & Texas Railway Company, common carriers of cotton for hire, issued their bills of lading for the same to the purchasers, which provided that the carriers should not be liable for the loss thereof by fire, and at the same time such railroad companies took up the receipts issued by the plaintiff to the original owners and surrendered them to the plaintiff, whereby the possession of the cotton was changed, contrary to the provisions of the policy, without any consent of, notice to, or knowledge by the defendant; (7) that it is provided in the policy that it shall not apply to or cover cotton which was at the time of loss covered in whole or in part by marine policies, and at that time 2,172 bales of the cotton alleged to have been burned, and of the value of \$101,973.73, were covered by marine policies theretofore issued to the respective owners of the cotton; (8) that after the railroads had issued their bills of lading for the cotton, and before and at the time of the fire, it was kept in a grossly negligent manner, in a dangerous public place, without being covered or sprinkled, and but a few feet from a railroad track, where locomotives of the Missouri Pacific and the St. Louis, Iron Mountain & Southern Railroads, emitting sparks, were constantly passing, by which sparks the fire was kindled, and the cotton was destroyed by a fire

which occurred in broad daylight, at about four o'clock P. M., and which fire those two railroad companies, by the use of ordinary care, could have extinguished by removing the bales first ignited or by putting out the fire by water from the hydrants which were close by; and that none of the cotton was destroyed by the negligence of the Little Rock & Memphis Railroad Company or its employes.

The plaintiff demurred to certain paragraphs of the answer, and among them paragraphs 7 and 8, as not stating facts sufficient to constitute a defense. The court overruled such demurrer as to two of the paragraphs and sustained it as to paragraphs 7 and 8: to which latter ruling the defendant excepted. Thereupon the case was tried by a jury, which found a verdict for the plaintiff for \$9,491.96, on which a judgment was accordingly entered, to review which the defendant has brought a writ of error.

The first four assignments of error on the part of the defendant relate to the overruling of its motion to strike out part of the complaint, the overruling of its demurrer to the complaint and to part thereof, and the sustaining of the demurrer of the plaintiff to paragraphs 7 and 8 of the answer.

At the trial, the plaintiff offered evidence tending to prove that it was engaged in the business of compressing cotton at the Town of Argenta, which is on the north bank of the Arkansas River directly opposite the City of Little Rock; that it received cotton for compression at Argenta and also at the premises described in the policy, at Little Rock; that for cotton received at either place it issued receipts to the depositors, red receipts at Argenta and green receipts at Little Rock, a blank form of which, as it appears in the bill of exceptions, if filled out, would read thus: "Little Rock, Arkansas, Nov. 1, 1887. Received by the Union Compress Company. From John Smith. Account of John Doe. For Compression. Storage after ten days will be charged. Not responsible for any loss by fire. Marks X, Y, Z. No. bales cotton, 65. Richard Roe, Superintendent;" that the holders of such receipts took them to the freight offices of one or the other of the two railway companies, the Missouri Pacific Railway Company and the Little Rock & Memphis Railroad Company, and those companies issued bills of lading for cotton, which specified the number of bales and the marks, agreeing to deliver the cotton at an address specified in the bill of lading; that the same bills of lading covered cotton which was received by the plaintiff at Argenta and which actually was at Argenta, and cotton received at Little Rock and which actually was at Little Rock; that one form of bill of lading was issued by the Missouri Pacific Railway Company and two forms by the Little Rock & Memphis Railroad Company; that it was claimed that each form covered a portion of the cotton burned; that each form, by its terms, exempted the carrier from liability for loss or damage by fire; and that, as the cotton might pass through the custody of several carriers before reaching its destination, each of them provided that the legal remedy for loss or damage occurring in transit should be only against the particular carrier in whose custody the cotton actually

might be at the time of the happening thereof. The Missouri Pacific Railway Company in its bills of lading reserved to itself the privilege of compressing all cotton signed for on the bill of lading. The Memphis & Little Rock Railroad Company did not reserve that privilege, but in one of its two forms, which was a through bill of lading to England, it stipulated for the benefit of any insurance that might have been effected on the goods. There are five of such foreign bills of lading, covering 158 bales of lost cotton. Bills of lading covering 1,460 bales alleged to have been burned were issued by the Missouri Pacific Railway Company. The loss claimed on behalf of the latter company was for 1,468 bales. The bills of lading issued by the Memphis & Little Rock Railroad Company were for 992 bales, but the loss claimed was for 1,211 bales. By the bills of lading issued by the Missouri Pacific Railway Company on the lost cotton, 884 bales were covered after the date of the policy; and by those issued by the Memphis & Little Rock Railroad Company 255 bales were covered after that date.

It also appears by the bill of exceptions that, on the issuing of the bills of lading, the respective railroad companies notified the plaintiff of their issue, and ordered the cotton designated therein to be compressed at Argenta; that all of the cotton transported from Little Rock to Argenta was carried on the track and by the cars of the Missouri Pacific Railway Company; that the Little Rock & Memphis Railroad Company had no track and ran no cars near the premises described in the policy; that the plaintiff paid the Missouri Pacific Railway Company an agreed price for the transportation of the cotton from Little Rock to Argenta; and that the cotton was to be compressed after it arrived at Argenta, and was there to be loaded on the cars of such of the two railroad companies as its marks and the bills of lading called for, to be transported by them to its destination.

The bill of exceptions further states that the plaintiff offered evidence tending to prove that 2,670 bales of cotton, covered by said bills of lading, were burned at the fire in question, while in the hands of the plaintiff for compression, after the bills of lading were issued and at the place described in the policy.

The plaintiff also proved that in October and November, 1887, there was an accumulation of cotton at the premises described in the policy, owing to the fact that the Missouri Pacific Railway Company had not sufficient cars to transport the cotton to Argenta as fast as it was received; that the cotton-sheds were open sheds and were at the time of the fire full of cotton, which had no tarpaulin or other cover over it, and stood within three or four feet of the track of the Missouri Pacific Railway Company, over which locomotives and trains passed several times daily; that, after the sheds were full, the cotton was stored in the street, leaving a passageway some four feet wide for foot passengers; that the two railroad companies had no control over the cotton while so stored, and could not obtain actual possession of it until the Missouri Pacific Railway Company transported it to Argenta for compression; but that that company could take it at any time across the river for compression.

The defendant offered in evidence the proof of loss furnished by the plaintiff to it, made out after the bringing of the suit, alleging the total destruction by fire of 2,687 bales of cotton, in addition to what was known as the Hanger cotton, and that the 2,687 bales were held by the plaintiff in trust or on commission, that is to say, to be compressed, and were the property of various persons, the plaintiff being interested in the same to the extent of its charges, and stating the names of the consignees and the number of bales and their value pertaining to each consignee, no allusion being made to any interest of the railroad companies.

(1.) The plaintiff offered evidence tending to prove that the policy in suit was taken out by it for the benefit of the railroad companies named in the complaint, and in pursuance of agreements between the plaintiff and those companies by which the plaintiff agreed to take out such insurance. The defendant objected to such evidence, on the ground that it was incompetent and in contradiction of the terms of the policy. The objection was overruled, and the defendant excepted.

The plaintiff also offered evidence tending to prove that by agreement between it and the railroad companies it charged and collected from them 18 cents per 100 pounds for all cotton compressed by it, which charge was by agreement intended to cover and did cover the compression of the cotton, the loading of it on the cars at Argenta, and the cost of insuring it for the benefit of the railroad companies. The defendant objected to the evidence on the ground that it was immaterial, irrelevant and incompetent, the objection was overruled, and the defendant excepted.

The plaintiff also offered evidence tending to prove that the contracts and customs of business before stated were well known to shippers and the defendant when the policy sued on was issued, it having been stated to the agents of the defendant, by an officer of the plaintiff, when the policy was applied for, that it was intended to cover the interests of the plaintiff and of the railroad companies. The defendant objected to this evidence, but the objection was overruled and the defendant excepted.

The plaintiff also offered evidence tending to prove that claims had been filed against the Missouri Pacific Railway Company by the owners of 1,463 bales of cotton burned at the fire, of the claimed value of \$72,735.58; that since the commencement of this suit that company had paid such claims to the amount of \$65,000; and that the balance had been adjusted by that company and would be paid. The defendant objected to the evidence on the ground that it was immaterial, irrelevant and incompetent, but the objection was overruled and the defendant excepted.

The plaintiff further offered evidence tending to prove that claims had been filed against the Little Rock & Memphis Railroad Company by the owners of 1,211 bales of cotton burned at the fire, of the claimed value of \$57,529.55, no part of which has been paid by that company, though suits had been brought on several of the claims and were still pending. The defendant objected to the evidence on the ground that it was incompetent, irrelevant and immaterial;

but the court overruled the objection and the defendant excepted.

After the close of the evidence, the defendant requested the court to instruct the jury as follows: "1. The policy of insurance of the defendant on which this action is brought covered all goods in possession of the Union Compress Company at the place designated in the said policy, at the date when said policy was issued, which were held by the said Union Compress Company under warehouse receipts issued to the owners of said cotton by said Company, and also all cotton subsequently and during the life of said policy so received by the Union Compress Company. 2. The policy in question insures the goods of the Union Compress Company at the place designated. It also insures the Union Compress Company to the extent of its liens upon or charges against all goods held by it during the life of the policy, not its own, but held by it in trust or on commission. It also insures the interest of the owners of the legal title to such goods so held. It does not insure anyone else. Any possible interest of any common carrier not an owner of the goods, or any of them, in the place designated, is not insured by said policy. 3. The jury are instructed to disregard all evidence in the case tending to show that the insurance in question was issued for the benefit of any railroad company not an owner of any of the goods destroyed by fire, for the value of which recovery is sought herein." The court refused to give any of those three instructions and the defendant excepted to each refusal.

The foregoing exceptions, except the two which relate to the sustaining of the demurrer to paragraphs 7 and 8 of the answer, may be grouped together, because they relate to the same question. The court refused to strike out the matter in the complaint which is before recited in brackets, and also overruled the demurrer of the defendant to that portion of the complaint; and on the trial the plaintiff was permitted to introduce evidence tending to prove some of the allegations contained in that part of the complaint. The three instructions before quoted as asked by the defendant, and not given, relate to the same matter.

The defendant contends that there was error in the action of the court covered by those exceptions, and complains that the court treated the words in the policy, "their own or held by them in trust or on commission," as if they read, "on account of whom it may concern;" that, as the plaintiff did not own the cotton, the beneficiaries under the policy were its owners; that no interest of any common carrier was covered by the policy; that it was not ambiguous; and that no parol testimony was admissible to aid in its interpretation or to show that the railroad companies were intended to be beneficiaries under it. The view urged is, that the plaintiff did not own any of the cotton or hold any of it on commission; that the insurance on goods held in trust was an insurance only for the benefit of the owners of the cotton; and that evidence of an intention to effect the insurance for the benefit of one who was not the owner of the goods was inadmissible, because it would contradict the policy.

But we think the positions taken on behalf of the defendant are not sound. The title to

cotton in the temporary custody of a bailee for compression, for which receipts or bills of lading have been given, is manifestly changing hands constantly. The language of the present policy, insuring cotton "their own or held by them in trust or on commission," accommodates such a state of things. In the present case, the insurance was really taken out by the railroad companies, and that fact was well known to the agents of the defendant at the time the policy was issued. The railroad companies had an insurable interest in the cotton, and to that extent were the owners of the cotton, which was held in trust for them by the plaintiff. Evidence of their ownership of the cotton was admissible. *Home Ins. Co. v. Baltimore Warehouse Co.* 98 U. S. 527, 542 [28: 868, 869].

The policy covered all the cotton which was placed in the hands of the plaintiff by those companies. It was lawful for the plaintiff to insure in its own name goods held in trust by it, and it can recover for their entire value, holding the excess over its own interest in them for the benefit of those who have intrusted the goods to it. *DeForest v. Fulton Fire Ins. Co.* 1 Hall, 94; *Home Ins. Co. v. Baltimore Warehouse Co.* 98 U. S. 527, 543 [28: 868, 869]; *Stillwell v. Staples*, 19 N. Y. 401; *Waring v. Indemnity Fire Ins. Co.* 45 N. Y. 806; *Waters v. Monarch F. & L. Assur. Co.* 5 El. & Bl. 870; *Siler v. Morris*, 13 Pa. 218; *Johnson v. Campbell*, 120 Mass. 449; *Fire Ins. Assn. v. Merchants & Miners Transp. Co.* 66 Md. 339; *London & N. W. R. Co. v. Glyn*, 1 El. & Bl. 652; *Phenix Ins. Co. v. Hamilton*, 81 U. S. 14 Wall. 504, 508 [20: 729, 731].

The words "held by them in trust," in this policy, cannot properly be limited to a holding in trust merely for an absolute owner, when it clearly appears that the railroad companies had an insurable interest in the cotton, and the plaintiff held the property in trust exclusively for those companies. The reasoning of the cases where the bailor was the owner of the goods insured by the bailee applies equally to any person, who, having an insurable interest in property, intrusts it to another; and such bailor can, to the extent of his insurable interest, claim the benefit of insurance effected in his favor by his bailee. The original depositors of the cotton surrendered to the railroad companies the receipts which they had taken from the plaintiff, and those companies were thus substituted in the relation to the plaintiff which before had been held by such depositors. The railroad companies thus became the beneficiaries of the trust, so far as the plaintiff was concerned, because they thus became the persons to whom the plaintiff owed the duty of bailment, and the persons entitled to demand the possession of the property from the plaintiff. There was privity in the plaintiff with the person who held its receipt, and privity with no one else. This is a necessary and obvious result of the course of business; and the business in question could not be carried on under any other circumstances so as to give protection by insurance to the parties really interested.

The case is not varied or affected by the clause in the receipts given by the plaintiff, "not responsible for any loss by fire," because

the relation of the plaintiff to the property intrusted to it, and its duty to the bailor, determine the legal propriety of the insurance for the benefit of the latter. In the present case, the arrangement was that the railroad companies should pay to the plaintiff, in connection with the charge for compressing, an additional sum which would provide for the insurance of all cotton in the possession of the plaintiff, for which the railroad companies should issue bills of lading. The defendant had notice that the insurance was effected in the interest of the railroad companies; and it issued the policy in the terms it did, to include the protection of the railroad companies. The fact that the same policy might protect the interest of other persons in respect to cotton held for them by the plaintiff cannot affect the question whether it protects the interest of the railroad companies in respect to cotton held by the plaintiff for them, during the life of the policy. Nor is it material whether the cotton was originally deposited by the railroad companies, or whether their interest accrued through the subsequent transfer to the railroad companies of receipts given by the plaintiff on a deposit of cotton made by other parties.

(2.) We come now to another group of errors assigned. The defendant requested the court to instruct the jury as follows: "The policy in question provides that it shall be void if there be any change in the possession of the insured property, except under circumstances which have no bearing on this case. If the jury believe from the evidence that after the policy in question was issued, any common carrier, with the knowledge and consent of plaintiff and under agreement with plaintiff, issued its bills of lading for any of the cotton which at the date of the policy was or thereafter came into possession of the plaintiff, the issuance of such bills of lading, under the conditions of the policy, avoided the policy as to all cotton covered by such bills of lading." The court refused to give such instruction, and the defendant excepted to the refusal.

The court instructed the jury as follows: "By an agreement made between the plaintiff and the St. Louis, Iron Mountain & Southern Railway Company and the Memphis & Little Rock Railway Company, the plaintiff engaged to insure for said railway companies, respectively, all cottons stored in the compress sheds and yards of the plaintiff, at the foot of Main Street, Little Rock, when the railway companies or either of them should notify the plaintiff of the issuance by them of bills of lading therefor. This agreement was carried out, and on the day of the fire the plaintiff held insurance in various companies, aggregating the sum of \$142,500 in trust and to indemnify the railway companies against loss or damage by fire of the cotton for which they had issued their bills of lading and which was stored in the plaintiff's sheds and yards described in the policy, at the foot of Main Street." The defendant excepted to this instruction.

The court also charged the jury as follows: "As the plaintiff is a trustee, and insured the cotton for the benefit of the railway companies, and has no separate claim of its own on the property, it is only entitled to recover an amount equal to its liability to the railroad

companies, or, in other words, a sum that will make the railway companies whole for the cotton on which they had issued bills of lading; so that, if the market price of cotton produces a larger sum than the aggregate loss of the railway companies (and 2,870 bales at \$50 per bale, if you should find that was the number of bales and their value, produces an amount slightly in excess of the claims of the railroad companies), then the plaintiff's recovery must be on the basis of the latter sum—that is, one that makes the railway companies whole. In no event is the market value of the cotton to be increased, but it may be reduced by the difference between the value and the amount that will satisfy the just claims of the railway companies. What amount of cotton was burned for which the railway companies had issued bills of lading and which was covered by policies taken out by the plaintiffs, the value of the same, and the amount of the just demands of the railway companies against the plaintiff for the cotton so burned, are questions of fact to be determined by you." The defendant excepted to this charge.

The court also charged the jury as follows: "This suit is brought on a policy of insurance issued by the defendant's Company to the Union Compress Company to indemnify the railroad company for the loss of cotton or for cotton that might be burned after the railroad company issued its bills of lading for it, and while it yet remained in the custody of the Compress Company. Now, the Compress Company, under its contract with the railroad company, is bound to make good, by insurance, to the railroad company, any damages resulting to it from the loss of cotton which the Compress Company held for the railroad company after the railroad company had issued its bills of lading therefor and notified it thereof." The defendant excepted to this charge.

The defendant contends that, although, under a proper construction of the policy, the railroad companies may be regarded as properly beneficiaries under it, the matters involved in the instructions so given by the court were questions of mingled fact and law, and were erroneous, in the light of the facts proved by the plaintiff. The ground urged is, that the policy cannot be reconciled with any intent to insure a railroad company against a loss caused by its own negligence, because the policy insures against "all direct loss or damage by fire;" that therefore the only interest which the railroad companies had in the cotton was a contingent interest, arising from their liability for damages for loss by a fire occurring through their own negligence; that the interest alleged to have been insured as that of the railroad companies was not such as could have sustained a claim on a direct loss by fire, because it was a contingent or doubtful interest, and not a certain or direct interest; that the fire alone could not inflict any loss; and that whether the railroad companies would suffer loss would depend on the contingencies: (1) whether or not their negligence caused the loss; (2) whether the owner would be able to prove negligence in the railroad companies; (3) whether the owner was innocent of contributory negligence; and (4) whether the owner should make a claim for

loss against the railroad companies within the Statute of Limitations.

Under this head, it is also urged that, on the face of the policy, the insurance was on cotton held in trust by the plaintiff, in a designated place, for thirty days after November 2; that it was claimed by the plaintiff, in the face of the policy and contradictory of its terms, that cotton covered by a bill of lading issued November 8th, by the Missouri Pacific Railway Company, which was held in trust by the plaintiff, and was in the place described, was not covered by the policy until the bill of lading was issued; that if, as the defendant alleges the fact to be, that cotton was covered by the policy from the 3d to the 8th of November, for the benefit of its owners, there was no process known to the law by which the benefit of such insurance could be transferred to the railroad companies, without action by either the owner or the insurer; that the fact that the plaintiff understood that the insurance was for the benefit of the owners of the cotton was shown by the practical construction put upon the insurance by the plaintiff after the fire, in putting in a claim on behalf of Hanger for 112 bales of cotton burned, not covered by the bills of lading, and being paid for it, on behalf of Hanger, as owner of the cotton; and that thus the plaintiff claims that the insurance was for the owners of the cotton, or for the railroad companies, according to circumstances.

It is further urged that, if the bills of lading changed the possession of the cotton, it was at the time of the fire in the possession of the railroad companies and not in that of the plaintiff, and the plaintiff had ceased to hold it in trust; that in such case it was not insured, because of the provision in the policy that any change in the possession should avoid the policy; that, if the bills of lading did not change the possession, there could have been no insurance on behalf of the railroad companies, because, in the absence of possession by them, they had no right to insure and no contingent liability to loss; and that it was error in the court to charge that at the time of the fire the plaintiff held insurance on cotton covered by bills of lading.

This court is also asked to review its announcement of the principle of law laid down in *Phoenix Ins. Co. v. Erie & W. Transportation Co.* 117 U. S. 312, 324 [29: 873, 879], that "no rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants."

It is also contended that the jury had a right to decide whether or not the policy was issued on goods held in trust for the railroad companies by the plaintiff, and whether or not the plaintiff or the railroad companies held the cotton at the time of the fire; and that these were not questions for the court to decide.

In reply to these suggestions, it is to be said, that the exception of loss by fire, contained in the receipts given by the plaintiff, and in the bills of lading given by the railroad companies, did not free them from responsibility for damages occasioned by their own negligence or that

of their employes. Nor are we disposed to review our decision that common carriers can insure themselves against loss proceeding from the negligence of their own servants. The doctrine announced in the case cited has been referred to with approval in the subsequent cases of *Orient Ins. Co. v. Adams*, 128 U. S. 67, 72 [81: 68, 66], and *Liverpool Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 438 [32: 788, 791].

As to the suggestion that by the bills of lading the possession of the cotton was transferred to the railroad companies, and that the policy was avoided thereby, the answer is that the cotton was still in the hands of the plaintiff, in its actual possession and upon its premises. At most, the railroad companies, by acquiring the receipts of the plaintiff and issuing bills of lading for the cotton, took only constructive possession of it: and the plaintiff, retaining actual and physical possession of it, did not lose any element of possession necessary to give it the right to effect insurance for its own benefit, and, as bailee or agent, for the protection of the railroad companies. All that the railroad companies acquired was the right to ultimate possession, which passed to them by the transfer to them, by the original depositors, of the cotton receipts given by the plaintiff.

As to the argument that no recovery can be had in the interest of the railroad companies, because the injury to them depended upon their liability for the negligence of their employes in causing the fire, and the point taken in regard to the words of the policy, "direct loss or damage by fire," the reply is, that those words mean loss or damage occurring directly from fire as the destroying agency, in contradistinction to the remoteness of fire as such agency. The books are full of cases on that subject, and the meaning of the policy is not doubtful. Remoteness of agency is the explosion of gunpowder, gases or chemicals, caused by fire; the explosion of steamboilers; the destruction of buildings to prevent the spread of fire, or their destruction through the falling of burning walls; and so forth. In the present case, the bales of cotton were physically burned by the direct action of fire.

(3.) The court also charged the jury as follows: "Now, you have heard the testimony, gentlemen, with reference to the situation under which this cotton was placed and the length of time it remained there. If you think there is no negligence on the part of the railroad company, then you will find that the railroad company is not liable for this cotton. If you can say that that was a proper place to store cotton, and that leaving a passageway there of not exceeding four feet up and down, through which persons passed at all hours of the day and night to the boat house and skiff ferry, and it being a dry season, with three or four thousand bales of cotton stored there—then, if you say this is not negligence, you excuse this railroad company, and to that extent will disallow the claim of the plaintiff; but if you should so find I would be very much surprised at your verdict, and would not be surprised if I should set it aside; but I will leave it for you to say." The defendant excepted to this instruction, and especially to the italicized portion thereof.

It is urged that in this part of the charge the court did not allude to facts proved which the

defendant claimed disproved negligence, and that thus the instruction was not a fair one as to the facts; that the place of storage was selected and the cotton was stored there by the owners of it, and not by the Memphis & Little Rock Railroad Company; that no negligence can be imputed to the latter on account of the unfitness of the place; that it had no control over the cotton stored in that place, and had no track at that place, the Missouri Pacific Railway Company having the track there; that the Memphis & Little Rock Railroad Company had no opportunity to obtain possession of the cotton until after it had been compressed at Argenta; that the bills of lading of the latter company exempted it from liability for loss occurring on the lines of other carriers, and the cotton was burned, not on its line, but on the line of the Missouri Pacific Railway Company; that the court made no allusion to any of these matters as going to establish the absence of negligence and liability on the part of the Memphis & Little Rock Railroad Company; that the court threatened the jury with its displeasure and the setting aside of the verdict if the jury should bring in a verdict for the defendant on that issue; and that this action of the court was erroneous.

But the mere fact of the dwelling by the court with emphasis upon facts which seemed to it of controlling importance, and expressing its opinion as to the bearing of those facts on the question of negligence, is immaterial, if the court left the issue to the jury. In the charge, just before the passage complained of, the court, in referring to the question of the liability of the Memphis & Little Rock Railroad Company for the destruction of the cotton, had said to the jury: "It is for you to determine whether this railroad company was not guilty of negligence, and was not at fault in leaving this cotton in an exposed condition after it issued bills of lading therefor;" and in the clause of the charge objected to, the court expressly states that it leaves the question of negligence to the jury.

On this subject, this court said, in *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 553 [80: 257, 258]: "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to a jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error." See also *Nudd v. Burrows*, 91 U. S. 426 [23: 286]; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291 [23: 898]; *St. Louis, I. M. & S. R. Co. v. Vickers*, 122 U. S. 360 [30: 1161].

(4.) In the course of the trial the plaintiff offered evidence tending to prove that the contracts and custom of business stated in the bill of exceptions were well known to shippers and to the defendant when the policy sued on was issued, it having been stated to the agents of the defendant by an officer of the plaintiff, when the policy was applied for, that it was intended

to cover the interests of the plaintiff and of the railroad companies. The defendant objected to the admission of the evidence, but the objection was overruled, and the defendant excepted; and this is alleged as error.

In this connection it is urged that the complaint does not allege any such knowledge on the part of the defendant, or any intention on its part to issue its policy for the benefit of the railroad companies. The case of *Hough v. People's F. Ins. Co.* 36 Md. 398, is cited in support of this assignment of error. But we think the evidence was admissible. In the *Hough Case* the policy covered the merchandise insured, "their own, or held by them in trust, or in which they have an interest or liability." Parol evidence was held to be incompetent which was offered to show that the policy did not cover merchandise which was their own. The evidence would have contradicted the plain terms of the policy. In the present case, the evidence offered was admissible under the ruling in *Home Ins. Co. v. Baltimore Warehouse Co.* 93 U. S. 527, 542 [23: 868, 869]. In that case the court says: "It is no exception to the rule" (governing the admission of parol evidence) "that, when a policy is taken out expressly 'for or on account of the owner' of the subject insured, or 'on account of whomsoever it may concern,' evidence beyond the policy is received to show who are the owners or who were intended to be insured thereby. In such cases, the words of the policy fail to designate the real party to the contract, and, therefore, unless resort is had to extrinsic evidence, there is no contract at all." See also *Finney v. Bedford Ins. Co.* 8 Met. 348; *Fire Ins. Asso. v. Merchants & Miners Transp. Co.* 66 Md. 339; *Snow v. Carr*, 61 Ala. 363.

Having issued the policy with notice that it was intended to cover the interest of the railroad companies, the defendant is estopped from asserting that the policy was intended to protect only the legal owners of the cotton.

(5.) It is alleged, also, that the court erred in sustaining the demurrer of the plaintiff to paragraph 7 of the defendant's answer, which alleged that at the time of the loss 2,172 bales of the cotton alleged to have been burned were covered by marine policies theretofore issued to the respective owners of the cotton, and therefore, under the terms of the policy in this suit, such cotton was not covered by it. It is alleged also as error that the court, at the trial, rejected, on the objection of the plaintiff and under the exception of the defendant, evidence offered by the latter tending to prove that that number of bales of the cotton covered by the bills of lading, and alleged to have been burned, were, at the time of the fire, covered by marine policies of insurance theretofore issued to the respective owners of such cotton, residing in various portions of the United States and in England.

It is to be said, in reply, that paragraph 7 of the answer does not show that the marine policies were on the same interest as that covered by the fire policy. This element is necessary, because otherwise the policy sued on would be of no practical force. As soon as the consignees of the cotton were advised by telegraph of its shipment, they would take out marine policies to cover their own risk; and thus the fire insurance companies would obtain the premi-

ums of insurance from the railroad companies, and immediately avoid all risk, because of the taking out of the marine policies. *North British & M. Ins. Co. v. London, Liverpool & Globe Ins. Co.* L. R. 5 Ch. Div. 569. The question of the legal effect of the contribution clause of the policy, before recited, is not presented by the record.

The objection alleged at the trial to the introduction of evidence as to the marine policies was made on the ground that it was immaterial and irrelevant, and that the insured knew nothing of those policies and had no interest in them. This was the objection which was sustained; and the allegation of paragraph 7 of the answer was, that the marine policies had been issued to the respective owners of the cotton. It did not appear that either the insurer or the insured had any previous knowledge of the existence of the marine policies, nor did it appear whether they were issued before or after the date of the fire policy. The issuing of the marine policies, in order to have any effect in this case, must amount to double insurance. In no other view can the defendant have any interest in the question of marine insurance. Double insurance exists only in the case of risks upon the same interest in property and in favor of the same person. *North British & M. Ins. Co. v. London, L. & G. Ins. Co.* L. R. 5 Ch. Div. 569; *Lowell Mfg. Co. v. Safeguard F. Ins. Co.* 84 N. Y. 591; *Phillips, Insurance*, § 359; *Wood, Fire Ins.* (1st ed.) § 352. No reason can exist for a distinction between the construction of a provision avoiding a policy in case of marine insurance and in case of further or additional fire insurance. In the latter case the provision is always construed as relating only to additional insurance upon the same interest and effected by the same person or in his interest.

The contention of the defendant is, that its policy is avoided by the taking out of a marine policy by the owner of the cotton, without the knowledge or participation of the plaintiff or of the railroad companies, whether the marine insurance was effected before or after the fire insurance in favor of the railway companies, and although the fire insurance policy was taken to protect the independent interests of the railroad companies. We cannot admit the soundness of this view. The cases cited where a policy is avoided by the carrying on of a prohibited business, or the storing of a prohibited article, without the knowledge or consent of the insured owner of a building, are placed upon the ground that the possession of the tenant or occupant of a building is the possession of its owner, and that the contracts which he makes as to the use of the insured premises are in the nature of warranties, and relate to matters over which he has legitimate control. It cannot be contended successfully that the condition in question here was intended by the plaintiff to subject the policy to forfeiture if any person who had a remote and independent insurable interest should take out a policy of marine insurance to protect that interest, the plaintiff having no privity with such person. As was said in *Grandin v. Rochester German Ins. Co.* 107 Pa. 26, 37: "We are not to suppose that conditions involving forfeitures are introduced into policies by insurance companies, which are purely arbitrary and without

reason, merely as a trap to the assured or as a means of escape for the company in case of loss. When, therefore, a general condition has no application to a particular policy, where the reason which alone gives it force is out of the case, the condition itself drops out with it." See also *Hoffman v. Aetna F. Ins. Co.* 82 N. Y. 405.

The offer of evidence by the defendant at the trial, in regard to the marine insurance, was by its terms an offer to prove the mere fact of marine insurance, in support of the defense set up in paragraph 7 of the answer; and the claim on the part of the defendant that the evidence was proper to support the further defense set up in the answer, as to the amount of the proportionate liability of the defendant, is not tenable. The offer was to prove merely the fact of marine insurance, and not to prove its amount. It was an offer in bar of liability, and not an offer applicable to a reduction of the verdict. No suggestion of the latter object was made in the offer, and the evidence, if admitted as offered, could have no bearing upon the question as to how much the proportionate liability of the defendant would be reduced by virtue of the marine policies. The only specific offer to prove the terms of any marine policy, and the extent of the insurance under it, was made in the form of an offer of the deposition of one Phillips and the testimony of one Bowen, both of which were excluded on proper grounds, and complaint is made only of the exclusion of the deposition of Phillips.

(6.) It is assigned for error that the court erred in striking out the testimony in the deposition of Phillips, the clerk of Ralli Bros., who were claiming pay from the Memphis & Little Rock Railroad Company for 158 bales of cotton, to the effect that that cotton was covered by marine policies taken out by Ralli Bros. The policies of insurance mentioned in the testimony in the deposition were not attached to it. The testimony was objected to by the plaintiff as incompetent because it was an attempt to prove by parol the contents of written instruments; it was stricken out by the court, and the defendant excepted.

The ruling of the court was manifestly correct. There was no proof that the policies referred to were in Liverpool, for all that the witness Bowen said was that he was informed they were there; and as to the copy which Phillips refused to attach to his deposition, all the evidence in regard to its identity is that Phillips said to the witness Bowen that such copy was a copy of the marine policy which had been issued on the cotton. This was, all of it, only hearsay evidence.

(7.) The court was requested by the defendant to instruct the jury as follows: "As this action is brought solely on behalf of the railroad companies on account of liability incurred through carelessness of the agents and servants of the companies, no cause of action accrued against the defendant until the actual payment by said companies of damages on account of the alleged fire, and the recovery cannot be greater than the value, on November 14, 1887, at Little Rock, of the cotton so burned and paid for—nor greater than the sum paid by the railroad companies—that is, if they have paid more than the value of the cotton they

cannot recover the excess from the defendant; if they have paid less than the value, they can recover only to the extent of the payment." The court refused to give that instruction, and defendant excepted. This is alleged as error. It is urged that the Memphis & Little Rock Railroad Company has never paid any damages, and that the Missouri Pacific Railway Company had not paid any when this suit was commenced; and it is contended that no cause of action accrues, in a case of that kind, until payment of the damages by the railroad companies is made.

But, as a bailee, under a policy taken out to cover property his own or held by him in trust or on commission, may enforce the contract of insurance to the full value of the property destroyed, holding the proceeds primarily for his own benefit and the balance for that of his bailor, the right of action of the plaintiff accrued on the occurring of the loss. The case cited by the defendant, *Oincinnati, H. & D. R. Co. v. Spratt*, 2 Duvall, 4, does not apply to the present case. That was a suit brought by a consignee of goods against a carrier, where the carrier was entitled, under a bill of lading given by it to the consignee, to insurance obtained by the consignee; and it was held that the consignee could not be compelled to proceed upon the policy of insurance before enforcing his claim against the carrier, even where it appeared that the insurer had agreed to pay its loss under the policy, and although it was alleged that the suit was prosecuted for the benefit of the insurer. But here the plaintiff is the assured. The insurance included the protection of the railroad companies. The premium was paid. The insured property was destroyed by fire. The condition of the liability of the insurer was complete, and its liability had fully accrued. The only question for litigation was whether the railroad companies were protected by the insurance. The defendant is called upon to perform only its agreement to pay the insurance money in case of the destruction of the cotton by fire. Its liability is not dependent upon the question whether the liability of the railroad companies has been discharged; nor is the plaintiff's right of action contingent upon the payment by the railroad companies of the value of the cotton burned, but it is contingent only upon the destruction of the cotton by fire under circumstances which impose a liability upon the railroad companies.

We see no error in the record, and the judgment is affirmed.

R. S. SEARL, *Plff. in Err.*,
v.
SCHOOL DISTRICT NO. 2, IN THE
COUNTY OF LAKE.

(See S. C. Reporter's ed. 553-555.)

Eminent domain—condemnation of land for school-house—right of owner—amount of com-

NOTE.—Eminent domain; right to take property; what may be taken.

Property cannot be taken under eminent domain without first making or securing payment of damages. *Sterling's App. (Pa.)* 2 Cent. Rep. 51; *Selfert*

compensation—school building on land—allowance for it—condition—possession in good faith—trespass—date of statute—owner's real interest.

1. Where a School District purchased a piece of land from a person in possession, having a squatter title, with knowledge by it of the issuance of a United States patent therefor, but under the advice of counsel and with the belief that the squatter title was the better title, and erected a school-house thereon, in subsequent proceedings to condemn the land as against the holder of the United States patent, who is the true owner, the School District is only obliged to pay such owner the value of the land without the school-house, although it was notified before the erection of the school-house that it would erect the school-house at its peril.
2. Courts of equity, in accord with the principles of the civil law, when their aid is sought by the real owner, compel him to make allowance for permanent improvements made bona fide by a party lawfully in possession under a defective title. But if the entry upon the land is a naked trespass, buildings permanently attached to the soil become the property of the owner of the latter. The trespasser can acquire no rights by his tortious acts.
3. The right of eminent domain cannot be exer-

cised except upon condition that just compensation shall be made to the owner, and it is the duty of the State to see that the compensation is just, not merely to the individual whose property is taken, but to the public which is to pay for it.

4. The good faith of the School District fixed the character of the entry and it cannot be held to have been such a trespass as to justify the claim that the school building, erected in similar good faith, so became part of the land as to entitle the owner to recover its value.
5. That the School District was not entitled, when it acquired the property, to the exercise of the power of eminent domain, because the Act making such proceedings lawful had not then been passed, is immaterial.
6. The Law of Colorado that "in estimating the value of all property actually taken, the true and actual value thereof at the time of the appraisalment shall be awarded," means the value of the owner's real interest.

[No. 1104.]

Submitted Jan. 10, 1890. Decided March 3, 1890.

[N ERROR to the Circuit Court of the United States for the District of Colorado to review a judgment in proceedings for the condemnation of land for school buildings, that the petitioner, upon the payment, or deposit in court, of the sum of money found to be the value of

v. Brooklyn, 101 N. Y. 136, 2 Cent. Rep. 136; Smith v. Inge, 80 Ala. 233; Petition of Mayor of N. Y. 90 N. Y. 569, 1 Cent. Rep. 149; Bethlehem South Gas & W. Co. v. Yoder (Pa.) 2 Cent. Rep. 599.

The federal government may exercise the right of eminent domain within a State, without its consent. *Cherokee Nation v. Southern Kansas R. Co.* 38 Fed. Rep. 900; *Stockton v. Balt. & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. Rep. 9.

In the absence of statutory authority, private property cannot be invaded under the power of eminent domain. *Re Poughkeepsie Bridge Co.* 11 Cent. Rep. 233, 108 N. Y. 483; *Godchaux v. Carpenter*, 19 Nev. 415; *Re Niagara Falls & W. R. Co.* 11 Cent. Rep. 272, 108 N. Y. 374.

The taking of land by municipalities for public parks is a taking for public use. *Re Niagara Falls & W. R. Co.* 11 Cent. Rep. 275, 108 N. Y. 374.

The power to take land by eminent domain may be given to a foreign corporation. *Abbott v. N. Y. & N. E. R. Co.* 5 New Eng. Rep. 527, 145 Mass. 450.

A construction company cannot seize land for railroad purposes. *Bloomfield R. Co. v. Grace*, 11 West. Rep. 368, 112 Ind. 128.

Not only property of a corporation, but its franchises, when inseparable, may be taken for public use on compensation being made therefor. *Re First Street (Mich.)* 9 West. Rep. 573; *Philadelphia, N. & N. Y. R. Co.'s App.* (Pa.) 12 Cent. Rep. 368; *Union Pac. R. Co. v. Leavenworth, N. & S. R. Co.* 20 Fed. Rep. 723; *Anniston & C. R. Co. v. Jacksonville, G. & A. R. Co.* 82 Ala. 297; *South Waverly Borough's App.* (Pa.) 9 Cent. Rep. 732; *Stockton v. Balt. & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. Rep. 9.

The interest which a settler has obtained by a homestead entry in public lands of the United States may be appropriated for a right of way for a railroad. *Burlington, K. & S. W. R. Co. v. Johnson*, 38 Kan. 142.

The Minnesota Statute of 1885 providing for the condemnation of lands for a state park is constitutional. *Minnehaha Falls Comrs. v. Henry*, 38 Minn. 266.

Irrigation districts are quasi public corporations, the purposes of their organization being for the general public benefit. *Turlock Irrigation Dist. v. Williams*, 78 Cal. 360.

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Upon just compensation being made, a right of way may be taken for the construction of a canal by a lumber company for the purpose of carrying lumber to a city and of supplying the city with water. *Dalles Lumbering Co. v. Urquhart*, 16 Or. 67.

A railroad company cannot condemn land for a landing for water craft. *Thomas v. St. Louis & C. R. Co.* 37 Fed. Rep. 589.

The power of a railroad company to take lands for a railroad implies the power to take them for depot buildings. *State v. Railroad Comrs.* 56 Conn. 308.

Portions of streets and highways may be condemned for railroad purposes, with the approval of the railroad commissioners. *Id.*

Under the Nebraska statutes, a railroad's right of condemnation is restricted to so much real estate as may be necessary for the location, construction and convenient use of its road. *Forney v. Fremont, E. & M. V. R. Co.* 23 Neb. 465.

The right of a railway company to condemn buildings situated on real estate necessary for its use is an incident to the right to condemn the land. *Id.*

A temporary lease of land by a railroad company, and commencing to build a switch thereon for private business enterprise, will not bar the right of another company to acquire such land for public railroad use. *Re Rochester, H. & L. R. Co.* 13 Cent. Rep. 234, 110 N. Y. 119.

The consent of the land owner to the appointment of commissioners for condemnation of land does not give power to the court in a case not within the statute. *State v. New York & N. J. Tel. Co.* 51 N. J. L. 83.

A railroad company acquires, with the lands condemned for the purposes of the construction and operation of its road, all the rights and privileges which appertain to it at the time of condemnation. *Willey v. Norfolk S. R. Co.* 88 N. C. 263.

The objection that one of the commissioners appointed to assess damages for lands taken, under the Kansas Statute, was not a freeholder, cannot avail to defeat the proceeding unless made either at the time of his appointment or at the time he proceeded to act. *Huling v. Kaw Valley R. & Imp. Co.* 130 U. S. 559 (82: 1045).

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the land, shall hold it with all the rights pertaining thereto. *Affirmed.*

Statement by Mr. Chief Justice Fuller:

School District No. 2, in the County of Lake and State of Colorado, filed its petition in the County Court of that County against R. S. Searl, stating that long prior to the first day of July, 1881, it had been, and then was, a School District duly and regularly organized; that on July 1, 1881, one Frances M. Watson was in the actual possession and occupancy, under a deed of conveyance to her, of certain lots in a certain block of an addition to the City of Leadville; that on the same day one Schlessinger was in the actual possession and occupancy under deed of conveyance to him of certain other lots; that said Watson and Schlessinger then were, and they and their grantors had for a long time prior thereto been, in the actual possession and occupancy of said lots claiming the ownership thereof; that on that day the board of directors of the School District, having been duly authorized and directed so to do, purchased the lots from Watson and Schlessinger and they were conveyed to the District, the said lots being contiguous and together

constituting but one tract or lot, not exceeding one acre; that the lots were situated within the boundaries of the School District, and were purchased for the purpose of a school lot upon which to locate and construct a school-house for the benefit of the School District and the people resident therein; that the School District entered into possession and occupation of the land on July 1, 1881, and proceeded to and did construct thereon a large, costly and valuable school-house, and ever since that time had been and now is in the possession and occupancy of said land, using the same for the purposes of a school; that since the purchase and entry into possession by the School District, the defendant, Searl, had acquired the legal title to the lots composing the school lot, the full title to the same having become vested in him on the second day of February, 1884; "that he is now the owner of said property, and that the title thereto acquired by your petitioner as aforesaid has wholly failed; that your petitioner made the purchases, entered into the possession, and constructed the school-house aforesaid in good faith, believing that it had good right so to do; that said school-house is located with reference to the wants and necessities of the people of

A petition to assess damages for lands taken by a telephone company must give a proper description of the poles and the premises to be occupied by them. *State v. New York & N. J. Tel. Co.* 51 N. J. L. 83.

Compensation for private property taken for public uses constitutes an essential element in "due process of law," and without such compensation the appropriation of private property to public uses will violate provisions of the 14th Amendment of the Constitution of the United States. *Scott v. Toledo*, 1 L. R. A. 688, 36 Fed. Rep. 385; *Thompson v. Pennsylvania R. Co.* (N. J.) 13 Cent. Rep. 209; *Strasbourg Borough v. Bachman* (Pa.) 13 Cent. Rep. 208.

Depriving the owner of a lot abutting on a public street of, or materially interfering with, his enjoyment of the easement in the street to its full width for admission of light and air to his lot, is a taking of his property for public use, for which full compensation must be made. *Adams v. Chicago, B. & N. R. Co.* 30 Minn. 286, 1 L. R. A. 493.

Raising the grade of a street to such a height that the earth of the fill slides over upon adjoining premises so far as to cover up a portion of the owner's dwelling by the embankment, closing a door and lower windows, constitutes a taking of the property, within the meaning of the constitutional provision requiring just compensation when private property is taken for public use. *Vanderlip v. Grand Rapids* (Mich.) 3 L. R. A. 247.

A purchaser of land at a sheriff's sale prior to the location of a line of railroad over it, although he does not receive the sheriff's deed until subsequently, is entitled to recover the damages assessed. *Pennsylvania Schuylkill Valley R. Co. v. Cleary*, 126 Pa. 442.

A railroad company chargeable with notice of a lease by the tenant's possession cannot discharge its liability to him for injury to crops, on appropriating the land in condemnation proceedings, by payment to the landlord. *Lafferty v. Schuylkill River East Side R. Co.* 3 L. R. A. 124, 124 Pa. 297.

A mortgagee cannot recover for consequential injuries to the mortgaged property from the construction of a railroad, where the mortgagor has, without fraud, made an amicable settlement for such damages with the company. *Knoll v. N. Y. C. & St. L. R. Co.* 1 L. R. A. 396, 121 Pa. 467.

The acquisition, by a railroad or canal company,

of an easement for a right of way over the land of a riparian owner, along or on the shore of his land, does not deprive him of his right to improve the connection of his land with the adjacent tidewater. *N. J. Zinc & Iron Co. v. Morris Canal & Bkg. Co.* 13 Cent. Rep. 342, 1 L. R. A. 133, 44 N. J. Eq. 369.

Remote and consequential damages to the property of an individual, as an indirect result of the construction by the State of a public work, do not constitute the taking of private property for public use without compensation, within the prohibition of the Constitution. *Green v. State*, 73 Cal. 29.

Indirect and consequential damages caused by a levee erected and maintained by a reclamation district do not constitute a taking of the property injured. *Lamb v. Reclamation Dist. No. 108*, 73 Cal. 125.

A railroad company constructing its track in a city street, under authority of a municipal ordinance, is nevertheless liable to an abutting property owner for the actual diminution in the market value of his land, caused by the construction of its track. *Denver & R. G. R. Co. v. Bourne*, 11 Colo. 59.

A railroad company is not liable for an injury to a water-mill by the clogging of its wheel and a partial filling of its reservoir and a stream of water by sand which was loosened by the construction of the road and washed away by heavy rains. *Trinity & S. R. Co. v. Meadows*, 73 Tex. 32, 3 L. R. A. 565.

An elevated railroad and its operation impose upon the street an unauthorized use, and are illegal and a trespass as against abutting owners not duly compensated. *Drucker v. Manhattan R. Co.* 8 Cent. Rep. 66, 106 N. Y. 157; *American Primitive Methodist Soc. v. Brooklyn Elevated R. Co.* 46 Hun. 530.

The operation of a railroad on land taken by eminent domain and abutting on a public city street, although diminishing the value of houses on the other side of the street, is *damnum absque injuria* for which owners of houses are not entitled to compensation. *Pennsylvania R. Co. v. Lippincott*, 8 Cent. Rep. 818, 116 Pa. 472; *Pennsylvania R. Co. v. Hunter*, 8 Cent. Rep. 823, 116 Pa. 472.

As to payment for private property taken for public use; Fifth Amendment to Constitution applies only to federal government, and not to States. —see *note*, to *Withers v. Buckley*, Bk. 15, p. 816.

each portion of said District, and was at the time of said purchases and is now necessary for the school purposes of said District, and that said land and school lot contain no more than is necessary for the location and construction of the school-house aforesaid and the convenient use of the school; that the compensation to be paid for and in respect of the property aforesaid for the purposes aforesaid cannot be agreed upon by your petitioner and the said defendant, the parties interested; and that the said defendant is a nonresident of the State of Colorado." Petitioner then averred that the value of the property did not exceed the sum of two thousand dollars; and prayed that the compensation to be paid by it to defendant for and on account of said property be assessed in accordance with the statute.

The defendant appeared and on his application the cause was removed into the Circuit Court of the United States for the District of Colorado. Upon the trial before the circuit judge and a jury, it was "agreed and admitted, among other things, that the premises appropriated were necessary for the petitioner and were taken for public use." And the following stipulation in writing was offered and read in evidence:

"For the purposes of the present hearing and trial only of the above-entitled action or proceeding, either in this court, where it is now pending, or in the Supreme Court of the United States, where it may be taken on appeal or writ of error, the following facts are agreed upon by and between the respective parties hereto, to wit:

"First. That a receiver's receipt was issued for the Sizer placer, United States survey No. 388, on the 16th day of April, A. D. 1881, out of the district land office of the United States at the City of Leadville, in the State of Colorado, to one Isaac Cooper, claimant.

"Second. That on the 18th day of May, A. D. 1881, a United States patent was issued to the said Isaac Cooper for the said Sizer placer.

"Third. That the land sought to be condemned in the present proceeding is a part of the said Sizer placer.

"Fourth. That since the 20th day of November, A. D. 1882, and before the institution of this proceeding, the said Isaac Cooper conveyed to the said R. S. Searl the said Sizer placer, and the said Searl by virtue thereof is now the owner and holder of the said patent title thereto.

"Fifth. That prior to the application for a patent to the said Sizer placer, and up to the time when the said school board purchased the same and took possession thereof, the land herein sought to be condemned was occupied, possessed and improved, and the ownership thereof claimed, by persons holding under what was called and known as a 'squatter title.'

"Sixth. That on or about the first day of July, A. D. 1881, the said school board purchased and took conveyances of the land now sought to be condemned, with the buildings and improvements thereon, made and erected by the said squatter occupants, from said occupants, and paid therefor the sum of thirty-five hundred (\$3,500) dollars.

"Seventh. That on or before the thirtieth

day of July, A. D. 1881, the said school board went into actual possession of the lots described in the petition herein, and immediately commenced to build, and on the thirtieth day of January, A. D. 1882, prior to the institution of these proceedings, completed improvements suitable and appropriate for educational purposes, at a cost to the said School District of forty thousand (\$40,000) dollars; which property it has since possessed and occupied and still occupies for school purposes.

"Eighth. That at the time of the commencement of this action and the institution of these proceedings in condemnation, the land described in the petition herein, together with the improvements thereon so made by the school board as aforesaid, was of the value of forty thousand (\$40,000) dollars.

"Ninth. That at the said times of taking possession and at the time of the commencement of this action and the institution of these proceedings in condemnation, the land described in the petition herein, without the improvements thereon made by the school board, was of the value of three thousand (\$3,000) dollars, and that the area of same is less than one acre.

"Tenth. That petitioner had knowledge of the issuance of a United States patent, covering the property sought to be condemned, prior to the purchase of the title which it subsequently purchased, and which was known as the squatter title.

"That prior to such purchase petitioner employed and paid reputable counsel to investigate said title; that the counsel so employed reported in favor of the validity of the so-called squatter title and against the validity of the United States patent; that, believing said so-called squatter title to be better than the title conveyed by United States patent, petitioner purchased the same; that after said purchase petitioner subscribed to the funds of an association organized for the purpose of endeavoring to defeat said patent title.

"Eleventh. That prior to the commencement of and during the erection of the school building now standing on the land sought to be condemned, the board of school directors of petitioner was notified on behalf of respondent, who at that time owned an equitable interest in the said property, and on behalf of respondent's grantors, that any building said School District might erect on said lots would be erected at the peril of the said School District, and would be claimed, when completed, by said respondent and his grantor, but the said School District, having purchased the said lots of the squatters in possession as aforesaid and believing that it had the better title thereto, proceeded, notwithstanding such notice, and made and erected said improvements as aforesaid.

"And in view of the Statute (Dawson's Colorado Code, p. 80, sec. 253), and for the purpose of putting as speedy an end to contention as possible, it is further stipulated that the foregoing values may be taken as the actual values at the time of the trial of this suit, and that the property sought to be condemned is for public use, and within the meaning of the law is necessary for the School District.

"Twelfth. That R. S. Searl is now, and was at the time of the commencement of these

proceedings, a citizen and resident of the State of Kansas."

The bill of exceptions also states that "the said defendant, R. S. Searl, introduced further evidence tending to show that he became the legal owner of the premises on the 2d day of February, 1884, and commenced his action of ejectment on the 24th of March, 1884, which was at issue and set for trial in this court on the 11th day of June, 1884; that petitioner filed bill for injunction and obtained writ of injunction restraining trial of ejectment suit on the 7th of June, 1884, and commenced these proceedings on the 9th of June, 1884."

The defendant requested the court to give to the jury a number of instructions, which are omitted in view of the grounds of decision here.

The court refused these instructions and charged the jury generally, and instructed them that the form of their verdict should be as follows: "We, the jury, find, first, that the accurate description of the property sought to be condemned in this action is lots 812, 814, 816, 818, and the north 18.6 feet and the east 35 feet of lot 810, North Poplar Street, and lots 211 and 218 East 9th Street, in Cooper's subdivision of the surface of the Sizer placer, U. S. survey No. 888, situate in the County of Lake and State of Colorado, together with the improvements thereon. Second. That the value of said property at this date is \$8,000."

To the giving of this instruction and to the refusal to give those prayed by the defendant, the defendant by his counsel then and there excepted. The jury thereupon returned a verdict in the sum of three thousand dollars, and judgment was rendered thereon that the petitioner, upon "the payment of the amount of the said verdict to the said respondent or the deposit of the said amount in this court within thirty days hereafter, shall be, and it hereby is, invested with the fee in and to said premises. And it appearing that the said petitioner is in possession, it is further considered by the court that upon the payment or deposit of the said sum of money within the time aforesaid [said petitioner shall] retain possession of and hold the premises aforesaid, with all the rights and interests thereto belonging and appertaining."

To review this judgment a writ of error was sued out from this court.

Messrs. Sam. P. Rose and Frank W. Owers, for plaintiff in error:

Such a purchase as that made by defendant in error does not constitute color of title and will not prevent the owner of the land taking buildings without payment at the termination of a suit in ejectment.

Steel v. St. Louis S. & R. Co. 106 U. S. 447 (27: 296); *Brant v. Virginia Coal & Iron Co.* 98 U. S. 327 (23: 927); *Henshaw v. Bissell*, 85 U. S. 18 Wall. 271 (21: 840).

A school district can claim no privileges or immunities from the results of such acts which would not be accorded to an individual seeking to exercise the right of eminent domain for the purpose of gain.

Potter's Dwarries, Statutes, 392-396; *U. S. v. Lee*, 106 U. S. 219, 220 (27: 181).

The common law always gave the buildings erected by a trespasser, with full knowledge of

the condition of the title to the land on which he built, to the legal owner of that land. The weight of authority in condemnation suits follows the common law.

U. S. v. Monterey County, 47 Cal. 515; *Graham v. Connersville N. C. R. Co.* 36 Ind. 463; *Re Long Island R. Co.* 6 Thomp. & C. 298; *N. Y. W. S. & B. R. Co. v. Gennet*, 37 Hun, 317; *Meriam v. Brown*, 128 Mass. 391; *Dietrich v. Murdock*, 42 Mo. 279; *Hibbs v. Chicago & S. W. R. Co.* 39 Iowa, 340; *Farrar v. Stackpole*, 6 Me. 154; *McElroy v. Kansas City*, 21 Fed. Rep. 260.

The certainty of compensation is the primary requisite to the appropriation of lands for public use under the right of eminent domain.

Potter's Dwarries, Statutes, 390; Cooley, Const. Lim. 699.

Compensation must be provided for prior to or pending the proceedings.

2 Kent, Com. 839; *Bloodgood v. Mohawk & H. R. Co.* 18 Wend. 17; *Bonaparte v. Camden & A. R. Co.* 1 Baldw. C. C. 205; *Garrison v. New York*, 88 U. S. 21 Wall. 204 (22: 614); Potter's Dwarries, Statutes, 387-392.

Mr. C. S. Thomas, for defendant in error:

This proceeding, though not a suit in equity proper, is in this sense equitable: that the damages to be recovered are such as ought justly to be paid and received.

Morgan's App. 39 Mich. 675, 679; *Oregon R. & Nav. Co. v. Mosier*, 14 Or. 519, 53 Am. Rep. 321, 326.

It seems difficult to imagine a case of the purchase of real property by a corporation where more perfect good faith in fact could exist or be manifested.

Pillow v. Roberts, 54 U. S. 13 How. 472 (14: 228); *Dillingham v. Brown*, 38 Ala. 311; *Little v. Magguier*, 2 Me. 176; *Brackett, Petitioner*, 53 Me. 236; *Hearick v. Doe*, 4 Ind. 164; *Sutton v. McLoud*, 26 Ga. 688; *Baily v. Doolittle*, 24 Ill. 578, 579; *Wright v. Mattison*, 59 U. S. 18 How. 52, 59 (15: 281, 284); *Woodward v. Blanchard*, 16 Ill. 424, 423; *McCagg v. Heacock*, 43 Ill. 156.

The want of good faith must be established by proof.

McConnel v. Street, 17 Ill. 354; *McCagg v. Heacock*, 34 Ill. 478, 479; *Brooks v. Bruyn*, 35 Ill. 894, 395; *Morrison v. Norman*, 48 Ill. 479.

Bad faith is not established by showing actual notice of existing claims or liens of other persons to the property.

Ewing v. Burnet, 36 U. S. 11 Pet. 41 (9: 624); *Bogardus v. Trinity Church*, 4 Paige, 200; *Clapp v. Bromaghnam*, 9 Cow. 558; *Chickering v. Philes*, 26 Ill. 519-521; *Cook v. Norton*, 43 Ill. 393, 394.

The inquiry is whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith.

Wright v. Mattison, 59 U. S. 18 How. 56 (15: 283); *Woodward v. Blanchard*, 16 Ill. 430, 431; *Dickenson v. Breeden*, 30 Ill. 326; *Lebanon Min. Co. v. Rogers*, 8 Colo. 86, 37; *Cook v. Norton*, 43 Ill. 393, 394; *Hinkley v. Greene*, 52 Ill. 227.

Wherever a state, condition or emotion of the mind has become material in giving legal character to an act performed, the advice of counsel learned in the law, under the influence of which the act was done, has ever been deemed and held controlling.

Cutter v. State, 36 N. J. L. 125, 128; *People v.*

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Whaley, 6 Cow. 661; *Commonwealth v. Shed*, 1 Mass. 228; *Com. v. Bradford*, 9 Met. 268; *Roy v. Goings*, 112 Ill. 656; *Brewer v. Jacobs*, 22 Fed. Rep. 217; *Sharpe v. Johnston*, 76 Mo. 660; *Smith v. Austin*, 49 Mich. 286; *Sparling v. Conway*, 75 Mo. 510; *Forbes v. Hagman*, 75 Va. 168; *Logan v. Maytag*, 57 Iowa, 107; *Kingsbury v. Garden*, 13 Jones & S. 224; *Decoux v. Lieux*, 33 La. Ann. 392; *Cooley, Torts* (1st ed.) 188, and cases cited; 2 Greenl. Ev. § 459, and cases cited; *Motes v. Bates*, 80 Ala. 382; *Johnson v. Miller*, 69 Iowa, 562; *Moore v. Northern Pac. R. Co.* 37 Minn. 147; *Jones v. Jones*, 71 Cal. 89; *Cuthbert v. Galloway*, 35 Fed. Rep. 466; *Mesher v. Iddings*, 72 Iowa, 558.

Improvements made upon the land of another, by one in good faith, believing himself to be the owner thereof, in equity belong to the party who made them.

2 Story, Eq. Jur. § 1237, note 1, and cases cited; *Bright v. Boyd*, 1 Story, C. C. 478, 2 Story, C. C. 605; *Putnam v. Ritchie*, 6 Paige, 390; *Williams v. Gibbs*, 61 U. S. 20 How. 535 (15: 1013); *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 569; *Barker v. Owen*, 93 N. C. 198; *Howard v. Massengale*, 13 Lea (Tenn.) 577; 3 Pom. Eq. Jur. § 1241, and cases cited; *Smith v. Drake*, 23 N. J. Eq. 302; *Miner v. Beekman*, 50 N. Y. 337; *McLoughlin v. Barnum*, 31 Md. 425; *Sale v. Crutchfield*, 8 Bush (Ky.) 636; *Preston v. Brown*, 35 Ohio St. 18; *Johnson v. Felot*, 24 S. C. 255, 58 Am. Rep. 253, 256; *Cooley, Const. Lim.* (2d ed.) 396.

When the owner of the land resorts to a court of equity to secure the land, he is required to make compensation for the improvements, as a condition to the obtaining by him of any relief.

Call v. Chase, 21 Wis. 518; *Pierce v. Schutt*, 20 Wis. 424; *Bond v. Kenosha*, 17 Wis. 287; *Plato v. Roe*, 14 Wis. 458; *Warden v. Fond du Lac County*, 14 Wis. 620; *Smith v. Humphrey*, 20 Mich. 409; *Hamill v. Thompson*, 3 Colo. 521; *Harts v. Brown*, 77 Ill. 284; 1 Pom. Eq. Jur. §§ 385, 388, and cases cited.

The just compensation to be paid to the owner of the paramount title will be limited to what the value of the property taken would have been had no improvements been made.

Lyon v. Green Bay & M. R. Co. 42 Wis. 538; *Kennedy v. Milwaukee & St. P. R. Co.* 22 Wis. 582, 585-588; *Cohen v. St. Louis, Ft. S. & W. R. Co.* 34 Kan. 158, 55 Am. Rep. 242; *California P. R. Co. v. Armstrong*, 46 Cal. 85; *Morgan's App.* 39 Mich. 675; *Justice v. Nesquehoning Valley R. Co.* 87 Pa. 28, 32; *Jones v. New Orleans & S. R. Co.* 70 Ala. 227; *Texas & St. L. R. Co. v. Matthews*, 60 Tex. 215; *Toledo, A. & G. T. R. Co. v. Dunlap*, 47 Mich. 456; *Mills, Eminent Domain*, § 148, and cases cited; *North Hudson County R. Co. v. Booraem*, 28 N. J. Eq. 450; *Oregon R. & Nav. Co. v. Mosier*, 14 Or. 519, 58 Am. Rep. 321; *Daniels v. Chicago, R. I. & P. R. Co.* 41 Iowa, 52; *Greece v. First Div. St. Paul & P. R. Co.* 26 Minn. 66; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273, 282, 283, and cases cited; *Ellis v. Rock Island & M. C. R. Co.* 14 West. Rep. 372, 125 Ill. 82; *Preston v. Sabine & E. T. R. Co.* 70 Tex. 375; *Louisville, N. O. & T. R. Co. v. Dickson*, 63 Miss. 380; *Northern C. R. Co. v. Canton County*, 30 Md. 354; *California S. R. Co. v. Southern Pac. R. Co.* 67 Cal. 59; *Hendry v. Trinity & S. R.* 133 U. S.

Co. (Tex.) 24 Am. & Eng. R. R. Cas. 287; *Wagner v. Cleveland & T. R. Co.* 22 Ohio St. 576; *Hyde v. Manchester*, 5 De G. & S. M. 249; *Martin v. London, C. & D. R. Co.* L. R. 1 Eq. 145.

It is immaterial when the right of eminent domain is delegated.

North Hudson County R. Co. v. Booraem, 28 N. J. Eq. 450; *Springfield & I. S. E. R. Co. v. Hall*, 67 Ill. 99; *Garrison v. New York*, 88 U. S. 21 Wall. 203, 205 (22: 614); *Baltimore & S. R. Co. v. Nesbit*, 51 U. S. 10 How. 395 (13: 469); *Hampton v. Com.* 19 Pa. 329; *Com. v. Beatty*, 1 Watts, 882; *Yost's Report*, 17 Pa. 524; *Fenelon's Petition*, 7 Pa. 173; *Mills, Eminent Domain*, § 98, and cases cited.

The right of eminent domain always existed at common law.

Kohl v. U. S. 91 U. S. 376 (23: 452); *East St. Louis v. St. John*, 47 Ill. 465; *Mills, Eminent Domain*, §§ 48, 84, 85, and cases cited; *Cooley, Const. Lim.* (2d ed.) 524, 526, 536, 547, and cases cited.

The prior occupation without authority of law would not preclude the School District from taking subsequent measures when authorized by law to condemn the land for its use.

Secombe v. Milwaukee & St. P. R. Co. 90 U. S. 23 Wall. 108, 118 (23: 67, 70), and cases cited.

The School District is a part of that sovereignty to which the power of eminent domain is reserved, and in which it rests and abides.

Marathon Twp. School Dist. v. Gage, 39 Mich. 484; *Widner v. State*, 49 Ark. 172.

The practice of condemnation for a school-house exists in many of the States.

Mills, Eminent Domain, § 17, and cases cited; *Township Board of Education v. Hackmann*, 48 Mo. 243; *Williams v. Newfane School Dist.* 33 Vt. 271; *Peckham v. North Providence School Dist.* 7 R. I. 545; *Long v. Fuller*, 68 Pa. 170.

Mr. Chief Justice Fuller delivered the opinion of the court:

Upon the conceded facts, unless the plaintiff in error was entitled to be compensated for the school-house in question, the instruction limiting the recovery to three thousand dollars was correct, and the judgment must be affirmed.

The Constitution of the State of Colorado provides "that no person shall be deprived of life, liberty or property, without due process of law;" and "that private property shall not be taken or damaged, for public or private use, without just compensation." (Art. II. §§ 15, 25; Gen. Stat. Col. 1883, pp. 84, 35.)

Did the just compensation thus secured to the owner of property, taken in the exercise of the power of eminent domain, include in this instance payment to the plaintiff in error for the improvements made by the School District in order to carry out the specific use and purpose for which the land was required? Could plaintiff in error properly insist that the loss of the school-house was an injury which he sustained by reason of the taking?

The argument is that the moment the school-house was completed it belonged to the owner of the land by operation of law, and therefore that he was entitled to be recompensed for it upon condemnation. The maxim *quicquid plantatur solo, solo cedit*, is not of universal application. Structures for the purposes of trade

or manufacture, and not intended to become irrevocably part of the realty, are not within the rule (*Van Ness v. Pacard*, 27 U. S. 2 Pet. 137 [7:184]); nor is it applicable where they are erected under agreement or by consent, the presumption not arising that the builder intended to transfer his own improvements to the owner. And courts of equity, in accord with the principles of the civil law, when their aid is sought by the real owner, compel him to make allowance for permanent improvements made bona fide by a party lawfully in possession under a defective title. Story, Eq. Jur. § 1237.

The civil law recognized the principle of reimbursing to the bona fide possessor the expense of his improvements if he was removed from his possession by the legal owner, by allowing him the increase in the value of the land created thereby. And the Betterment Laws of the several States proceed upon that equitable view. The right of recovery, where the occupant in good faith believes himself to be the owner, is declared to stand upon a principle of natural justice and equity, and such laws are held not to be unconstitutional as impairing vested rights, since they adjust the equities of the parties as nearly as possible according to natural justice; and in its application as a shield of protection, the term "vested rights" is not used in any narrow sense, but as implying a vested interest of which the individual cannot be deprived arbitrarily without injustice. The general welfare and public policy must be regarded, and the equal and impartial protection of the interests of all. Cooley, Const. Lim. *356, *386.

But if the entry upon land is a naked trespass, buildings permanently attached to the soil become the property of the owner of the latter. The trespasser can acquire no rights by his tortious acts.

The circuit court was not dealing with an action of ejectment or trespass, but simply with a proceeding in the exercise of the right of eminent domain. That right is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law. It cannot be exercised except upon condition that just compensation shall be made to the owner, and it is the duty of the State, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it. *Garrison v. New York*, 88 U. S. 21 Wall. 196, 204 [22:612, 614]; *Kohl v. United States*, 91 U. S. 867, 871 [23:449, 450]. The occupancy here was in no respect for a private purpose or pecuniary gain, but strictly and wholly for the public use. There could be no presumption that this public agent intended to confer public property upon a private individual, nor were the circumstances such as to impart the character of willful trespass to the entry by the District, or impose liability to the forfeiture of improvements made in discharge of its public duty.

It is among the agreed facts in the case that the premises appropriated were necessary for the schools and were taken for that public use; that though the District had knowledge of the issuing of a patent covering the property, yet it purchased the adverse title of the party then in possession, believing it to be better than the

patent title, and upon the advice of reputable counsel, who had, on investigation, reported against the validity of the patent and in favor of the validity of the title purchased, and paid thirty-five hundred dollars, which was five hundred dollars more than the actual value, without the building, was admitted to be when the trial took place; and that, notwithstanding notice that it was proceeding at its peril, it erected the building in reliance upon such belief that it had the better title. The only legitimate inference from these facts is that the District acted throughout in good faith, as the opposite of fraud and bad faith, and, although it may have been wholly mistaken, the intention guided the entry and fixed its character, and it cannot be held to have been such a trespass as to justify the claim that the school building, erected in similar good faith, so became part and parcel of the land as to entitle the owner to recover its value. Plaintiff in error knew when he obtained the title that the land was in necessary use by the public for a purely public purpose, and that no intention of parting with the structures could be imputed; and no notice of what his grantor or himself intended to insist on could destroy the good faith in fact, which the conceded belief of the District imparted to its conduct.

In *Wright v. Mattison*, 59 U. S. 18 How. 50 [15:280], this court, in considering a statute of the State of Illinois in protection of persons "in the actual possession of lands or tenements under claim and color of title made in good faith," reiterated the rule that color of title is matter of law, but good faith in the party claiming under such color is purely a question of fact; and held that, while defects in the title might not be urged against it as destroying color, they might have an important and legitimate influence in showing a want of confidence and good faith in the mind of the vendee, if they were known to him, and he therefore believed the title to be fraudulent and void. The court approved of the opinion of the Supreme Court of Illinois in *Woodward v. Blanchard*, 16 Ill. 424, in which it was said by Scates, Ch. J., that "the state of mind of the party in relation to such title was an existing truth which must be ascertained and found as a fact in the cause. Many independent facts and surrounding circumstances may be admissible in evidence, and legitimately considered as establishing or impeaching the state of mind in its good faith, honest belief or trust in, or dependence upon, such title." And this language was quoted by the court from that opinion: "Good faith is doubtless used here in its popular sense, as the actual, existing state of the mind; whether so from ignorance, skepticism, sophistry, delusion, fanaticism or imbecility, and without regard to what it should be from given legal standards of law or reason." *Ewing v. Burnet*, 86 U. S. 11 Pet. 41 [9:624]; *Pillow v. Roberts*, 54 U. S. 13 How. 472 [14:228]. As remarked by Beckwith, J., in *McCagg v. Heacock*, 34 Ill. 476, 479: "The good faith required by the statute, in the creation or acquisition of color of title, is a freedom from a design to defraud the person having the better title;" and "the knowledge of an adverse claim to, or lien upon, property, does not, of itself, indicate bad faith in a purchaser, and is not even evidence of it,

unless accompanied by some improper means to defeat such claim or lien."

We are of opinion that plaintiff in error could not successfully contend that the School District should be treated as a naked trespasser. And as the actual value of the land at the time of the trial must have included whatever increase may have inured by reason of its adaptability to school purposes and every other element entering into its cash or market value, as tested by its capacity for any and all uses, it follows that the true criterion of recovery was adopted.

It is not denied that the School District, when it filed its petition, was entitled to acquire the property in the exercise of the power of eminent domain, but it is said that it could not do so prior to February 13, 1883, the date of the passage of an Act rendering such action on its part lawful. (Sess. Laws Col. 1883, p. 263; Gen. Stat. § 8044, p. 898.) But we cannot perceive that this affects the precise question before us. Inability to condemn indicates that possession was not taken with the view of proceedings to that end, but that is conceded on the other ground that the School District believed that it had the better title and erected its building accordingly. When it came to possess and exercise the power, the inquiry was limited to such compensation as was just and did not embrace remote or speculative damages, or payment for injuries not properly susceptible of being claimed to have been sustained.

It was ruled in *Secombe v. Milwaukee & St. P. R. Co.* 90 U. S. 23 Wall. 108, 118 [23:67, 70], in relation to the taking of private property by a railroad company under the power of eminent domain, that "prior occupation without authority of law would not preclude the company from taking subsequent measures authorized by law to condemn the land for their use. If the company occupied the land before condemnation without the consent of the owners, and without any law authorizing it, they are liable in trespass to the persons who owned the land at the time, but not to the present plaintiff."

Plaintiff in error obtained the legal title February 2, 1884, and this petition was filed the second day of June of that year. If he suffered injury by being kept out of possession, for which he could recover damages, they could not be assessed in this action, and there is nothing in the record to show that any claim to that effect was made.

Chapter XXXI. of the General Laws of Colorado treats of eminent domain, and constitutes chapter XXI. of Dawson's Code of Civil Procedure, referred to in the record. Section 258 provides that "in estimating the value of all property actually taken, the true and actual value thereof at the time of the appraisalment shall be allowed and awarded," and that "in all cases the owner or owners shall receive the full and actual value of all property actually taken." (Dawson's Code 1884, p. 80.) This means, of course, the value of the owner's real interest. It was agreed that at the time of the trial the actual value of the land, "without the improvements thereon made by the school board," was three thousand dollars, so that, as before stated, the sole question is whether the circuit court erred in holding that the defendant could not be allowed for the improvements.

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We think that in this there was no error. In our judgment, the technical rule of law invoked to sustain the defendant's contention that he owned the school-house was inapplicable, and the value of the improvements could not justly be included in the compensation. Numerous well-considered decisions of the state courts announce the same result. *Justice v. Nesquehoning Valley R. Co.* 87 Pa. 28, 32; *Jones v. New Orleans & S. R. Co.* 70 Ala. 227; *Lyon v. Green Bay & M. R. Co.* 42 Wis. 588; *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 273; *Oregon R. & Nav. Co. v. Mosier*, 14 Or. 519; *Morgan's Appeal*, 39 Mich. 675.

The judgment is affirmed.

DAVID ARMSTRONG, Receiver of the FIDELITY NATIONAL BANK OF CINCINNATI,
OHIO, Appt.,
v.

THE AMERICAN EXCHANGE NATIONAL BANK OF CHICAGO, ILLINOIS.

SAME v. SAME.

(See S. C. Reporter's ed. 433-470.)

Foreign bill of exchange—consideration—deposit of draft—notice—deposit ticket—estoppel by representation—certificate of deposit—rights of receiving bank—receiver of bank, when estopped—payment of certificate—liability of bank issuing it—improper use of proceeds—illegal transaction—recovery upon—obligation connected with, when enforced—interest on receiver's dividend.

1. A draft drawn in Ohio, upon a bank in New York, and payable in New York, is a foreign bill of exchange.

NOTE.—Bills drawn in one State and payable in another are foreign bills. See note to *Buckner v. Finley*, Bk. 7, p. 523.

When bank charging bill or note to maker, or crediting holder with the amount of, discharges other parties, see note to *Brown v. Barry*, Bk. 1, p. 638.

As to acceptance or promise to accept, by letter or telegram, see note to *Coolidge v. Payson*, Bk. 4, p. 135.

As to transfer of bills by delivery or assignment; obligation of assignor or transferor, see note to *Pease v. Dwight*, Bk. 12, p. 399.

As to securities given for money lost at play, see note to *Thompson v. Bowie*, Bk. 13, p. 423.

As to who will be deemed to have acted in good faith in taking; what is notice to prevent holder from recovery, see note to *Fowler v. Brantly*, Bk. 10, p. 473.

As to rights of holder of commercial paper transferred after due, see note to *Foley v. Smith*, Bk. 13, p. 331.

Lex loci and lex fori as to interpretation, effect and validity of bills and notes, and usury. See note to *Slacum v. Pomery*, Bk. 3, p. 205.

When an indorser can allege want of consideration, duress, fraud and other defenses, see note to *McDonald v. Magruder*, Bk. 7, p. 744.

As to liability and rights of indorser before payee, see note to *Rey v. Simpson*, Bk. 13, p. 230.

As to certification of checks; liability of bank on, see note to *Merchants Bank of Boston v. State Bank of Boston*, Bk. 13, p. 1006.

As to liability of a bank upon a check drawn upon it, see note to *National Bank of Republic v. Millard*, Bk. 13, p. 397.

2. In a suit on a bill of exchange by the payee against the drawer, want of consideration from the purchaser of the bill cannot be shown, if the payee is a bona fide holder for value, the purchaser not being the drawer's agent in delivering the bill to the payee.
3. Where a draft is deposited with a bank by the holder, and the bank places the draft to the depositor's credit, as cash, and pays his checks drawn on it, the bank becomes the owner of the draft for value.
4. The fact that the draft was payable to the order of the bank was not notice to the bank that the holder was not its purchaser or remitter.
5. A deposit ticket made by the assistant cashier of the bank for the use of the officers of the bank, and not seen nor assented to by the depositor, did not change the terms of the deposit as between the bank and the depositor.
6. Where a bank represents to another bank that a holder of a draft is a bona fide holder, and it takes the draft on deposit and places it to the holder's credit and pays his checks, relying on such representation, the former bank is estopped from showing that such holder was not a bona fide holder of the draft, and its receiver stands in no better position.
7. A letter of advice or statement written by the cashier of one bank to another bank stating that a person therein named has deposited with the former bank a sum of money therein stated to the credit of the latter bank for the use of another, is a certificate of deposit.
8. The bank to whose credit the moneys were thus stated to be deposited, by receiving such certificate and applying it to the use of the person directed therein, became an innocent purchaser for value of the certificate, and the bank writing it became indebted in its amount to the bank receiving it.
9. The subsequent receiver of the bank who made such certificate is estopped from setting up the falsity of the statement therein that the money was deposited with it to the credit of the other bank, after the latter has acted upon it.
10. The certificate of deposit was as much applied to the use of the person named therein as having made the deposit, by paying his indebtedness to the bank receiving it, as by paying what he owed to any other party.
11. If the person stated in the certificate as having made the deposit to the credit of the bank receiving it did not in fact deposit the money as stated by the bank making the certificate, the receiver of the latter bank must make good the representation by placing a like amount to the credit of the bank who received the certificate.
12. The bank receiving the certificate of deposit was bound to honor the checks of the person named therein drawn on the fund, and could not refuse to pay them on the ground that such person intended to make a improper use of the money, such as to pay a gambling debt.
13. In a suit on the certificate of deposit brought by the bank which received it against the receiver of the bank which issued it, the latter cannot defend on the ground that the plaintiff knew that if it paid over the money to the person named in the certificate, as the bank issuing it requested, the money would be used in an illegal transaction, in which the plaintiff did not participate and of which it had no knowledge or notice.
14. Where losses have been made in an illegal transaction, a person who lends money to the loser, with which to pay the debt, can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used.
15. An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case.
16. Interest on a dividend declared by a receiver should be allowed from the time it was declared and ought to have been paid.

[Nos. 1110, 1111.]

Submitted Jan. 13, 1890. Decided March 3, 1890.

APPEALS from decrees of the Circuit Court of the United States for the Southern District of Ohio, the decree in No. 1110 being one directing defendant to allow the plaintiff's claim on the draft in question for its full amount against the assets in his hands as receiver and to satisfy it by dividends from the assets of the Fidelity Bank and to pay the dividend of 25 per cent already declared, with interest from date of dividend and the costs of the suit; and the decree in No. 1111 being that the plaintiff is bona fide holder of the certificate of deposit for valuable consideration, and that such certificate is a valid claim for the balance due on it against the assets in the hands of defendant as such receiver, and that he satisfy the same by paying dividends from the assets of said bank, and that he pay thereon said dividend of 25 per cent already declared, with interest and costs.

Affirmed.

The facts are stated in the opinion.

Mr. John W. Herron, for appellant:

The court erred in giving a judgment for interest on the amount of dividend previously declared.

White v. Knox, 111 U. S. 784 (28: 603).

The whole doctrine of bona fide holder, as applied to negotiable instruments, rests upon the mode of negotiation or transfer which is peculiar to commercial paper.

New York C. T. Co. v. Wyandotte Nat. Bank, 101 U. S. 68 (25: 876); *Vorce v. Rosenberg*, 12 Neb. 448; *Chariton Pione Co. v. Davidson*, 16 Neb. 377; *Aldrich v. Stockwell*, 9 Allen, 45.

A certificate of deposit dated, executed and payable in Ohio is governed by the law of Ohio.

It is not "negotiable paper" according to the statute of Ohio, and a bona fide holder as such acquires no greater right than the person to whom it was given.

Kyle v. Thompson, 11 Ohio St. 621; *Tisen v. Hanford*, 31 Ohio St. 194; *Weber v. Orten*, 91 Mo. 677; *New York C. T. Co. v. Wyandotte Nat. Bank*, 101 U. S. 68 (25: 876).

A delivery of this letter of advice by Wilshire as Harper's agent to the appellee could effect nothing as against the Fidelity Bank.

Coleman v. Riches, 20 Eng. L. & Eq. 323; *Pollard v. Finton*, 105 U. S. 7 (26: 998); *Farmers & M. Bank v. Butchers & D. Bank*, 16 N. Y. 125; *Grant v. Norway*, 10 C. B. 665; *Hern v. Nichols*, 1 Salk. 289; *Bazendale v. Bennett*, L. R. 3 Q. B. Div. 525.

The appellee is not a bona fide holder for value.

Stewart v. Lansing, 104 U. S. 505 (26: 866); *Marion County v. Clark*, 94 U. S. 278 (24: 59).

The paper in question is invalid by reason of the illegality of the transaction in which it originated.

Pearce v. Foote, 113 Ill. 228; *Coffman v. Young*, 20 Ill. App. 76; *Raymond v. Leavitt*, 46 Mich.

447; *Brown v. Tunkington*, 70 U. S. 8 Wall. 877 (18: 255); *Cunningham v. Augusta Nat. Bank*, 71 Ga. 400.

A person is estopped only so far as his words or conduct have influenced another party.

Merrill v. Tyler (N. Y.) 2 Selden's Notes, 47; *Campbell v. Nichols*, 83 N. J. L. 82; *Dresser v. Missouri & I. C. Co.* 93 U. S. 92 (23: 815).

Interest on the dividend should not have been allowed.

White v. Knox, 111 U. S. 784 (28: 603); *Rethel F. Nat. Bank v. Pahquioque Bank*, 81 U. S. 14 Wall. 402 (20: 845); *Chemical Nat. Bank v. Bailey*, 12 Blatchf. 480.

Messrs. W. H. Swift and C. B. Matthews, for appellee:

If the remitter purchase the bill of credit for himself, and sell it in good faith to the payee, the drawer cannot resist the payee's suit for want of consideration if the remitter failed to pay the purchase money.

1 Daniel, Neg. Inst. § 178; *Munroe v. Border*, 8 C. B. 861; 1 Parsons, Notes and Bills, 181; *Watson v. Russell*, 3 Best & S. 34; *South Boston Iron Co. v. Brown*, 63 Me. 189; *Glascok v. Rand*, 14 Mo. 550; *Horn v. Fuller*, 6 N. H. 511; *St. Louis & S. F. R. Co. v. Johnston*, 27 Fed. Rep. 248, 23 Blatchf. 489.

When a sight bill is deposited with a bank by a customer and a credit is given him by the bank for the paper, if the customer draws checks against the credit, the bank acquires title to the paper.

Circleville Nat. Bank v. Bank of Monroe, 33 Fed. Rep. 408; *Re Madison Bank*, 5 Biss. 515; *Clark v. Merchants Bank*, 2 N. Y. 380; *Stuyvesant Bank v. National M. Bank*, 7 Lans. 197.

Checks deposited in a bank and placed to the credit of the depositor become the property of the bank.

Re Franklin Bank, 1 Paige, 249; *Platt v. Beebe*, 57 N. Y. 839; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530; *Brooks v. Bigelow*, 142 Mass. 6; *National Commercial Bank v. Miller*, 77 Ala. 168; *Ayres v. Farmers & M. Bank*, 79 Mo. 421; *Flannery v. Coates*, 80 Mo. 444; *Titus v. Mechanics Nat. Bank*, 35 N. J. L. 538; *Terhune v. Bergen County Bank*, 34 N. J. Eq. 867; *First Nat. Bank v. Crawford*, 2 Cin. Super. Ct. Rep. 125; *Re Carew's Estate Act*, 81 Beav. 39; *Ex parte Richdale*, L. R. 19 Ch. Div. 409.

A written statement by a bank that it has received on deposit a certain sum of money for the account of some party named in the instrument is a certificate of deposit.

Morse, Banks and Banking, 63; *Hart v. Life Assn.* 54 Ala. 495; *Long v. Straus*, 4 West. Rep. 235, 107 Ind. 94; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 75 U. S. 8 Wall. 276 (19: 349); *Lynch v. Goldsmith*, 64 Ga. 50; *Story, Bills*, § 459; 2 Daniel, Neg. Inst. 800, § 1790; 1 Randolph, Com. Paper, § 10.

Certificates of deposit are nothing more nor less than promissory notes.

1 Parsons, Notes and Bills, 26; *Morse, Banks and Banking*, 63, 64; *Miller v. Austen*, 54 U. S. 18 How. 218 (14: 119); *Curtis v. Leavitt*, 15 N. Y. 92; *Leavitt v. Palmer*, 3 N. Y. 84; *Barnes v. Ontario Bank*, 19 N. Y. 152; *Orleans Bank v. Merrill*, 2 Hill, 295; *Bank of Peru v. Farnsworth*, 18 Ill. 563; *Laughlin v. Marshall*, 19 Ill. 390; *Hunt v. Divine*, 37 Ill. 187; *White v. Franklin Bank*, 22 Pick. 181; *Hart v. Life* 133 U. S.

Assn. 54 Ala. 495; *Kilgore v. Bulkley*, 14 Conn. 362; *Lindsey v. McClelland*, 18 Wis. 482; *Chillicothe Bank v. Dodge*, 8 Barb. 283; *Poorman v. Mills*, 85 Cal. 118; *Hazleton v. Columbus Union Bank*, 32 Wis. 51; *Tripp v. Curtin*, 86 Mich. 494; *Bean v. Biggs*, 1 Iowa, 488; *Howe v. Hartness*, 11 Ohio St. 449.

No precise words of contract are necessary, provided they amount in legal effect to a promise to pay.

Byles, Bills, 8; *Cummings v. Gassett*, 19 Vt. 308; *Franklin v. Marsh*, 6 N. H. 364; *Hussey v. Winslow*, 59 Me. 170; *Fleming v. Burge*, 6 Ala. 373; *Blood v. Northrup*, 1 Kan. 28; *Finnay v. Shirley*, 7 Mo. 42; *Leavitt v. Palmer*, 3 N. Y. 85.

The contract between the two banks was made in Illinois, and must be interpreted by the law of that State.

Scudder v. Union Nat. Bank of Chicago, 91 U. S. 406 (23: 245).

A bank having received a deposit must honor the customer's checks against it. It cannot refuse to pay on the ground that the customer intends to make an improper use of the money.

Tenant v. Elliott, 1 Bos. & P. 3; *Farmer v. Russell*, 1 Bos. & P. 296; *Sharp v. Taylor*, 2 Phil. 801; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258 (6: 488); *McBlair v. Gibbes*, 58 U. S. 17 How. 232 (15: 132); *Kinsman v. Parkhurst*, 59 U. S. 18 How. 289 (15: 385); *Brooks v. Martin*, 69 U. S. 2 Wall. 70 (17: 732); *Planters Bank v. Union Bank*, 83 U. S. 16 Wall. 483 (21: 473); *Union Pac. R. Co. v. Durant*, 95 U. S. 576 (24: 391); *Caldwell v. Harding*, 1 Lowell, 326; *Central Trust Co. v. Ohio C. R. Co.* 23 Fed. Rep. 306; *Wann v. Kelly*, 5 Fed. Rep. 584; *Western U. Teleg. Co. v. Union P. R. Co.* 1 McCrary, 558; *Burke v. Flood*, 6 Sawy. 220; *McMicken v. Perin*, 59 U. S. 18 How. 507 (15: 504); *Nicholson v. Gooch*, 5 El. & Bl. 999; *Tyler v. Carlisle*, 4 New Eng. Rep. 409, 79 Me. 210; *McGavock v. Puryear*, 6 Coldw. (Tenn.) 84; *Waugh v. Beck*, 5 Cent. Rep. 536, 114 Pa. 422; *Faikney v. Reynolds*, 4 Burr. 2069; *Petrie v. Hannay*, 3 T. R. 418; *Farmer v. Russell*, 1 Bos. & P. 295; *Ehrman v. Union C. L. Ins. Co.* 85 Ohio St. 324.

Mr. Justice Blatchford delivered the opinion of the court:

These are appeals by David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio, from decrees rendered against him by the Circuit Court of the United States for the Southern District of Ohio, in two suits in equity brought against him in that court by the American Exchange National Bank of Chicago, Illinois. The first case will be referred to as No. 1110, and the second case as No. 1111.

No. 1110 was commenced on the 5th of November, 1887, by a petition, which was demurred to by the defendant. The demurrer was overruled, the defendant answered the petition, and there was a replication to the answer. Then, by leave of the court, a bill in equity was filed in place of the petition. The bill sets forth the following facts: The plaintiff is a corporation under the laws of the United States, doing a general banking business in Chicago, Illinois. The defendant is the receiver of the Fidelity National Bank of

Cincinnati, Ohio, a corporation created under the laws of the United States, which did a general banking business in Cincinnati, Ohio. On the 15th of June, 1887, the plaintiff became the owner and holder of a draft drawn by the Fidelity Bank on the Chemical National Bank of the City of New York, a copy of which, with all credits and indorsements thereon, is as follows:

"The Fidelity National Bank.

"\$100,000.00.

"Cincinnati, June 14, 1887, No. 16,412.

"Pay to the order of American Exch'ge Nat. B'k, Chicago, one hundred thousand dollars.

"Benj. E. Hopkins,

"As. Cas. Cashier.

"To the Chemical National Bank, New York City."

Indorsed: "Without recourse. A. L. Dewar, cashier. Dep. acct. C. J. Kershaw & Co. C. J. Kershaw & Co. Pay American Exchange Nat. Bank, New York, account of American Exchange Nat. Bank of Chicago, 15 June, 1887. A. L. Dewar, cash."

At the time the draft was drawn, Benjamin E. Hopkins was the assistant cashier of the Fidelity Bank, and by its authority the signature, "Benj. E. Hopkins, As. Cas.," was used for the signature of that bank. Within a reasonable time after the plaintiff became the owner of the draft, to wit, on June 17, 1887, it was presented to the drawee for payment, which was refused. It was protested for non-payment, and notice of the demand, refusal and protest was forthwith given to the Fidelity Bank; and thereupon that bank became liable to the plaintiff in the sum of \$100,000, with interest from June 17, 1887. After the draft was drawn and the plaintiff had become its owner, the Fidelity Bank, without the knowledge of the plaintiff, ordered the drawee not to pay the draft; and the drawee, in refusing to pay it, was acting in accordance with such instructions. On the 27th of June, 1887, the comptroller of the currency of the United States, acting under the statute, appointed the defendant receiver of the Fidelity Bank. On the 12th of July, 1887, a decree was rendered by the Circuit Court of the United States for the Western Division of the Southern District of Ohio, in a proceeding instituted by such comptroller against the Fidelity Bank, adjudging that its franchises had been forfeited and declaring it to be dissolved. In September, 1887, the claim of the plaintiff was presented to the receiver in due form, but he rejected it.

The prayer of the bill is for a decree that such claim for \$100,000, with interest from June 17, 1887, to June 27, 1887, is a valid claim against the estate in the hands of the defendant as receiver, and that he be directed to satisfy it by paying dividends upon it from the assets of the Fidelity Bank; and for general relief.

The defendant answered the petition, and, after the bill was filed, it was ordered that such answer stand for an answer to the bill, and that the replication which had been filed to it stand also.

The defense set up in the answer is that the plaintiff is not the owner of the draft; that it was signed by Hopkins, and came into the pos-

session of the plaintiff, without any consideration paid for it by the plaintiff to the Fidelity Bank; and that that bank never received any consideration from any person for it, and is not indebted to the plaintiff on account of it.

It was admitted of record that the draft was presented to the drawee within the reasonable time allowed by law, that payment was refused, that it was protested for nonpayment, and that notice of demand, refusal and protest was given in due time to the Fidelity Bank; and also that the defendant, on October 31, 1887, declared, and has paid, a dividend of 25 per cent on all claims against the Fidelity Bank and the receiver, approved or adjudicated as valid claims.

Besides cases Nos. 1110 and 1111, a third suit was brought, and testimony was taken in all three of them at the same time. It was stipulated of record that all depositions taken or to be taken in any one of the three cases might be read by either party in all of them.

After a hearing on pleadings and proofs, a decree was entered, on the 3d of December, 1888, in No. 1110, setting forth that, on the 15th of June, 1887, the plaintiff became and had ever since been the owner of the draft in question; that it was duly presented to the drawee and payment refused, and the Fidelity Bank had due notice; that the claim was duly presented to the receiver and rejected; that it is a just and valid claim, and should have been allowed by him; that the plaintiff is a bona fide holder of the draft for a valuable consideration before maturity, without notice of any want of consideration, free from all equities or defenses whatsoever; and directing the defendant to allow the claim as one for the full amount of \$100,000 against the assets in his hands as receiver, to satisfy it by paying such dividends as had been made theretofore and as should be made thereafter from the assets of the Fidelity Bank in due course of administration, and to pay the dividend of 25 per cent already declared October 31, 1887, with interest from that date until the date of payment, and also the costs of the suit. From that decree the defendant has appealed.

No. 1111 was commenced by a petition filed on the 5th of November, 1887, which was demurred to and the demurrer was overruled. The defendant then answered the petition, a replication was filed to the answer, and then leave was granted to the plaintiff to file a bill in equity instead of the petition. That bill sets forth as follows, in addition to the same formal matters set forth in the bill in No. 1110: On the 14th of June, 1887, the Fidelity Bank issued a certificate of deposit, or letter of advice, addressed to the plaintiff, of which the following is a copy:

"Briggs Swift, President; E. L. Harper, Vice-President; Ammi Baldwin, Cashier; Benj.

E. Hopkins, Ass't. Cashier.

"U. S. depository. The Fidelity National Bank. Capital, \$2,000,000.00; surplus, \$400,000.00.

"Cincinnati, June 14th, 1887.

"The American Exchange National Bank, Chicago, Illinois.

"Gentlemen: Messrs. Wilshire, Eckert & Co. have deposited two hundred thousand

(§200,000.00) dollars to your credit for the use of C. J. Kershaw & Co.

"Respectfully yours,
"Benj. E. Hopkins, As. Cas."

At the time this certificate of deposit was issued, Benjamin E. Hopkins was the assistant cashier of the Fidelity Bank, and his signature, "Benj. E. Hopkins, As. Cas.," was used as the signature of that bank. The certificate was delivered by it to the plaintiff on the 15th of June, 1887, and the plaintiff has owned it ever since. On the faith thereof, the plaintiff, at the request of said C. J. Kershaw & Co., on said 15th of June, paid to said C. J. Kershaw & Co., and upon their orders, the full amount of \$200,000, and by means thereof became entitled to recover from the Fidelity Bank the full amount of the certificate. On June 18, 1887, the plaintiff presented the certificate to the Fidelity Bank, at its banking office in Cincinnati, and demanded payment thereof, which was refused. The plaintiff became indebted to the Fidelity Bank in the sum of \$1,802.77, for a balance on general account. After deducting such balance, there was due from the latter to the plaintiff, at the time of such demand, \$198,697.23, which amount is still due, with interest from June 18, 1887. In September, 1887, that claim was presented to the defendant for allowance, but he rejected it.

The prayer of the bill is for a decree that the claim, amounting to \$198,697.23, with interest from June 18, 1887, to June 27, 1887, is a valid claim against the assets in the hands of the defendant as receiver, and that he be directed to satisfy it by paying dividends upon it from the assets of the Fidelity Bank in due course of administration.

The answer to the petition and the replication thereto were ordered to stand in respect to the bill, and like stipulations were made as in case No. 1110.

The defense set up in the answer is as follows: One Joseph Wilshire was a member of the firm of Wilshire, Eckert & Co. E. L. Harper, Benjamin E. Hopkins (the assistant cashier of the Fidelity Bank) and Wilshire conspired to defraud the Fidelity Bank. Harper, Hopkins and Wilshire, with other persons, were, at and before the 14th of June, 1887, engaged in what is called "a deal" in wheat, which is speculating in wheat, in Chicago, by buying very large amounts of wheat on paying a margin or percentage of the purchase price, and entering into contracts for future delivery to them of wheat in large quantities, upon which contracts they were advancing and paying a margin or part of the price of the wheat. The object of the speculation and purchase under the contracts was to enable said parties to own and control all the wheat then in Chicago or to arrive within the time of the performance of the contracts, and thereby to create what is called a "corner" in the market, that is to say, by contracting for the purchase and delivery of more wheat than exists and can by any possibility be delivered, to create a fictitious value or price therefor, effect an advance in the market price of wheat in Chicago, and realize a profit thereon to Harper, Hopkins and Wilshire, and such other persons as might be engaged with them in the speculation. Harper, Hop-

kins and Wilshire conspired together unlawfully to abstract from the Fidelity Bank its money and to embezzle its funds in the possession or control of Harper and Hopkins as its officers, and, by drawing bills of exchange and other evidences of indebtedness in the name of the bank, to use its credit and resources for their own benefit, not in the prosecution of its legitimate business, but in the purchase of wheat in Chicago and contracts for the future delivery of wheat, in the prosecution of said unlawful speculation. The letter of advice addressed to the plaintiff, set forth in the bill, was signed by Hopkins and delivered by Harper to Wilshire, in the execution of the scheme to abstract the funds of the bank and unlawfully use its credit in the speculation in wheat, and for no other purpose. Wilshire, Eckert & Co. did not deposit any part of the \$200,000, mentioned in the letter of advice, in the Fidelity Bank, to the credit of the plaintiff, for the use therein expressed. The letter was unlawfully and fraudulently addressed to the plaintiff, when in fact no money had been deposited by any person to the credit of the plaintiff with the Fidelity Bank, and in the execution of said scheme. At the time of the alleged delivery of the letter of advice to the plaintiff, it had notice that Harper, Hopkins and Wilshire were engaged in said speculation, and were using the credit and funds of the Fidelity Bank unlawfully for such purpose, and that the letter of advice was written and signed for such purpose, and delivered to Wilshire and by him to the plaintiff, to be used by and through the plaintiff, and by C. J. Kershaw & Co., who were, and to the plaintiff were well known to be, brokers, in the purchase of wheat for the account of Wilshire and his confederates, and had full knowledge that the purchases were in the execution of an unlawful combination to control the market for wheat and thereby enhance the value thereof in Chicago. The terms of the agreement between Wilshire, representing the firm of Wilshire, Eckert & Co., and his confederates, and the circumstances connected therewith, were such that the plaintiff was put upon inquiry, and could not and did not bona fide make advances to C. J. Kershaw & Co., nor become entitled to receive from the Fidelity Bank any part of the amount of such advances, and, if made by the plaintiff, they were not made in the regular course of business, but in bad faith and with such notice. The Fidelity Bank did not become indebted to the plaintiff in any amount, and the claim is not a valid one and ought not to be allowed.

On the 3d of December, 1888, after a hearing on pleadings and proofs, a decree was made setting forth that, on the 15th of June, 1887, the plaintiff became the owner of the certificate of deposit or letter of advice set out in the bill; that, on the faith thereof, and without notice of the matters set forth in the answer, the plaintiff, on the 15th of June, 1887, advanced to C. J. Kershaw & Co. the full amount of \$200,000, and by reason thereof then became entitled to recover from the Fidelity Bank the full amount of the certificate; that, on the 18th of June, 1887, the plaintiff presented the certificate to the Fidelity Bank and demanded payment thereof, which was refused; that, after the Fidelity Bank became indebted to the

plaintiff in said sum of \$200,000, the plaintiff became indebted to the Fidelity Bank in the sum of \$1,802.77, being a balance due on general account; that, after deducting such balance, there was due from the Fidelity Bank, at the time of such demand, \$198,697.23; that the claim therefor was presented to the defendant and rejected; and that the plaintiff is a bona fide holder of the certificate, for valuable consideration, without notice of any want of consideration, and free from any equities or defenses whatsoever. The decree adjudges that the claim is a valid claim for \$198,697.23 against the assets in the hands of the defendant as receiver, and directs him to satisfy the same by paying thereon such dividends as had been made theretofore, and should be made thereafter, from the assets of the Fidelity Bank, in due course of administration, and to pay the dividend of 25 per cent already declared, October 31, 1887, with interest from that date until the time of payment, and also the costs of the proceeding. From this decree the defendant has appealed.

Case No. 1110 will be first considered. The receiver contends that the draft is not a valid claim against the funds in his hands; that there was no indorsement of it by the plaintiff, which was the payee, to a bona fide holder; that the draft came into the possession of the plaintiff without any consideration being paid therefor by it to the Fidelity Bank, and that bank never received any consideration from any person for it; and that the plaintiff does not occupy the position of an indorsee of it for value.

The facts in evidence, as we understand them, are these: The draft numbered 16,412 was deposited with the plaintiff by one of its regular customers, C. J. Kershaw & Co., on June 15, 1887, and was indorsed by the plaintiff's cashier and by that firm for deposit, thus: "Dep. acct. C. J. Kershaw & Co. C. J. Kershaw & Co." This draft was indorsed over on the same day by the plaintiff to the American Exchange National Bank of New York, for collection for account of the plaintiff, and was duly presented to the drawee on the 17th of June, 1887. Payment was refused, the draft was duly protested and returned to the plaintiff, and notice of protest was duly given to the drawer. Another draft for \$100,000, numbered 16,413, and not involved in either of the suits Nos. 1110 and 1111, was drawn by the Fidelity Bank on the Chemical National Bank of New York City to the order of C. J. Kershaw & Co., and was indorsed and deposited with the plaintiff by that firm on June 15, 1887. It also was sent forward, payment was refused, it was protested, and notice was given to the drawer. A claim for its amount having been rejected by the receiver, a suit was brought on it by the plaintiff against the receiver, and a decree was rendered in favor of the plaintiff for its full amount. The third suit was No. 1111.

The plaintiff and the Fidelity Bank were corresponding banks, and made collections for each other. The copartnership of C. J. Kershaw & Co. was composed of Charles J. Kershaw and Hamilton Dewar, as general partners, and Charles B. Eggleston, as special partner. It was engaged in the grain commission business on the Board of Trade in Chicago, and kept its sole bank account with the plaintiff. In

March, 1887, and before that time, it began to purchase wheat on orders from Wilshire, Eckert & Co., who were commission merchants in Cincinnati; and it was buying wheat also for J. W. Hoyt, another commission merchant in Cincinnati. It did not know the principals for whom Wilshire, Eckert & Co. and Hoyt were acting, and did not know until the 30th of May that they were acting for the same principal. It was the custom of Wilshire, Eckert & Co. to transfer money to Kershaw & Co., for such purchases, by advising the latter that a certain sum had been deposited in bank in Cincinnati to their credit, and Kershaw & Co. then drew a draft against such deposit, and deposited the draft to their own credit with the plaintiff. Kershaw & Co. selected the Fidelity Bank as the bank in which they wished the funds to be deposited. After the two banks became correspondents, money was transmitted also by certificates of deposit substantially like the one in No. 1111; and, prior to the 15th of June, 1887, the Fidelity Bank had issued and sent to the plaintiff four such certificates, on printed forms, reading as follows—the written portions being in italics:

"The Fidelity National Bank.

"Cincinnati, April 28th, 1887.

"A. L. Dewar, Esq., Cashier American Exchg. Natl., Chicago, Ills.

"Dear Sir: We credit your account *twenty-five thousand dollars*, received from *Wilshire, Eckert & Co.*, for the use of *C. J. Kershaw & Co.*

"Respectfully yours,

Ammi Baldwin, Cashier."

[On the margin:] "Letter of advice."

[Written across the face:] "Same telegraphed this date."

"The Fidelity National Bank.

"Cincinnati, Apr. 28th, 1887.

"A. L. Dewar, Esq., Cashier American Ex. Natl. Bk., Chicago, Ills.

"Dear Sir: We credit your account *one hundred and three thousand dollars*, received from *C. J. Kershaw & Co.*, \$50,000 wired, \$53,000 wired, for the use of *C. J. Kershaw & Co.*

"Respectfully yours,

"\$103,000.00. *E. L. Harper, V. P.*"

[On the margin:] "Letter of advice."

"The Fidelity National Bank.

"Cincinnati, April 29th, 1887.

"A. L. Dewar, Esq., Cashier American Exchg. Nat. Bk., Chicago, Ills.

"Dear Sir: We credit your account *twenty-five thousand dollars*, received from *Wilshire, Eckert & Co.*, for the use of *C. J. Kershaw & Co.*

"Respectfully yours,

"\$25,000. *Ammi Baldwin, Cashier.*"

[On the margin:] "Letter of advice."

[Written across the face:] "Same telegraphed you this date, under our special telegraphic code."

"The Fidelity National Bank.

"Cincinnati, April 30th, 1887.

"A. L. Dewar, Esq., Cashier, Chicago, Ills.

"Dear Sir: We credit your account *one hundred thousand dollars*, received from *Wilshire, Eckert & Co.*, for the use of *C. J. Kershaw & Co.*

"Respectfully yours,

"\$100,000. *Ammi Baldwin, Cashier.*"

[On the margin:] "Letter of advice."

[Written across the face:] "Same telegraphed you this date."

These certificates were issued for five different deposits made with the Fidelity Bank to the credit of the plaintiff, for the use of Kershaw & Co. The Fidelity Bank sent to the plaintiff a telegram announcing each of such deposits, the telegrams being as follows:

"Cincinnati, O., 28.

"To Am'n Ex. Nat. Bk.

"Wilshire, Eckert & Co. deposit with us for your credit, use C. J. Kershaw & Co., twenty-five thousand dollars.

"Fidelity N. Bank."

"4-28.

"To American Ex. Nat. Bank.

"Kershaw & Co. have placed to your credit fifty thousand dollars.

"Fidelity National Bank."

"Cincinnati, O., 28.

"To American Ex. Nat. Bank.

"Kershaw & Co. have placed to your credit fifty-three thousand additional.

"Fidelity Nat. Bank."

"Cincinnati, O., 29.

"To Am. Ex. Nat. Bk.

"Wilshire, Eckert & Co. deposit to your credit, for the use of C. J. Kershaw & Co., \$25,000.

"Fidelity N. Bank."

"Cincinnati, O., 30.

"To American Exchange Natl. Bank, Chicago.
"Wilshire, Eckert & Co. deposit to your credit, for the use of C. J. Kershaw & Co., \$100,000.
Fidelity Natl. Bank."

On the 2d of May, 1887, the Fidelity Bank sent another telegram to the plaintiff, announcing that Wilshire, Eckert & Co. had deposited with it, to the credit of the plaintiff, for account of Kershaw & Co., \$100,000.

The Fidelity Bank, therefore, had advised the plaintiff, prior to June 15, 1887, that it had received six different deposits to the credit of the plaintiff for the use of Kershaw & Co., amounting in the aggregate to \$353,000, and that four of those deposits, amounting to \$250,000, had been made by Wilshire, Eckert & Co. It was the custom of the plaintiff, on receiving such certificates of deposit, to place the amount of the same to the credit of Kershaw & Co., and allow them to check against the same as deposits of money; and the four certificates were all paid by the Fidelity Bank. It was also the custom of the plaintiff to place to the credit of Kershaw & Co., as cash, any drafts which they drew on Cincinnati and deposited with it.

On the 13th of June, 1887, Wilshire was in Chicago, and promised Kershaw & Co. that he would deposit on the next day \$200,000 for their use, in the Fidelity Bank. Wilshire returned to Cincinnati that night, and on June 14th Kershaw & Co., in anticipation of that deposit, left their draft for \$200,000 with the plaintiff, asking the latter to find out by telegram if the deposit had been made, and, if so, to forward the draft for collection. The plaintiff telegraphed to the Fidelity Bank, on June 14, as follows: "Has two hundred thousand been placed with you for C. J. K. & Co.?" The Fidelity Bank on the same day replied: "Not yet made," and the draft was not sent forward. In consequence of this promise of Wilshire, and the previous course of dealing between the two

banks, the plaintiff was prepared to receive, on the morning of June 15, as hereafter mentioned, the certificate of deposit for \$200,000.

The state of the account of Kershaw & Co. with the plaintiff, on the morning of June 14, 1887, was this: They owed the plaintiff \$380,378.37 overdraft and \$280,000 in notes; against which the plaintiff held as collateral security 692,688 bushels of wheat, 5,000 bushels of corn, and certain wheat then being loaded for shipment. The total value of such collateral, on the morning of that day, was \$736,000, and the total indebtedness of Kershaw & Co. to the plaintiff was \$660,378.37. During that day there was a panic in wheat, and the price fell from 92 cents to 74 cents a bushel. The security of the plaintiff fell in value at a corresponding rate, and at 1 o'clock in the afternoon was worth only \$544,894. Kershaw & Co. then owed the plaintiff \$525,477.01, namely, \$280,000 in notes and \$245,477.01 overdraft. Thereupon the plaintiff stopped paying the checks of Kershaw & Co., the amount of the checks refused being about \$60,000.

The state of the account between the Fidelity Bank and the plaintiff, on the 14th of June, 1887, was as follows: The former owed the latter a balance of something over \$100,000, consisting in part of a draft drawn on the former by Wilshire, Eckert & Co., to the order of Kershaw & Co., on the 18th of June, and deposited by Kershaw & Co. with the plaintiff on that day. The plaintiff, in accordance with its custom, had treated such draft as a cash item, and had paid the checks of Kershaw & Co. against it, on the 14th. On the night of the 13th, that draft had been sent by the plaintiff to the Fidelity Bank for payment, and on the 14th the latter telegraphed the plaintiff that it was paid. Payment was made by placing the amount to the credit of the plaintiff on the books of the Fidelity Bank. On the same day (June 14) the plaintiff telegraphed to the Fidelity Bank, "Remit at once hundred thousand, clearing-house currency or gold," in response to which it received, on the morning of the 15th, \$50,000 in currency by express and a draft for \$50,000, drawn by the Fidelity Bank on the Chemical National Bank of New York, which was duly paid by the drawee. At the close of business on the 14th of June, the plaintiff had security enough to make itself whole as respected Kershaw & Co., and it had called upon the Fidelity Bank for substantially the whole balance of account due from that bank, and the same had been sent on. The plaintiff had, therefore, no inducement to take any unusual risk, in regard to the transactions now to be stated.

Just after the plaintiff had closed its bank for business on the 14th of June, it received the following telegram:

"Cincinnati O., 6 | 14, 1887.

"Am. Ex. Nat. Bank:

"Joseph Wilshire will be at your bank tomorrow morning with six hundred thousand dollars to make his trade with Kershaw and others good if they are protected until he arrives.

"Fidelity Nat. Bank."

The cashier of the plaintiff sent for Kershaw & Co., showed them this telegram, and told

them that, while the plaintiff wanted to do everything in its power to assist them, it could not agree to protect them in any manner. Kershaw & Co. replied in substance that if Wilshire came from Cincinnati that night, he would arrive about 8 o'clock the next morning, and that they needed no protection for the time before his arrival. Kershaw & Co. then suggested and dictated the following telegram, which was sent by the cashier of the plaintiff:

"Chicago, 14 June, 1887.

"Fidelity National Bank, Cincinnati, Ohio:

"If Wilshire is here to-morrow morning with six hundred thousand currency the deal will be safe. Answer quick.

"Am. Exch. Nat. Bank."

The same night, two telegrams were received by the plaintiff, which read as follows:

"Cincinnati, Ohio, June 14, 1887.

"American Exchange Natl. Bank:

"Wilshire will be there on the morning train.

"Fidelity Natl. Bank."

"Cincinnati, Ohio, 6 | 14, 1887.

"American Exchange National Bank, Chicago:

"Have already wired you that he will be there with six hundred thousand in the morning.

"Fidelity Nat. Bank."

Kershaw & Co. were also advised by telegram from Cincinnati the same afternoon that \$600,000 would be sent to Chicago that night.

Wilshire arrived in Chicago on the morning of June 15, and went to the plaintiff's bank, where he had an interview with Kershaw, Dewar and Eggleston, all the members of the firm of Kershaw & Co. Kershaw and Dewar figured up how much money they needed, and estimated that they needed \$68,000 to settle up trades through the clearing-house of the Board of Trade, \$90,000 to deposit for additional margins, and \$60,000 to make good the checks which the plaintiff had refused to pay the day before, making a total of \$218,000. The cashier of the plaintiff took down those figures at the time. Wilshire went out and shortly afterwards returned with an envelope from which he took four drafts (one of which was the draft in suit in No. 1110), and the certificate of deposit in suit in No. 1111. Each of the four drafts was for the sum of \$100,000, dated June 14, 1887, and drawn by the Fidelity Bank on the Chemical National Bank of New York. One was payable to the order of Wilshire, Eckert & Co., one to the order of J. W. Wilshire (not sued on), one to the order of C. J. Kershaw & Co., and the other (in suit in No. 1110) to the order of the plaintiff. The four drafts and the certificate of deposit made up the sum of \$600,000.

The two instruments involved in suits Nos. 1110 and 1111 were taken by Wilshire from the envelope and delivered by him to Kershaw & Co. The plaintiff took them on deposit from Kershaw & Co., and placed the amounts of them to the credit of the latter, in accordance with the usual course of business, together with another of the drafts, for the sum of \$100,000. Kershaw & Co. thus received \$400,000 of the paper, Irwin, Green & Co. receiving the remainder, \$200,000. The evidence shows

that the two drafts and the certificate of deposit were taken by the cashier of the plaintiff on its behalf, and placed to the credit of Kershaw & Co. by the plaintiff, without any agreement or arrangement on the part of the plaintiff, except to credit them to Kershaw & Co. as cash.

Before the plaintiff received this \$400,000, the account of Kershaw & Co. with it was overdrawn \$245,477.01, as before stated. On receiving the deposit the plaintiff placed to the credit of Kershaw & Co., as cash, in a single item, \$399,200, the full amount of the deposit less \$900 charged for exchange. This was according to the usual course of business between the plaintiff and Kershaw & Co., and according to the understanding of the parties at the time. This deposit canceled the overdraft of \$245,477.01, and left a balance to the credit of Kershaw & Co., on the morning of June 15, of \$153,722.99. As soon as the plaintiff opened its bank on that day there was a run upon the account of Kershaw & Co., and before 11 o'clock in the morning the plaintiff had paid or certified their checks to the amount of \$239,930.78. Meanwhile the plaintiff received on deposit \$25,249.40; but this was a draft drawn against a shipment of wheat which the plaintiff had held as collateral security, and the plaintiff's condition was not bettered thereby. The plaintiff therefore, in reliance upon such deposit of \$399,200, not only canceled Kershaw & Co.'s overdraft of \$245,477.01, but also gave them \$239,930.78 of fresh money, making a total of \$485,407.79. By crediting the paper as cash, and using it to cancel the overdraft, the plaintiff also waived its right to sell for that purpose the grain which it held as collateral security. The result was that when the plaintiff did sell the grain, after the paper of the Fidelity Bank was dishonored, it realized only \$449,194.88 for the same grain which, when the plaintiff stopped paying Kershaw & Co.'s checks on June 14, was worth \$544,894, being a shrinkage of \$95,699.12.

When the plaintiff had paid Kershaw & Co.'s checks to the amount of \$239,930.78, their account was overdrawn \$60,958.39; and when it was found by Kershaw & Co. that it would take \$200,000 (instead of \$68,000) to pay their differences in the Board of Trade clearing-house, the plaintiff refused to certify their checks for \$200,000, and they therefore suspended payment.

The Fidelity Bank placed the amount of the certificate of deposit involved in suit No. 1111 to the credit of the plaintiff, and the latter charged the same on its books to the Fidelity Bank, as a cash deposit, and notified the Fidelity Bank that it had done so. From the 28th of April, 1887, when the Fidelity Bank sent the first certificate of deposit to the plaintiff, down to the 15th of June, 1887, the Fidelity Bank had represented that Wilshire, Eckert & Co. were depositing funds with it, which it was remitting to the plaintiff; and the telegrams of June 14, 1887, from the Fidelity Bank, held out Wilshire as the owner of the \$600,000 which he was to take to Chicago to protect the trades. During the six days while the Fidelity Bank remained open after the paper in question was taken by the plaintiff, the Fidelity Bank made no complaint that the plaintiff had not acted in all the transactions in an honest

manner, and in accordance with the instructions of the Fidelity Bank.

What took place between the officers of the Fidelity Bank and Wilshire, which the receiver alleges in his answer amounted to a conspiracy to embezzle the funds of that bank, was not revealed to the plaintiff until it was disclosed by the evidence taken in the suits.

In regard to No. 1110, it is contended by the receiver that the draft could not take effect until it was delivered to the plaintiff; that such delivery must have been made by the Fidelity Bank; that therefore Wilshire was acting for that bank in delivering the draft; and that, as between the Fidelity Bank and the plaintiff, want of consideration may be shown.

The draft in question was drawn in Ohio, upon a bank in New York, and was payable in New York. It was therefore a foreign bill of exchange. Where there are four parties to such a bill, namely, the drawer, the drawee, the payee and the remitter or purchaser, the usual course of business is for the drawer to deliver it to the remitter or purchaser, and for the latter to deliver it to the payee. In such a course of dealing, the remitter does not act as the agent of the drawer, but acts for himself, and in a suit on the bill by the payee against the drawer, want of consideration cannot be shown, if the payee is a bona fide holder for value. *Munroe v. Bordier*, 8 C. B. 862; *Watson v. Russell*, 3 Best & S. 84; *South Boston Iron Co. v. Brown*, 63 Me. 189; *Horn v. Fuller*, 6 N. H. 511; *Daniel*, Neg. Inst. § 178; 1 Parsons, Notes and Bills, 181, 199.

When Wilshire went to the plaintiff's bank, on the morning of June 15, 1887, he came duly accredited by the Fidelity Bank as the purchaser of the \$600,000 of paper which he brought; and he acted assuch in delivering the draft in suit in No. 1110. The fact that the draft was payable to the order of the plaintiff was not inconsistent with the representation that Wilshire held it as purchaser and remitter. Wilshire received value for it from Kershaw & Co., and acted with them in getting the draft placed to their credit as cash by the plaintiff; so that the plaintiff became the holder of the draft for value. Wilshire gave to Kershaw & Co. the \$400,000 on account of the indebtedness of Wilshire, Eckert & Co. to them. As Wilshire delivered the paper to Kershaw & Co. with the knowledge of the plaintiff, and with the understanding that the plaintiff was to take it and place it to the credit of Kershaw & Co., the past indebtedness of Wilshire, Eckert & Co. to Kershaw & Co. was a sufficient consideration to give to the plaintiff a good title to the paper for the use of Kershaw & Co.; and it is manifest that the inducement to Wilshire to give the paper to Kershaw & Co. was chiefly the consideration that the plaintiff would give credit at once to Kershaw & Co. for the amount. This credit was given, and on the faith of it the plaintiff paid to Kershaw & Co., on their checks, \$289,980.78. The plaintiff thus became the owner of the paper which it received on deposit. *Clark v. Merchants Bank*, 2 N. Y. 880; *Re Franklin Bank*, 1 Paige, 249; *Platt v. Beebe*, 57 N. Y. 339; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530; *National Bank v. Millard*, 77 U. S. 10 Wall. 152 [19:897]; *Brooks v. Bigelow*, 142 Mass. 6; *National Commercial* 183 U. S. .

Bank v. Miller, 77 Ala. 168; *Ayres v. Farmers & M. Bank*, 79 Mo. 421; *Flannery v. Coates*, 80 Mo. 444; *Titus v. Mechanic Nat. Bank*, 35 N. J. L. 588; *Terhune v. Bergen County Bank*, 34 N. J. Eq. 387; *Re Carver's Estate Act*, 31 Beav. 39; *Ex parte Richdale*, L. R. 19 Ch. Div. 409.

We do not think that the fact that the draft was payable to the order of the plaintiff was notice to the plaintiff that Wilshire was not its purchaser or remitter; or that the manner in which the plaintiff acted after taking the draft for deposit shows that the plaintiff was not a bona fide holder for value.

The draft for \$100,000, in suit in No. 1110, and the draft for \$100,000 to the order of Kershaw & Co., showed a difference in form, which was noticed by the assistant cashier of the plaintiff, who feared that the Fidelity Bank might claim subsequently that the draft payable to the order of the plaintiff was a part of the \$200,000 mentioned in the certificate of deposit in suit in No. 1111. He therefore sent to the Fidelity Bank this telegram:

"Chicago, 15 June, 1887.

"Fidelity National Bank, Cincinnati, Ohio.

"Your draft on New York, number sixteen four twelve, delivered us this morning, is made payable to our order. Why was this done, and is the amount charged against us or is it intended for use of W., as he may direct? Answer quick.

"American Exchange National Bank."

This telegram was sent, as the cashier says, "as an extra precaution;" but, without waiting for a reply to it, the plaintiff paid the checks of Kershaw & Co. until their account was not only exhausted but was overdrawn \$60,958.89, when further payment of their checks was stopped. This was two hours before any reply by telegram was received from the Fidelity Bank. When the reply came, it did not disavow the authority of Wilshire to use the draft No. 16,412 as a part of the \$600,000, the reply being as follows:

"Cincinnati, Ohio, June 15, 1887.

"American Exchange National Bank, Chicago.

"We want number sixteen four twelve to apply on your account, and have wired parties. Please send all drafts to us and order Cincinnati National to deliver one to-day. Party that controls special account out of city. Answer.

Fidelity National Bank."

The inference to be drawn from this telegram was that draft No. 16,412 had been given to Wilshire for his use, but that since it had been issued something had occurred which made the Fidelity Bank desire to withdraw it, if it could obtain the consent of the parties in interest, to whom it had wired. The telegram from the plaintiff was sufficient to notify the Fidelity Bank that Wilshire was using draft No. 16,412 as a part of the \$600,000; and it gave the Fidelity Bank an opportunity to "answer quick" that Wilshire had no right to use that draft in that way, if such were the fact. There was nothing in the reply telegram from the Fidelity Bank, even if it had been received in time, to warn the plaintiff not to place that draft to the credit of Kershaw & Co., and nothing to discredit Wilshire's title to it. After that, and until the time when the Fidelity Bank closed its doors, it made no claim that

the draft No. 16,412 was not issued in good faith as a part of the \$600,000, or that the plaintiff had applied it wrongly to the credit of Kershaw & Co.

While the plaintiff was paying the checks of Kershaw & Co., the two drafts for \$100,000 each and the certificate of deposit were in the hands of its assistant cashier, on the way to be entered upon its books, and while they were in his hands he made out the following deposit ticket:

"American Exchange National Bank, Chicago.

"Deposited for account of C. J. Kershaw & Co., June 15, 1887. Checks and drafts on other towns and cities:

Cincinnati.....	200,000
" N. Y.....	100
*Fidelity.....	100,000
	400,000
	800
	399,200

"*Credited subject to advice from the Fidelity Nat. that draft is for Kershaw account. We have wired for advice."

This ticket was handed to the teller with the deposit, before the note at the bottom was put upon it; but immediately afterwards the assistant cashier went back to the teller and added the note. This deposit ticket was not made out when the deposit was made.

It appears that when the deposit was taken, the cashier of the plaintiff made out a deposit ticket showing one item of \$400,000 deposited by Kershaw & Co., which ticket was made out at their request when they handed the deposit to the cashier and told him to place it to their credit. That deposit ticket did not come to the hands of the assistant cashier, and he made out the above deposit ticket; but there is no evidence to show that the latter deposit ticket was ever seen or assented to by Kershaw & Co. or by Wilshire. It appears that Kershaw & Co. did not know that the plaintiff had not placed the deposit at once to their credit on its books, although they did know of the telegram which the plaintiff sent to the Fidelity Bank. The above deposit ticket was thus made out by the assistant cashier of the plaintiff, for the use of the plaintiff, and it did not change in any way the terms of the deposit as between the plaintiff and Kershaw & Co., being only a private memorandum for the guidance of the paying teller. The credit on the books of the plaintiff was not made in accordance with the terms of that ticket, the credit being in one item, of \$399,200, and unconditional, the note at the bottom of the ticket not being carried into the books of the plaintiff.

These words in the telegram of June 15 from the Fidelity Bank, "Please send all drafts to us, and order Cincinnati National to deliver one to-day. Party that controls special account out of city,"—are explained thus: On the 14th of June, Irwin, Green & Co. deposited with the plaintiff a draft of theirs on the Fidelity Bank for \$217,862.50, which the plaintiff sent to the Cincinnati National Bank for collection.

It was presented on the 15th of June to the Fidelity Bank, which refused to pay it, alleging that the deposit against which the draft was drawn had not been made. Irwin, Green & Co., however, held a certificate of deposit issued by the Fidelity Bank, and their draft was

drawn against that deposit. The party, Hoyt, who controlled the special deposit was out of the City of Cincinnati, but he was in Chicago, and said that the draft was all right and ought to be paid. The telegram from the Fidelity Bank contained also the request that the plaintiff should order the Cincinnati National Bank to turn over to the Fidelity Bank, without payment, such draft for \$217,862.50, and should send directly to the Fidelity Bank all drafts upon the latter.

On the 16th of June, four telegrams passed between Wilshire and the plaintiff, which show that the plaintiff did not suspect that Wilshire had any connection with the Fidelity Bank or its officers. The first was as follows:

"Cincinnati, Ohio, 6 | 16, 1887.

"To Am. Ex. Bank:

"After yesterday's understanding Kershaw must be protected to-day. Should this be done, all is well; if not, fear trouble to all.

Wilshire."

The plaintiff replied as follows, under date of June 17th:

"Chicago, June 17, 1887.

"Wilshire, Cincinnati, Ohio:

"Do not admit any understanding, but if you will deposit three hundred thousand to the credit of this bank, with the First National Bank, Cincinnati, and have that bank wire to their correspondents here by cipher that this has been done, and to advise us, and also have Chemical, New York, telegraph us through American Exchange National Bank that the drafts for two hundred thousand which will be presented by American Exchange National Bank for our account and use of Kershaw will be paid, we will protect Kershaw up to four hundred thousand dollars. He claims three hundred thousand will see him through."

On the 16th of June the plaintiff received the following letter from the Fidelity Bank:

"Cincinnati, June 15, 1887.

"American Exchange National Bank, Chicago, Illinois:

"Gentlemen: We charge your account \$100,000 New York exchange to your order sent you by messenger to-day.

"Respectfully yours,

"E. L. Harper, V. P."

The plaintiff thereupon sent to Wilshire the following telegram, and Wilshire replied by telegram as follows:

"June 16, 1887.

"Wilshire, Cincinnati:

"Fidelity advises us this morning by letter that they have charged to our account New York exchange for one hundred thousand, payable to our order and left with us by you yesterday. This must be reversed and Chemical instructed to wire us they will pay same. Also Fidelity wire us direct that they have reversed the charge, and authorize us to use this item for Kershaw. Otherwise you must deposit four hundred thousand instead of three hundred thousand in the bank we have already designated. Rush.

"American Exchange National Bank."

"Cincinnati, 16.

"To American Exchange Natl. Bank:

"Your telegram received at eleven three.

183 U. S.

Will go to work at once and arrange matter, but you must see Kershaw through without fail. You should have wired us sooner and would have fixed you up as desired.

"J. W. Wilshire."

The telegram dated June 17, from the plaintiff to Wilshire, shows that the plaintiff was determined to avoid trouble over draft No. 16,412, which it had credited to Kershaw & Co., but which the Fidelity Bank had charged to the plaintiff.

Wilshire left Chicago during the night of June 15, knowing the exact condition of things between Kershaw & Co. and the plaintiff. He reported to Harper at Cincinnati the next morning, and at the very time when he was sending his two telegrams of June 16 to the plaintiff, he and Harper were arranging further to defraud the plaintiff by stopping payment of the drafts which Wilshire took to Chicago. They telegraphed the Chemical National Bank not to pay them, and when the four drafts were presented it refused to pay them. Harper and Hopkins, on the 16th of June, charged draft No. 16,412 to the plaintiff on the books of the Fidelity Bank, but they entered it in the transactions of June 15, and changed the footings of the column in which the entry was made.

In reply to the suggestion that the plaintiff took the draft No. 16,412 as collateral security, and therefore was not a bona fide holder of it, it is to be said that the plaintiff took the deposit as a cash deposit, and that there was no agreement with Kershaw & Co. that the deposit should be held only as security; because the amount of the deposit was credited as cash on the books of the plaintiff, at or about 11 o'clock on the morning of June 15, and the plaintiff paid the checks of Kershaw & Co. on the faith of the deposit of the draft.

The conclusion of the whole matter is, that the Fidelity Bank represented to the plaintiff that Wilshire was a bona fide holder of draft No. 16,412, for his use in making good his trades with Kershaw & Co.; that the plaintiff, relying on such representations, took the draft on deposit from Kershaw & Co., placed it to their credit, and paid their checks; and that, under those circumstances, the Fidelity Bank was estopped from showing that Wilshire was not a bona fide holder of the draft, and the receiver stands in no better position than the Fidelity Bank.

The decree of the circuit court in No. 1110 was therefore right.

As to No. 1111 the paper in question was in its legal character a certificate of deposit. *Hart v. Life Assn.* 54 Ala. 495; *Long v. Straus*, 107 Ind. 94 [4 West. Rep. 285]; *Lynch v. Goldsmith*, 64 Ga. 42, 50; *Hove v. Hartness*, 11 Ohio St. 449; *Miller v. Austen*, 54 U. S. 13 How. 218 [14: 119].

The certificate stated that Wilshire, Eckert & Co. had deposited so much money. The Fidelity Bank telegraphed to the plaintiff that Wilshire would come with so much money. It intended that the plaintiff should take the paper as money. The plaintiff did take it as money, and the Fidelity Bank entered the paper on its books as being its own check upon itself. Wilshire went to the plaintiff on the morning of June 15 as the purchaser and con-

troller of the certificate in like manner as he went as the purchaser and controller of draft No. 16,412. At the request of Wilshire, Eckert & Co., the Fidelity Bank issued the certificate directly to the plaintiff. What has been said before, in relation to the claim of the plaintiff as the holder of the draft No. 16,412, applies with equal force to its claim as the holder of the certificate. It was a purchaser, and an innocent purchaser, for value, of both pieces of paper. There is no question of negotiability, because the suit is brought by the original payee, and the paper was applied by the plaintiff for the use of Kershaw & Co., as directed by the certificate.

As soon as the paper was delivered to and accepted by the plaintiff, the Fidelity Bank had entered into a contract with it to pay \$200,000. The suit is for the amount which the Fidelity Bank agreed to pay, and not for damage sustained by the plaintiff through the misrepresentation of that bank. The plaintiff accepted the contract in good faith, by placing \$200,000 to the credit of Kershaw & Co.; and it also charged \$200,000 to the Fidelity Bank, and notified that bank that it had done so. The Fidelity Bank acted on that contract, after it was notified of its acceptance by the plaintiff, by placing \$200,000 to the credit of the plaintiff, and charging that amount to Wilshire, Eckert & Co. The plaintiff was not required to pay the Fidelity Bank anything upon the contract, because the Fidelity Bank represented that Wilshire, Eckert & Co. had paid for it. The plaintiff was required, if it accepted the contract, to give the benefit of it to Kershaw & Co. It did that by at once giving Kershaw & Co. credit for \$200,000, and that amount still stands on its books to the credit of Kershaw & Co. The defendant cannot escape the consequences of the contract of the Fidelity Bank by saying that the statement of that bank that it had received from Wilshire, Eckert & Co. the consideration for the contract was false, because he is estopped from setting up for his protection the falsity of that statement after the plaintiff had acted upon it. The plaintiff is seeking to recover upon a contract, and the receiver is defending by setting up the false representation of the Fidelity Bank.

The suggestion is not a sound one that the plaintiff took the paper under such circumstances as would put a man of ordinary prudence upon inquiry. The Fidelity Bank, prior to June 14, 1887, had notified the plaintiff of four deposits made with the former by Wilshire's firm, for the use of Kershaw & Co., in April and May, 1887, amounting together to \$250,000. For each of those deposits the Fidelity Bank had issued paper similar to that in suit in No. 1111. The amounts were placed to the credit of Kershaw & Co. by the plaintiff, and were paid by the Fidelity Bank to the plaintiff in the due course of business. Nothing passed between the two banks to indicate that the Fidelity Bank knew what Wilshire's firm was doing with the money, until the telegram of June 14, from the Fidelity Bank to the plaintiff, was received by the latter. The plaintiff was banker for Kershaw & Co., and had that day stopped payment of their checks. Kershaw & Co. were the brokers of Wilshire's firm, and had bought a large quantity of wheat for them for future delivery, which needed im-

mediate protection by the deposit of margins. The Fidelity Bank was the banker in Cincinnati of Wilshire's firm, and the two banks were regular correspondents. It was natural for Wilshire to ask his bank to send the telegram to Kershaw & Co's bank, and there was nothing in that to put a prudent institution upon inquiry. It was natural that the cashier of the plaintiff should understand that the two banks were carrying on the telegraphic correspondence solely for the benefit of their respective customers; and the plaintiff was led to expect that Wilshire would arrive the next morning with \$600,000 of his own money, to use in making good his trades with Kershaw and others. There was nothing in the telegram to lead the plaintiff to understand that Wilshire would be in Chicago with \$600,000 of the money of the Fidelity Bank, to make good trades of his for that bank. The appearance of Wilshire the next morning with \$600,000 would naturally lead the plaintiff to believe that it was his own money, and the same money spoken of in the telegram of the day before from the Fidelity Bank.

There was nothing in the paper brought by Wilshire to lead the plaintiff to suspect that the money was the money of the Fidelity Bank. The paper was all in proper form to be controlled by Wilshire, and to be used by him to protect his trades with Kershaw and others. The cashier of the plaintiff had suggested by telegram to the Fidelity Bank, on the 14th of June, that Wilshire should bring currency. As he brought paper, which, if the plaintiff took it, must be treated as money, and as the plaintiff had another draft on the Fidelity Bank for \$217,862.50, deposited by Irwin, Green & Co., which was then in Cincinnati for collection, the cashier of the plaintiff, before finally taking the paper, asked Wilshire if the Fidelity Bank was solvent. This indicated no suspicion of the true state of facts, as they were subsequently disclosed, and the question was a natural one to be put to a person who was having large money transactions with the Fidelity Bank, and who had just indorsed its two drafts for \$100,000 each. The attorney of the plaintiff was at the bank, and before its cashier took the paper he told the attorney what Wilshire had said, and that everything appeared perfectly straight. He would not have taken the paper and paid out nearly \$240,000 on the faith of it if he had suspected that it was otherwise than the bona fide paper of the Fidelity Bank, issued for a like amount of money received by that bank.

When the plaintiff learned that the Fidelity Bank had refused to pay the Irwin, Green & Co. draft for \$217,862.50, and when it had received the telegram of the Fidelity Bank asking that that draft be turned over to it without payment, it lost confidence in the solvency of the Fidelity Bank, but it still believed Wilshire to be the true principal, and telegraphed him to put his money in another bank. Wilshire replied by telegram, on June 16: "Will go to work at once and arrange matter; but you must see Kershaw through without fail. You should have wired us sooner, and would have fixed you up as desired," thus keeping up the deception.

The rumors on the Board of Trade and in the

public press that Harper was the real principal for whom Wilshire was acting cannot affect the plaintiff. There is no evidence that any officer of the plaintiff ever heard any rumor connecting Harper's name with the purchases of grain. Even if the plaintiff had learned as a fact that Harper was buying wheat through Wilshire, that would not have been notice that the statement in the certificate of deposit, that Wilshire, Eckert & Co. had deposited \$200,000, was false; nor would it have been notice that Harper was using the funds of the Fidelity Bank. The drafts and the certificate of deposit were all of them signed by Hopkins, the assistant cashier of the Fidelity Bank. Nothing occurred to make the plaintiff suspicious of the bona fide character of the paper; and Wilshire, by delivering the paper, affirmed the statement of the Fidelity Bank that his firm had deposited \$200,000 to the credit of the plaintiff. Wilshire was concerned in concealing the truth. He had come for the express purpose of deceiving the plaintiff; and the latter cannot be charged with negligence in not asking for information from him. There is no evidence tending to show that the plaintiff had any suspicion that Harper, Hopkins and Wilshire had conspired together to embezzle the funds of the Fidelity Bank, or that the paper was signed by Hopkins, and delivered by Harper to Wilshire, to be used in purchasing wheat. The success of the conspiracy depended on the concealment of the fact that Wilshire, Eckert & Co. were not depositing with the Fidelity Bank the amounts for which it was issuing its paper. There was authority to issue the paper, if Wilshire, Eckert & Co. made the deposit; and the consequence of the fraud must fall upon the Fidelity Bank, and not upon the plaintiff.

As to the suggestion that the plaintiff was not warranted in giving an immediate credit of \$200,000 to Kershaw & Co. on the faith of the certificate of deposit, it is to be said that so far as the face of the paper is concerned it was left to the option of the plaintiff either to give Kershaw & Co. the immediate use of the money, or to await the collection of the money on the certificate. It is apparent that the Fidelity Bank, in issuing the paper, intended that the plaintiff should use it as money, and the emergency upon Kershaw & Company required such use of it.

In reply to the claim on the part of the receiver that if the plaintiff can recover at all it can recover only the money which it paid out in reliance on the certificate, it is to be said that that instrument is a contract by the Fidelity Bank offering to the plaintiff to become its debtor in the sum of \$200,000, and asking it to become a creditor of the Fidelity Bank, for the benefit of Kershaw & Co., the object being to convert a credit in Cincinnati, for which Wilshire, Eckert & Co. had paid, into a credit in Chicago with the plaintiff, as the banker of Kershaw & Co., for the use of that firm. The plaintiff accepted this offered contract, assumed the relation of creditor to the Fidelity Bank, for the use of Kershaw & Co., and at once gave them credit for \$200,000, thus fully complying with the contract. When the plaintiff placed \$400,000 to the credit of Kershaw & Co., it paid them that amount; and the legal effect of the transaction was the same as if the plaintiff had given

\$400,000 in currency to Kershaw & Co., and they had deposited it to their credit in some other bank.

The plaintiff held Kershaw & Co's check for \$256,878.18, which it was carrying. The check was regular, and the plaintiff had a right to have it paid at once. It had not been charged up, for there was only \$11,401.17 in Kershaw & Co's account, against which to charge it; but, in stating the overdraft on the evening of June 14, we have treated it as if it had been debited. That check was paid by the plaintiff and charged to Kershaw & Co., on the morning of June 15, in reliance upon the deposit of the Fidelity Bank paper for \$400,000. The plaintiff had the right to apply the deposit of Kershaw & Co. to the payment of their indebtedness to it which was due. It was the understanding of Kershaw & Co. that all of their outstanding checks should be paid from the deposit. In addition to canceling the check for \$256,878.18, the plaintiff paid out \$239,930.78 on June 15. It therefore paid out during that day \$496,808.96. It received on deposit \$399,200 in Fidelity Bank paper, and \$25,249.40 in a draft drawn against a shipment of wheat, and there was a credit upon its books of \$11,401.17 at the beginning of business on that day. The debit side of the account was therefore \$496,808.96, and the credit \$435,850.57, being an excess of debit of \$60,958.39.

The plaintiff also forebore to sell the grain which it held as collateral security for Kershaw & Co's indebtedness, and which was worth on June 14, at the lowest market price of that day, \$544,894. After payment of the Fidelity Bank paper was refused, the plaintiff sold the grain for \$449,194, a shrinkage of \$95,700. There was no agreement that the plaintiff should hold the grain, but the deposit of \$400,000 made it unnecessary to sell it, and good faith toward Kershaw & Co., under the circumstances, required that that should not be done. The plaintiff, therefore, in reliance upon the paper of the Fidelity Bank, paid the check of Kershaw & Co. for \$256,878.18, gave them \$239,930.78 of further money, and suffered a loss of \$95,700 on the collateral security which it held.

We do not think that the matter of the application of the proceeds of the collateral security has anything to do with either of the cases.

As Kershaw & Co. deposited, and the plaintiff credited, the three pieces of Fidelity Bank paper as a single cash item, whatever the plaintiff did on the faith of the deposit of \$400,000 was done on the faith of each piece of paper which went to make up that deposit. When the plaintiff accepted the certificate of deposit, it was at liberty to use the credit for \$200,000 in any manner which it and Kershaw & Co. might agree upon, the only requirement made by the Fidelity Bank being that the credit should be applied to the use of Kershaw & Co. It was applied to such use as much by paying their indebtedness to the plaintiff as by paying what they owed to any other party. As the plaintiff is seeking to recover on a contract with which it has fully complied on its part, the receiver must fully comply with the other part of it; and if Wilshire, Eckert & Co. did not put \$200,000 in the Fidelity Bank to the

credit of the plaintiff, as that bank declared they had done, the receiver must make good the representation by placing a like amount to the credit of the plaintiff.

As to the defense that Harper, Hopkins and Wilshire, with other persons, on and before June 14, 1887, were engaged in purchasing wheat on contracts for future delivery, and otherwise, with the object of creating a "corner" in the market; that at the time of the delivery of the paper to the plaintiff it had notice that they were engaged in such speculation; and that the certificate of deposit was delivered to Wilshire and by him to the plaintiff to be used, through the plaintiff and by Kershaw & Co., who were, and were well known to the plaintiff to be, brokers engaged in the purchase of wheat, in such speculation, for the account of Wilshire and his confederates,—the defense amounts to this, that if the plaintiff received money from the Fidelity Bank to be transferred to Kershaw & Co., it could refuse to pay over the money to the latter, if it knew that they intended to use the money to pay a gambling debt which the Fidelity Bank had contracted.

When the plaintiff received the deposit from Kershaw & Co., it was bound to honor their checks against it; and it could not refuse to pay them on the ground that Kershaw & Co. intended to make an improper use of the money. If Wilshire, Eckert & Co. and Kershaw & Co. were engaged in gambling, and the former had deposited money in the Fidelity Bank to be transferred to the plaintiff, in order that Kershaw & Co. might check out the amount from the plaintiff's bank in payment of losses sustained in the gambling transactions, and both banks knew that the money was to be so used, still the Fidelity Bank, having received the deposit, could not refuse to pay it over to the plaintiff, and the plaintiff, having received it, could not refuse to honor the checks of Kershaw & Co. drawn against it. *Tenant v. Elliott*, 1 Bos. & P. 3; *Farmer v. Russell*, 1 Bos. & P. 296; *Sharp v. Taylor*, 2 Phil. 801; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258 [6: 468]; *Kinsman v. Parkhurst*, 59 U. S. 18 How. 239 [15: 885]; *Brooks v. Martin*, 69 U. S. 2 Wall. 70 [17: 732]; *Planters Bank v. Union Bank*, 88 U. S. 16 Wall. 483 [21: 473]; *McMicken v. Perin*, 59 U. S. 18 How. 507 [15: 504].

Nor do we think that the Statute of Illinois (1 Starr & Curtis Stat. 1885, pp. 791, 792, sections 180, 181), or the case of *Pearce v. Foote*, 113 Ill. 228, has any application to the present case. That Statute makes it an offense to "corner" the market, or to attempt to do so, and makes void all contracts to reimburse or pay any money or property knowingly lent or advanced at the time and place of any play or bet, to any person gaming or betting. The two banks were not attempting to corner the market in wheat. Whether Wilshire and his confederates were engaged in attempting to do so, and had made purchases for that purpose through Kershaw & Co. as brokers, is another question. This is not a suit by Kershaw & Co. against Wilshire or his firm, or against the Fidelity Bank. It is a suit on a contract made by the Fidelity Bank with the plaintiff; and the receiver cannot defend it on the ground that the plaintiff knew that if it paid over the money to Kershaw & Co., as the Fidelity Bank requested,

the money would be used in an illegal transaction.

In *Pearce v. Foote*, *supra*, Foote made an express agreement with certain commission men to trade exclusively in differences in options, declaring that he did not want to buy any provisions, but simply to speculate and settle on differences. He lost a large sum in such transactions, and indorsed over to the commission men certain notes. The court held that such options were gambling contracts, and that, as the Statute of Illinois provided that any person who should lose in a gambling transaction might recover back from the winner whatever he should pay on account of such loss, Foote could recover the value of the notes from the commission men. But the plaintiff is not the winner in any gambling transaction. The purport of the decision in *Pearce v. Foote* is that, as the commission men participated in the illegal transaction, they could not take the ground that their interest was only that of a commission. The plaintiff is not in the situation of the commission men, and the receiver is not in the situation of Foote. The cases which have been decided in regard to the Statute of Illinois arose between brokers and principals, or between winner and loser, and do not apply to the case at bar.

It is contended, however, by the receiver, that the money advanced by the plaintiff to Kershaw & Co., on the 15th of June, was advanced knowingly at the time in the course of an attempt to corner the market and to aid Kershaw & Co. in doing so. The Statute of Illinois makes void any contract "for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play or bet to any person or persons so gaming or betting." This is not a suit against Kershaw & Co. to recover money lent to them; nor is it true that the plaintiff advanced money to them to assist them in attempting to corner the market. It is not averred in the answer, nor proved, that Kershaw & Co. were engaged in such an attempt. The averment of the answer is that Harper, Hopkins, Wilshire and other persons to the defendant unknown, were engaged in such an attempt, and that Kershaw & Co. were acting as brokers; but it is not averred that the brokers had any knowledge of the object of their principals, and the evidence shows that they had no such knowledge. The money which the plaintiff advanced to Kershaw & Co., on the 15th of June, was not lent to them on an agreement by them to repay it; but it was advanced to them in consideration of the deposit with the plaintiff of the \$400,000 of Fidelity Bank paper. Nor is there any proof that any of the money paid by the plaintiff to Kershaw & Co., on the 15th of June, was paid out for wheat purchased for Wilshire, Eckert & Co. The burden was on the receiver to show clearly that the money paid out was upon illegal transactions. He fails to do so; and much more does he fail to show that the money was paid for present purchases, that is, in the language of the Statute, that it was advanced "at the time and place" of the purchases, and not to pay debts incurred in the making of past purchases. If it were shown that the plaintiff advanced money to Kershaw & Co., on the 15th of June, to be used in paying for wheat which Kershaw

& Co. had purchased at some time in the past, in an attempt to corner the market, it would not follow that the plaintiff could not collect from them such advances.

Where losses have been made in an illegal transaction a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used. *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258 [6: 463]; *Kimbrow v. Bullitt*, 63 U. S. 22 How. 256, 269 [16: 313, 317]; *Planters Bank v. Union Bank*, 83 U. S. 16 Wall. 500 [21: 490]; *Tyler v. Carlisle*, 79 Me. 210 [4 New Eng. Rep. 409]; *McGarock v. Puryear*, 6 Coldw. 34; *Waugh v. Beck*, 114 Pa. 422 [5 Cent. Rep. 536].

It is not shown, as is claimed by the receiver, that in advancing the money to Kershaw & Co. the plaintiff became a participator in an illegal attempt to corner the market, or that it had aided in such an attempt by previously advancing money to them upon a part of the wheat as collateral security. Although the plaintiff had advanced money from time to time to them upon wheat as collateral security, there is no evidence that it knew, or had any reason to suspect, that the wheat was purchased in an attempt to corner the market.

An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case. *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258 [6: 463]; *Faikney v. Reynous*, 4 Burr. 2069; *Petrie v. Hannay*, 3 T. R. 418; *Farmer v. Russell*, 1 Bos. & P. 296; *Planters Bank v. Union Bank*, 83 U. S. 16 Wall. 483 [21: 473]; *McBlair v. Gibbs*, 58 U. S. 17 How. 232, 236 [15: 182, 183]; *Brooks v. Martin*, 69 U. S. 2 Wall. 70 [17: 732]; *Bly v. Second Nat. Bank*, 79 Pa. 453.

Although the contract between the two banks was made in the State of Illinois, it was to be performed in the State of Ohio; and, the receiver being estopped from saying that Wilshire, Eckert & Co. did not deposit the \$200,000 in the Fidelity Bank to the credit of the plaintiff, it is the law of Ohio (*Ehrman v. Union Cent. L. Ins. Co.* 35 Ohio St. 324) that he cannot be heard to say that the plaintiff acquired the certificate of deposit in connection with an illegal transaction.

The result, however, of the evidence is that it does not appear, as alleged in the answer of the receiver, that the plaintiff had knowledge or notice that the paper in suit was delivered to it to be used through it by Kershaw & Co. in connection with an attempt to corner the market. A detailed discussion of the evidence would not be profitable.

We think, therefore, that the circuit court was right in making a decree against the receiver in No. 1111.

In both of the cases it is claimed that the court erred in adjudging that the plaintiff was entitled to interest on the 25 per cent dividend on its claim, from October 31, 1887, until the time the dividend should be paid. As authority the receiver cites the case of *White v. Knorr*, 111 U. S. 784 [28: 603]. But we do not think it applies. In that case a judgment was obtained for a claim by White, in June, 1883, which included interest on his claim to that

time. While the claim was in litigation, the receiver had paid ratable dividends of 65 per cent to other creditors. After the judgment in favor of White, the comptroller of the currency calculated the amount due him as of December 20, 1875, the time when the bank failed, and paid him 65 per cent on that amount. He contended that the dividend should be calculated on his claim with interest to the time of the judgment; but this court sustained the action of the comptroller. In the present case, the claims of the plaintiff, as allowed, do not include interest beyond the date when the bank failed. Interest upon the dividend which it ought to have received on the 31st of October, 1887, is a different matter. The allowance of that interest is necessary to put the plaintiff on an equality with the other creditors. That point was not decided in *White v. Knox*, and we think the circuit court did not err in allowing such interest.

It results that the decrees in both cases must be affirmed.

Mr. Chief Justice Fuller did not take any part in the decision of this case.

DANIEL STURR, *Appl.*,

v.

CHARLES W. BECK.

(See S. C. Reporter's ed. 541-552.)

Jurisdictional amount—territorial judgment, review of—riparian proprietor's rights to running stream—settler under homestead entry of lands, is riparian proprietor—right to water of stream—lawful occupancy—sec. 2339, Rev. Stat.

1. Upon the affidavits filed on both sides in this case, the court decides that the water right in controversy is worth the jurisdictional amount, and the motion to dismiss is overruled.
2. No judgment or decree of the highest court of a Territory can be reviewed by this court in matter of fact, but only in matter of law, and this court is confined in this case to determining whether the court's findings of fact support the judgment.
3. A riparian proprietor of land bordering upon a running stream has a right to the flow of its waters as a natural incident to his estate, and they cannot be lawfully diverted against his consent.
4. A settler who has made a homestead entry of public land for over a year, and has been in possession for three years, is a riparian proprietor of the land, as to another person who subsequently locates a water right on the land.

NOTE.—As to alluvion or accretion and reliction; right to, and ownership of; by what law title to is determined; rule of division among riparian owners, —see note to *Kennedy v. Hunt*, Bk. 12, p. 829; also note to *St. Clair County v. Lovington*, Bk. 23, p. 59.

As to right of the United States and the States to shore lands and accretions against piers, see note to *Hallett v. Beebe*, Bk. 14, p. 36.

As to what is seashore; how far lands bounded on extend, —see note to *U. S. v. Pacheco*, Bk. 17, p. 865.

As to title to water by appropriation; common-law rule; rule of mining States, —see note to *Atchison v. Peterson*, Bk. 22, p. 414.

5. No subsequent attempt to take the water only can override the prior appropriation of both land and water of a settler who has made a homestead entry of the land, and who has lawful riparian occupancy with intent to appropriate the land.
6. Smith's lawful occupancy in this case under settlement and entry was a prior appropriation which Sturr could not displace.
7. Section 2339 of the Revised Statutes as to rights to the use of water was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.

[No. 1172.]

Submitted Dec. 9, 1889. Decided March 3, 1890.

APPEAL from a judgment of the Supreme Court of the Territory of Dakota affirming a judgment of the District Court of that Territory dismissing a suit for an injunction against defendant from interfering with an alleged water right of complainant and the use of the water of a creek and for damages. *Affirmed.*

Statement by Mr. Chief Justice Fuller:

This suit was commenced by Daniel Sturr against Charles W. Beck by a complaint filed in a District Court of the Territory of Dakota, seeking an injunction against the defendant from interfering with an alleged water right and ditch of the complainant and the use of the water of a certain creek through the same, and for damages alleged to have been sustained by interference which had already taken place. The allegations of the complaint were denied in the answer of the defendant, so far as inconsistent with its statements; and the facts in regard to the matters set up in the complaint were averred by the defendant as he claimed them to be, with a prayer for an injunction against the complainant from trespassing upon his land and diverting the water of the creek, and from keeping and maintaining the ditch on his land, and for damages and costs. The cause was tried by the court upon an agreed statement of facts, it being stipulated that the court might make its findings of fact and conclusions of law on such agreed statement with the same effect as if the facts therein contained had been proven in court. The court thereupon proceeded to make its findings of fact and conclusions of law as follows:

"Findings of Fact.

"1st. That the plaintiff, Daniel Sturr, made a homestead filing or entry of the S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, E. $\frac{1}{4}$ S. E. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ of sec. 85, town. 7 N., of range 3 E., B. H. M., on the 15th day May, 1880, and thereafter at the United States land office at Deadwood, D. T., made final proof or entry thereof on the 10th day of May, 1888, having settled thereon in June, 1877, and he has resided thereon continuously ever since, cultivating at least seventy acres thereof, and has received a patent for said land from the United States.

"2d. That one John Smith made a homestead filing or entry of the W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, and lot 2 of sec. 2, town. 6 N., of range 3 E., B. H. M., on the 25th day of March, 1879, and thereafter at the United States land office at Deadwood, D. T., made final proof or

entry thereof on the 10th day of May, 1883, having settled thereon in March, 1877, and resided thereon until he sold the same to defendant Beck, in May, 1884, and has received a patent for said land from the United States.

"8d. That on or about the 15th day of May, 1880, the plaintiff, Daniel Sturr, without any grant from John Smith, the occupant and claimant, as above stated, went upon the homestead claim of John Smith, above described, and located a water right on said Smith's homestead, claiming the right to divert 500 inches, miner's measurement, of the waters of False Bottom Creek then and long prior thereto flowing over and across said land in its natural channel, and to carry the same by means of a ditch to and upon his own homestead claim, immediately adjacent.

"4th. That said plaintiff posted a written notice at the point of said proposed diversion, claiming the right to divert said water, and caused a copy of the same to be filed in the office of the register of deeds in and for Lawrence County, Dakota, on the 9th day of May, 1881, and the same was recorded in Book 14, page 468, of the records of said county.

"5th. That immediately thereafter the plaintiff constructed a ditch from the point of such diversion across the John Smith homestead, and diverted and conveyed not less than 800 inches of the waters of said False Bottom Creek to and upon his said land adjacent, and there used the same for irrigating his crops growing thereon whenever the same was necessary until interfered with by the defendant, in the summer of 1886.

"6th. That on May first, 1884, John Smith conveyed his said homestead to the defendant, Charles W. Beck, by warranty deed, purporting to convey the fee without any reservation, whereupon the plaintiff entered into the possession thereof and has so remained ever since.

"7th. That in the spring of 1886 the defendant Beck notified the plaintiff Sturr to cease diverting the waters of False Bottom Creek from their natural channel upon defendant's said land, and forbade him maintaining his said ditch upon defendant's said land for that purpose.

"8th. That the custom existing and which has existed in Lawrence County ever since its settlement recognizes and acknowledges the right to locate water rights and to divert, appropriate and use the waters of flowing streams for purposes of irrigation when such location, diversion and use does not conflict or interfere with rights vested and accrued prior thereto.

"9th. That neither John Smith nor the defendant Beck ever made any water-right location claiming the waters of False Bottom Creek, and had not prior to the said location thereof by the plaintiff, Daniel Sturr, ever diverted the said waters from their natural channel where they had been accustomed to flow.

"10th. That said John Smith, on the second day of February, 1882, recited in the written contract of that date made with the plaintiff, Daniel Sturr, that the latter was the owner of the Elm Tree water right, which was the said water right located as aforesaid by said Sturr on the 15th day of May, 1880.

"11th. That the use of said water for irriga-

tion is beneficial and valuable to the person or persons owning or possessing the same.

"Conclusions of Law.

"1st. That at the time of the location of the water right made upon John Smith's homestead by the plaintiff, Daniel Sturr, in May, 1880, a prior right to have the waters of said False Bottom Creek flow in the regular channel of said creek over and across said land had vested in John Smith by virtue of his homestead filing or entry made on the 25th day of March, 1879, he having made final proof or entry thereafter.

"2d. That said vested right so acquired by said John Smith was conveyed to the defendant, Charles W. Beck, by warranty deed on May first, 1884.

"3d. That the plaintiff, Daniel Sturr, by his location and diversion of the waters of False Bottom Creek, so made by him upon the homestead of said John Smith on the 15th day of May, 1880, acquired no right as against the defendant Beck to divert said waters or to maintain a ditch upon defendant's land for that purpose.

"4th. That the patent issued to John Smith for the premises mentioned related back to the date of his making his homestead filing or entry of said premises on the 25th day of March, 1879.

"5th. That the plaintiff can take nothing by this action."

Judgment in favor of the defendant was entered, dismissing the complaint upon the merits and awarding costs.

To the tenth finding of fact and to conclusions of law Nos. 1, 2, 3 and 4 plaintiff duly excepted, and also to the judgment and decree, and filed his motion to set aside certain of the findings of facts and conclusions of law, and to adopt others named in their places, and also for a new trial, which motions were severally overruled, and he excepted. Plaintiff thereupon prosecuted an appeal to the Supreme Court of the Territory, and assigned as error that the court erred "in its finding of fact No. 10, and in not correcting the same as requested by plaintiff in his motion to correct said finding;" in the conclusions of law Nos. 1, 2, 3 and 4 respectively; in denying the motion for a new trial, and "because the decision of the court is against law." The judgment of the district court was affirmed by the supreme court, which rendered the following opinion: "The judgment of the lower court is affirmed. The court holds that the homesteader was the prior appropriator of the water right, and the plaintiff has no right to enter upon the prior possession of the defendant under his H. E. for the purpose of appropriating any portion of the running streams and creeks thereon." An appeal was then taken to this court.

Messrs. Daniel McLaughlin and William R. Steele, for appellant:

Until it parts with its ownership, the government is the riparian proprietor of the public lands.

Atchison v. Peterson, 87 U. S. 20 Wall. 510 (22: 415); *Irwin v. Phillips*, 5 Cal. 140; *Butte C. & D. Co. v. Vaughn*, 11 Cal. 143; *Ortman v. Dixon*, 13 Cal. 33; *Basey v. Gallagher*, 87

U. S. 20 Wall. 681 (22: 455); *Broder v. Natoma Water & M. Co.* 101 U. S. 276 (25: 790).

Neither pre-emption settlement nor homestead entry effects segregation until the minimum price of the land is received in the one case, and final proof is made in the other.

Simmons v. Wagner, 101 U. S. 260 (25: 910); *Frisbie v. Whitney*, 76 U. S. 9 Wall. 194-196 (19: 672); *Yosemite Valley Case*, 82 U. S. 15 Wall. 77 (21: 82); *U. S. v. Stores*, 14 Fed. Rep. 824; *U. S. v. Lane*, 19 Fed. Rep. 910; *U. S. v. Freyberg*, 32 Fed. Rep. 195; *U. S. v. Taylor*, 35 Fed. Rep. 484; *Hammond v. Rose*, 11 Colo. 524; *Moriarity v. Boone Co.* 39 Iowa, 634; *Flint & P. M. R. Co. v. Gordon*, 41 Mich. 420; *French v. Spencer*, 62 U. S. 21 How. 228 (16: 97); *Shepley v. Cowan*, 91 U. S. 337 (23: 426); *Johnson v. Bullou*, 28 Mich. 379; *Osgood v. El Dorado Mining Co.* 56 Cal. 571; *Farley v. Spring Valley M. Co.* 58 Cal. 142; *Tenem Ditch Co. v. Thorpe* (Wash. Terr.) 20 Pac. Rep. 588; *Ellis v. Pomeroy Imp. Co.* (Wash. Terr.) 21 Pac. Rep. 27; *Geddis v. Parrish* (Wash. Terr.) 21 Pac. Rep. 314.

A mere right of pre-emption is not a title.

People v. Shearer, 30 Cal. 648; *Hutton v. Frisbie*, 87 Cal. 491; *Western P. R. Co. v. Tevis*, 41 Cal. 492; *Love v. Hutchins*, 41 Cal. 684; *Frisbie v. Whitney*, 76 U. S. 9 Wall. 187 (19: 668).

The doctrine of relation is a fiction of law for the furtherance of justice, but is not admitted to the prejudice of third parties having any right.

Jackson v. Bard, 4 Johns. 280, 284; *Jackson v. Bull*, 1 Johns. Cas. 85; *Heath v. Ross*, 12 Johns. 140; *Tenem Ditch Co. v. Thorpe* (Wash. Terr.) 20 Pac. Rep. 588; *Lynch v. De Bernal*, 76 U. S. 9 Wall. 815 (19: 714); *Gibson v. Chouteau*, 80 U. S. 18 Wall. 101 (20: 587); *Megerle v. Ashe*, 33 Cal. 74; *Smith v. Athern*, 34 Cal. 506; *Daniels v. Lansdale*, 43 Cal. 41, 100 U. S. 113 (25: 587); *Belk v. Meagher*, 104 U. S. 233 (26: 736).

Congress intended to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition.

Basey v. Gallagher, 87 U. S. 20 Wall. 683, 684 (22: 455).

Messrs. Van Cise & Wilson and R. A. Burton, for appellee:

On an appeal from a territorial court, this court will not go behind the findings of fact adopted by the trial court, and, by affirmance of judgment, approved by the appellate court, to consider the evidence.

Stringfellow v. Cain, 99 U. S. 610 (25: 421); *Cannon v. Pratt*, 99 U. S. 619 (25: 446); *Neelin v. Wells, Fargo & Co.* 104 U. S. 428 (26: 802); *Davis v. Fredericks*, 104 U. S. 618 (26: 849); *Hecht v. Boughton*, 105 U. S. 235 (26: 1018); *Gray v. Howe*, 108 U. S. 12 (27: 634); *Eilers v. Boatman*, 111 U. S. 356 (28: 454); *O'Reilly v. Campbell*, 116 U. S. 418 (29: 669); *Zeckendorf v. Johnson*, 123 U. S. 617 (31: 277).

The law gave the use of the water to appellee while it ran through his farm. To make appellant a prior appropriator he must have taken out the water under a claim of right while the land was still in the possession of the government, and before any claim or settlement had been made.

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Union Mill & M. Co. v. Dangberg, 2 Sawy. 450, 455; *Luz v. Haggin*, 69 Cal. 255; *Weiss v. Oregon I. & S. Co.* 13 Or. 496; *Crandall v. Woods*, 8 Cal. 136, 141, 143, 144.

This court has recognized the value of prior possession against intruders in the following among many cases:

Atherton v. Fowler, 96 U. S. 513 (24: 782); *Lamb v. Davenport*, 85 U. S. 18 Wall. 307 (21: 759); *Trenouth v. San Francisco County*, 100 U. S. 251 (25: 626); *Durand v. Martin*, 120 U. S. 366 (30: 675).

The appellee's grantor made his homestead entry over a year prior to the attempted location of appellant's water right. This gave him a vested right in the land and in the use of the water.

Op. Atty.-Gen. Mac Veagh, July 15, 1881, 1 Copp's P. L. Laws, 887, 388; *Red River & L. of W. R. Co. v. Sture*, 32 Minn. 95; *White v. Hastings & D. R. Co.* 2 Copp's P. L. Laws, 878; *Burlington, K. & S. W. R. Co. v. Johnson*, 38 Kan. 142.

If Sturr's ditch and water right were an interest in the appellee's land by way of a servitude or easement, it could only have been acquired by grant, or its equivalent, prescription.

Dakota Civil Code, §§ 245, 249; Washb. Easements, 18, and cases cited.

A parol license is revocable at will.

Washb. Easements, 19; *De Hora v. U. S.* 72 U. S. 5 Wall. 599 (18: 681); *Veghte v. Raritan Water Power Co.* 19 N. J. Eq. 153; *Drake v. Wells*, 11 Allen, 141, 144; *Fool v. New Haven & N. Co.* 28 Conn. 214, 223.

Mr. Chief Justice Fuller delivered the opinion of the court:

With the notice of appeal and appeal bond appellant filed his own affidavit and that of another that the ditch and water right in controversy were reasonably worth \$7,500. After the record was filed here a motion was made by appellee to dismiss, accompanied by several affidavits, to the effect that such value was far less than \$5,000. And upon this motion counter-affidavits have been presented. We have carefully examined all these papers and conclude that the motion should be overruled.

No judgment or decree of the highest court of a Territory can be reviewed by this court in matter of fact, but only in matter of law; and we are confined in this case to determining whether the court's findings of fact support the judgment. *Idaho and Oregon Land Co. v. Bradbury*, 132 U. S. 509 [33: 433]; 18 Stat. 27, 28.

John Smith settled on the tract of land described in March, 1877, and continued to reside thereon until he sold and conveyed it by warranty deed to Beck, the appellee. He made his homestead filing or entry March 25, 1879, and his final proof May 10, 1883, and received a patent from the United States. The water of False Bottom Creek flowed in its natural channel over and across Smith's homestead, and in May, 1880, Sturr, the appellant, went upon that homestead, located a water right thereon and constructed a ditch which diverted the waters of the creek to his own adjacent land. Beck went into possession under the deed from Smith, and in 1886 notified Sturr to cease diverting the water and maintaining the ditch, and this suit thereupon followed.

It is not contended on behalf of Sturr that he is entitled to maintain the ditch because he constructed and used it, or that Smith's acquiescence amounted to anything more than a revocable license. There was no grant nor an adverse enjoyment so long continued as to raise a legal presumption of a grant. But it is insisted that the doctrine of prior appropriation of water on the public land and its beneficial use protects him from interference because neither Smith nor Beck made any water-right location claiming the waters of False Bottom Creek, and had never diverted those waters prior to Sturr's location.

If, however, Smith obtained a vested right to have the creek flow in its natural channel by virtue of his homestead entry of March 25, 1879, and possession thereunder, or if his patent took effect as against Sturr by relation as of that date, then it is conceded that Sturr cannot prevail and the judgment must be affirmed.

The right of a riparian proprietor of land bordering upon a running stream to the benefit to be derived from the flow of its waters as a natural incident to, or one of the elements of, his estate, and that it cannot be lawfully diverted against his consent, is not denied, nor does the controversy relate to the just and reasonable use as between riparian proprietors. The question raised is whether Smith occupied the position of a riparian proprietor or a prior appropriator, as between himself and Sturr, when the latter undertook to locate his alleged water right. At that time Smith had been in possession for three years, and his homestead entry had been made over a year.

A claim of the homestead settler, such as Smith's, is initiated by an entry of the land, which is effected by making an application at the proper land office, filing the affidavit and paying the amounts required by sections 2238 and 2290 of the Revised Statutes. Under section 2291 the final certificate was not to be given or patent issued "until the expiration of five years from the date of such entry." But under the third section of the Act of May 14, 1880, chap. 89 (21 Stat. 141), providing that "any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the Homestead Laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the Pre-emption Laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the Pre-emption Laws," the ruling of the Land Department has been that if the homestead settler shall fully comply with the law as to continuous residence and cultivation, the settlement defeats all claims intervening between its date and the date of filing his homestead entry, and in making final proof his five years of residence and cultivation will commence from the date of actual settlement.

Under section 2297 of the Revised Statutes it is provided that upon change of residence or abandonment as therein mentioned, before the expiration of the five years, "then and in that event the land so entered shall revert to the government." It was held by Attorney-General

MacVeagh, in an opinion to the Secretary of War, July 15, 1881, that "where a homestead entry of public land has been made by a settler, the land so entered cannot, while such entry stands, be set apart by the President for a military reservation, even prior to the completion of full title in the settler;" that "upon the entry the right in favor of the settler would seem to attach to the land, which is liable to be defeated only by failure on his part to comply with the requirements of the Homestead Law in regard to settlement and cultivation. This right amounts to an equitable interest in the land, subject to the future performance by the settler of certain conditions (in the event of which he becomes invested with full and complete ownership); and until forfeited by failure to perform the conditions, it must prevail not only against individuals, but against the government." 1 Land Dec. 80. And many rulings of the Interior Department sustain this view. These official utterances are entitled to great respect at the hands of this court, as remarked by *Mr. Justice Lamar* in *Hastings & Dakota R. Co. v. Whitney*, 182 U. S. 357, 363 [38: 368, 366].

In *Witherspoon v. Duncan*, 71 U. S. 4 Wall. 210, 218 [18: 389, 341], it is said by *Mr. Justice Davis*, speaking for the court, that "in no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property. . . . The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the mean time holds the naked legal fee in trust for the purchaser, who has the equitable title." It may be said that this language refers to the certificate issued on final proofs, but if the word "entry," as applied to appropriations of land, "means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim" (*Chotard v. Pope*, 25 U. S. 12 Wheat. 586, 588 [6: 737]), the principle has a wider scope.

In *Hastings & Dakota R. Co. v. Whitney*, *ubi supra*, an affidavit for the purpose of entering land as a homestead was filed on behalf of one Turner, in a local land office in Minnesota, on May 8, 1865, Turner claiming to act under section 1 of the Act of March 21, 1864 (13 Stat. 35), now section 2298 of the Revised Statutes of the United States. As a matter of fact, Turner was never on the land, and no member of his family was then residing, or ever did reside, on it, and no improvements whatever had ever been made thereon by anyone. Upon being paid their fees, the register and receiver of the land office allowed the entry, and the same stood upon the records of the local land office, and upon the records of the General Land Office, uncanceled, until September 30, 1872. Between May, 1865, and September, 1872, Congress made a grant to the State of Minnesota for the purpose of aiding in the construction of a railroad from Hastings, through certain counties, to a point on the western boundary of the State, which grant was accepted by the Legislature of the State of Minnesota and transferred to the Hast.

ings and Dakota Railroad Company, which shortly thereafter definitely located its line of road by filing its map in the office of the commissioner of the General Land Office. All these proceedings occurred prior to the 30th of September, 1872. This court declared that the almost uniform practice of the Department has been to regard land upon which an entry of record, valid upon its face, has been made, as appropriated and withdrawn from subsequent homestead entry, pre-emption, settlement, sale or grant, until the original entry be canceled or be declared forfeited, in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the Land Laws; and it was held that whatever defects there might be in an entry, so long as it remained a subsisting entry of record, whose legality had been passed upon by the land authorities and their action remained unreversed, it was such an appropriation of the tract as segregated it from the public domain, and therefore precluded it from subsequent grant; and that this entry on behalf of Turner "attached to the land" in question, within the meaning of the Act of Congress making the grant (14 Stat. 87), and could not be included within it. And as to mere settlement with the intention of obtaining title under the Pre-emption Laws, while it has been held that no vested right in the land as against the United States is acquired until all the prerequisites for the acquisition of title have been complied with, yet rights in parties as against each other were fully recognized as existing, based upon priority in the initiatory steps, when followed up to a patent. "The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants." *Shepley v. Cowan*, 91 U. S. 330, 337 [23: 424, 426].

Section 2339 of the Revised Statutes, which is in substance the ninth section of the Act of Congress of July 26, 1866 (14 Stat. 253), provides: "Whenever, by priority of possession, rights to the use of water, for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed." This section, said *Mr. Justice Miller*, in *Broder v. Water Co.*, 101 U. S. 274, 276 [25: 790, 791], "was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

By section 17 of the Act of July 9, 1870, amendatory of the Act of July 26, 1866, it was provided, among other things, that "all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the Act of which this Act is amendatory." 16 Stat. 218. And this was carried forward into section 2340 of the Revised Statutes, and Smith's patent was subject to that reservation.

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The 9th section of the Act of 1866 is referred to by *Mr. Justice Field* in *Atchison v. Peterson*, 87 U. S. 20 Wall. 507, 512 [22: 414, 416], and in the opinion it is said that "the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams."

When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. As the riparian owner has the right to have the water flow *ut currere solebat*, undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect.

The Dakota Civil Code contains this section:

"Sec. 255. The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same." *Leviess's Dakota Codes*, 2d ed. 781.

By section 527, which is section 1 of an Act Relating to Water Rights, passed in February, 1881, it is provided: "That any person or persons, corporation or company, who may have or hold a title or possessory right or title to any mineral or agricultural lands within the limits of this Territory, shall be entitled to the usual enjoyment of the waters of the streams or creeks in said Territory for mining, milling, agricultural or domestic purposes: *Provided*, That the right to such use shall not interfere with any prior right or claim to such waters when the law has been complied with in doing the necessary work." *Leviess's Codes*, 861.

Section 650 of the Code of Civil Procedure is as follows:

"Any person settled upon the public lands belonging to the United States, on which settlement is not expressly prohibited by Congress or some department of the general government, may maintain an action for any injuries done the same; also an action to recover the possession thereof, in the same manner as if he possessed a fee simple title to said lands." *Leviess's Codes*, 171.

The local custom is set forth in the findings to have consisted in the recognition and acknowledgment of "the right to locate water rights, and to divert, appropriate and use the waters of flowing streams for purposes of irrigation when such location, diversion and use does not conflict or interfere with rights vested and accrued prior thereto."

Thus, under the laws of Congress and the Territory, and under the applicable custom, priority of possession gave priority of right. The question is not as to the extent of Smith's interest in the homestead as against the government, but whether as against Sturr his lawful

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occupancy under settlement and entry was not a prior appropriation which Sturr could not displace. We have no doubt it was, and agree with the brief and comprehensive opinion of the supreme court to that effect.

The judgment is affirmed.

Mr. Justice Brewer was not a member of the court when this case was submitted, and took no part in its decision.

THE COUNTY OF LINCOLN, *Plff. in Err.*,

NICHOLAS LUNING.

(See S. C. Reporter's ed. 529-534.)

Suits against States—county may be sued—law stating where suit may be brought—state decision—Nevada law—when fund for payment is provided—Statute of Limitations.

1. The Eleventh Amendment of the Federal Constitution, which restrains the jurisdiction granted by the Constitution over suits against States, is limited to those suits in which the State is a real party or a party on the record.
2. A county is a corporation created by and with such powers as are given to it by the State and is not within such constitutional restriction and may be sued in the circuit court.
3. Although the Act under which the bonds in this case were issued provides for litigation concerning the same, and names a court of the State in which such litigation can be had, such jurisdiction is not exclusive and does not prevent suit in the circuit court.
4. Where the Supreme Court of a State has held that a statute of the State does not contravene a State Constitution, this court will follow such decision.
5. Sections 1950 and 1964-1966 of the General Statutes of Nevada have application only to unliquidated claims and accounts, and do not apply to bonds and coupons.
6. The Nevada Act of 1873, which provided for the registering of overdue coupons, and for payment in a particular order, was a new provision for the payment of these bonds. It provided a special trust fund to which the coupon holder might, in the order of registration, look for payment.
7. When payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the Statute of Limitations until he shows that that fund has been provided.

[No. 1274.]

Submitted Jan. 13, 1890. Decided March 3, 1890.

IN ERROR to the Circuit Court of the United States for the District of Nevada to review judgments against a County on bonds and coupons issued by it. *Affirmed.*

The facts are stated in the opinion.

Mr. H. F. Bartine, for plaintiff in error:

The United States circuit court had no jurisdiction of the subject matter of the actions or of the parties thereto. The defendant is an integral part, a political subdivision, of the State.

Sharp v. Contra Costa County, 94 Cal. 291; *Clarke v. Lyon County*, 8 Nev. 185; *McBane v.*

People, 50 Ill. 504; *Barnes v. D. C.* 91 U. S. 544 (23: 441).

Counties cannot be sued at all except by the express statutory consent of the sovereign State of which they are parts.

Gilman v. Contra Costa County, 8 Cal. 57; *Hunsaker v. Borden*, 5 Cal. 290; *Hastings v. San Francisco*, 18 Cal. 57; *Floral Springs Water Co. v. Rives*, 14 Nev. 483.

The complaints do not state facts sufficient to constitute a cause of action, and cannot, therefore, support the judgment.

Champion v. Sessions, 1 Nev. 478; *Dow v. Humbert*, 91 U. S. 294 (23: 368); *Cooley, Const. Lim.* 149; *State v. Silver*, 9 Nev. 227; *State v. Hallock*, 19 Nev. 384.

When the Constitution of a State has been construed by the highest court in the State, such construction is followed by this court.

Elmwood v. Marcy, 92 U. S. 289 (23: 710); *Hall v. DeCuir*, 95 U. S. 487 (24: 547).

The court erred in not sustaining the pleas of the Statute of Limitations to the coupons.

Amy v. Dubuque, 98 U. S. 470 (25: 228); *Koshkonong v. Burton*, 104 U. S. 668 (26: 886); *Nash v. El Dorado County*, 11 Sawy. 86; *Wilcox v. Williams*, 5 Nev. 206; *Taylor v. Hendrie*, 8 Nev. 245.

Mr. Abraham Clark Freeman, for defendant in error:

A county is subject to suit in the national courts.

Lyell v. Lapeer County, 6 McLean, 446; *McCoy v. Washington County*, 3 Wall. Jr. 881; *Cowles v. Mercer County*, 74 U. S. 7 Wall. 118 (19: 87); *McPike v. Lincoln County*, 7 Cent. L. J. 264; *Cunningham v. Ralls County*, 1 Fed. Rep. 458; *Jordan v. Cass County*, 8 Dill. 185; *Adams v. Republic County*, 23 Fed. Rep. 211; *Wall v. Monroe County*, 103 U. S. 77 (26: 481); *Cleveland C. S. & L. Asso. v. Topeka*, 87 U. S. 20 Wall. 655 (24: 455); *Cromwell v. Sac County*, 94 U. S. 851 (24: 195); *Greene County v. Daniel*, 102 U. S. 195 (26: 101); *Floral Springs Water Co. v. Rives*, 14 Nev. 484.

Lincoln County is a corporation.

Angell & Ames, Corporations, §§ 14, 23, 164; *Dill. Mun. Corp.* § 22; *Louisville & N. R. Co. v. Davidson County Court*, 1 Sneed (Tenn.) 687; *Shavnee County v. Carter*, 2 Kan. 128; *Price v. Sacramento County*, 6 Cal. 256; *Levy Court v. Coroner*, 69 U. S. 2 Wall. 501 (17: 851); *Dean v. Davis*, 51 Cal. 406.

The complaint did state facts sufficient to constitute a cause of action.

Montgomery v. Tutt, 11 Cal. 318; *Wolcott v. Van Santvoord*, 17 Johns. 248, 8 Am. Dec. 396; *Wallace v. McConnell*, 88 U. S. 18 Pet. 136 (10: 95); *Hills v. Place*, 48 N. Y. 520, 8 Am. Rep. 568; *Daniel, Neg. Inst.* § 643; *McNairy v. Bell*, 1 Yerg. 502, 24 Am. Dec. 454.

An Act of January 18, 1877, which provides for the registration of overdue coupons, and their payment thereafter in the order of their registration, exempts them from the operation of the Statute of Limitations.

Nash v. El Dorado County, 24 Fed. Rep. 255; *Underhill v. Sonora*, 17 Cal. 177; *Freehill v. Chamberlain*, 65 Cal. 604.

Mr. Justice Brewer delivered the opinion of the court:

This is an action on bonds and coupons.

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Judgment was rendered against the County and it alleges error. The primary question is as to the jurisdiction of the circuit court. This jurisdiction is challenged on two grounds: first, it is claimed that because the County is an integral part of the State it could not, under the Eleventh Amendment of the Federal Constitution, be sued in the circuit court; and, secondly, inasmuch as the Act under which the bonds were issued provided for litigation concerning the same, and named a court of the State in which such litigation could be had, that such jurisdiction was exclusive and prevented suit in the circuit court.

With regard to the first objection, it may be observed that the records of this court for the last thirty years are full of suits against counties, and it would seem as though by general consent the jurisdiction of the federal courts in such suits had become established. But irrespective of this general acquiescence, the jurisdiction of the circuit courts is beyond question. The Eleventh Amendment limits the jurisdiction only as to suits against a State. It was said by Chief Justice Marshall, in *Osborn v. The Bank*, 22 U. S. 9 Wheat. 738, 857 [6: 204, 282], that "the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is of necessity limited to those suits in which the State is a party on the record."

While that statement was held by this court in the case of *Re Ayers*, 128 U. S. 448 [31: 216], to be too narrow, yet by that decision the jurisdiction was limited only in respect to those cases in which the State is a real, if not a nominal, defendant; and while the county is territorially a part of the State, yet politically it is also a corporation created by and with such powers as are given to it by the State. In this respect it is a part of the State only in that remote sense in which any city, town or other municipal corporation may be said to be a part of the State. *Metropolitan R. Co. v. Dist. Col.* 182 U. S. 1 [33: 231].

The Constitution of the State of Nevada explicitly provides for the liability of counties to suit. Article eight is entitled "Municipal and Other Corporations," and its ten sections contain provisions, some applicable to private and others to both private and municipal corporations. Section five declares that "corporations may sue and be sued in all courts in like manner as individuals." And that this section is not to be limited to private corporations is evident, not alone from the generality of its language and from the title of the article, but also from several sections therein in which municipal corporations are expressly named. Thus the second section subjects the property of corporations to taxation, with a proviso "that the property of corporations formed for municipal . . . purposes may be exempted by law." And section ten expressly recognizes the county as a municipal corporation, for its language is: "No county, city, town or other municipal corporation shall become a stockholder," etc. Thus the liability of counties as municipal corporations to suit is declared by the Constitution itself. Further, the Act under which these bonds were issued provided for suits against the County in respect to this indebtedness in one of the courts of the State; and this 133 U. S.

liability of a county to suit has been affirmed by the Supreme Court of Nevada in the following cases: *Waitz v. Ormsby County*, 1 Nev. 370; *Clarke v. Lyon County*, 8 Nev. 181; *Floral Springs Water Co. v. Rives*, 14 Nev. 484.

With regard to the other objection the case of *Cowles v. Mercer County*, 74 U. S. 7 Wall. 118 [19: 87], is decisive. In that case the court, by the chief justice, expressed its opinion on the very question in these words: "But it was argued that counties in Illinois, by the law of their organization, were exempted from suit elsewhere than in the circuit courts of the county. And this seems to be the construction given to the statutes concerning counties by the Supreme Court of Illinois. But that court has never decided that a county in Illinois is exempted from liability to suit in national courts. It is unnecessary, therefore, to consider what would be the effect of such a decision. It is enough for this case that we find the board of supervisors to be a corporation authorized to contract for the county. The power to contract with citizens of other States implies liability to suit by citizens of other States, and no statute limitation of suability can defeat a jurisdiction given by the Constitution."

With regard to the objection that the Statute under which these bonds were issued contravenes the State Constitution, it is enough to refer to the case of *Odd Fellows Sav. & C. Bank v. Quillen*, 11 Nev. 109, in which the Supreme Court of the State held the Act valid, following in that decision the case of *Youngs v. Hall*, 9 Nev. 212.

It is further objected that the complaint was defective in not showing that the bonds and coupons had been presented to the county commissioners and county auditor for allowance and approval, as provided by sections 1950 and 1964-1966 of the General Statutes of the State. Those sections, referring to claims and accounts, have application only to unliquidated claims and accounts, and do not apply to bonds and coupons. This question was presented in the case of *Greene County v. Daniel*, 102 U. S. 187, 194 [26: 99, 101], in which the court observed, speaking of bonds and coupons, that "the claim was, to all intents and purposes, audited by the court when the bonds were issued. The validity and amount of the liability were then definitely fixed, and warrants on the treasury given, payable at a future day."

The remaining question arises on the Statute of Limitations. By the General Limitation Law of the State some of the coupons were barred; but there has been this special legislation in reference to these coupons. The bonds were issued under the Funding Act of 1873. In 1877 the County was delinquent in its interest, and the Legislature passed an Act amendatory to the Act of 1873. This amendatory Act provided for the registering of overdue coupons, and imposed upon the treasurer the duty of thereafter paying the coupons as money came into his possession applicable thereto, in the order of their registration. Statutes of Nevada 1877, 46.

The coupons which by the General Limitation Law would have been barred were presented, as they fell due, to the treasurer for payment, and payment demanded and refused, because the interest fund was exhausted.

Thereupon the treasurer registered them as presented, in accordance with the Act of 1877, and from the time of their registration to the commencement of this suit there was no money in the treasury applicable to their payment. This Act, providing for registration and for payment in a particular order, was a new provision for the payment of these bonds, which was accepted by the creditor, and created a new right upon which he might rely. It provided, as it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the County to pay such coupons as were registered, in the order of their registration, as fast as money came into the interest fund; and such promise was by the creditor accepted; and when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the Statute of Limitations until he shows that that fund has been provided.

The cases of *Underhill v. Sonora*, 17 Cal. 172, and *Freehill v. Chamberlain*, 65 Cal. 603, are in point. In the former case the court observes that "the legislative Acts then recognized the debt and made provision for its payment. This is enough to withdraw the case from the operation of the Statute; it is equivalent to a trust deed by the State setting apart property out of which the money due was to be paid at a given time, if not sooner paid upon a claim acknowledged to be an outstanding debt; and we cannot conceive of any principle of law or justice which would hold the claim to be barred by the Statute simply because the creditor waited after this for his money." In the other case it was held that "where a statute provides for the issuing of bonds of a city with interest coupons payable as fast as money should come into the treasury from special sources designated by the Act, the Statute of Limitations does not commence to run against the coupons until the money is received in the treasury in accordance with the terms of the Act."

Both of these decisions were rendered before the Act of 1877 was passed, and, being in an adjoining State which has always had close relations with the State of Nevada, may well have induced the passage of that Act.

These are all the questions presented. We see no error in the rulings in the circuit court, and its judgment is therefore affirmed. *The cases of the same plaintiff in error against Charles Sutro, No 1275, and C. D. Vincent, No. 1276, on the present docket, are similar, and the same judgment will therefore be entered in them.*

PAUL LOUIS BURTHE ET AL., *Plffs. in Err.*,

ARTHUR DENIS, *Dative Testamentary Executor.*

(See S. C. Reporter's ed. 514-528.)

Jurisdiction as to treaty question—French

NOTE.—As to construction and operation of treaties, see note to *U. S. v. Amistad*, Bk. 10, p. 828.

As to when awards will be set aside by a court of equity, and when not, see note to *Burchell v. Marsh*, Bk. 15, p. 98.

Treaty of 1880—authority of commission—allowance of part of claim to French heirs and legatees—extrinsic evidence, when allowable to explain judgment—immaterial evidence.

1. Where the contention of the plaintiffs in error that they are entitled to an award rendered by the French and American Claims Commission is founded upon the French Treaty of 1880, the decision of the Supreme Court of Louisiana against the right thus asserted by them presents a question for the jurisdiction of this court.
2. That Commission possessed no authority to consider any claims against the government of either the United States or of France, except as held, both at the time of their presentation and of judgment thereon, by citizens of the other country.
3. A French citizen having a claim against the United States having died, said Commission could only allow, under the Treaty, the proportion of the claim going to such of his heirs and legatees as are citizens of France; and such Commission having allowed a part of such claim, the whole sum allowed must be paid to such French heirs and legatees, and cannot be equally distributed to them and other heirs and legatees of the claimant who are citizens of the United States.
4. Relief by the Commission under the Treaty could be given only to those legatees who were at the time citizens of France.
5. Where a judgment is ambiguous or uncertain as to what, or what portion of, claims were allowed by it, extrinsic evidence is admissible to ascertain and determine those facts.
6. Letters of counsel and the letter of one of the commissioners are not competent evidence for that purpose; but where, though received as evidence, they could not have had any effect upon the decision, as the claim rested on a treaty, the evidence is immaterial.

[No. 1381.]

Submitted Jan. 13, 1890. Decided March 3, 1890.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment of that court reversing a decree of the District Court of the Parish of New Orleans that the amount of an award made by the French and American Claims Commission should go to the French heirs only of the original claimant, and should not be distributed equally among them and the American heirs. *Reversed.*

Statement by *Mr. Justice Field*:

At the commencement of the late civil war L. F. Foucher, a citizen of France and a resident of the City of Paris, and bearing the title of Marquis de Circé, was the owner of a plantation situated on the east bank of the Mississippi River, a few miles above the centre of the City of New Orleans, though within its corporate limits. A portion of it was known as Exposition Park or Audubon Park. When the city was occupied by the federal troops in 1862 they took possession of the plantation. Some of its fields were used for pasture; some were converted into camping ground; and upon part a hospital for the soldiers was built. The whole was in the military occupation and control of the United States, to the entire exclusion of the owner. In 1865 a claim for reimbursement of the damages sustained was presented on behalf of the owner to the Military Claims Commission sitting at New

Orleans. General Canby, as commanding general of the district embracing that city, and the head of the Commission, made a report upon the claim, recommending, upon the advice of his chief quartermaster, its settlement by the payment of \$36,438.83. This report was addressed to the adjutant-general's department, and forwarded to Washington in June, 1866. No part of this claim was, however, paid, for the reason, as stated by counsel, that before action was had upon it the Act of Congress of February 21, 1867, was passed, forbidding the settlement of any claim for the occupation of or injury to real estate by the military authorities or troops of the United States where such claim originated during the war. (14 Stat. 397.)

In 1869 Foucher died, leaving a will, in which he made his widow, also a citizen of France, his universal legatee, and she was put in possession of his estate. In 1877 she died, leaving a will by which she devised her entire estate to her nephews and nieces, who were appointed her universal legatees jointly. After some litigation to determine the true construction of this will, the legatees went into possession of her estate. (31 La. Ann. 568.) The estates both of Foucher and of his widow were settled and the property distributed among the legatees of the latter or their heirs. The executors were discharged and the successions considered as finally closed. Neither the estate of Foucher nor of his widow had received any moneys upon the claim which had been presented on behalf of Foucher in 1865, for the damage sustained by the occupation and use of his plantation by the federal troops, the payment of which had been recommended by General Canby; nor was any mention made of the claim in the distribution of the estate of either.

In January, 1880, a Convention was concluded between the United States and France (12 Stat. 678), by which it was agreed that "all claims on the part of corporations, companies or private individuals, citizens of the United States, upon the government of France, arising out of acts committed against the persons or property of citizens of the United States not in the service of the enemies of France, or voluntarily giving aid and comfort to the same, by the French civil or military authorities, upon the high seas or within the territory of France, its colonies and dependencies, during the late war between France and Mexico, or during the war of 1870-'71, between France and Germany, and the subsequent civil disturbances known as the 'Insurrection of the Commune;' and on the other hand, all claims on the part of corporations, companies or private individuals, citizens of France, upon the government of the United States, arising out of acts committed against the persons or property of citizens of France not in the service of the enemies of the United States, or voluntarily giving aid and comfort to the same, by the civil or military authorities of the government of the United States, upon the high seas or within the territorial jurisdiction of the United States, during the period comprised between the thirteenth day of April, eighteen hundred and sixty-one, and the twentieth day of August, eighteen hundred and sixty-six, 188 U. S.

shall be referred to three commissioners, one of whom shall be named by the President of the United States, and one by the French government, and the third by His Majesty the Emperor of Brazil." The Convention also provided that the Commission thus constituted should be competent and obliged to examine and decide upon all claims of the above character presented to them by the citizens of either country, except such as had been already diplomatically, judicially or otherwise by competent authorities previously disposed of by either government; but that no claim or item of damage or injury based upon the emancipation or loss of slaves should be entertained. The Convention also provided that the Commission should, without delay, after its organization, proceed to examine and determine the claims specified, and that the concurring decisions of the commissioners or of any two of them should be conclusive and final; and the contracting parties especially engaged so to consider them, and to give full effect to such decisions, without any objections, evasions or delay whatever.

The Commission thus provided for was organized and proceeded to the hearing of claims at the City of Washington. The claim of Foucher was for acts committed against his property within the period prescribed, and the parties interested in that claim were desirous of presenting it to the Commission for consideration. That Commission, as it was authorized to do under the Act of June 16, 1880, providing for carrying the Treaty into effect, had adopted rules for the conduct of its business, among which was one that, if the claimant were dead, his executor or administrator, or legal representatives, must appear for him, and that each claimant should file in the office of the Commission a statement of his claim, in the form of a memorial addressed to the Commission. (21 Stat. 296, chap. 253, § 4.) The successions of Mr. and Mrs. Foucher were accordingly reopened, and Arthur Denis was appointed dative testamentary executor in both, that is, an executor to take the place of the one named in the wills of the deceased.

Soon afterwards Mr. Denis filed in the office of the Commission a memorial entitled "*Arthur Denis, Dative Testamentary Executor of Foucher, v. The United States.*" In this memorial he presented the claim in the right of Foucher, deceased, and joined with him as claimants all parties interested in the successions of Mr. and Mrs. Foucher, all of whom were citizens of the United States, except Paul Louis Burthe and Dominique Francois Burthe, who were citizens of France; and he filed a power of attorney showing that he appeared as their agent. Subsequently these latter parties filed a separate petition or memorial, in which they appeared in person. They are heirs each of one eighth of the estate of Mrs. Foucher.

In June, 1883, the Commission rendered its award as follows:

"*Arthur Denis* }
v. } No. 603.
The United States. }

"We allow this claim at the sum of nine thousand and two hundred dollars, with interest at five per cent from April 1st, 1865."

Of this award Mr. Denis collected \$8,229.18,

from which he reserved \$114.98 for future costs, and deducted \$2,884.20 for charges and expenses, which are conceded to have been correct, leaving a balance of \$5,280. This sum as dative executor he proposed to distribute among all the heirs and legatees of Mrs. Foucher precisely as he would have done had this amount been moneys possessed by her as part of her estate at the time of her death. All the parties, except the plaintiffs in error, are citizens of the United States, and were such citizens at the time of the award. The plaintiffs in error, being the only heirs who were at the time citizens of France, insisted that they were entitled to the whole award. Mr. Denis presented the matter to the Civil District Court for the Parish of Orleans for determination, showing the respective proportions the heirs and legatees would be entitled to receive if the sum mentioned was to be distributed among them in the same proportion as the original estates. Accompanying this showing—tableau of distribution as it is termed—he made the following statement:

"The undersigned, testamentary executor, understands that the French and American Claims Commission established the uniform jurisprudence for its decisions that it could not hear and determine any claims against the United States except those of claimants and beneficiaries who were French citizens, and that the said Commission rejected all claims of persons not French citizens, even when they represented the claim of a deceased French person.

"In claim No. 603, of the succession of L. F. Foucher de Circé, the actual claimants are all American citizens except Paul Louis Burthe and Dominique Francois Burthe, who are French citizens. Under the said jurisprudence of the Commission, and considering the status of the American claimants, the executor felt great doubt and hesitation as to the distribution to be made under this tableau. On the one hand it seemed as if the Commission, under its rulings, could not have made any award in favor of the American claimants, and that the award as allowed must have been intended for the French claimants only; but, on the other side, the Commission not having in express terms excluded the American claimants, the executor concluded, in making the tableau, to allow to the several legatees their recognized proportions of interest in the estates, leaving the French heirs to come by oppositions and assert their rights, if any they have, to the entire award."

To this representation, or tableau of distribution, the plaintiffs in error made opposition, alleging that they were entitled to the whole award, being the only heirs and legatees who were French citizens at the time the claim was presented and when the award was rendered; and that no award under the Treaty could have been made in favor of the other heirs and legatees, they being citizens of the United States at that time, and that no executor, administrator or person representing the succession of a person who was not a French citizen at the time the damage was suffered and award rendered could have any standing before the Commission. The district court of the parish, the

court of original jurisdiction, maintained the position of the plaintiffs in error, and decreed that the entire fund, \$5,280, should go to them, one half to each. From this judgment the executor appealed to the Supreme Court of Louisiana, which tribunal reversed the decree below, giving judgment in favor of the executor, to the effect that the entire fund in his possession from the award, less the charges and expenses incurred and the amount retained for future costs, should be distributed proportionally among the legatees and heirs of Mrs. Foucher, according to the tableau of distribution presented by him. From this latter judgment the case is brought to this court on writ of error.

Messrs. Charles Carroll and Alex. Porter Morse, for plaintiffs in error:

This case is governed, not by the laws of Louisiana, but by the provisions of the Treaty itself, which is, in the premises, the supreme law of the land.

Ware v. Hylton, 3 U. S. 3 Dall. 237 (1: 584); *Hauenstein v. Lynham*, 100 U. S. 483 (25: 628).

The award of the commissioners settles nothing as to the conflicting rights of the respective claimants, *inter sese*.

Comegys v. Vasse, 26 U. S. 1 Pet. 193 (7: 108); *Sheppard v. Taylor*, 30 U. S. 5 Pet. 675 (8: 269); *Frevall v. Bache*, 39 U. S. 14 Pet. 95 (10: 369); *Judson v. Corcoran*, 58 U. S. 17 How. 612 (15: 381).

The total amount awarded belongs to the plaintiffs in error, who are the only citizens of France.

Emerson v. Hall, 38 U. S. 13 Pet. 409, 413 (10: 223, 224). *Harris' Succession*, 39 La. Ann. 444.

Mr. Henry Chiapella, for defendant in error:

Where the question of jurisdiction is so involved with other questions that the court cannot eliminate it without passing on the merits, it will be heard on the final argument on the merits.

Semple v. Hager, 71 U. S. 4 Wall. 431 (18: 402); *Bethell v. Demaret*, 77 U. S. 10 Wall. 537 (19: 1007).

Neither Treaty nor rules require of derivative claimants French citizenship.

Williams v. Oliver, 53 U. S. 12 How. 111 (13: 915); *Gill v. Oliver*, 52 U. S. 11 How. 545 (13: 806).

Parol evidence is not admissible to explain a judgment.

Avery v. Police Jury, 15 La. Ann. 223; *Durnford's Succession*, 1 La. Ann. 92.

The estoppel of a judgment extends to all matters material to the decision which the parties might have had decided.

Lindsley v. Thompson, 1 Tenn. Ch. 272; *Aurora v. West*, 74 U. S. 7 Wall. 102 (19: 49); *Beloit v. Morgan*, 74 U. S. 7 Wall. 623 (19: 206).

The principle that the treaties of the United States are the supreme law of the land has no application here.

Sheppard v. Taylor, 30 U. S. 5 Pet. 675, 710 (8: 269, 270); *Frevall v. Bache*, 39 U. S. 14 Pet. 95 (10: 369); *Comegys v. Vasse*, 26 U. S. 1 Pet. 193 (7: 108); *Phelps v. McDonald*, 99 U. S. 303, 307 (25: 474, 476); *Emerson v. Hall*, 38 U. S. 13 Pet. 411 (10: 223).

Mr. Justice Field delivered the opinion of the court:

As the contention of the plaintiffs in error that they are entitled to the entire award rendered by the French and American Claims Commission, after deducting from it the conceded charges and expenses, is founded upon the stipulations of the Treaty of 1880, the refusal of the Supreme Court of Louisiana to recognize the right thus asserted by them presents a question for the jurisdiction of this court, within the express terms of the 25th section of the Judiciary Act of 1789, which is reproduced, somewhat enlarged in its provisions, in the Revised Statutes (§ 709). The decision was against the right specially claimed under the Treaty in question.

The position of the plaintiffs in error was, in our judgment, well taken, and should have been sustained. Independently of the express provisions of the Treaty it could not reasonably be urged that the award should inure to the benefit of citizens of the United States. It would be a remarkable thing, and we think without precedent in the history of diplomacy, for the government of the United States to make a treaty with another country to indemnify its own citizens for injuries received from its own officers. To any suggestion of that kind from a foreign country the government of the United States would probably answer that it was entirely competent to deal with its own citizens and to do justice to them without the interposition of any other country.

But the express language of the Treaty here limits the jurisdiction of the Commission to claims by citizens of one country against the government of the other. It matters not by whom the claim may have been presented to the Commission. That body possessed no authority to consider any claims against the government of either the United States or of France, except as held, both at the time of their presentation and of judgment thereon, by citizens of the other country.

There is no ambiguity in the language of the Treaty on this subject; it is entirely free from doubt. It is true Arthur Denis presented the claim as dative testamentary executor of Mr. Foucher's succession, and he joined, in his memorial to the Commission, all the legatees and heirs under the will of Madame Foucher, to whom the estate of her husband had been left, appearing also for the plaintiffs in error under a power of attorney from them, they subsequently appearing in person. This memorial only gave the Commission full knowledge of the origin and condition of the claim. It could not enlarge its power or bring within its jurisdiction any claim against the United States of other parties than citizens of France. When the award was made it could lawfully be intended for no other than such citizens. The right of the plaintiffs in error to the award arises upon the Treaty, to which any rules for the distribution of estates under the law of Louisiana must give way, the Treaty being of superior authority in the case. They were entitled, each to one eighth of any property coming to them as legatees of Mrs. Foucher, and that proportion of the whole claim shown to exist against the United States for damages to the property of her husband and for its use,
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was all that the Commission could allow, as it could not consider the interests of their co-legatees or co-heirs, they not being citizens of France. The amount of the whole claim as set forth in the memorial presented by Denis exceeded \$100,000. The amount which General Canby, in 1865, recommended to be paid, as already stated, exceeded \$36,000. Whatever the damages sustained by Foucher as estimated by the Commission that body could allow only one fourth thereof, the proportion due to the plaintiffs in error. Any award to their co-legatees would have been invalid and void. They may be entitled to an equal share in the whole claim against the government of the United States; but if so they must resort to remedies provided by the laws of the United States for the prosecution of claims against them, or, if those remedies are inadequate to give this relief, they must apply to Congress. Relief by the Commission under the Treaty could be given only to those legatees who were at the time citizens of France.

On the hearing before the district court, the brief of counsel for the French government, and of private counsel filed with the Commission for the claimants, and letters of the latter counsel, were produced to show that no claim was pressed by them except on behalf of the plaintiffs in error; and also a letter of one of the commissioners, to show that no other claim was considered by the Commission. Objection was taken to this evidence on the ground that the decision of the Commission could not be interpreted by subsequent testimony, or by the arguments of counsel before it, or the opinions of attorneys employed in the case. As we understand the objection, it went to the competency of the testimony, rather than to its sufficiency. As a general rule, the judgment of a court or commission is to be interpreted by its own language and the pleadings or proceedings upon which it is founded. Extrinsic evidence to aid in its interpretation is inadmissible unless after reference to the pleadings and proceedings there remains some ambiguity or uncertainty in it. In such cases resort may be had to other evidence, as where, from the generality of the language in the pleadings or proceedings, as well as in the decision, it becomes necessary to ascertain and limit the extent of the judgment intended. Thus, where a former judgment is pleaded in bar of a second action upon the same demand, it is competent to show by extrinsic evidence the identity of the demands in the two cases, if this does not appear on the face of the pleadings. *Washington, Alexandria & Georgetown Steam Packet Co. v. Sickles*, 65 U. S. 24 How. 333 [16: 650]; *Miles v. Caldwell*, 69 U. S. 2 Wall. 85 [17: 555]; *Cromwell v. Sac County*, 94 U. S. 851, 855 [24: 195].

If it had been necessary to limit the effect of the award of the Commission in the present case, we do not perceive any valid objection to extrinsic evidence for that purpose. The brief of counsel for the claimants would show the character and extent of their contention before that body. But letters of counsel and the letter of one of the commissioners can hardly be considered as competent evidence. Their declarations, if receivable at all, could only be so in the form of testimony given by

them as witnesses in the case, and not in any *ex parte* written communication. But, though received as evidence, they could not have had any effect upon the decision as to the claim of the plaintiffs in error. Their claim rested on the Treaty, which authorized no award in favor of any other parties before the Commission. It is therefore immaterial that such evidence was received. The nature and extent of the award, and the parties entitled to it, depended upon considerations which such evidence could in no way affect.

It follows that *the judgment of the Supreme Court of Louisiana must be reversed and the cause remanded, with directions to take further proceedings in accordance with this opinion; and it is so ordered.*

FRANCIS A. PALMER, *Plff. in Err.*,

v.

MARTIN T. McMAHON, Receiver of Taxes
of the CITY OF NEW YORK.

(See S. C. Reporter's ed. 660-670.)

State decision—shares of national banks taxable—U. S. securities—deductions of debts from assessment—discrimination in taxation—N. Y. taxation valid—N. Y. Tax Law constitutional—due process of law—collection of tax by commitment of person constitutional.

1. This court is bound by the decision of the Court of Appeals of the State of New York as to compliance with the State Statute in relation to taxes, form of assessment and oath of assessors.
2. Capital of national and state banks invested in United States securities cannot be subjected to state taxation; but shares of bank stock may be taxed in the hands of their individual owners at their actual instead of their par value, without regard to the fact that part or the whole of the capital of the corporation might be so invested.
3. Under Acts permitting the deduction of debts from the value of all a person's taxable property, such deduction must be permitted from the value of such shares; but a statute is not void because it does not provide for a deduction; nor is the assessment void if deductions are not made, but voidable only. Individual instances of omission or undervaluation cannot be relied on to invalidate an assessment.
4. Because a state statute does not provide for the taxation of shares in corporations other than banks, it does not follow that the shareholders in national banks are discriminated against.
5. The mode of taxation adopted by the State of New York in reference to its corporations, excluding trust companies and savings banks, does not operate in such a way as to make the tax assessed upon shares of national banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens.

NOTE.—As to power of States to tax, see note to *Dobbins v. Erie County*, Bk. 10, p. 1022.

That taxation of stock or shares in corporation does not impair obligation of contracts; and as to taxation of shares of national banks and other corporations.—see note to *Providence Bank v. Billings*, Bk. 7, p. 939.

As to exemption from taxation; whether a contract

6. Chapter 230 of the Laws of New York of 1843 is constitutional. It does not deprive of liberty or property without due process of law, nor of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. The phrase "due process of law" does not necessarily mean a judicial proceeding.

7. When the law provides for a mode of confirming or contesting the assessment, with due notice to the person assessed, and for a review, the assessment does not deprive the owner of his property without due process of law.

8. Collection of tax by distress and seizure of person is of very ancient date. Under the Act of 1843, commitment is not resorted to until other means of collection have failed and then only upon a showing of property possessed, not accessible to levy, but enabling the owner to pay if he chooses.

9. Collection in this way, founded on necessity and long recognized by the State of New York and operating alike on all persons and property similarly situated, is not within the inhibitions of the Fourteenth Amendment.

[No. 145.]

Submitted Jan. 24, 1890. Decided March 3, 1890.

IN ERROR to the Court of Common Pleas for the City and County of New York to review a judgment and order finding Francis A. Palmer guilty of misconduct in neglecting to pay personal taxes assessed against him and ordering that he stand committed until he shall have paid the taxes with interest and costs. *Affirmed.*

The several decisions in this case below are reported as follows: 11 Daly, 214; 12 Daly, 362; 102 N. Y. 176.

Statement by *Mr. Chief Justice Fuller*:

This is a writ of error to the Court of Common Pleas for the City and County of New York to review a judgment and order finding Francis A. Palmer guilty of misconduct in neglecting to pay personal taxes assessed, imposed and confirmed against him for the year 1881, and ordering that he stand committed until he shall have paid the amount of the said taxes, with interest and costs, unless the court should see fit sooner to discharge him, which judgment and order were rendered in a proceeding brought under the provisions of chapter 230 of the Laws of the State of New York of 1843, art. II., secs. 12 and 13, which sections are as follows:

"Sec. 12. In case of the refusal or neglect of any person to pay any tax imposed on him for personal property, if there be no goods or chattels in his possession upon which the same may be levied by distress and sale according to law, and if the property assessed shall exceed the sum of one thousand dollars, the said receiver, if he has reason to believe that the person taxed has debts, credits, choses in action or other personal property, not taxed elsewhere

or not; not implied,—see note to *Tucker v. Ferguson*, Bk. 22, p. 805.

As to when an injunction to restrain the collection of a tax will be granted, see note to *Dows v. Chicago*, Bk. 20, p. 65.

As to when taxes illegally assessed can be recovered back, see note to *Ersikine v. Van Arsdale*, Bk. 21, p. 63.

in this State, and upon which levy cannot be made according to law, may thereupon in his discretion make application, within one year, to the court of common pleas of the county, or the supreme court, to enforce the payment of such tax.

"Sec. 18. The court may impose a fine for the misconduct mentioned in the next preceding section, sufficient in amount for the payment of the tax assessed, and of the costs and expenses of the proceedings authorized by this Act to enforce such payment, or to punish such misconduct; and the amount of such tax shall be paid out of such fine to the said receiver, who shall pay the same in like manner as the tax was required to be paid; and costs and expenses of such proceedings shall be paid out of such fine to the said receiver who made the application to enforce the payment of the tax."

The record shows that on the 17th day of April, 1882, Martin T. McMahon, the receiver of taxes of the City of New York, filed a petition against Francis A. Palmer in the court of common pleas, stating that in the year 1881 Mr. Palmer was a resident of the Twenty-first Ward in the City of New York and a stockholder in the National Broadway Bank, located in the Third Ward of said City; that the shares of stock in said bank owned by Mr. Palmer were duly assessed for the year 1881 at the valuation of \$247,635, which valuation was entered by the tax commissioners in "The Annual Record of the Assessed Valuation of Real and Personal Estate" for the year 1881, which record was open for examination and correction from the second Monday of January until the first day of May, 1881, and the fact that the books were so open was duly advertised; that before April 30, 1881, Palmer applied for a reduction of the valuation, and it was reduced by the commissioners to the sum of \$190,635; that on May 1, 1881, the assessment rolls were prepared from the books, upon which his name was entered, with an assessment against him for his shares at the valuation last mentioned, which rolls were duly certified to the Board of Aldermen of the City of New York, and immediately afterwards the tax commissioners gave public notice that the tax rolls had been completed and delivered to the board, and would be open to public inspection for the period of fifteen days from the date of the notice, which notice was duly published in several newspapers in the City of New York for fifteen days consecutively, commencing July 5, 1881; that thereafter the tax upon such valuation of Palmer's shares of stock was estimated and set down upon said roll at the sum \$4,994.63, and on October 13, 1881, was duly confirmed by the board of aldermen, and corrected assessment rolls showing the amount of said tax were delivered to McMahon, as receiver of taxes, with a warrant for the collection thereof; that notice was duly published in twelve New York newspapers that said assessment rolls had been delivered and that the taxes were due and payable thereon; that thereafter notice was again published in twelve newspapers that unless the taxes were paid the receiver would proceed to collect them according to law; and a fourth notice was likewise published requiring payment; that Palmer had neglected to pay the sum of \$3,684.63 of the tax assessed against

him; that subsequently to the 15th of January, 1882, a warrant was issued by the receiver to a marshal of the city for the collection of said tax, which was returned unsatisfied, except as to the sum of \$1,310, after demand of payment from Palmer, which was refused as to \$3,684.63; that there were no goods or chattels in Palmer's possession upon which said tax might be levied by distress and sale; that one year had not elapsed since said refusal or the return of the warrant; and that the receiver had reason to believe that Palmer had debts, credits, choses in action or other personal property, not taxed elsewhere in the State of New York, upon which levy could not be made according to law; and he applied for the enforcement of payment of the tax pursuant to the Statute.

Defendant Palmer was ordered, upon the foregoing petition, to show cause why he should not be punished for his misconduct in neglecting and refusing to pay said personal-property tax, and he appeared and interposed an affidavit, in which he set up various matters in resistance to the order, and among other things insisted that his shares of stock were not lawfully assessed for the year 1881, for reasons stated in a demand theretofore served upon the commissioners of taxes in the City of New York, of which a copy was attached to the affidavit, dated April 26, 1881, and whereby the tax commissioners were requested to strike from the record the names of all the shareholders in said bank upon various grounds, and, in case the foregoing demand was refused, further demanding that the assessed value of each share, which had been fixed by the commissioners at \$45, be reduced to \$10, by deducting the value of United States bonds held by the bank, and, in the event of a refusal, that the valuation of each share should be reduced to the amount of \$27, being sixty per cent of the assessed value of each share of stock exclusive of real estate. In support of the petition affidavits of the tax commissioners were presented to the court. It appeared that a deduction of \$57,000 on account of debts due by Palmer had been made from the original valuation of the shares, on his application. The court of common pleas thereupon made the order complained of, an opinion being given by Van Brunt, J. (11 Daly, 214), in which all the objections made by Palmer were carefully considered and overruled. From this order an appeal was taken to the general term of the court of common pleas, by which said order was affirmed, the opinion of the court being delivered by Beach, J., and reported in 12 Daly, 362. From the judgment of the general term an appeal was taken to the Court of Appeals of the State of New York, the judgment affirmed, and the proceedings remitted to the court of common pleas. The opinion of the court of appeals by Ruger, Ch. J., is to be found in 102 N. Y. 176, and is quoted from with approval by this court in *Mercantile Bank v. New York*, 121 U. S. 138, 158 [80: 895, 902]. To the judgment of the court of common pleas this writ of error was sued out.

Mr. Wm. Hildreth Field, for plaintiff in error:

The system of taxing the appellant's national

bank shares resulted in taxing the moneyed capital invested in them at a greater rate than is assessed upon other moneyed capital.

People v. Weaver, 100 U. S. 543 (25: 706); *Boyer v. Boyer*, 118 U. S. 689 (28: 1089); *San Mateo County v. Southern P. R. Co.* 8 Am. & Eng. R. R. Cas. 1; *People v. Davenport*, 91 N. Y. 574.

The proceedings under chapter 280 of the Laws of 1843 would deprive the appellant of his property and liberty without due process of law.

Kentucky Railroad Tax Cases, 115 U. S. 822 (29: 414); *People v. Weaver*, 100 U. S. 539 (25: 705); *Stuart v. Palmer*, 74 N. Y. 188.

The oath of the deputy tax commissioner failing to comply with the Statute is a jurisdictional defect and fatal to the validity of the assessments.

Brevort v. Brooklyn, 89 N. Y. 139; *Westfall v. Preston*, 49 N. Y. 849; *Bellinger v. Gray*, 51 N. Y. 610; *Bradley v. Ward*, 58 N. Y. 401; *People v. Suffern*, 68 N. Y. 321; *Hinckley v. Cooper*, 22 Hun, 253; *Merritt v. Portchester*, 71 N. Y. 309; *Scheiber v. Kuehler*, 49 Wis. 301; *Morrill v. Taylor*, 6 Neb. 236.

The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice.

Stuart v. Palmer, 74 N. Y. 188, 189.

Where a later statute covers the whole subject, the former statute will be held to be repealed.

Heckman v. Pinkney, 81 N. Y. 211.

Mr. David J. Dean, for defendant in error:

The case at bar is a collateral proceeding, in which insufficiencies or errors in tax proceedings will not afford ground of relief.

People v. Comrs. of Taxes, 71 U. S. 4 Wall. 244 (18: 344); *Newman v. Livingston County*, 45 N. Y. 676, 687; *Chemung Bank v. Elmira*, 58 N. Y. 49, 52; *Swift v. Poughkeepsie*, 37 N. Y. 511; *Bank of Commerce v. Mayor*, 48 N. Y. 184; *People v. Weaver*, 100 U. S. 543 (25: 706); *Albany County Suprs. v. Stanley*, 105 U. S. 310 (26: 1049).

The tax commissioners had jurisdiction, under chapter 596 of the Laws of New York of 1880, page 888, to assess the plaintiff in error as a stockholder in the national bank on the value of his shares of stock therein. Capital of national banks invested in United States securities cannot be taxed.

People v. Comrs. of Taxes, 67 U. S. 2 Black, 620, 635, note (17: 451, 457); *Bank Tax Case*, 69 U. S. 2 Wall. 200 (17: 793).

The shares of stock can be taxed in the hands of individual owners.

Van Allen v. Assessors, 70 U. S. 3 Wall. 573 (18: 229); *Bradley v. People*, 71 U. S. 4 Wall. 459 (18: 433); *People v. Comrs. of Taxes*, 71 U. S. 4 Wall. 244 (18: 344); *Louisville First Nat. Bank v. Com.* 76 U. S. 9 Wall. 353 (19: 701); *Lionberger v. Rouse*, 76 U. S. 9 Wall. 468 (19: 721).

After deducting just debts, the shares of stock can be taxed in the hands of individual owners.

Williams v. Weaver, 100 U. S. 547 (25: 708); *Mercantile Bank v. New York*, 121 U. S. 158 (30: 902).

There should be no abatement of the amount of the assessment of such apportionate part of

the value of each share as fairly represents the government securities held by the bank.

People v. Comrs. of Taxes, 71 U. S. 4 Wall. 244 (18: 344); *Mercantile Bank v. New York*, 121 U. S. 149 (30: 899).

Individual instances afford no ground for impeaching assessments.

Albany County Suprs. v. Stanley, 105 N. Y. 318 (26: 1052); *Mercantile Bank v. New York*, 121 U. S. 149 (30: 899); *Hepburn v. School Directors*, 90 U. S. 23 Wall. 480 (23: 112).

Taxation of shareholders in national banks is constitutional.

People v. Comrs. of Taxes, 94 U. S. 415 (24: 164).

That the law of the State of New York provides a separate system for the taxation of certain corporations does not create a discrimination against shareholders in national banks.

Lionberger v. Rouse, 76 U. S. 9 Wall. 476 (19: 725); *Tappan v. Merchants Bank*, 86 U. S. 19 Wall. 504 (22: 195); *Everitt's App.* 71 Pa. 216; *McVeagh v. Chicago*, 49 Ill. 329.

Chap. 280 of the Laws of 1843 does not deprive of liberty and property without due process of law.

Re De Peyster, 80 N. Y. 572; *Re Loudon*, 89 N. Y. 548; *Methodist Protestant Church v. Baltimore*, 6 Gill, 391; *O'Neal v. Virginia & M. Bridge Co.* 18 Md. 1, 26; Cooley, *Taxation* (2d ed.) 864; *Murray v. Hoboken Land & I. Co.* 59 U. S. 18 How. 272 (15: 372); *Weimer v. Bunbury*, 80 Mich. 201; *State v. Allen*, 2 McCord, 56; *Rockwell v. Nearing*, 85 N. Y. 308; *Harris v. Wood*, 6 T. B. Monroe, 642, 643; *McMillen v. Anderson*, 95 U. S. 37, 41 (24: 835); *Re Trustees Pub. School*, 31 N. Y. 574; *Spencer v. Merchant*, 125 U. S. 855 (31: 767); *Davidson v. New Orleans*, 96 U. S. 97 (24: 616); *Hagar v. Reclamation Dist.* 111 U. S. 701 (28: 569).

Mr. Chief Justice Fuller delivered the opinion of the court:

We are bound by the decision of the Court of Appeals of the State of New York adversely to the plaintiff in error, as to failure to comply with the State Statute in relation to the method of procedure, form of assessment, oath of assessors, etc., in respect to which it may be further remarked that the attack in this case is in its nature collateral. *Stanley v. Albany County Suprs.* 121 U. S. 535 [30: 1000]; *Albany County Suprs. v. Stanley*, 105 U. S. 305 [26: 1044]. We proceed to examine, therefore, whether the assessment was invalid because the Statute under which it was laid contravened the Constitution or laws of the United States, and whether the proceedings authorized by chapter 280 of the Laws of 1843 operated to deprive the citizen of liberty or property without due process of law.

Section 5219 of the Revised Statutes, Title LXII., *National Banks*, reads as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions,

that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by nonresidents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent, according to its value as other real property is taxed."

Chapter 596 of the Laws of New York of 1880 is entitled "An Act to Provide for the Taxation of Banks and of Moneyed Capital Engaged in the Business of Banking, Receiving Deposits or Otherwise," and its third section reads thus:

"The stockholders in every bank, banking association or trust company, organized under the authority of this State, or of the United States, shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholders in the assessment of taxes at the place, city, town or ward where such bank, banking association or trust company is located, and not elsewhere, whether the said stockholder reside in said place, city, town or ward or not; but in the assessment of said shares, each stockholder shall be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this State, and the assessment or taxation shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State. In making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank, banking association or trust company, and in which any portion of their capital is invested, in which said shares are held, to the whole amount of the capital stock of such bank, banking association or trust company; nothing herein contained shall be held or construed to exempt the real estate of banks, banking associations or trust companies from either state, county or municipal taxes; but the same shall be subject to state, county, municipal and other taxation, to the same extent and rate, and in the same manner, according to its value, as other real estate is taxed." 1 Laws of New York of 1880, pp. 888, 889.

We have decided that so much of the capital of national and state banks as is invested in United States securities cannot be subjected to state taxation (*People v. Comrs. of Taxes*, 67 U. S. 2 Black, 620 [17: 451]; *Bank Tax Case*, 69 U. S. 2 Wall. 200 [17: 793]); but that shares of bank stock maybe taxed in the hands of their individual owners at their actual instead of their par value (*People v. Comrs. of Taxes*, 94 U. S. 415 [24: 164]; *Hepburn v. Carlisle School Directors*, 90 U. S. 23 Wall. 480 [23: 112]), without regard to the fact that part or the whole of the capital of the corporation might be so invested (*Van Allen v. Assessors*, 70 U. S. 3 Wall. 573 [18: 229]; *Bradley v. People*, 71 U. S. 4 Wall. 459 [18: 433]; *People v. New York*

County Comrs. of Taxes, 71 U. S. 4 Wall. 244 [18: 344]); and that under Acts permitting the deduction of debts from the value of all a person's taxable property, such deduction must be permitted from the value of such shares (*People v. Weaver*, 100 U. S. 539, 546 [25: 705, 707]); but that a statute is not void because it does not provide for a deduction, nor is the assessment void if deductions are not made, but avoidable only. *Albany County Suprs. v. Stanley*, 105 U. S. 805 [26: 1044]. We have also held that individual instances of omission or undervaluation cannot be relied on to invalidate an assessment (*Suprs. v. Stanley, supra*); and that because a state statute does not provide for the taxation of shares in corporations other than banks, it does not follow that the tax on moneyed capital invested in bank shares is at a greater rate than that of the moneyed capital of individual citizens invested in other corporations, nor are the shareholders in national banks discriminated against, because the taxation of such other corporations is arrived at under a separate system. *Mercantile Bank v. New York*, 121 U. S. 188 [30: 895]. In this last case the assessment was made in pursuance of section 812 of an Act of the Legislature of the State of New York, passed July 1, 1882, entitled "An Act to Revise the Statutes of This State Relating to Banks, Banking and Trust Companies," which section is identical with section 8 of the Act of 1880, except that trust companies are omitted in the Act of 1882, and a provision in relation to notice is added at the end of the section. The court held as follows: "The main purpose of Congress in fixing limits to state taxation on investments in shares of national banks was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business, and operations and investments of like character. The term 'moneyed capital,' as used in Rev. Stat., § 5219, respecting state taxation of shares in national banks, embraces capital employed in national banks, and capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money—as in banking as that business is defined in the opinion of the court; but it does not include moneyed capital in the hands of a corporation, even if its business be such as to make its shares moneyed capital when in the hands of individuals, or if it invests its capital in securities payable in money. The mode of taxation adopted by the State of New York in reference to its corporations, excluding trust companies and savings banks, does not operate in such a way as to make the tax assessed upon shares of national banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens." The conclusions there announced and the reasoning by which they are supported, are decisive in the disposition of the errors assigned on behalf of the plaintiff in error, on the first branch of this case. The assessment was not void because in contravention of the Constitution or laws of the United States.

But it is argued that chapter 280 of the Laws of New York of 1843 is unconstitutional, as depriving the plaintiff in error of liberty and

property without due process of law, and of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. That Amendment provides that no State "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It is insisted that Palmer had no notice and no opportunity to be heard or to confront or cross-examine the witnesses for the taxing authorities or to subpoena witnesses in his own behalf; and had not otherwise the protection afforded in a judicial trial upon the merits. The phrase "due process of law" does not necessarily mean a judicial proceeding. "The nation from whom we inherit the phrase 'due process of law,'" said this court, speaking by *Mr. Justice Miller*, "has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation." *McMillen v. Anderson*, 95 U. S. 87, 41 [24: 385, 386].

The power to tax belongs exclusively to the legislative branch of the government, and when the law provides for a mode of confirming or contesting the charge imposed, with such notice to the person as is appropriate to the nature of the case, the assessment cannot be said to deprive the owner of his property without due process of law. *Spencer v. Merchant*, 125 U. S. 845 [31: 763]; *Walston v. Nevins*, 128 U. S. 578 [32: 544]. The imposition of taxes is in its nature administrative and not judicial, but assessors exercise quasi judicial powers in arriving at the value, and opportunity to be heard should be and is given under all just systems of taxation according to value.

It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which and the place where such complaints may be made. *Hagar v. Reclamation District*, 111 U. S. 701, 710 [28: 569, 571].

The Law of New York gave opportunity for objection before the tax commissioners (Laws of New York 1859, chap. 302, § 10, p. 681), and the plaintiff in error appeared and obtained a large deduction from the original valuation. If dissatisfied with the final action of the commissioners, he could have had that action reviewed on certiorari. Laws of New York 1859, chap. 302, § 20, p. 684; *People v. Comrs. of Taxes*, 71 U. S. 4 Wall. 244 [18: 344]. But he did not avail himself of this remedy.

The proceeding here was purely an executive process to collect the tax after the liability of the party was finally fixed.

Collection by distress and seizure of person is of very ancient date (*Murray v. Hoboken Land Co.* 59 U. S. 18 How. 272 [15: 372]); and counsel for defendant in error cites many English statutes, commencing with the twelfth year of Henry VII. (chap. 13), which in their essential features resemble the New York Law upon the subject, one in 6 Henry VIII. (chap. 26) being strikingly like it. (2 Statutes of the Realm, 644; 3 Statutes of the Realm, 156, 230, 516, 812; 4 Statutes of the Realm, 176, 334, 385,

744, 991, 1108, 1247; 5 Statutes of the Realm, 9, 700; 7 Statutes of the Realm, 567.) Under the Act of 1843 commitment is not resorted to until other means of collection have failed and then only upon a showing of property possessed, not accessible to levy, but enabling the owner to pay if he chooses, this constituting such misconduct as justifies the order. That law had been in existence for more than forty years at the time of this proceeding. We do not regard the collection in this way, founded on necessity and so long recognized by the State of New York as to be justifiably resorted to under the circumstances detailed in the Act, and operating alike on all persons and property similarly situated, as within the inhibitions of the Fourteenth Amendment.

The judgment is affirmed.

Mr. Justice Blatchford did not take any part in the decision of this case.

MORTON CULVER ET AL., *Pliffs. in Err.*,
v.
GERTRUDE UTHE.

(See S. C. Reporter's ed. 655-660.)

Copies of records of Land Office, as evidence—Swamp Land Act—right of previous locator of land—land, when sold—what constitutes a sale of such land—vested right—cases limited.

1. Copies of records, books or papers, in the General Land Office, authenticated by the seal and certified by the commissioner thereof, are evidence equally with the originals thereof.
2. The owner of a military land warrant who delivered it to the commissioner of the Land Office with a direction that it be located upon certain swamp land in Illinois, and it was so located, and who received the certificate of the register and receiver of the Land Office showing his right to a patent, had, prior to the issuing of the patent, an equitable title to the land which excluded it from the grant to the State by Congress by the Swamp Land Act.
3. This land was not unsold within the meaning of that Act which granted to the State only the swamp lands which remained unsold at the passage of that Act.
4. The delivery by such owner of his land warrant to the proper officers of the government, with a direction that it be located on this land, and the paper which they issued to him, showing that he had thereby acquired the right to a patent for the land, constituted a sale within the meaning of the Act of Congress granting the swamp lands to the States.
5. That Act excluded from the grant made thereby all the swamp and overflowed lands for which the government had, by contract, given a vested

NOTE.—As to pre-emption rights, see note to *U. S. v. Fitzgerald*, Bk. 10, p. 785.

When patents for land may be set aside for fraud, see note to *Miller v. Kerr*, Bk. 5, p. 381.

As to errors in surveys and descriptions in patents for lands; how construed,—see note to *Watts v. Lindsey*, Bk. 5, p. 423.

As to land grants to railroads, see note to *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.* Bk. 28, p. 794.

right, for a valuable consideration, to individuals before its passage.

6. *Iowa v. McFarland*, 110 U. S. 471 (28: 198), limited.

[No. 191.]

Submitted Jan. 7, 1890. Decided March 3, 1890.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment affirming a judgment of a lower court of that State in favor of plaintiff for the amount of certain promissory notes given as the purchase price of land in that State, the title to which defendants alleged had failed. *Affirmed*.

The facts are stated in the opinion.

Opinion below, 4 West. Rep. 176, 116 Ill. 643.

Mr. Morton Culver, for plaintiffs in error:

This case has been tried twice in the Circuit Court of Cook County, Illinois, has twice been passed upon by the Appellate Court of the First District of Illinois (*Gormley v. Uthe*, 1 Ill. App. 170; *Culver v. Uthe*, 7 Ill. App. 468), and was then decided by the Supreme Court of Illinois. *Gormley v. Uthe*, 4 West. Rep. 176, 116 Ill. 643.

The pretended location was improperly admitted in evidence.

1 Greenl. Ev. § 483 et seq.; *Russell v. White-side*, 5 Ill. 7; *Hannibal & St. J. R. Co. v. Smith*, 76 U. S. 9 Wall. 99 (19: 601).

Under the Act of 28th February, 1850, the title to the swamp lands in the several States passed to such States individually on that day; the Act was a grant *in presenti*.

Keller v. Brickley, 78 Ill. 133; *Matthews v. Goodrich*, 3 West. Rep. 371, 102 Ind. 557.

The older patent carries the title.

Bruner v. Mantore, 2 Ill. 156; *Hannibal & St. J. R. Co. v. Smith*, 76 U. S. 9 Wall. 99 (19: 601).

A grant *in presenti* is a patent, and a patent only passes title.

Wilcox v. Jackson, 38 U. S. 13 Pet. 498 (10: 264); 1 Greenl. Ev. §§ 74, 81.

Land disposed of by the United States in satisfaction of military land warrants are not sold, within the meaning of the Statute.

Hannibal & St. J. R. Co. v. Smith, 76 U. S. 9 Wall. 99 (19: 601); *Iowa v. McFarland*, 110 U. S. 471 (28: 198).

A sale is a transfer of property for a fixed price in money or its equivalent, but land granted to a person entering the military or naval service of the country is a bounty.

Carsan v. Watts, 3 Doug. 350; *Eades v. Vandeput*, 4 Doug. 1; *Banks v. Conant*, 14 Allen, 497; *Kelly v. Sprout*, 97 Mass. 169; *Alexander v. Duke of Wellington*, 2 Russ. & Myl. 35, 56, 64.

Mr. Harvey B. Hurd for defendant in error.

Mr. Justice Miller delivered the opinion of the court:

The writ of error in this case brings before us for review a judgment of the Supreme Court of the State of Illinois. The suit was brought originally by the present defendant in error, Gertrude Uthe, against Morton Culver and Michael Gormley, in which she sought to recover on eleven promissory notes made by them March 28, 1874, all of which were due

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and unpaid at the commencement of this action, and on which she claimed to recover the sum of \$7,000. To this the defendants pleaded, among other defenses, that the notes were given as the purchase price of a quarter section of land in Cook County in that State, and that the consideration for which said notes were given, namely, the title to said quarter section, had utterly failed, and that plaintiff had no title to the lands which she sold to the defendants at the time of the sale, or at any other time.

The plaintiff recovered judgment against defendants, notwithstanding this plea, which was affirmed in the Supreme Court of the State, upon a writ of error issued by that court, and it is that judgment which we are called upon to review. 116 Ill. 643 [4 West. Rep. 176].

The facts out of which the jurisdiction of this court arises, and on which we are to determine whether there is error in the judgment of the supreme court, are substantially as follows: The father of the plaintiff, Gertrude, in whom the title which she sold to the defendants originated, had a patent from the United States for the land in controversy, dated February 10, 1851, which purported on its face to be issued under the Act of Congress of February 11, 1847 (9 Stat. 123), on a military land warrant that he had deposited in the General Land Office.

This land warrant was located on the land in question, at the Land Office of the United States in Chicago, Illinois, on July 10, 1850, under the authority of Uthe himself, and the land-warrant certificate was delivered up, and the patent aforesaid issued to him in due time and after the proper course of proceedings. There does not seem to be any valid objection to the mode in which this was done.

The defense relied upon the fact that the land in question was swamp land within the meaning of the Act of Congress of the 28th of September, 1850 (9 Stat. 519); that by that Statute the title to the land was transferred to the State of Illinois between the time of the location of the military land warrant and the issue of the patent for it to Uthe; and that therefore the title claimed under Uthe utterly failed, being vested by that Statute in the State of Illinois, the Act being a grant *in presenti*, and taking effect at its date.

The first section of that Act reads as follows:

"To enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this Act, shall be, and the same are hereby, granted to said State."

The Act is extended by its fourth section to the other States of the Union in which there were swamp lands belonging to the United States, including the State of Illinois, and the argument of the defendant in error is that by reason of the location of the military land warrant of Uthe on this land on the 10th day of July, 1850, nearly three months before the passage of this Act, it had been sold to Uthe, within the meaning of the Statute; and this is the principal question which we have to decide.

There does not seem to be any doubt that the land in controversy was swamp land, within the meaning of the Act of Congress, and if the location by Uthe of his land warrant did not create a right to the land which excludes it from the grant to the State by Congress, the plaintiff Gertrude had no title, and the defense should have been sustained.

The first objection taken to the claim of Uthe was to the introduction in evidence of the certified copy of the records of the Land Office of the United States at Washington, concerning the location of the land warrant by Uthe. This transcript is certified by L. Harrison, acting commissioner of the General Land Office, under the seal of his office, and contains the various acts of the register and receiver of the Land Office at Chicago and of Uthe, in regard to the location of the land, showing that it was subject to location at the time, and that the land warrant was properly delivered up and deposited with the commissioner of the Land Office.

The objection made in the brief of counsel to the reception of this copy is not very clearly stated. It is said that a simple inspection both of the United States Statute and of the Illinois Statute would show conclusively that it could not be admitted under either of them, and reference is made to section 20, chapter 51, of the Revised Statutes of Illinois, and section 906 of the Revised Statutes of the United States. But section 891 of the latter Statutes is ample authority for the introduction in evidence of the transcript of the General Land Office in the present case. It reads as follows:

"Copies of any records, books or papers, in the General Land Office, authenticated by the seal and certified by the commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record."

There is therefore no error in the admission of this transcript in evidence.

As regards its effect upon the rights of the parties, it seems to us it shows that under an Act of Congress which authorized it to be done, Uthe, by directing his land warrant to be located upon this land and delivering up the warrant, and by the proceedings of the Land Office upon that location, which resulted in issuing a patent to him for the land, had acquired an equitable title to the land, or what may be called a vested interest in it, prior to the passage of the Swamp Land Act by Congress. He had done what by the Act of Congress of 1847 entitled him to the land on which his warrant was located. He had delivered up the land warrant, the evidence of his claim against the government. He had received in exchange for it the certificate of the receiver and register of the Land Office, and these entitled him to a patent after such delay as was necessary to ascertain the fact that the land had been granted to no one else, and that all his proceedings were regular, which facts were to be determined by the commissioner of the Gen-

eral Land Office, and which were determined in his favor. He had paid for this land. He had paid by the delivering up and cancellation of his land warrant. He had received the certificate of the register and receiver of the Land Office at Chicago, which, by the laws of nearly all the Western States, have been made equivalent to a title to the land in actions of ejectment, though the strict legal title remained in the United States at the date of the passage of the Swamp Land Act.

Are we to suppose that Congress intended to give to the State of Illinois the land which it had already, by a contract for which value was received, promised to convey to Uthe? As the grant to the States of the swamp land within their jurisdiction was a gratuity, although accompanied with a trust for the reclamation of said land, it is not easily to be supposed that Congress intended to be thus generous at the expense of parties who had vested rights in any of the lands so donated, derived from the United States. It would be a matter of considerable doubt whether such an inference, that Congress intentionally violated its contract, would be indulged, if there were no words of reservation in the Statute. But when we find the broad declaration made that the grant only includes those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of the Act, we do not have much difficulty in holding that this land was not unsold within the meaning of the Statute. It is true that in a technical sense, and where a due regard to the intention of the parties using the word "sold" is had, it may mean a transfer of the title of property for a money consideration. Yet, it has other meanings which would include the present transaction, when it is obvious that such was the intent of the party using the phrase. We cannot doubt that the delivery by Uthe of his land warrant to the proper officers of the government, with a direction that it be located on this land, and the paper which they issued to him, showing that he had thereby acquired the right to a patent for the land, constituted a sale within the meaning of the Act of Congress granting the swamp lands to the States. The case of *Iowa v. McFarland*, 110 U. S. 471 [28:198], it is true, gives a different construction to the word "sale" in an Act of Congress concerning certain sales of public lands. But the intent of Congress in that case was relied on as indicating that the word "sale," as applied to a disposal of the public lands by the government, was limited to sales for cash. The following language, used in the opinion in that case, indicates this very clearly:

"When each of these Acts speaks of lands 'sold by Congress,' five per cent of the net proceeds of which shall be reserved and be 'disbursed' or 'appropriated' for the benefit of the States in which the land lies, it evidently has in view sales in the ordinary sense, from which the United States receive proceeds, in the shape of money payable into the treasury, out of which the five per cent may be reserved and paid to the State; and does not intend to include lands promised and granted by the United States as a reward for military service, for which nothing is received into the treasury."

In the present case, the Act which we are now construing does not contemplate the receipt of any money into the treasury of the United States, nor the payment of any money out of it, in regard to these swamp lands. We feel at liberty, therefore, to construe the Statute as intending to exclude from the grant all the swamp and overflowed lands for which it had, by contract, given a vested right, for a valuable consideration, to individuals before the passage of that Act.

The decision of the Supreme Court of Illinois, which affirmed the action of the lower court, founded on this principle, is sound in regard to the questions which we have power to review, and *its judgment is therefore affirmed.*

WILLIAM ASPINWALL, *Plff. in Err.*

PETER BUTLER, Receiver of the PACIFIC NATIONAL BANK OF BOSTON.

(See S. C. Reporter's ed. 595-610.)

National bank—liability of shareholder—increase of stock—whole amount not subscribed—secs. 5142 and 5151, Rev. Stat.

1. Where the directors of a National Bank passed a resolution to increase its stock, giving its stockholders the right to take the new stock to an amount equal to that then held by them, the fact that some of the new stock is not taken is not sufficient ground for a particular stockholder to repudiate his new stock taken by him and withdraw the amount paid therefor, and to exempt him as a shareholder from statutory liability to creditors.
2. There was no express condition that the individual subscriptions should be void if the whole of the new stock was not subscribed; and there was no implied condition in law to that effect.
3. Section 5142 of the Revised Statutes is not violated by an issue of the exact amount of stock that was paid in; it was intended to prevent what is called watering of stock.
4. Where the stock was lawfully created and the defendant subscribed for the shares in question and paid for them, and received his certificate, he became a stockholder; and, when the Bank went into liquidation, he became liable under section 5151 of the Revised Statutes to pay an amount equal to the stock by him so held for debts of the Bank.

[No. 957.]

Submitted Jan. 7, 1890. Decided March 3, 1890.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment for plaintiff in an action by a Receiver of a National Bank to recover an assessment on its capital stock, of a stockholder, to pay the debts of the Bank. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 83 Fed. Rep. 217.

Messrs. Thomas H. Talbot and Benjamin N. Johnson for plaintiff in error.

Mr. A. A. Ranney, for defendant in error:

The acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibilities of a shareholder. *Upton v. Tribilcock*, 91 U. S. 45 (23: 208); *Brigham v. Mead*, 10 Allen, 245; *Buffalo & N.* 183 U. S.

Y. O. R. Co. v. Dudley, 14 N. Y. 836; *Seymour v. Sturges*, 26 N. Y. 134.

Informalities and irregularities in the proceedings, the general action being *intra vires*, are of no avail in collateral suits.

Scoville v. Thayer, 105 U. S. 143 (26: 968); *Chubb v. Upton*, 95 U. S. 665 (24: 523); *Pullman v. Upton*, 96 U. S. 328 (24: 818); *Upton v. Tribilcock*, 91 U. S. 45 (23: 208).

The determination by the comptroller of the facts essential for his action in giving the certificate is conclusive.

Casey v. Galli, 94 U. S. 673 (24: 168); *Keyser v. Hitz*, 2 Mackey, 478; *Cadle v. Baker*, 87 U. S. 20 Wall. 650 (22: 448); *Kennedy v. Gibson*, 75 U. S. 8 Wall. 498 (19: 476).

Not only the original associates, but each new member, agree to the charter and the charter powers.

Ball, Nat. Banks, note to § 5151; *Curran v. Arkansas*, 56 U. S. 15 How. 804 (14: 705); *Hathorn v. Calfe*, 69 U. S. 2 Wall. 10 (17: 776); *Davis v. Weed*, 44 Conn. 569.

Mr. Justice Bradley delivered the opinion of the court:

This case is governed by that of *Delano v. Butler*, 118 U. S. 634 [30: 260]. The cases are not identical, it is true; but the principles established in that case require a similar decision in this. The substantial facts, up to a certain point, are the same; what took place afterwards cannot vary the result.

The Pacific National Bank of Boston failed and passed into the hands of a receiver on the 22d day of May, 1882, and the comptroller of the currency on the 27th of November, 1882, ordered an assessment of 100 per cent on the capital stock for the purpose of enforcing the individual liability of the stockholders, to pay the liabilities of the institution, under section 5151 of the Revised Statutes. Fifty shares of the stock, amounting to \$5,000, stood in the name of Aspinwall individually, and 50 other shares in his name as trustee and guardian. This suit was brought against him by the receiver of the Bank to recover \$5,000 as the holder of the individual stock. He denied that he was the holder of any such stock; and, for another plea, averred that it had been fraudulently and illegally issued, and was not binding against him as a holder thereof. A trial by jury was waived, and the cause was tried by the circuit court, which made a special finding of facts, and decided in favor of the plaintiff. The writ of error is to that decision.

After the finding of facts had been made, the defendant prayed the court to rule "Upon the facts found in this case the plaintiff is not entitled to judgment;" but the court refused this prayer, and found that the defendant was the owner of fifty shares of stock on May 20 and May 22, 1882, and entered judgment for the plaintiff for the sum of \$6,550; to which refusal to rule, ruling and entry of judgment the defendant then excepted; and this is the only exception in the case. The question is whether this general finding is supported by the special facts found, and is in accordance with the law.

Amongst other things, the findings set forth the 5th and 6th of the original articles of association of the Bank. By the 5th article the

capital stock is fixed at \$250,000, but with the privilege of being increased, according to section 5142 of the Revised Statutes, to any sum not exceeding \$1,000,000; and in case of increase, each stockholder was to have the privilege of subscribing his *pro rata* share. The sixth article specifies the powers and duties of the board of directors, amongst which was the power "to provide for an increase of the capital of the association, and to regulate the manner in which such increase shall be made," and the power "to make all by-laws that it may be proper and convenient for them to make under said Revised Statutes for the general regulation of the business of the association and the management and administration of its affairs."

The findings also set forth the first and eleventh by-laws of the Bank: the former of which fixed the regular annual meeting of the stockholders for the election of directors on the second Tuesday of January of each year, fourteen days' notice of which was to be given. The eleventh by-law was as follows, to wit:

"Sec. 11. Whenever an increase of stock shall be determined upon it shall be the duty of the board to notify all the stockholders of the same and cause a subscription to be opened for such increase, and each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for in proportion to his existing stock in the Bank. If any stockholder should fail to subscribe for the amount of stock to which he may be entitled within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock."

The findings further state:

"On the 18th day of September, 1881, the capital stock of the Bank was \$500,000, divided into 5,000 shares of the par value of \$100 each, of which shares the defendant, Aspinwall, as trustee under the will of Augustus Aspinwall and guardian under the will of Thomas Aspinwall for the benefit of his son, William H. Aspinwall, a minor, held fifty, which stood in his name as guardian and trustee on the books of the Bank, a certificate of said shares having been taken in the same way. . . .

"September 18, 1881, the directors of the Bank passed the following vote:

"Voted, That the capital of this Bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in an amount equal to that now held by them."

A printed notice of this resolution was thereupon sent to all the stockholders of the Bank; and at the bottom of this printed notice there was left a space and lines indicated for stockholders to write therein their subscriptions to the new stock to which they were entitled. Other than this there was no subscription paper opened. Some stockholders signified their assent on the notice in the place indicated at the bottom and sent it to the Bank. Others did not, but went or sent to the Bank and paid the money for the new stock to which they would be entitled in the proposed increase, taking

receipts in the printed form prepared for that purpose.

The defendant received said notice, and thereupon went to the Bank and informed A. I. Benyon, its president, that he had not sufficient funds in his hands as guardian and trustee with which to take as such the fifty shares in the proposed increase, and that he should therefore subscribe for and take the same himself individually. The president of the Bank said that he could do so. The defendant afterwards returned to the Bank the said notice received by him with the following subscription written at the bottom thereof signed by him:

"I will take the fifty new shares to which I am entitled and will pay for them as above.
"William Aspinwall."

Subsequently, on October 1st, 1881, the defendant went to the Bank and paid the sum of five thousand dollars, receiving therefor a receipt, a copy of which is as follows:

"Pacific National Bank.

"\$5,000. Boston, October 1st, 1881.

"Received of William Aspinwall five thousand dollars on account of subscription to new stock.

"J. M. Pettengill, Cashier."

The defendant was well acquainted with Mr. Benyon, seeing him almost daily, and he did some business with the Bank.

At the time the defendant paid this money and took this receipt he asked Mr. Benyon, the president of the Bank, if there was any of the new stock that had not been taken, stating that if that were the case he, the defendant, would like to take some more of the new stock. The president of the Bank replied that all the new stock had been taken, and that the defendant could not have any more than fifty shares already subscribed for and taken. Defendant desired his certificate, but was told that he could only have a receipt, as they were not in a position to issue certificates. The defendant believed this statement of the president of the Bank, that all the new stock had been taken, to be true, but he was not told that all the money had been paid for the new stock.

Payments for new stock in the proposed increase of \$500,000 were made to the amount of \$330,100 on and prior to October 1, 1881, subsequent to which time additional payments were made until November 15, 1881. The total amount thus paid in for new stock was \$461,800.

Certificates for the new stock were issued on and after October 1, 1881, as called for, nearly all being delivered. The following is a copy of the certificate delivered to, and received by, the defendant, November 5, 1881, to wit:

"Fifty shares.

"Pacific National Bank of Boston, Mass.

"This certifies that William Aspinwall, of Brookline, is proprietor of fifty shares in the capital stock of the Pacific National Bank of Boston, Mass.; transferable only on the books of said Bank in person or by attorney on surrender of this certificate.

"A. I. Benyon, President.

"Boston, October 1, 1881.

"J. M. Pettengill, Cashier."

The Bank kept a book, called a stock ledger, in which it entered the names of the stockholders, their places of residence, and the number of shares held by each, in a debit and credit account.

An entry of fifty shares to the credit of William Aspinwall appears to have been made in this stock ledger, of which the following is a copy:

"William Aspinwall, of Brookline.
"October 1st, 1881. By fifty shares. \$5,000."

At what time this certificate and entry were made does not appear except by the books. The stock ledger shows that the amount of capital stock as credited to the respective parties named therein in a credit and debit form as aforesaid was, on November 18, 1881, \$961,300, and so remained to May 22, 1882, the entry as to said defendant being the same at the latter date as made originally as aforesaid.

On the 18th of November, 1881, said Bank became insolvent, suspended payment and closed its doors; and Daniel Needham, an examiner of national banks, was placed by the comptroller of the currency in charge of said Bank and all its funds, assets, records and books. The Bank remained under the exclusive charge and in the possession of said Needham, with its doors closed to business, until on or about March 18, 1882.

A committee of the directors went to Washington in December, 1881, and had an interview with the comptroller of the currency in relation to the affairs of the Bank. The fact that a vote had been passed in September previous to increase the capital to a million dollars, and that the full amount of that increase had not been subscribed for or paid in when the Bank failed, in November, was talked over in that conversation. It was discussed with the comptroller as to what should be done in view of the facts and as to what should be regarded as the capital of the Bank, and in pursuance of that interview the directors of the Bank, on December 18, 1881, passed the following vote, viz.:

"Voted, That whereas it was voted by this board on the thirteenth day of September last that the capital of this Bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in equal amount to that held by them; and whereas the stockholders were duly notified of said vote, and also that subscriptions to the new stock would be payable October 1; and whereas \$461,300 of said new stock has been taken and paid in; and whereas \$38,700 thereof has not been taken and paid in:

"Voted, That said \$38,700 of said stock be, and is hereby, canceled and deducted from said capital stock of \$1,000,000, and that the paid-up capital stock of this association amounts to \$961,300.

"Voted, That the comptroller of the currency be notified that the capital of this association has been increased in the sum of \$461,300, and that the whole amount of said increase has been paid in as part of the capital of this association, and that he be requested to issue his certificate of said increase to this association, according to law."

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The following certificate was thereupon sent to the comptroller of the currency by the cashier, and sworn to by him, to wit:

"Pacific National Bank of Boston.

"December 13, 1881.

"To the Comptroller of the Currency, Washington, D. C.:

"It is hereby certified that the capital stock of 'The Pacific National Bank of Boston' has been increased, pursuant to the articles of association of said Bank, in the sum of four hundred and sixty-one thousand three hundred dollars, all of which has been paid in, and that the paid-up capital stock of said Bank now amounts to nine hundred sixty-one thousand three hundred dollars.

"[Seal.] J^r M. Pettengill, Cashier."

Upon the receipt by the comptroller of a copy of the vote of December 13th and the certificate of the cashier of December 13th the comptroller sent, December 16, 1881, to the directors of the Bank the following certificate:

"Treasury Department.

"Office of Comptroller of the Currency.

"Washington, December 16, 1881.

"Whereas satisfactory notice has been transmitted to the comptroller of the currency that the capital stock of 'The Pacific National Bank of Boston, Mass.,' has been increased in the sum of four hundred and sixty-one thousand three hundred dollars in accordance with the provisions of its articles of association, and that the whole amount of such increase has been paid in:

"Now, it is hereby certified that the capital stock of 'The Pacific National Bank of Boston, Mass.,' aforesaid has been increased as aforesaid in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid into said Bank as a part of the capital stock thereof, and that the said increase of capital is approved by the comptroller of the currency.

"In witness whereof I hereunto affix my official signature.

"[Seal.] John J. Knox, Comptroller."

At a meeting of the directors of the Bank, held on the 14th of December, 1881, resolutions were adopted and a copy sent to the comptroller, whereby, after setting forth, by way of recital, several particulars with regard to the condition of the Bank, going to show that it might resume business under certain conditions, it was, amongst other things, resolved as follows, to wit:

"Resolved, That in the opinion of the directors of said Bank the interests of both creditors and stockholders require its early reorganization.

"Resolved, That the comptroller of the currency be requested to authorize the stockholders of the association to levy an assessment of 100 per cent upon the par value of the capital stock now paid in, viz., \$961,300, upon condition that said Weeks shall return to this Bank \$350,000 additional checks, as agreed, before said assessment shall be made."

Other resolutions adopted at the same time set forth a certain scheme of reorganization, and it was finally resolved as follows, to wit:

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"Resolved, That a copy of these resolutions be forwarded to the comptroller of the currency and his approval asked of the scheme of reorganization herein set forth, and that he grant the directors until January 15, 1882, to perfect said scheme of organization."

There was no vote of the stockholders of said association passed relating to increase or reduction of its capital stock, unless the vote of January 10, 1882, hereafter mentioned, was such. On the 16th day of December, 1881, the comptroller of the currency sent to the Bank the following communication, namely:

"Washington, Dec. 16, 1881.

"The Pacific National Bank of Boston, Massachusetts:

"The entire capital stock of the Pacific National Bank of Boston, Massachusetts, amounting to nine hundred and sixty-one thousand three hundred (961,300) dollars, having been lost, notice is hereby given to said Bank, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred (100) per cent, upon its shareholders *pro rata* for the amount of capital stock held by each, and that if such deficiency shall not be paid and said Bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver may be appointed to close up the business of the association according to the provisions of section 5224 of the Revised Statutes of the United States.

"In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the City of Washington and District of Columbia, this sixteenth day of December, A. D. 1881.

"[Seal.]

John Jay Knox.

"Comptroller of the Currency."

It does not appear that any communication was made to the defendant by the Bank with reference to said votes of the directors of December 13 and 14, or the certificates of the comptroller of December 16, or with reference to any change in the proposed increase in the capital of the Bank to one million dollars. The defendant never saw nor had communicated to him the books of the Bank or their contents. He was in the Bank almost daily and knew of the suspension on November 18, 1881. He does not remember or believe that he had knowledge of the proposed change, or the change made in the proposed increase of the stock of \$500,000, and of the certificate of the comptroller of December 16, 1881, until informed of the facts during the stockholders' meeting of January 10, 1882, or possibly on that day just before the meeting was organized and after the stockholders were assembled for the same, when he learned them.

On the 10th of January, 1882, the annual meeting of the stockholders of the Bank was held pursuant to call. At this meeting the examiner made a report of the condition of the Bank, a board of directors was chosen, and, after a statement by the counsel of the Bank of the facts relating to the increase of its capital stock, and as to how much had in fact been paid in under the vote to increase to one

million dollars, and of the legal result thereof, and of the vote of December 13, and the certificates of the comptroller of the currency, dated December 16, and after a full discussion of the matter, the following vote was adopted by stock vote, 5,494 shares in favor and 55 shares against:

"Voted, In accordance with the notice of the comptroller of the currency, dated December 16, 1881, there be, and hereby is, laid an assessment of one hundred per cent upon the shareholders of the Pacific National Bank of Boston, Mass., *pro rata* for the amount of capital stock of said Bank held by each shareholder.

"Voted, That the board of directors notify each shareholder of said assessment and collect the same forthwith."

Notice of this vote was sent to the stockholders.

The defendant attended said meeting of the shareholders, acting as the holder of and representing only the fifty shares of original stock held by him as trustee and guardian, and as such voted in the negative on the question of the assessment, expressly stating on his ballot that he voted as the holder of fifty shares of old stock held by him as trustee and guardian. He did not vote or in any way act at said meeting as the holder of any new stock, and notified the directors of the Bank that he did not consider himself a holder of any shares in the alleged increase of \$461,300.

April 23, 1882, the defendant paid the assessment voted January 10, 1882, on the fifty shares of original stock held by him as guardian and trustee, using his own personal funds to make such payment, but did not pay any assessment on any new stock.

On March 18, 1882, by permission of the comptroller of the currency, on representations to the effect that the Bank was then solvent, the directors took possession of the assets of the Bank, opened its doors to business, and continued to do a general banking business, loaning money, receiving and paying deposits, and paying debts and expenses, until the 20th day of May, 1882, but made no losses on new loans during that period.

On or about April 21, 1882, notice was sent to all those who had not paid the assessment voted January 10th, and amongst others to the defendant, that unless such assessment should be paid by the 28th of April, 1882, their stock would be advertised for sale, and would be sold at auction according to law on the 31st of May, 1882.

On the 22d of May, 1882, the defendant delivered to the cashier of the Bank the certificate for new stock which he had received, and a written demand for the repayment of the \$5,000 which he had paid thereon; and on the 30th of May he brought suit against the Bank therefor, which is still pending.

On the 20th of May, 1882, the directors voted to go into liquidation, and the business of the Bank was closed, and a receiver was appointed by the comptroller of the currency. It was found that the liabilities of the Bank, exclusive of capital stock, were \$2,500,000, and its assets worth about \$500,000.

The court further found that the board of directors and the comptroller of the currency

acted in good faith and without fraud in the premises.

It will be seen from the foregoing statement that all the material facts which existed in the case of *Delano v. Butler, qua supra*, existed in the present case, except that Delano actually paid the assessment made on his new stock as well as that made on his original stock; whereas, in the present case, Aspinwall refused to pay said assessment, repudiated the new stock, and has brought suit to recover the amount of his subscription paid therefor.

We do not think that this difference makes any difference in the liability. The new stock was created in a regular manner by the board of directors, who had authority for that purpose; it was subscribed and actually paid in by the stockholders; it was certified to the comptroller of the currency, and approved by him; and it was reported to the meeting of stockholders, and approved by them, as their almost unanimous vote for an assessment shows.

The most forcible objection to the validity of the increased capital of \$461,300 is that it did not equal the amount first voted for by the directors, which was \$500,000. But as reduced, it had the sanction of the directors, the approval of the comptroller of the currency, and the assent of the stockholders at their meeting on the 10th of January, 1882. The deficiency under \$500,000 arose from the fact that some of the stockholders did not avail themselves of their right to subscribe. The 11th section of the by-laws of the Bank has this express provision, that "if any stockholder should fail to subscribe for the amount of stock to which he may be entitled within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock." This gave the directors full power over the deficiency of the subscriptions, and was in itself authority, if no other existed, to validate the action of the directors and the comptroller in disregarding such deficiency, and equating the new stock to the subscriptions actually made and paid in. There was no express condition that the individual subscriptions should be void if the whole \$500,000 was not subscribed; and, in our judgment, there was no implied condition in law to that effect. Each subscriber, by paying the amount of his subscription, thereby indicated that it was not made on any such condition. It is not like the case of creditors signing a composition deed to take a certain proportion of their claims in discharge of their debtor. The fixed amount of capital stock in business corporations often remains unfilled, both as to the number of shares subscribed, and as to payment of installments; and the unsubscribed stock is issued from time to time as the exigencies of the company may require. The fact that some of the stock remains unsubscribed is not sufficient ground for a particular stockholder to withdraw his capital. There may be cases in which equity would interfere to protect subscribers to stock where a large and material deficiency in the amount of capital contemplated has occurred. But such cases would stand on their own circumstances. It could hardly be contended that the present case, in which more than

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ninety-two per cent of the contemplated increase of capital was actually subscribed and paid in, would belong to that category. In *Minor v. Mechanics Bank of Alexandria*, 26 U. S. 1 Pet. 46 [7: 47], only \$820,000 out of \$500,000 of capital authorized by the charter was subscribed in good faith; but the court did not regard this deficiency in the subscriptions as at all affecting the status of the corporation, or the validity of its operations.

Some reliance is placed on the words of the Act of Congress which authorizes an increase of capital within the maximum prescribed in the articles of association. They are found in section 5142 of the Revised Statutes, which declares that any banking association may, by its articles, provide for an increase of its capital from time to time, but adds, "No increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the comptroller of the currency, and his certificate obtained specifying the amount," etc. This clause would have been violated by an issue of \$500,000 of new stock, when only \$461,300 was paid in; but not by an issue of the exact amount that was paid in. The clause in question was intended to secure the actual payment of the stock subscribed, and so to prevent what is called watering of stock. In the present case the Statute was strictly and honestly complied with.

The argument of the defendant asks too much. It would apply to the original capital of a company as well as to an increase of capital. And will it do to say, after a company has been organized and gone into business, and dealt with the public, that its stockholders may withdraw their capital and be exempt from statutory liability to creditors, if they can show that the capital stock of the company was not all subscribed?

In the *Delano Case* the objection under consideration was discussed by *Mr. Justice Matthews*, speaking for the court, in the manner following. He there said: "In the present case the association did, in fact, finally assent to an increase of the capital stock, limited to \$461,300; that amount was paid in as capital and the comptroller of the currency, by his certificate, approved of the increase, and certified to its payment; so that there seems little room to question the validity of the proceedings resulting in such increase. All the requisites of the Statute were complied with. The circumstance that the original proposal was for an increase of \$500,000, subsequently reduced to the amount actually paid in, does not seem to affect the question, for the amount of the increase within the maximum was always subject to the discretionary power of the association itself, exerted in accordance with its articles of association, and to the approval and confirmation of the comptroller of the currency." (118 U. S. 649 [30:264]). In these remarks we entirely concur, and do not see why they do not furnish a complete answer to the objection arising from the change of amount. There was no agreement or condition that the amount should not be changed. The making of the change, therefore, could not have the effect of enabling the defendant to repudiate his subscription and his acceptance of the stock, unless he could show that the change

was fraudulently made, or was made to such an inequitable extent as to defeat the purpose and object of the increase.

If these views are correct, it makes no manner of difference what the defendant afterwards did in the way of objection or protest, either at the stockholders' meeting or elsewhere. The stock was lawfully created, the defendant subscribed for the shares in question and paid for them, and received his certificate; and nothing was afterwards done by the directors, the comptroller of the currency, or the stockholders in meeting assembled, which they had not a perfect right to do. The defendant became a stockholder; he held the shares in question when the Bank finally went into liquidation, and, of course, became liable under section 5151 of the Revised Statutes to pay an amount equal to the stock by him so held.

The judgment is affirmed.

THE LOUISVILLE, NEW ORLEANS
AND TEXAS RAILWAY COMPANY,

Plff. in Err.,

v.

STATE OF MISSISSIPPI.

(See S. C. Reporter's ed. 587-595.)

Mississippi Statute requiring railroads to provide separate accommodations for white and colored races, constitutional—distinction between state and interstate commerce.

1. The Mississippi Statute of March 2, 1868, as settled by the Supreme Court of that State, applies solely to commerce within the State; and this court must accept as conclusive such construction of the Statute of the State by its highest court.
2. The first section of said Statute, which requires railroads to provide separate accommodations for the white and colored races, is within the power of the State, and is not a regulation of interstate commerce and does not violate the commerce clause of the Constitution.
3. There is a commerce wholly within the State, which is not subject to the constitutional provision, and a distinction between commerce among States and between the citizens of a single State, conducted within its limits.

[No. 1195.]

Submitted Jan. 10, 1890. Decided March 3, 1890.

IN ERROR to the Supreme Court of the State of Mississippi to review a judgment sustaining a conviction for a violation of sec. 1 of the Mississippi Statute of March 2, 1868, requiring railroads to provide separate accommodations for the white and colored races.

Affirmed.

The facts are stated in the opinion.

Messrs. W. P. Harris and Yerger & Percy, for plaintiff in error:

The decision of the Mississippi court, that the Act of March 2, 1868, is valid, is in direct conflict with the judgment of this court.

Hall v. DeCuir, 95 U. S. 485 (24:547); *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 (30:244).

The carrier, its road, the process of commerce it conducts and the instruments employed, fall,

with the business to which they are inseparably attached, under the commerce clause of the Constitution.

Sherlock v. Alling, 93 U. S. 99, 104 (23: 819, 821); *Smith v. Alabama*, 124 U. S. 473 (31:510).

Imposing conditions upon the carrier are impediments to its free admission to the territory of the State as a carrier of interstate commerce.

Henderson v. Wickham, 92 U. S. 259 (23:543); *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727 (28:1137); *People v. Compagnie Générale*, 107 U. S. 59 (27:383).

There is a distinction between the vessel or vehicle employed, and fixtures or wharves or conveniences and agencies strictly territorial and local.

Cooley v. Wardens of Phila. 58 U. S. 12 How. 299 (13:966); *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 713 (18:96); *Mobile County v. Kimbal*, 102 U. S. 691 (26:288); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29: 158).

Mr. T. M. Miller for defendant in error.

Mr. Justice Brewer delivered the opinion of the court:

The question presented is as to the validity of an Act passed by the Legislature of the State of Mississippi on the 2d of March, 1868. That Act is as follows:

"Sec. 1. *Be it enacted*, That all railroads carrying passengers in this State (other than street railroads) shall provide equal, but separate, accommodation for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations.

"Sec. 2. That the conductors of such passenger trains shall have power, and are hereby required, to assign each passenger to the car or the compartment of a car (when it is divided by a partition) used for the race to which said passenger belongs; and that should any passenger refuse to occupy the car to which he or she is assigned by such conductor, said conductor shall have power to refuse to carry such passenger on his train, and neither he nor the railroad company shall be liable for any damages in any event in this State.

"Sec. 3. That all railroad companies that shall refuse or neglect within sixty days after the approval of this Act to comply with the requirements of section one of this Act, shall be deemed guilty of a misdemeanor, and shall, upon conviction in a court of competent jurisdiction, be fined not more than five hundred dollars; and any conductor that shall neglect to, or refuse to, carry out the provisions of this Act shall, upon conviction, be fined not less than twenty-five nor more than fifty dollars for each offense.

"Sec. 4. That all Acts and parts of Acts in conflict with this Act be, and the same are hereby, repealed, and this Act to take effect and be in force from and after its passage." Acts of 1868, p. 48.

The plaintiff in error was indicted for a violation of that Statute. A conviction in the trial court was sustained in the supreme court, and from its judgment this case is here on error. The question is whether the Act is a regulation of interstate commerce and therefore beyond

the power of the State; and the cases of *Hall v. DeQuir*, 95 U. S. 485 [24:547], and *Wabash R. Co. v. Illinois*, 118 U. S. 557 [30:244], are specially relied on by plaintiff in error.

It will be observed that this indictment was against the Company for the violation of section one, in not providing separate accommodations for the two races; and not against a conductor for a violation of section two, in failing to assign each passenger to his separate compartment. It will also be observed that this is not a civil action brought by an individual to recover damages for being compelled to occupy one particular compartment, or prevented from riding on the train; and hence there is no question of personal insult or alleged violation of personal rights. The question is limited to the power of the State to compel railroad companies to provide within the State separate accommodations for the two races. Whether such accommodation is to be a matter of choice or compulsion does not enter into this case. The case of *Hall v. DeQuir*, *supra*, was a civil action to recover damages from the owner of a steamboat for refusing to the plaintiff, a person of color, accommodations in the cabin specially set apart for white persons; and the validity of a Statute of the State of Louisiana, prohibiting discrimination on account of color, and giving a right of action to the party injured for the violation thereof, was a question for consideration. The steamboat was engaged in interstate commerce, but the plaintiff only sought transportation from one point to another in the State. This court held that Statute, so far as applicable to the facts in that case, to be invalid. That decision is invoked here; but there is this marked difference. The Supreme Court of the State of Louisiana held that the Act applied to interstate carriers, and required them, when they came within the limits of the State, to receive colored passengers into the cabin set apart for white persons. This court, accepting that construction as conclusive, held that the Act was a regulation of interstate commerce, and therefore beyond the power of the State. The chief justice, speaking for the court, said: "For the purposes of this case we must treat the Act of Louisiana of February 23, 1869, as requiring those engaged in interstate commerce to give all persons traveling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that Act in the courts below, and it is conclusive upon us as the construction of a state law by the state courts. It is with this provision of the Statute alone that we have to deal. We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the States." And again: "But we think that it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The Statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the

business as it comes into the State from without or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced."

So the decision was by its terms carefully limited to those cases in which the law practically interfered with interstate commerce. Obviously whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with colored passengers, was a question of interstate commerce, and to be determined by Congress alone. In this case, the Supreme Court of Mississippi held that the Statute applied solely to commerce within the State; and that construction, being the construction of the Statute of the State by its highest court, must be accepted as conclusive here. If it be a matter respecting wholly commerce within a State, and not interfering with commerce between the States, then obviously there is no violation of the commerce clause of the Federal Constitution. Counsel for plaintiff in error strenuously insists that it does affect and regulate interstate commerce, but this contention cannot be sustained.

So far as the first section is concerned (and it is with that alone we have to do), its provisions are fully complied with when to trains within the State is attached a separate car for colored passengers. This may cause an extra expense to the railroad company; but not more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the State.

No question arises under this section, as to the power of the State to separate in different compartments interstate passengers, or to affect in any manner, the privileges and rights of such passengers. All that we can consider is, whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the State is no invasion of the powers given to Congress by the commerce clause.

In the case of *Wabash Railway Co. v. Illinois*, *supra*, Mr. Justice Miller, speaking for the court, said: "If the Illinois Statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the

competency of the Illinois Legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the Statute under consideration, it is not subject to the constitutional provision concerning commerce among the States. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the State, which is not subject to the constitutional provision, and the distinction between commerce among the States and the other class of commerce between the citizens of a single State, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other. *The Daniel Ball*, 77 U. S. 10 Wall. 557 [19: 999]; *Hall v. DeCuir*, 95 U. S. 485 [24: 547]; *W. U. Tel. Co. v. Texas*, 105 U. S. 460 [28: 1067]."

The Statute in this case, as settled by the Supreme Court of the State of Mississippi, affects only such commerce within the State, and comes therefore within the principles thus laid down. It comes also within the opinion of this court in the case of *Stone v. Farmers Loan and Trust Co.* 116 U. S. 307 [29: 636].

We see no error in the ruling of the Supreme Court of the State of Mississippi, and its judgment is therefore affirmed.

Mr. Justice Harlan, dissenting:

The defendant, the Louisville, New Orleans and Texas Railroad Company, owns and operates a continuous line of railroad from Memphis to New Orleans. If one of its passenger trains—starting, for instance, from Memphis to go to New Orleans—enters the territory of Mississippi, without having cars attached to it for the separate accommodation of the white and black races, the Company and the conductor of such train are liable to be fined as prescribed in the Statute, the validity of which is here in question. In other words, it is made an offense against the State of Mississippi if a railroad company engaged in interstate commerce shall presume to send one of its trains into or through that State without such arrangement of its cars as will secure separate accommodations for both races.

In *Hall v. DeCuir*, 95 U. S. 485 [24: 547], this court declared unconstitutional and void, as a regulation of interstate commerce, an Act of the Louisiana Legislature which required those engaged in interstate commerce to give all persons traveling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. The court, speaking by Chief Justice Waite, said: "We think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The Statute now

under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. This disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause in the Constitution was adopted. The River Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

It seems to me that those observations are entirely pertinent to the case before us. In its application to passengers on vessels engaged in interstate commerce, the Louisiana enactment forbade the separation of the white and black races while such vessels were within the limits of that State. The Mississippi Statute, in its application to passengers on railroad trains employed in interstate commerce, requires such separation of races, while those trains are within that State. I am unable to perceive how the former is a regulation of interstate commerce and the other is not. It is difficult to understand how a state enactment, requiring the separation of the white and black races on interstate carriers of passengers, is a regulation of commerce among the States, while a similar

enactment forbidding such separation is not a regulation of that character.

Without considering other grounds upon which, in my judgment, the Statute in question might properly be held to be repugnant to the Constitution of the United States, I dissent from the opinion and judgment in this case upon the ground that the Statute of Mississippi is, within the decision in *Hall v. DeCuir*, a regulation of commerce among the States, and is therefore void.

I am authorized by Mr. Justice Bradley to say that, in his opinion, the Statute of Mississippi is void as a regulation of interstate commerce.

EMILE BOESCH ET AL., *Appts.*,

v.

ALBERT GRÄFF ET AL.

(See S. C. Reporter's ed. 697-709.)

Refusal to grant new trial not reviewable—assignment of patent—patented articles cannot be bought in foreign country, and sold here—master's report—exceptions to—damages—reduction of price.

1. The refusal of the circuit court to grant a rehearing is not open to consideration in this court.
2. An assignment of a patent absolute in form conveys the legal title, which is not defeated by a subsequent conditional contract that, if the payments are not made, the title is to return to the assignor,—particularly where the payments were made in full.
3. A dealer residing in the United States cannot purchase in another country articles patented there, from a person authorized to sell them, and import them to and sell them in the United States, without the license of the owners of the United States patent.
4. The report of a master is merely advisory to the court, which it may accept and act upon in whole or in part, according to its own judgment as to the weight of the evidence.
5. In dealing with exceptions to such reports the conclusions of the master have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake.
6. Where the patentee granted no licenses, and had no established license fee, but supplied the demand himself, and was able to do so, an enforced reduction of price is a proper item of damages, if proven by satisfactory evidence.
7. When a plaintiff seeks to recover because he has been compelled to lower his prices to compete with an infringing defendant, he must show satisfactorily that his reduction in prices was due solely to the acts of the defendant, or to what extent it was due to such acts.

[No. 1408.]

Submitted Jan. 10, 1890. Decided March 3, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of California in favor of complainant in

an action to recover damages for infringement of letters-patent for an improvement in lamp burners. *Reversed.*

The facts are stated in the opinion.

Mr. J. J. Scrivner, for appellants:

This case should be dismissed for want of jurisdiction, on the ground that the title to the patents, sufficient to maintain a suit for infringement, was not vested in the complainants.

Dibble v. Augur, 7 Blatchf. 90; *Gayler v. Wilder*, 51 U. S. 10 How. 477 (13: 504); *Sanford v. Messer*, 1 Holmes, 149; *Blanchard v. Eldridge*, 1 Wall. Jr. 337.

All parties having title to the patent are necessary parties, either as plaintiffs or as defendants; and those who dispute the title should be made defendants.

Edgerton v. Breck, 5 Bann. & Ard. 42; *Jordan v. Dobeon*, 2 Abb. U. S. 398.

A patentee may maintain a suit at law upon his patent in his own name, although he is under contract to assign it to others, if the contract has not been executed.

Wheeler v. McCormick, 11 Blatchf. 834; *Potter v. Wilson*, 2 Fish. Pat. Cas. 102; *Gamewell Fire Alarm Teleg. Co. v. Brooklyn*, 22 Pat. Off. Gaz. 1978.

This is not a case in which the complainant can waive profits and demand damages.

Root v. R. Co. 105 U. S. 189, 217 (26: 975, 981); *Livingston v. Woodworth*, 58 U. S. 15 How. 546 (14: 809); *Seymour v. McCormick*, 57 U. S. 16 How. 480 (14: 1024); *Goulds Mfg. Co. v. Cowing*, 12 Blatchf. 248.

Messrs. Jno. H. Miller and J. P. Langhorne, for appellees:

Here the assignment to Gräff, being on condition subsequent, the title vested in him at the time of the execution of the assignment.

4 Kent, Com. 125 *et seq.*; *Littlefield v. Perry*, 88 U. S. 21 Wall. 205 (22: 577).

The unrestricted sale of a patented article by a territorial grantee confers on the purchaser the right to use, not to re-sell, that particular article in any other territory of the United States.

Adams v. Burke, 1 Holmes, 40, 84 U. S. 17 Wall. 458 (21: 700); 4 Fish. Pat. Cas. 392; *McKay v. Wooster*, 2 Sawy. 373.

A difference in degree, not in kind—a difference in form, not in substance—cannot avoid a charge of infringement.

Winans v. Denmead, 56 U. S. 15 How. 330 (14: 717); *Morey v. Lockwood*, 75 U. S. 8 Wall. 280 (19: 339); *Gould v. Rees*, 82 U. S. 15 Wall. 187 (21: 39); *Eddy v. Dennis*, 95 U. S. 560 (24: 363); *Union Paper Bag Machine Co. v. Murphy*, 97 U. S. 120 (24: 985); *Held v. Rice*, 104 U. S. 734 (26: 911); *Brush v. Condit*, 132 U. S. 39 (33: 251).

The granting and refusing of rehearings are matters entirely in the discretion of the trial court.

Buffington v. Harvey, 95 U. S. 99 (24: 381); *Hall v. Weare*, 92 U. S. 728 (23: 500); *Mandeville v. Wilson*, 9 U. S. 5 Cranch, 15 (8: 28);

NOTE.—Assignment, before issuing and reissuing patent; recording; when assignment transfers extended terms. See note to *Gayler v. Wilder*, Bk. 13, p. 504.

When assignee may sue for infringement; when

patentee must; when they must join.—see note to *Wilson v. Rousseau*, Bk. 11, p. 1141.

As to damages for infringement of patent; treble damages.—see note to *Hogg v. Emerson*, Bk. 13, p. 824.

Welch v. Manderville, 11 U. S. 7 Cranch, 152 (8: 299); *U. S. v. Evans*, 9 U. S. 5 Cranch, 280 (8: 101); *Breedlove v. Nicolet*, 32 U. S. 7 Pet. 418 (8: 781).

A master's report is of the same solemnity as the verdict of a jury, and will not be interfered with, except for a plain and palpable abuse of power or discretion.

Tilghman v. Proctor, 125 U. S. 136 (81: 664); *Cullaghan v. Myers*, 128 U. S. 617 (32: 547); *Metsker v. Bonebrake*, 108 U. S. 86 (27: 654); *Bates v. St. Johnsbury & L. C. R. Co.* 32 Fed. Rep. 628; *Welling v. LeBau*, 32 Fed. Rep. 293, 34 Fed. Rep. 41; *Wooster v. Thornton*, 26 Fed. Rep. 274; *Bridges v. Sheldon*, 7 Fed. Rep. 17; *Greene v. Bishop*, 1 Cliff. 186; *Donnell v. Columbian Ins. Co.* 2 Sumn. 66; *Mason v. Crosby*, 3 Woodb. & M. 268.

Exceptions to a master's report should be precise and raise well defined issues. General allegations of error, without pointing to any particulars, are clearly insufficient.

Dexter v. Arnold, 2 Sumn. 125; *Mason v. Crosby*, 3 Woodb. & M. 258; *Harding v. Handy*, 24 U. S. 11 Wheat. 126 (6: 433); *Wilkes v. Rogers*, 6 Johns. 592; *Da Costa v. Da Costa*, 3 P. Wms. 140; *Dubourg de St. Colombe v. U. S.* 32 U. S. 7 Pet. 625 (8: 807).

Exceptions to a master's report cannot be made for the first time in this court.

Wilson v. McNamee, 102 U. S. 574 (26: 235); *Kinsman v. Parkhurst*, 59 U. S. 18 How. 289 (15: 385); *Springer v. U. S.* 102 U. S. 586 (26: 258); *Belk v. Meagher*, 104 U. S. 279 (26: 735); *Clark v. Fredericka*, 105 U. S. 4 (26: 988); *Pittsburgh, C. & St. L. R. Co. v. Heck*, 102 U. S. 120 (26: 58); *Canal & C. St. R. Co. v. Hart*, 114 U. S. 654 (29: 226); *Bell v. Bruen*, 42 U. S. 1 How. 169 (11: 189); *Doe v. Watson*, 49 U. S. 8 How. 263 (12: 1072); *Barrow v. Read*, 50 U. S. 9 How. 366 (13: 177); *Hudgins v. Kemp*, 61 U. S. 20 How. 54 (15: 856).

If the profits are found to equal the damages, the court will enter a decree for the profits.

Enigh v. Baltimore & O. R. Co. 6 Fed. Rep. 288.

Where it appears on the accounting that the infringer has realized no profits, but that the complainant has sustained damages, then a decree will be entered for such damages.

Marsh v. Seymour, 97 U. S. 348 (24: 963).

Where the accounting shows both damages and profits, and that the profits do not amount to so much as complainant's damages, the court will allow him to waive all claim to profits and take a decree for the damages.

Birdsall v. Coolidge, 93 U. S. 64 (23: 802); *Yale Lock Co. v. Sargent*, 117 U. S. 552 (29: 959); *Child v. Boston & F. Iron Works*, 19 Fed. Rep. 259; *Simpson v. Davis*, 22 Fed. Rep. 444; *Star Salt Caster Co. v. Croseman*, 4 Bann. & Ard. 566.

One element of such damages is the loss accruing from the enforced reductions of the complainant's selling prices.

Yale Lock Co. v. Sargent, 117 U. S. 552 (29: 959); *Philp v. Nock*, 84 U. S. 17 Wall. 460 (21: 679); *McComb v. Brodie*, 1 Woods, 153; *Fitch v. Bragg*, 16 Fed. Rep. 247; *Hobbie v. Smith*, 27 Fed. Rep. 668; *Creamer v. Bowers*, 35 Fed. Rep. 207; *Goulds Mfg. Co. v. Cowing*, 105 U. S. 253 (26: 987).

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Mr. Chief Justice Fuller delivered the opinion of the court:

Albert Gräff and J. F. Donnell filed their bill in the Circuit Court of the United States for the Northern District of California against Emile Boesch and Martin Bauer, to recover for infringement of letters-patent No. 289,571, for an improvement in lamp burners, granted on December 4, 1883, to Carl Schwintzer and Wilhelm Gräff of Berlin, Germany, assignors of one half to J. F. Donnell & Co., of New York, all rights being averred to be now vested in the complainants. Claim 1 alleged to have been infringed reads as follows:

"In a lamp burner of the class described, the combination, with the guide tubes, of a ring-shaped cap provided with openings for the wicks, said cap being applied to the upper ends of the guide tubes, so as to close the intermediate spaces between the same, substantially as set forth."

The patent was granted December 4, 1883, but prior to that, November 14, 1879, January 13, 1880, and March 26, 1880, letters-patent had been granted to Carl Schwintzer and Wilhelm Gräff by the government of Germany for the same invention. After a hearing on the merits, an interlocutory decree was entered, finding an infringement, and referring the case to a master for an accounting. The opinion will be found reported in 33 Fed. Rep. 279. A petition for a rehearing was filed and overruled. The case then went to the master, who reported that the infringement was willful, wanton and persistent; that the appellees had sustained damages to the extent of \$2,970.50; and that they waived all claims to the profits realized by the infringement. Exceptions were filed to this report and overruled, and a final decree entered in favor of Gräff and Donnell for \$2,970.50, with interest, and costs, from which decree this appeal has been prosecuted.

Appellants urge three grounds for reversal:

First. That a title to the patent sufficient to maintain a suit for infringement was not at the date of filing the bill vested in the complainant.

Second. That Boesch and Bauer could not be held for infringement, because they purchased the burners in Germany from a person having the right to sell them there, though not a licensee under the German patents.

Third. That the damages awarded were excessive.

These propositions are presented by some of the errors assigned, and are the only errors alleged which require attention, that which questions the infringement not being argued by counsel, and that which goes upon the refusal of the circuit court to grant a rehearing not being open to consideration here. *Buffington v. Harvey*, 95 U. S. 99, 100 [24: 381]; *Steines v. Franklin County*, 81 U. S. 14 Wall. 15, 22 [20: 846, 848]; *Pittsburgh, C. & St. L. R. Co. v. Heck*, 102 U. S. 120 [26: 58]; *Kennon v. Gilmer*, 131 U. S. 22, 24 [33: 110, 111].

The assignment by Schwintzer to Albert Gräff was dated the 22d day of April, 1885, was absolute in form and transferred title to six twenty-fourths of the patent for the expressed consideration of "the sum of one hun-

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dred dollars and for other valuable considerations;" but a contract between Schwintzer and Albert Gräff was produced by the latter upon his examination by the respondents, which read as follows:

"S. 1. Mr. Albert Gräff binds himself to pay to Mr. Carl Schwintzer, instead of the, in the patent letter mentioned, one hundred dollars for the first year, the sum of two hundred and fifty marks, payable on the 1st February, 1886, and each following year on the same date the sum five hundred marks (not less) till the amount of four thousand marks are paid in all.

"S. 2. Should Mr. Albert Gräff, of San Francisco, not be able to sell more than one thousand burners, called Diamond or Mitrail-leuse burners, No. 10,621, manufactured by Mess. Schwintzer & Gräff, of Berlin, he reserves to himself to make up a new agreement with Mr. Carl Schwintzer.

"S. 3. Should not Mr. Albert Gräff, San Francisco, against all expectations, stick to the agreements mentioned in S. 1 & 2, all titles of the patent letter ceded to him by Carl Schwintzer shall him return.

"S. 4. Mr. Carl Schwintzer, partner of the firm Schwintzer & Gräff, engages to deliver to Mr. Albert Gräff the said burners at the same price as before, if the market price of the metal does not exceed—make 150 % kos., and promise likewise to effect any order promptly, if in his power."

Albert Gräff testified in respect to the words, "instead of the, in the patent letter mentioned, one hundred dollars for the first year," etc., that they meant that, instead of the one hundred dollars mentioned in the assignment, he was to pay two hundred and fifty marks the first year, and that the contract was made one day later than the assignment. Counsel contends that the two documents must be construed together, and amount simply to an executory contract to assign when Gräff shall have paid the sum of 4,000 marks; that, therefore, Gräff could at most only be regarded as a licensee of the interest under the patent, until such time as his contract should be executed according to its terms; and that the legal right as to six twenty-fourths of the patent remained in Schwintzer, who was therefore a necessary party. It is evident that the agreement was not drawn by parties well versed in English, but their intention is sufficiently apparent. The assignment being absolute in form, conveyed the legal title, and on the next day the parties signed this contract, relating to the consideration, probably to enable Albert Gräff to pay the 4,000 marks out of the sales of the burners; at all events, it provides that if Gräff failed to carry out his covenants, then the title was to return to Schwintzer, which provision was in the nature of a security to him that he should be paid. The condition that if Mr. Albert Gräff did not, "against all expectations, stick to the agreements mentioned in S. 1 & 2, all titles of the patent letter ceded to him by Carl Schwintzer shall him return," is a condition subsequent. The title had already vested, but was liable to be defeated *in futuro* on failure of the condition. There has been no such failure, but on the contrary Albert Gräff has paid the 4,000 marks in full. We shall there-

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fore not reverse the decree on the ground first referred to.

Letters-patent had been granted to the original patentees for the invention by the government of Germany in 1879 and 1880. A portion of the burners in question were purchased in Germany from one Hecht, who had the right to make and sell them there. By section 5 of the Imperial Patent Law of Germany, of May 25, 1877, it was provided that "the patent does not affect persons who, at the time of the patentee's application, have already commenced to make use of the invention in the country, or made the preparations requisite for such use" (12 Pat. Off. Gaz. 183.) Hecht had made preparations to manufacture the burners prior to the application for the German patent. The official report of a prosecution against Hecht in the first criminal division of the Royal District Court, No 1, at Berlin, in its session of March 1, 1882, for an infringement of the Patent Law, was put in evidence, wherefrom it appeared that he was found not guilty, and judgment for costs given in his favor upon the ground "that the defendant has already prior to November 14, 1879—that is to say, at the time of the application by the patentees for and within the State—made use of the invention in question, especially, however, had made the necessary preparations for its use. § 5, *eodem*. Thus Schwintzer & Gräff's patent is of no effect against him, and he had to be acquitted accordingly."

It appears that appellants received two invoices from Germany, the burners in one of which were not purchased from Hecht, but, in the view which we take of the case, that circumstance becomes immaterial. The exact question presented is whether a dealer residing in the United States can purchase in another country articles patented there, from a person authorized to sell them, and import them to and sell them in the United States, without the license or consent of the owners of the United States patent.

In *Wilson v. Rousseau*, 45 U. S. 4 How. 646 [11: 1141], it was decided that a party who had purchased and was using the Woodworth planing machine during the original term for which the patent was granted, had a right to continue the use during an extension granted under the Act of Congress of 1836; and *Mr. Chief Justice Taney*, in *Bloomer v. McQuewan*, 55 U. S. 14 How. 539, 549 [14:582, 585], says, in reference to it, that "the distinction is there taken between the grant of the right to make and vend the machine and the grant of the right to use it." And he continues: "The distinction is a plain one. The franchise which the patent grants consists altogether in the right to exclude everyone from making, using or vending the thing patented without the permission of the patentee. This is all he obtains by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share in the monopoly, and that monopoly is derived from, and exercised under, the protection of the United States. And the interest he acquires necessarily terminates at the time limited for its continuance by the law which created it. . . . But the purchaser of the implement or machine for the

purpose of using it in the ordinary pursuits of life stands on different ground. In using it he exercises no rights created by the Act of Congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee. The inventor might lawfully sell it to him, whether he had a patent or not, if no other patentee stood in his way. And when the machine passes to the hands of the purchaser it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the Act of Congress."

In *Adams v. Burke*, 84 U. S. 17 Wall. 453 [21: 700], it was held that "where a patentee has assigned his right to manufacture, sell and use within a limited district an instrument, machine or other manufactured product, a purchaser of such instrument or machine, when rightfully bought within the prescribed limits, acquires by such purchase the right to use it anywhere, without reference to other assignments of territorial rights by the same patentee;" and that "the right to the use of such machines or instruments stands on a different ground from the right to make and sell them, and inheres in the nature of a contract of purchase, which carries no implied limitation to the right of use within a given locality." *Mr. Justice Bradley*, with whom concurred *Mr. Justice Swayne* and *Mr. Justice Strong*, dissented, holding that the assignee's interest "was limited in locality, both as to manufacture and use." The right which Hecht had to make and sell the burners in Germany was allowed him under the laws of that country, and purchasers from him could not be thereby authorized to sell the articles in the United States in defiance of the rights of patentees under a United States patent. A prior foreign patent operates under our law to limit the duration of the subsequent patent here, but that is all. The sale of articles in the United States under a United States patent cannot be controlled by foreign laws. This disposes of the second error relied on.

This brings us to the consideration of the damages reported by the master, which report was confirmed by the court; and we are met on the threshold by the objection that the exceptions taken in the circuit court were not sufficiently specific to entitle appellants to raise the questions here upon which they submit argument.

These exceptions are as follows:

"First exception. For that the said master has in and by his said report certified on page six thereof that 'the cap was the essential feature' of the Gräff burner. The respondent adopted Gräff's arrangement, and then reduced the price of the burner, forcing Gräff to do the same in order to hold his trade. The evidence shows that the reduction in prices by Gräff was solely due to the respondents' infringement. So far as the evidence shows, the only competitor with Gräff in the use of his cap arrangement during the period covered by the accounting, was the respondent; whereas the said master ought to have certified that respondent came innocently into possession of the burners by purchase in the ordinary course of business from legitimate manufacturers

thereof in Germany, and that immediately upon being notified that they were claimed to be an infringement he ceased to sell the same. The evidence shows that at about the time Gräff made the alleged reduction in the price of his burners there were thrown upon the market lamp-burners of other kinds of equal or greater power, which came directly in competition with the Gräff burner, and that the reduction in price was the result of such competition; that the sale of 14 infringing burners by respondent in the course of three years' trade could not have been a sufficient competition to plaintiff's business to cause him to make a reduction of price, where the testimony shows that during the period from March 1st, 1896, when complainant reduced the price of burners, until October 31st, 1897, he sold about 6,000 of said burners.

"Second exception. For that the said master hath certified 'that the amount of damages which the complainant has suffered and sustained from and by reason of said infringement is two thousand nine hundred and seventy dollars and fifty cents;' whereas he should have reported nominal damages.

"In all which particulars the report of the said master is, as the said respondent is advised, erroneous, and the said respondent appeals therefrom to the judgment of this honorable court."

It is conceded that these exceptions raise two points, namely, that the infringement was not willful, and that the reduction of prices was not caused solely by it. And this, as it seems to us, is quite sufficient to permit the real question involved to be passed upon. The master awarded \$2,970.50 as damages for the reduction in price, which, he holds, was caused by the respondents' infringement. He says:

"After the reduction in his prices, complainant sold, at wholesale, one thousand three hundred and twelve ten-wick burners, at a price twenty-five cents less on each than his original price; four hundred and fifty twelve-wick burners, at fifty cents less; five hundred and ninety-two sixteen-wick burners, at seventy-five cents less; and seven hundred and sixteen twenty-wick burners at seventy-five cents less, a total difference between the original and the reduced prices of one thousand five hundred and thirty-five dollars and fifty cents.

"In addition, he sold at retail, on an average, five burners on each of the five hundred and seventy-four business days between the time when his prices were first reduced and October 31st, 1897; the number of burners thus sold being two thousand eight hundred and seventy, which were sold at a minimum reduction of fifty cents each under original prices—a total difference between the original and the new prices of fourteen hundred and thirty-five dollars; which sum, added to the said sum of one thousand five hundred and thirty-five dollars and fifty cents, gives an aggregate amount of two thousand nine hundred and seventy dollars and fifty cents."

The report of a master is merely advisory to the court, which it may accept and act upon in whole or in part, according to its own judgment as to the weight of the evidence. *Kimberly v. Arms*, 129 U. S. 512, 528 [32: 764,

767]. Yet, in dealing with exceptions to such reports, "the conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part." *Tilghman v. Proctor*, 125 U. S. 136, 149 [31: 664, 668]. We think there was error here within that rule.

Where the patentee granted no licenses, and had no established license fee, but supplied the demand himself, and was able to do so, an enforced reduction of price is a proper item of damages, if proven by satisfactory evidence. *Yale Lock Manufacturing Co. v. Sargent*, 117 U. S. 586 [29: 954]. The damages must be actual damages, but where the patented feature is the essential element of the machine or article, as in the case just cited, if such damages can be ascertained they may be awarded. When, however, a plaintiff seeks to recover because he has been compelled to lower his prices to compete with an infringing defendant, he must show that his reduction in prices was due solely to the acts of the defendant, or to what extent it was due to such acts. *Cornely v. Markwald*, 131 U. S. 159 [38: 117]. There must be some data by which the actual damages may be calculated. *New York v. Ransom*, 64 U. S. 28 How. 487 [16: 515]; *Rude v. Westcott*, 130 U. S. 152 [32: 888].

The master reported "that the number of lamp burners proven to have been sold by respondents, containing the invention claimed in and by the first claim of complainants' letters-patent, is fourteen, provided that only the capped burners sold contain said invention, and that the number is one hundred and fourteen, if the half-capped burners so sold are to be held to contain said invention."

The evidence established that the first invoice of lamp burners contained fifty 20-wick burners with caps, of which respondents sold four; and fifty 12-wick burners with half caps, of which respondents sold twelve; and fifty 16-wick burners with half caps, of which respondents sold forty-four; and that respondents altered the forty-six remaining 20-wick burners by changing their caps to half caps, and sold forty-four. This makes the one hundred with half caps, referred to by the master. Of the second invoice, the respondents sold four 20-wick capped burners and six 16-wick capped burners, making, with four 20-wick burners with caps sold out of the first invoice, the fourteen capped wick burners reported as thus disposed of. The original bill in this case was filed September 17, 1886. It had been preceded by another suit, which had been dismissed. The goods in the second invoice, it is testified, had been ordered before this suit was commenced, but the invoice is dated October 16, 1886. This invoice contained one hundred 20 and one hundred 16-wick burners with caps, of which respondents sold four 20-wick and six 16-wick burners unchanged as before stated. Most of this lot were still on hand at the time the testimony was taken, though some had been altered into what was called the "Boesch burner," which had no caps at all, and sold as such.

The evidence tends to establish a profit of \$1.85 on the 20-wick burners; \$1.50 on the 16-wick, and 75 cents on the 12-wick. This would show a profit of \$23.80 on the fourteen capped burners, being eight 20-wick and six 16-wick burners; and a profit of \$156.40 on the one hundred half-capped burners, being forty-four 20-wick, forty-four 16-wick and twelve 12-wick burners. Respondents had been advised by their counsel that the burners with half caps were not an infringement. The cap was the invention in question. The claim infringed, as already seen, was a combination, with the guide tubes, of a ring-shaped cap provided with openings for the wicks, said cap being applied to the upper ends of the guide tubes, so as to close the intermediate spaces between the same. The half cap admitted the air directly to each wick, and in that respect differed from the claim of the patent. It is argued, however, with much force, on behalf of the appellees, that the difference was a difference in degree and not in kind, as the air reached the wick when the full cap was used, and the functions of the latter as a strengthening band, a protector of the tops of the tubes, and in other particulars, were performed by the half cap; and this position is not resisted by counsel for appellants. But assuming that the sale of one hundred burners with half caps was an infringement, we are not prepared to concede that the sale of one hundred and fourteen burners under the circumstances detailed could have had the effect in compelling a reduction of price which has been ascribed to it.

It is remarked by the master that "it is a fact of common knowledge that there is to be found on sale in the market a great variety of lamp burners, among which, as shown by the evidence, have been for many years burners of the same general class as complainants'." This being so, and Boesch & Bauer being dealers in burners generally, it is not to be presumed that Gräff reduced his prices, for nineteen months, on six thousand burners, not on account of competition in burners, but because of the effect upon his particular burner created by the sale of fourteen of the same kind, and of one hundred differing but the same in principle. Conceding that as Gräff granted no licenses, and had no established license fee, but supplied the demand for his burner himself, and was able to supply that demand, and that, therefore, if he was compelled to lower the price by the infringement he could recover for the loss thus sustained, does the evidence satisfactorily establish that the reduction in prices was due solely to the acts of the defendants in infringing? The opinion of Mr. and Mrs. Gräff to that effect is not sufficient, and even that is so qualified as to fall far short of expressing it. The master allowed upon 8,070 burners sold at wholesale, and on 2,870 sold at retail, by the complainants, between March 1, 1886, and October 31, 1887, or 5,940 in all. The sales of one hundred and four out of the one hundred and fourteen sold by the respondents apparently took place prior to the filing of the bill. Boesch had been in the business for twenty years. The firm of Boesch & Bauer carried a large stock of lamps, embracing a hundred varieties in styles and sizes, under a very large variety of names.

Gräff's burner was a "mitrailleuse" burner, and called "Diamond," as the Miller burner

was. Boesch testified that there was no difference between the selling price of the Hecht, the Miller and the Boesch burners; that there was no demand in their trade for a mitrailleuse burner with a cap; and that in his judgment the Boesch burner was better than the Hecht. This evidence may properly be considered in connection with the fact that but one hundred and fourteen were sold.

We cannot concur with the conclusion that the result of the sales of the one hundred and fourteen burners was to keep Gräff's prices for his particular burner down from March 1, 1886, to October 31, 1887. If Boesch and Bauer had a burner which satisfied the public just as well as Gräff's, and which they could sell cheaper, Gräff cannot complain of the consequences. If Gräff's burner was so much better than any other that the public must have it he could make his own price, and, if within the bounds of reason, find a sufficient market.

In the state of the case disclosed by this record, the complainants must be content with the protection of an injunction and a recovery of the profits realized from the infringing sales. *The decree is reversed and the cause remanded for further proceedings in conformity with this opinion.*

CHARLES A. GREGORY, *Appt.*,

JOHN^d G. STETSON.

(See S. C. Reporter's ed. 579-587.)

Parties in equity—who necessary—contract—party affected by decree.

1. In equity, all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, so that there may be a complete decree, which shall bind them all.
2. No final decree can be rendered affecting the parties to the contract sued on without making them all parties to the suit.
3. A court cannot adjudicate directly upon a person's right without having him either actually or constructively before it.
4. Notwithstanding the Statute and the 47th Equity Rule, a circuit court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby.

[No. 1514.]

Submitted Jan. 6, 1890. Decided March 3, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Massachusetts dismissing a suit in equity on demurrer, in an action to obtain a decree that complainant was the owner of a note and that defendant held the same as trustee for complainant and that the same be paid to him.

Affirmed.

The facts are stated in the opinion.

Opinion below, 39 Fed. Rep. 708.

Mr. F. A. Brooks, for appellant:

Mrs. Pike was beyond the jurisdiction of the court, and it was impossible for the plaintiff in this case to join her as a party defendant therein, and therefore it was not necessary for him to attempt to do so.

47th Rule of Equity Practice; *Williams v. Bankhead*, 86 U. S. 19 Wall. 571 (22: 185); *Van Bokkelen v. Cook*, 5 Sawy. 587; U. S. Rev. Stat. § 787.

The order of July 9, 1887, was passed on motion of Mrs. Pike without formal notice to Gregory, the plaintiff in that suit, and without due process of law in any respect.

Smith v. Mason, 81 U. S. 14 Wall. 419 (20: 748); *Marshall v. Knox*, 88 U. S. 16 Wall. 556 (21: 482); *Pennoyer v. Neff*, 95 U. S. 714 (24: 565); *Walden v. Craig*, 39 U. S. 14 Pet. 154 (10: 395); *Nations v. Johnson*, 65 U. S. 24 How. 195 (16: 628); Wells, Jurisdiction, chap. 11, § 82, and cases cited.

Mr. John G. Stetson *pro se*.

Mr. Justice Lamar delivered the opinion of the court:

This is a suit in equity brought in the Circuit Court of the United States for the District of Massachusetts by Charles A. Gregory, a citizen of Illinois, against William C. N. Swift and John G. Stetson, citizens of Massachusetts, for the alleged violation by Stetson of the following contract of bailment as respects the \$15,000 note therein mentioned:

"Boston, Dec. 24, 1886.

"Received of Thomas H. Talbot, Esq., as attorney for Mary H. Pike, executrix of Frederic A. Pike, and of Francis A. Brooks, Esq., as attorney of Charles A. Gregory, two notes of hand made or signed by W. C. N. Swift, of New Bedford, dated April 20, 1883, one for \$15,000, on two years' time, and one for \$20,834.60, three years' time, payable to Charles F. Jones. Said notes are to be held by me, subject to the joint order and direction of the said Talbot and Brooks, and dealt with as they may jointly direct.

"John G. Stetson."

The amended bill filed on the 30th of January, 1889, alleged that on the 10th of January, 1887, complainant filed a bill in that court against the defendants Swift and Stetson, and one Thomas H. Talbot, and referred to that bill as in part incorporated therein. The material allegations of that bill, so far as concerns this case, are as follows: That on or about the 16th of December, 1884, complainant filed a bill in one of the state courts of Massachusetts against the defendant Swift and one Frederic A. Pike, of Calais, in the State of Maine, to obtain possession of the two notes heretofore mentioned, then in the possession of Pike, which suit was afterwards removed into the court below, where it was then pending and undetermined; that the defendants to that suit filed their respective answers to the bill, issues were joined, proofs taken and the case assigned for final hearing, but was not heard, for the reason that it was then agreed in writing between Pike and

NOTE.—When parties interested are numerous, part may maintain a bill in equity for benefit of all. See note to *Smith v. Swormstedt*, Bk. 14, p. 942; also note to *Bacon v. Robertson*, Bk. 15, p. 499.

As to parties necessary, in equity, want of; when a

defense; when objection to be made,—see note to *Morgan v. Morgan*, Bk. 4, p. 242; also note to *Marshall v. Beverly*, Bk. 5, p. 97.

As to parties in error, who necessary, see note to *Owings v. Kincannon*, Bk. 8, p. 727.

complainant to refer their controversy to the Hon. E. R. Hoar to determine the true ownership and rights of possession of the notes referred to, and in case of the death of either or both of them their respective legal representatives should be bound by the award to be made; that soon after the submission to the referee Pike died testate, having appointed his wife, Mary A. Pike, executrix of his will, and residuary legatee of his estate, who proceeded in relation to the matter before the referee in the same manner as if the submission had been entered into by her personally; and that the referee after hearing the parties interested made and published the following award, and delivered a copy of the same to complainant:

"The undersigned, referee in the matter submitted to him by Charles A. Gregory and Frederic A. Pike, under the submission, a copy of which is hereto annexed, having duly heard the parties, awards and determines thereon, and this is my final award in the premises as follows, to wit: That the said Pike is not entitled to detain or withhold from said Gregory the two Swift notes mentioned or described in the submission, except for the purpose of securing the payment of another certain note, signed by G. W. Butterfield and Charles F. Jones, for the sum of \$2,437.50, dated July 26, 1883, and payable to C. H. Eaton, of Calais, Me., or order, a copy of which is hereto annexed; that upon or after the said Eaton note, or whatever sum is now due thereon with interest, as stipulated in said note, shall have been paid by the said Gregory, the said Gregory will be entitled to the possession of the two Swift notes, one of \$15,000, and one of \$20,384.60. He also finds and determines that upon the payment of said Eaton note by said Gregory, he will be entitled to a transfer or delivery to himself of said Eaton note, and to the benefit of any sums which may be recovered of the said Butterfield and Jones on said note. Dated at Boston, the thirtieth day of November, in the year one thousand eight hundred and eighty-six.

"E. R. Hoar.

"On or before January 1, 1884, we promise to pay C. H. Eaton, or order, two thousand four hundred and thirty-seven dollars and fifty cents, with interest at the rate of one per cent per month from date. Value received.

"G. W. Butterfield;

"Charles F. Jones."

It was then alleged that afterwards Mrs. Pike, having examined the award which had been temporarily returned to the referee for that purpose, undertook to revoke the power under which the referee had acted, and to vacate and annul the award made by him, whereupon the referee, upon being waited upon by complainant through F. A. Brooks, his attorney, accompanied by Thomas H. Talbot, the attorney for Mrs. Pike, returned the award to complainant and gave the said notes to said attorneys, who thereupon took them to defendant Stetson, receiving from him the receipt heretofore set out in full; that complainant on the 4th of January, 1887, in order to entitle himself to the sole and exclusive possession of the notes heretofore mentioned, paid the note of \$2,437.50 in favor of C. H. Eaton, mentioned in the award, whereby he became enti-

tled to receive from the defendant Stetson the two notes referred to, the rights of Mrs. Pike and her attorney, Talbot, in and to the same thus having ceased and become of no effect; and that by an instrument in writing dated December 5, 1884, Charles F. Jones, the payee of the two notes, transferred and assigned them to complainant, and authorized him to sue for and collect them, using the payee's name for that purpose, and to deal with them generally as his own property.

The bill in this case then alleged that the defendants Swift and Stetson each answered that bill, and that issue was duly joined upon those answers; that on the 18th of June, 1887, while the defendant Stetson was in possession of the \$15,000 note by virtue of the contract heretofore set out in full, the defendant Swift filed his petition in the old equity cause of *Gregory v. Pike and Swift* to enjoin the suing out or levying of an execution upon any judgment that might be rendered upon the law side of the court upon that note, which had matured and had been sued upon in the name of the payee Jones, until the final determination of the rights of the parties to that equity cause; that on the 9th of July it was ordered by the court below in the old equity cause that the defendant Stetson file the \$15,000 note in the action at law of *Jones v. Swift*, and that upon the entry of judgment in that action the defendant Swift be directed to pay into the registry of the court the amount of that judgment, the same to be held subject to the rights of the parties claiming the note, and to abide the decision of the court in that cause; and that in obedience to those orders of court, and by the voluntary procurement of the defendant Swift, judgment was entered in the action at law against Swift on the \$15,000 note, the note was delivered up by the defendant Stetson and filed with the papers in that action, and the amount of the judgment was paid by Swift to the clerk of the court below, who then claimed to hold the same "subject to the rights of the parties claiming said note and to abide the decision of the court" in the old equity cause of *Gregory v. Pike et al.*

The bill then alleged that all the orders and proceedings heretofore mentioned as pertaining to that old cause in equity were irregular, improper and contrary to law; that at and before the time of the passage of said orders the cause in which they were made had been abated by the death of Pike, one of the defendants thereto, which fact was suggested to the court by complainant on the 6th of January, 1887; that complainant is entitled to the benefits of the action at law heretofore mentioned and to the proceeds of the judgment obtained therein, he having by leave of the court intervened in that action, as a claimant of the note in suit, before the entry of judgment upon it; that the amount of the judgment having been paid over to the defendant Stetson, as clerk of the court, the same was entered satisfied by him, and the money so received was deposited in bank, where it has since remained, the \$15,000 note being filed in said old equity cause; and that the defendant Stetson claims to have been duly authorized by the aforesaid orders of court to deal with the note as above set forth, and to be exempted by those orders from all liability to

complainant under the before-mentioned receipt of December 24, 1886.

The bill prayed that the money paid by the defendant Swift to the defendant Stetson, as clerk of the court, in satisfaction of the judgment rendered on the \$15,000 note, be remanded to Stetson, in his individual capacity, as if no orders, as above recited, had been passed, and that he be ordered to pay over the proceeds of that note to complainant, and for other and further relief.

Later amendments to the prayer of the bill were, that complainant be decreed to have become the sole owner of the \$15,000 note prior to July 9, 1887, and that the defendant Stetson's possession of the same thereafter was that of a trustee holding for complainant's sole use and benefit; and a further prayer that if the relief sought against Stetson could not be granted, the defendant Swift be ordered and decreed to pay to complainant the amount of said \$15,000 note.

The defendants filed separate demurrers to the bill, which were sustained by the court, and the bill was dismissed. *Gregory v. Swift*, 89 Fed. Rep. 708. The complainant thereupon prosecuted his appeal to this court.

The bill having been dismissed by agreement, as respects the defendant Swift, the only questions in the case for our consideration are those relating to the demurrer of the defendant Stetson. That demurrer rests on ten grounds, but the court below considered only one of them, viz., the ninth one, which is as follows: "This bill is defective for want of proper parties, in that it does not make Mary H. Pike, executrix of Frederic A. Pike, Thomas H. Talbot and Francis A. Brooks, or either of them, parties thereto."

We are of opinion that the decree of the court below must stand. The rule as to who shall be made parties to a suit in equity is thus stated in Story's Eq. Pl., sec. 72: "It is a general rule in equity (subject to certain exceptions, which will hereafter be noticed) that all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all. By this means, the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it or to others, who are interested in the subject matter, by a decree, which might otherwise be

grounded upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto." See also 1 Daniell's Ch. Pl. and Pr. 246 *et seq.*

In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that a court cannot adjudicate directly upon a person's right without having him either actively or constructively before it. This principle is fundamental. The allegations of the bill show that the contract sued on was made and entered into subsequently to the termination of the proceedings before the referee. By the terms of that contract the note in dispute between Mrs. Pike and the complainant was to be held by the bailee, Stetson, "subject to the joint order and direction" of their respective attorneys. It seems too plain to require argument that complainant Gregory, Mrs. Pike, Talbot, Brooks and Stetson all had an interest in the subject matter of the contract—such an interest, too, as brings the case within the rule just announced.

The point was made in the court below, and it is also pressed here, that, Mrs. Pike being a nonresident and beyond the jurisdiction of the court, it was impossible to join her as a party defendant to this suit, and that it was therefore unnecessary to attempt to do so. The court below ruled against the complainant on this point, and we see no error in that ruling. The general question involved therein has been before this court a number of times, and it is now well settled that, notwithstanding the Statute referred to and the 47th Equity Rule, a circuit court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby. *Shields v. Barrow*, 58 U. S. 17 How. 130, 141, 142 [15: 158, 162]; *Coiron v. Millaudon*, 60 U. S. 19 How. 113, 115 [15: 575], and cases there cited.

But even admitting the complainant's contention as regards the making of Mrs. Pike a party to this suit, it does not follow that Talbot and Brooks should not have been made parties. As we have shown, they had a substantial interest in the subject matter of the contract sued on, and they should have been made parties to the suit.

We see no error in the decree of the court below prejudicial to the complainant, and it is therefore affirmed.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1889.

Vol. 134.

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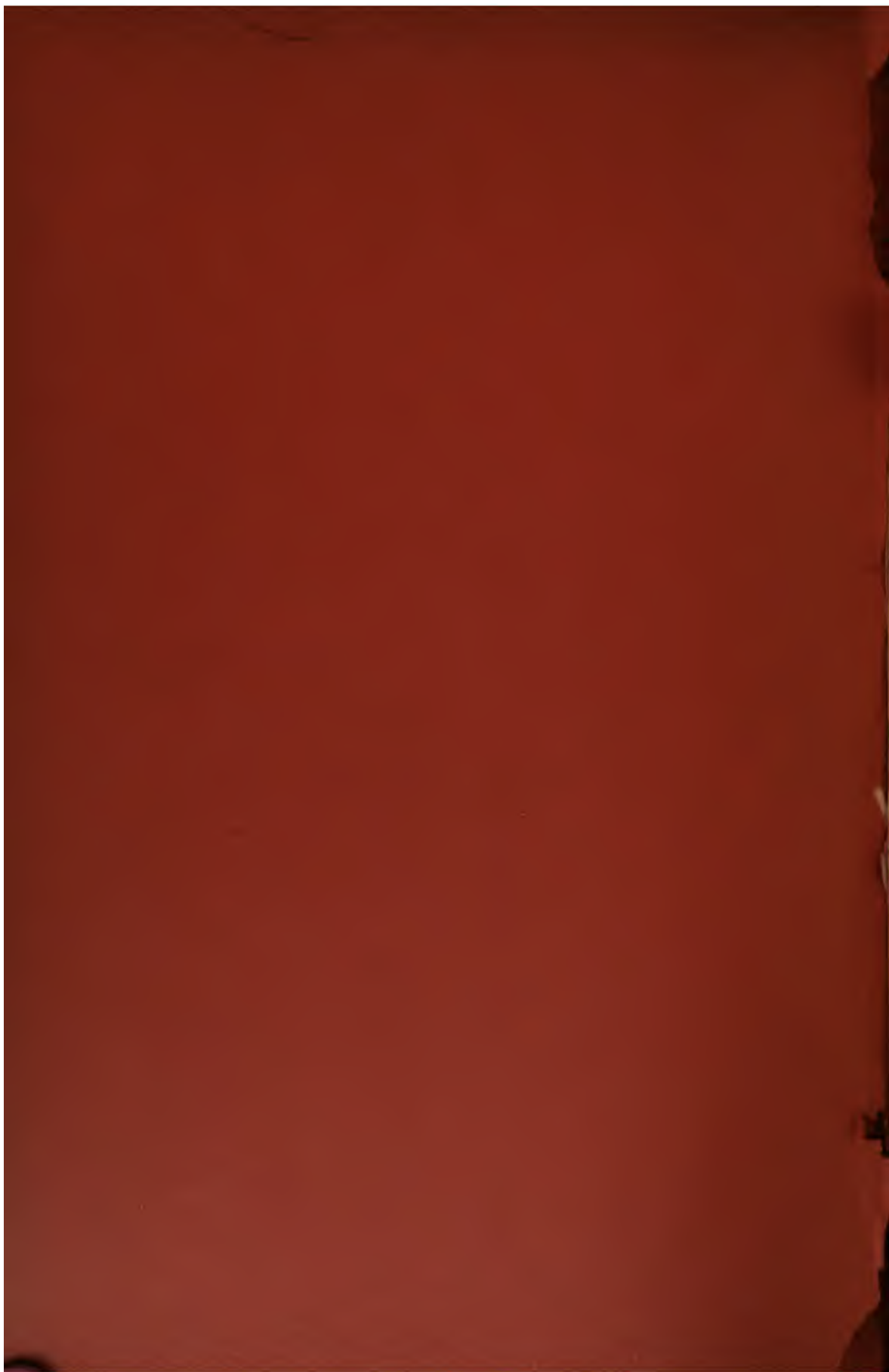
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			1007-1008	" " " "	1297
			1009-1010	" " " "	1298
			1011-1012	" " " "	1299
			1013-1014	" " " "	1300
			1015-1016	" " " "	1301
			1017-1018	" " " "	1302
			1019-1020	" " " "	1303
			1021-1022	" " " "	1304



THE DECISIONS OF THE Supreme Court of the United States,

AT
OCTOBER TERM, 1889.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

EUGENE EILENBECKER ET AL., *Plffs. in Err.*,
v.

THE DISTRICT COURT OF PLYMOUTH COUNTY, IOWA.

(See S. C. Reporter's ed. 31-40.)

U. S. Constitution—trial by jury—judicial power—power of courts to punish for contempt, without trial by jury—disobedience of process—due process of law—Iowa Statute prohibiting sale of liquors—proceeding in equity.

1. The first eight articles of the Amendments to the Constitution have reference to powers exercised by the government of the United States, and not to those of the States.
2. This limitation is true in regard to clause 3 of section 2 of article III. of the original Constitu-

tion, that the trial of all crimes, except cases of impeachment, shall be by jury.

3. Article III. is intended to define the judicial power of the United States, and it is in regard to that power that the declaration is made that the trial of all crimes, except in cases of impeachment, shall be by jury, and it was not intended to be applied to trials in the state courts.
4. Proceedings according to the common law for contempt of court are not subject to the right of trial by jury. It is one of the powers necessarily incident to a court of justice that it may punish for contempt in order to vindicate its dignity, enforce its orders or protect itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power.
5. Courts have the power to punish in this summary manner the disobedience of any party to any lawful writ, process, order, rule, decree or command of the court.

NOTE.—Contempt; power of court; right to trial by jury.

The power to punish for contempt is inherent in a court. *Re Terry*, 128 U. S. 289 (32:405); *Kregel v. Bartling*, 23 Neb. 848.

The courts of the United States have power to punish for contempts of court committed in the presence of the said courts, or so near thereto as to obstruct the administration of justice. *Re Savin*, 181 U. S. 267 (33:150); *Re Terry*, 128 U. S. 289 (32:405).

In suitable cases, a legislative body may punish a member for a contempt, technically termed breach of privilege. 2 Bishop, *Crim. Law*, §§ 247, 249, *note*; *Anderson v. Dunn*, 19 U. S. 6 Wheat. 204 (5:242); *Burdett v. Abbott*, 14 East, 1; *Thompson's Case*, 8 How. St. Tr. 1; *Beaumont v. Barrett*, 1 Moore, P. C. 59.

In circumstances justifying, it may expel a member. *Story, Const.* §§ 837, 838; *Cooley, Const. Lim.* 133; *Hiss v. Bartlett*, 3 Gray, 468.

As to powers of court to punish for contempt, see *note to Ex parte Robinson*, Bk. 22, p. 205.

That there is no review of decree punishing for contempt; limits to rule,—see *note to New Orleans v. N. Y. M. S. Co.* Bk. 22, p. 354.

Right to trial by jury.

The provisions of the South Carolina Constitution giving the right of trial by jury to every person 184 U. S.

charged with any crime or offense did not take away the power, previously existing in municipal courts, to try offenders for violating municipal ordinances without jury. *Anderson v. O'Donnell*, 1 L. R. A. 632, 29 S. C. 355.

A person held to answer for a contempt is not entitled to a jury trial. *McDonnell v. Henderson*, 74 Iowa, 619.

Va. Code, § 717, authorizing a commitment for a fine imposed by a justice, is not unconstitutional for failure to provide for a jury trial. *Marx v. Milstead*, 18 Va. L. J. 378, 11 *Crim. L. Mag.* 688.

In proceedings under the Minnesota Insolvent Act, a debtor is not entitled to a jury trial. *Re Howes*, 38 Minn. 408.

As to trial by jury; how affected by Seventh Amendment to the Constitution,—see *note to Justices of N. Y. v. U. S. Bk.* 19, p. 658.

As to jury, of what number; practice in regard to; illness or insanity of one; thirteen or eleven jurors; wrong person serving as juror by mistake,—see *note to Slusby v. Foote*, Bk. 14, p. 394.

As to causes of challenge of jurors and their qualifications,—see *note to Clinton v. Englebrecht*, Bk. 20, p. 659.

As to discharge or withdrawal of juror before verdict; effect of,—see *note to U. S. v. Perez*, Bk. 6, p. 165.

As to the questions of law and fact, for court or jury, in civil and criminal cases, see *note to King v. Delaware Ins. Co.* Bk. 3, p. 155.

6. A proceeding by which a fine and imprisonment are imposed upon parties for contempt in violating the injunction of the court, regularly issued in a suit to which they were parties, without trial by jury, is due process of law, whether the contempt occurred in the course of a criminal proceeding or of a civil suit.
7. That part of the Statute of Iowa concerning the sale of liquors which declares that no person shall own or keep, or be in any way concerned, engaged or employed in owning or keeping, any intoxicating liquors with intent to sell the same within that State, and all the prohibitory clauses of the Statute, are within the constitutional powers of the State Legislature.
8. It is no objection to the Statute that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the Statute declares such acts to be.

[No. 101.]

Submitted Jan. 8, 1890. Decided March 3, 1890.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment affirming the judgment of the District Court of Plymouth County in that State imposing a fine and imprisonment for contempt in refusing to obey a writ of injunction. *Affirmed.*

The facts are stated in the opinion.

Reported below, 69 Iowa, 240.

Messrs. Argo & McDuffie and **William A. McKenney** for plaintiffs in error.

Messrs. J. S. Strubel, Rishel & Hart, S. M. Marsh and A. J. Baker, Atty-Gen. of Iowa, for defendant in error:

The power to punish for contempt is not limited to courts of law. It may be exercised in proper cases by courts of equity.

Ex parte Hamilton, 51 Ala. 68; *Chaffee v. Quidnick Co.* 18 R. I. 448, 444; *Ex parte Walker*, 25 Ala. 100; *Wikle v. Siloa*, 70 Ga. 717; *Goodville v. Millmann*, 56 Ill. 525; *State v. Matthews*, 87 N. H. 453; *Mariner v. Dyer*, 2 Me. 169.

A proceeding in the court below, for contempt of court, is not reviewable on appeal or writ of error.

Hayes v. Fischer, 102 U. S. 121 (26:95); *Ex parte Kearney*, 20 U. S. 7 Wheat. 38 (5:391); *New Orleans v. N. Y. Mail Steamship Co.* 87 U. S. 20 Wall. 387 (22:354).

The prohibitions contained in the first twelve Constitutional Amendments were not designed as limits upon the state governments in reference to their citizens, but exclusively upon federal power.

Barron v. Baltimore, 32 U. S. 7 Pet. 247 (3:878); *Fox v. Ohio*, 46 U. S. 5 How. 410 (12:213); *Ohio Mechanics & T. Bank v. Thomas*, 59 U. S. 18 How. 384 (15:460); *Twitcheil v. Commonwealth*, 74 U. S. 7 Wall. 324 (19:228); *Presser v. Illinois*, 116 U. S. 252 (29:615).

The provision of the Federal Constitution which secures to every person, when value exceeds \$20, right of trial by jury, has no application to trials in state courts.

Edwards v. Elliott, 88 U. S. 21 Wall. 549, 557 (22:490, 492); *McLean v. Leicht*, 69 Iowa, 407, 408.

The power to punish for contempt is not in conflict with the provisions of the Constitution requiring the trial of crimes to be by jury.

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U. S. v. Duane, Wall. C. C. 102-106; *Ex parte Hamilton*, 51 Ala. 68; *Little v. State*, 90 Ind. 388-340.

Mr. Justice Miller delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Iowa.

The judgment which we are called upon to review is one affirming the judgment of the District Court of Plymouth County in that State. This judgment imposed a fine of five hundred dollars and costs on each of the six plaintiffs in error in this case, and imprisonment in the jail of Plymouth County for a period of three months; but they were to be released from confinement if the fine imposed was paid within thirty days from the date of the judgment.

This sentence was pronounced by the court as a punishment for contempt in refusing to obey a writ of injunction issued by that court, enjoining and restraining each of the defendants from selling, or keeping for sale, any intoxicating liquors, including ale, wine and beer, in Plymouth County, and the sentence was imposed upon a hearing by the court, without a jury, and upon evidence in the form of affidavits.

It appears that on the 11th day of June, 1885, separate petitions in equity were filed in the District Court of Plymouth County against each of these plaintiffs in error, praying that they should be enjoined from selling, or keeping for sale, intoxicating liquors, including ale, wine and beer, in that county. On the 6th of July the court ordered the issue of preliminary injunctions as prayed. On the 7th of July the writs were served on each of the defendants in each proceeding by the sheriff of Plymouth County. On the 24th of October, complaints were filed, alleging that these plaintiffs in error had violated this injunction by selling intoxicating liquors contrary to the law and the terms of the injunction served on them, and asking that they be required to show cause why they should not be punished for contempt of court. A rule was granted accordingly, and the court, having no personal knowledge of the facts charged, ordered that a hearing be had at the next term of the court, upon affidavits; and on the 8th day of March, 1886, it being at the regular term of said District Court, separate trials were had upon evidence in the form of affidavits, by the court without a jury, upon which the plaintiffs were found guilty of a violation of the writs of injunction issued in said cause, and a sentence of fine and imprisonment, as already stated, entered against them.

Each plaintiff obtained from the Supreme Court of the State of Iowa, upon petition, a writ of certiorari, in which it was alleged that the District Court of Plymouth County had acted without jurisdiction and illegally in rendering this judgment, and by agreement of counsel, and with the consent of the Supreme Court of Iowa, the cases of the six appellants in this court were submitted together and tried on one transcript of record. That court affirmed the judgment of the District Court of Plymouth County, and to that judgment of affirmance this writ of error is prosecuted.

The errors assigned here are that the Supreme

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Court of Iowa failed to give effect to clause 3 of section 2 of article III. of the Constitution of the United States, which provides that the trial of all crimes, except in cases of impeachment, shall be by jury, and also to the provisions of article VI. of the Amendments to the Constitution, which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.

The second assignment is, that the Supreme Court of Iowa erred in holding that plaintiffs could be fined and imprisoned without first being presented by a grand jury, and could be tried on *ex parte* affidavits; which decision, it is said, is in conflict with and contrary to the provisions of both articles V. and VI. of the Amendments to the Constitution of the United States, the latter of which provides that in all criminal prosecutions the accused shall enjoy the right to be confronted by the witnesses against him.

The fourth assignment is, that the Supreme Court erred in not holding that section 12 of chapter 143 of the Acts of the Twentieth General Assembly of Iowa is in conflict with article VIII. of the Amendments to the Constitution of the United States, which provides that excessive fines shall not be imposed nor cruel and unusual punishments inflicted. These three assignments, as will be presently seen, may be disposed of together.

The third assignment is, that the Supreme Court of Iowa erred in not holding that said chapter 143 of the Acts of the Twentieth General Assembly of Iowa, and especially section 12 of said chapter, is void, and in conflict with section 1 of article XIV. of the Amendments to the Constitution of the United States, in this, that it deprives persons charged with selling intoxicating liquors of the equal protection of the laws, and it prejudices the rights and privileges of that particular class of persons, and denies to them the right of trial by jury, while in all other prosecutions the accused must first be presented by indictment, and then have the benefit of trial by a jury of his peers.

The first three of these assignments of error, as we have stated them, being the first and second and fourth of the assignments as numbered in the brief of the plaintiffs in error, are disposed of at once by the principle often decided by this court, that the first eight articles of the Amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the States. *Livingston v. Moore*, 82 U. S. 7 Pet. 469 [8: 751]; *The Justices v. United States*, *Murray*, 76 U. S. 9 Wall. 274 [19: 658]; *Edwards v. Elliott*, 88 U. S. 21 Wall. 582 [22: 487]; *United States v. Cruikshank*, 92 U. S. 542 [23: 588]; *Walker v. Sauvinet*, 92 U. S. 90 [23: 678]; *Fox v. Ohio*, 46 U. S. 5 How. 410 [12: 213]; *Holmes v. Jennison*, 89 U. S. 14 Pet. 540 [10: 579]; *Presser v. Illinois*, 116 U. S. 252 [29: 615].

The limitation, therefore, of articles V. and VI. and VIII. of those Amendments being intended exclusively to apply to the powers exercised by the government of the United States, whether by Congress or by the judiciary, and not as limitations upon the powers of the States, can have no application to the present case, and the same observation is more obvious-

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ly true in regard to clause 3 of section 2 of article III. of the original Constitution, that the trial of all crimes, except in cases of impeachment, shall be by jury. This article III. of the Constitution is intended to define the judicial power of the United States, and it is in regard to that power that the declaration is made that the trial of all crimes, except in cases of impeachment, shall be by jury. It is impossible to examine the accompanying provisions of the Constitution without seeing very clearly that this provision was not intended to be applied to trials in the state courts.

This leaves us alone the assignment of error that the Supreme Court of Iowa disregarded the provisions of section 1 of article XIV. of the Amendments to the Constitution of the United States, because it upheld the Statute of Iowa, which it is supposed by counsel deprives persons charged with selling intoxicating liquors of the equal protection of the law, abridges their rights and privileges, and denies to them the right of trial by jury, while in all other criminal prosecutions the accused must be presented by indictment, and then have the benefit of trial by a jury of his peers.

The first observation to be made on this subject is, that the plaintiffs in error are seeking to reverse a judgment of the District Court of Plymouth County, Iowa, imposing upon them a fine and imprisonment for violating the injunction of that court, which had been regularly issued and served upon them. Of the intentional violation of this injunction by plaintiffs we are not permitted to entertain any doubt, and, if we did, the record in the case makes it plain. Neither is it doubted that they had a regular and fair trial, after due notice, and opportunity to defend themselves in open court at a regular term thereof.

The contention of these parties is, that they were entitled to a trial by jury on the question as to whether they were guilty or not guilty of the contempt charged upon them, and because they did not have this trial by jury they say that they were deprived of their liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power.

In the case in this court of *Ex parte Terry*, 128 U. S. 289 [32: 405], this doctrine is fully asserted and enforced, quoting the language of the court in the case of *Anderson v. Dunn*, 19 U. S. 6 Wheat. 204, 227 [5: 242, 247], where it was said that "courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates;" citing also with approbation the language of the Supreme Judicial Court of Massachusetts in *Cartwright's Case*, 114 Mass. 280, 288, that "the summary power

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to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of *Magna Charta* and of the twelfth article of our Declaration of Rights."

And this court, in *Terry's Case*, held that a summary proceeding of the circuit court of the United States without a jury, imposing upon Terry imprisonment for the term of six months, was a valid exercise of the powers of the court, and that the action of the circuit court was also without error in refusing to grant him a writ of habeas corpus. The case of Terry came into this court upon application for a writ of habeas corpus, and presented, as the case now before us does, the question of the authority of the circuit court to impose this imprisonment on a summary hearing without those regular proceedings which include a trial by jury, which was affirmed. The still more recent cases of *Ex parte Savin*, 131 U. S. 287 [38: 150], and *Ex parte Cuddy*, 131 U. S. 280 [38: 154], assert very strongly the same principle. In *Ex parte Robinson*, 86 U. S. 19 Wall. 505 [22: 205], this court speaks in the following language:

"The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the Act of Congress of March 2d, 1831. (4 Stat. 487.)"

The Statute, now embodied in § 725 of the Revised Statutes, reads as follows:

"The power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness or any other person or persons to any lawful writ, process, order, rule, decree or command of the said courts."

It will thus be seen that even in the Act of Congress, intended to limit the power of the courts to punish for contempts of its authority by summary proceedings, there is expressly left the power to punish in this summary manner the disobedience of any party to any lawful writ, process, order, rule, decree or command of said court. This Statute was only designed for the government of the courts of the United States, and the opinions of this court in the cases we have already referred to show conclusively what was the nature and extent of the power inherent in the courts of the States by

virtue of their organization, and that the punishments which they were authorized to inflict for a disobedience to their writs and orders was ample and summary, and did not require the interposition of a jury to find the facts or assess the punishment. This, then, is due process of law in regard to contempts of courts, was due process of law at the time the Fourteenth Amendment of the Federal Constitution was adopted, and nothing has ever changed it except such statutes as Congress may have enacted for the courts of the United States, and as each State may have enacted for the government of its own courts.

So far from any statute on this subject limiting the power of the courts of Iowa, the Act of the Legislature of that State, authorizing the injunction which these parties are charged with violating, expressly declares that for violating such injunction a person doing so shall be punished for the contempt by a fine of not less than five hundred or more than a thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment, in the discretion of the court. So that the proceeding by which the fine and imprisonment imposed upon these parties for contempt in violating the injunction of the court, regularly issued in a suit to which they were parties, is due process of law, and always has been due process of law, and is the process or proceeding by which courts have from time immemorial enforced the execution of their orders and decrees, and cannot be said to deprive the parties of their liberty or property without due process of law.

The counsel for plaintiffs in error seek to evade the force of this reasoning by the proposition that the entire Statute under which this injunction was issued is in the nature of a criminal proceeding, and that the contempt of court of which these parties have been found guilty is a crime for the punishment of which they have a right to trial by jury.

We cannot accede to this view of the subject. Whether an attachment for a contempt of court, and the judgment of the court punishing the party for such contempt, is in itself essentially a criminal proceeding or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offense against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitution. We do not suppose that that provision of the Constitution was ever intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit.

We might rest the case here; but the plaintiffs in error fall back upon the proposition that the Statute of the Iowa Legislature concerning the sale of liquors, under which this injunction was issued, is itself void, as depriving the parties of their property and of their liberty without due process of law. We are not prepared to say that this question arises in the present case. The principal suit in which the injunction was issued, for the contempt of

which these parties have been sentenced to imprisonment and to pay a fine, has never been tried so far as this record shows. We do not know whether the parties demanded a trial by jury on the question of their guilty violation of that Statute. We do not know that they would have been refused a trial by jury if they had demanded it. Until the trial of that case has been had they are not injured by a refusal to grant them a jury trial. It is the well-settled doctrine of this court that a part of a statute may be void and the remainder may be valid. That part of this Statute which declares that no person shall own or keep, or be in any way concerned, engaged or employed in owning or keeping, any intoxicating liquors with intent to sell the same within this State, and all the prohibitory clauses of the Statute, have been held by this court to be within the constitutional powers of the State Legislature, in the cases of *Mugler v. Kansas*, 123 U. S. 623 [81: 205], and *Powell v. Pennsylvania*, 127 U. S. 678 [32: 258].

If the objection to the Statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the Statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the Constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly it seems to us to be quite as wise to use the processes of the law and the powers of the court to prevent the evil as to punish the offense as a crime after it has been committed.

We think it was within the power of the Court of Plymouth County to issue the writs of injunction in these cases, and that the disobedience to them by the plaintiffs in error subjected them to the proceedings for contempt which were had before that court.

The judgment of the Supreme Court of Iowa is affirmed.

HAMILTON ORMSBY ET AL., *Plffs. in Err.*,
 v.

WILLIAM B. WEBB ET AL.

(See S. C. Reporter's ed. 47-68.)

Jurisdiction to review judgment of Supreme Court of District of Columbia, probating a

will—final judgment—case—questions reviewable—exceptions—writ of error proper—evidence—knowledge of will—instruction.

1. This court has jurisdiction to re-examine and reverse or affirm the final judgment of the Supreme Court of the District of Columbia, affirming an order of the same court, in special term, admitting a will to probate and record, where such final judgment and order affects the ownership or disposition of property of a greater value than \$5,000.
2. An order in the Supreme Court of the District, at special term, admitting a will to probate and record, is a final judgment reviewable by the general term.
3. A proceeding in the Supreme Court of the District involving the validity, as a last will and testament, of an instrument offered for probate, and its admission to probate, is a "case," the final judgment in which can be here reviewed, when the value of the matter in dispute is sufficient.
4. An appeal to the general term from the final order of probate made in the special term, based upon the finding of a jury, upon issues tried by them, brings into review before the general term all the questions of law that are properly presented by the bill of exceptions taken at the trial.
5. An appeal to this court from the final judgment of the Supreme Court of the District, affirming the order of probate, brings here for re-examination all the questions properly arising upon those bills of exceptions.
6. A proceeding involving the original probate of a last will and testament is not strictly a proceeding in equity and may be brought to this court upon writ of error.
7. Evidence that the decedent received the bulk of his estate by breaking the will of his grandfather is immaterial upon the issue as to whether the paper in question was or was not valid as his last will and testament.
8. Testimony that one of the legatees, about the date of the will, had knowledge of its provisions, is not competent upon the trial of the issue as to competency to make a will.
9. It was not error to refuse an instruction requested, where the court had already fully instructed the jury upon the subject.

[No. 179.]

Argued Jan. 9, 10, 1890. Decided March 3, 1890.

IN ERROR to the Supreme Court of the District of Columbia to review a judgment of the Supreme Court of the District of Columbia in General Term which affirmed the final order of the same court in Special Term admitting to probate the last will and testament of Levin M. Powell. *Affirmed.*

The facts are stated in the opinion.

Messrs. John J. Johnson, Wm. G. Johnson and Wm. Stone Abert, for plaintiffs in error:

NOTE.—As to fraud and undue influence in avoidance of deed or will, see note to *Harding v. Handy*, Bk. 6, p. 429.

As to fraud or illegal consideration, how far will avoid contract, see note to *Armstrong v. Toler*, Bk. 6, p. 468.

As to cancellation of a deed or a contract in equity for fraud, concealment or misrepresentation, see note to *Neblett v. Macfarland*, Bk. 23, p. 471.

As to when deed set aside for weakness of mind or imbecility of grantor, see note to *Allore v. Jewell*, Bk. 24, p. 280.

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As to when void for fraud, insanity, drunkenness, duress, undue influence, imbecility, infancy or fraud on marriage; from ward to guardian, to trustee from cestui que trust, to executor from heir,—see note to *Harding v. Handy*, Bk. 6, p. 429.

Fraud and undue influence in execution of wills.

Where the testator's property amounted to \$500,000, and the attorney, who was also the draughtsman of the codicil, was made a beneficiary to the extent of \$80,000; and the evidence showed the testator to have expressed affection for the attorney; that persons were present who heard the attorney

If the testator received his estate from one branch of his family and by his will diverted it to another, it was a proper circumstance in determining the reasonableness of the will.

Davis v. Calvert, 5 Gill & J. 307.

It is always competent to show that a legatee participated in the preparation of the will and had knowledge at that time of its contents.

Milton v. Hunter, 18 Bush, 163, 167, 168; *Jackson, Hoogland, v. Vail*, 7 Wend. 125, 128; *Morris v. Stokes*, 21 Ga. 552, 570, 571; *Fairchild v. Bascomb*, 35 Vt. 393, 418; *Beall v. Cunningham*, 1 B. Mon. 399, 401.

If the testator be once proved to be under the dominion of a person, that dominion is presumed to continue and control him.

Huguenin v. Baseley, 2 White & Tud. Lead. Cas. in Eq. (4th Am. ed.) 1280, and cases cited; *Mowry v. Silber*, 2 Bradf. 149, 153; *Taylor v. Wilburn*, 20 Mo. 806, 809, 810; *Newhouse v. Goodwin*, 17 Barb. 236, 258; *Davis v. Calvert*, 5 Gill & J. 307, 308, 311, 312; *Boyse v. Rosborough*, 6 H. L. Cas. 51; *Roberts v. Trawick*, 17 Ala. 55.

Less proof of undue influence is required where it is already proved that the person exerting it occupies a peculiar relation of trust and confidence, which is itself an influence, and where that person is a large beneficiary.

Huguenin v. Baseley, 2 White & Tud. Lead. Cas. in Eq. (4th Am. ed.) 1274, 1277; *Mowry v. Silber*, 2 Bradf. 183, 147, 149, 151; *Van Pelt v. Van Pelt*, 30 Barb. 188-140; *Tyler v. Gardiner*, 35 N. Y. 559; *O'Neil v. Murray*, 4 Bradf. 320; *Boyd v. Boyd*, 66 Pa. 283, 293; *Harrel v. Harrel*, 1 Duval (Ky.) 203; *Sears v. Shafer*, 6 N. Y. 268, 271-273; *Newhouse v. Goodwin*, 17

Barb. 236, 258, 259; *Harvey v. Sullens*, 46 Mo. 147, 152-154; *Kinne v. Johnson*, 60 Barb. 77, 78; *Dale v. Dale*, 38 N. J. Eq. 274, 276; *McLaughlin v. McDavitt*, 63 N. Y. 213, 219.

Evidence that the legatee improperly influenced the testator as to other important matters than the execution of said will is proper to be considered by the jury as tending to show that she did improperly influence him to make the bequests in her favor, or to exclude others of his next of kin and heirs-at-law from a participation in his estate.

Huguenin v. Baseley, 2 White & Tud. Lead. Cas. in Eq. (4th Am. ed.) 1280; *Boyse v. Rosborough*, 6 H. L. Cas. 51; *Lewis v. Mason*, 109 Mass. 171, 174; *Newhouse v. Goodwin*, 17 Barb. 258.

Evidence that a beneficiary under the will, instrumental in procuring the preparation and execution of the same, prevented certain of the next of kin or heirs-at-law of said testator, who are injured by said will, from having access to him; that she misrepresented such next of kin or heirs-at-law to the said testator,—shows undue influence.

Tyler v. Gardiner, 35 N. Y. 592, 593; *Delafield v. Parish*, 25 N. Y. 91-95; *Huguenin v. Baseley*, 2 White & Tud. Lead. Cas. in Eq. (4th Am. ed.) 1289.

Messrs. Enoch Totten and Wm. B. Webb, for defendants in error:

This court is without jurisdiction to review this cause because it is a case of equity jurisdiction, and cannot be brought into this court for review on a writ of error, and the motion to dismiss should be granted.

Mauro v. Ritchie, 3 Cranch, C. C. 147; *Brewster v. Wakefield*, 63 U. S. 23 How. 113 (16301);

read the codicil over to the testator,—*Held*, that the burden of proof in such a case is upon the proponent to show that the testator fully understood the nature and consequences of [the] testamentary act. *Re Soule*, 22 Abb. N. C. 236, 19 N. Y. S. R. 532; *Re Martin*, 98 N. Y. 193; *Collier v. Idley*, 1 Bradf. 94; *Post v. Mason*, 91 N. Y. 539.

A person of sound mind, acting with full knowledge of her affairs, competent to understand her relations to those whom she wishes to benefit, may bestow her bounty as she likes, and no presumption of unfair dealing can arise, although one of the beneficiaries happens to be her attorney. Undue influence, when relied upon to defeat a testamentary disposition, must be proved and not merely assumed to exist. *Loder v. Whepley*, 111 N. Y. 230, 19 N. Y. S. R. 331; *Re Smith*, 95 N. Y. 516.

The rule reiterated that, where a man has a wife living at the time of his marriage to deceased, who was induced to marry him and make a will in his favor on the supposition that he was single, it is such a fraud as vitiates the will. *Re Rockwell's Will*, 18 N. Y. S. R. 437; *Tilby v. Tilby*, 2 Dem. 514.

Evidence of undue influence by the wife of the testator to induce the will, which was largely in her favor, considered and held insufficient. *Mason v. Williams*, 53 Hun, 398.

The fact the the will was left for 14 years after its execution unchanged and undisturbed,—*Held*, evidence in favor of the deliberate purpose of the testator in its execution. *Re Harold's Will*, 20 N. Y. S. R. 995.

Where a will was made with full knowledge of its effect, when the testatrix was free from all restraining influences, the facts that the relatives were left in indigent circumstances, and most of the property bequeathed to the spiritual adviser of the testatrix,

do not render the will invalid, especially where it appeared that testatrix was not pleased with her relatives. *Re Hollohan's Will*, 24 N. Y. S. R. 449.

Testatrix gave all her property to her minor grandson, and upon his death without issue to her brothers, sisters and nieces. She had an unfavorable opinion of the grandson's father, and named her brother, in whom she had full confidence, as executor, with authority to manage the estate for the grandson. *Held*, that the facts indicated no fraud or undue influence. *Re Rosecrans' Will*, 24 N. Y. S. R. 483.

The fact that the will disinherits one of testator's children is not alone evidence of undue influence. *Re Hall's Will*, 21 N. Y. S. R. 307; *Cudney v. Cudney*, 68 N. Y. 152; *Marx v. McGlenn*, 88 N. Y. 367; *Re Martin*, 98 N. Y. 193.

A will was prepared by a stranger under the direction of testatrix's son, in the absence of testatrix. It appeared from credible testimony that testatrix heard the will read, and expressed her satisfaction therewith. The whole evidence reviewed, and held not sufficient to justify a finding that the will was the result of the son's undue influence. *Re Johnson's Will*, 5 N. Y. Supp. 322.

Will contested by son for undue influence,—facts of its execution reviewed, and held insufficient evidence of undue influence. *Re White's Will*, 23 N. Y. S. R. 832; *Children's Aid Society v. Loveridge*, 70 N. Y. 394; *Cudney v. Cudney*, 68 N. Y. 148.

Evidence to establish undue influence upon an infirm testator, considered and held insufficient to defeat a will. *McKenna's Will*, 4 N. Y. Supp. 453.

The familiar rules as to validity of a provision in the will of an infirm and ignorant person in favor of the draftsman, applied. *Re Lansing's Will*, 17 N. Y. S. R. 440.

Mayhew v. Soper, 10 Gill & J. 366; *Walker v. Dreville*, 79 U. S. 12 Wall. 440 (20:429); *U. S. v. Judges*, 70 U. S. 3 Wall. 673 (18:111); *McCullum v. Eager*, 48 U. S. 2 How. 61 (11:179); *The San Pedro*, 15 U. S. 2 Wheat. 132 (4:202); *Carter v. Cutting*, 12 U. S. 8 Cranch, 251 (8:553); *U. S. v. Emholt*, 105 U. S. 414 (26:1077); *Hayes v. Fischer*, 102 U. S. 121 (26:95); *Surgett v. Lapice*, 49 U. S. 8 How. 48 (12:982).

The decree of the special term admitting the will to probate and granting letters testamentary was made in accordance with the requirements of the statute and was rightly made.

Pegg v. Warford, 4 Md. 885; *Price v. Taylor*, 21 Md. 363; *Van Ness v. Van Ness*, 47 U. S. 6 How. 62 (12:844).

The influence which will avoid and annul a will must be a present constraint, sufficient to overcome the free agency of the testator at the time the will was made.

Layman v. Conrey, 60 Md. 286; 1 Redf. Wills, 524, 534; *Eckert v. Flowery*, 43 Pa. 46.

Mr. Justice Harlan delivered the opinion of the court:

This writ of error brings up for review a judgment of the Supreme Court of the District of Columbia, in general term, which affirmed a final order of the same court, in special term, admitting to probate and record a certain writing as the last will and testament of Levin M. Powell, who died in the City of Washington on the 15th day of January, 1885. That instrument provided for the disposition of property of the value of more than one hundred thousand dollars.

At October Term, 1886, of this court a motion was made that the writ of error be dismissed for want of jurisdiction, "because the judgment of the Supreme Court of the District of Columbia to which said writ of error was directed is not a final judgment;" and, in the alternative, that the judgment be affirmed because the writ of error was sued out merely for delay. That motion was overruled. *Ormsby v. Webb*, 122 U. S. 630 [80: 1249]. At the present term a second motion to dismiss was made; this time, upon the ground that the case is one of equity jurisdiction, and could be brought here only by appeal.

The history of this litigation, as disclosed by the record, is as follows:

Sarah C. Colmesnil, one of the heirs-at-law of the deceased, presented to the Supreme Court of the District of Columbia, holding a special term for probate business, a petition alleging that the above writing—previously presented to that court for probate by the persons named therein as executors—was not the last will and testament of Levin M. Powell; that by reason of his physical and mental condition he was incompetent to make a will; and that if his name was placed to that writing it was not done by his will, but by the procurement, undue influence and fraud of Harriet C. Stewart, one of the persons named therein as a legatee.

It was thereupon ordered that the following issues be transmitted to be tried in the circuit court before a jury:

"First. Whether the said paper-writing purporting to be the last will and testament of the said Levin M. Powell, bearing date on the 134 U. S.

27th of October, 1884, was executed and attested in due form of law.

"Second. Whether the contents of said paper-writing were read to or by the said Levin M. Powell at or before the alleged execution thereof by him.

"Third. Whether the said Levin M. Powell at the time of the alleged signing of said paper-writing was of sound and disposing mind and capable of executing a valid deed or contract.

"Fourth. Whether the said writing was executed by the said Levin M. Powell under the influence of suggestions, importunities and undue persuasion of the said Harriet C. Stewart, or any other person or persons, when his mind, from its disordered, diseased and enfeebled state, was unable to resist the same.

"Fifth. Whether the execution of said paper-writing was procured by fraud, misrepresentation or undue influence or persuasion of the said Harriet C. Stewart, or any other person or persons acting of their own volition or under the direction of the said Stewart."

Subsequently, in the Supreme Court of the District, holding a circuit court, an order was made that upon the trial of the above issues before a jury, Mrs. Colmesnil and others who had filed caveats should be plaintiffs, and Charles D. Drake and William B. Webb, as the proponents of the last will and testament of the deceased, and who were named as his executors, should be defendants.

The verdict of the jury consisted of answers to the above questions. The first, second and third were answered in the affirmative; the fourth and fifth in the negative. A motion for a new trial having been overruled, the caveators prosecuted an appeal to the general term, which affirmed the action of the special term.

At a subsequent date the caveators filed in the Supreme Court of the District, holding a special term for what is called orphans' court business, the record of the trial of the issues submitted to the jury, and moved that the verdict be set aside upon the ground that the court trying those issues erred in rejecting competent testimony, in its instructions to the jury, in refusing to instruct the jury as requested by the caveators, and in rulings during the trial to which they took exceptions. This motion was overruled, and an order was made admitting the writing in question to probate and record as the will of Levin M. Powell, and directing letters testamentary to issue to the persons named therein as executors. From this last order an appeal was taken to the general term, which affirmed the order of the special term overruling the motion to set aside the verdict of the jury, as well as the order admitting the above writing to probate as the last will of the deceased.

The question raised by the first motion to dismiss for want of jurisdiction in this court, having been re-argued, will be again examined in connection with the motion to dismiss, upon the ground that the case, in any event, is one of equity cognizance to be brought here only by appeal. We do this because no opinion was delivered when this motion was overruled at a former term.

The defendants in error contend, in effect, that this court is without jurisdiction to review

an order of the Supreme Court of the District, by virtue of which a writing is finally admitted to probate as the last will and testament of the person signing it, whatever may be the value of the matter in dispute. This, it is argued, results from the statutes regulating the jurisdiction of the courts of the District, and the decisions of this court declaring their scope and effect.

The Act of February 27, 1801, concerning the District of Columbia (2 Stat. 108), created the Circuit Court of the District, with all the powers in such court and the judges thereof that were vested by law in the circuit courts and judges of the circuit courts of the United States, and with jurisdiction of all crimes and offenses committed in the District, and of all cases in law and equity between parties, both or either of which shall be residents thereof. The eighth section of the Act provided that "any final judgment, order or decree in said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined and reversed or affirmed in the Supreme Court of the United States, by writ of error or appeal, which shall be prosecuted in the same manner, under the same regulations, and the same proceedings shall be had therein, as is or shall be provided in the case of writs of error on judgments, or appeals upon orders or decrees, rendered in the circuit court of the United States." The same Act created an orphans' court in each of the Counties of Washington and Alexandria, that should have the powers and perform the duties prescribed in reference to such courts in Maryland, appeals therefrom to be to the Circuit Court of the District, which should therein have all the powers of the chancellor of that State. § 12.

Among the statutes of Maryland then in force was the Act of 1798, which authorized the orphans' court, whenever required by either party to a contest therein, to direct a plenary proceeding by bill or petition, to which there should be an answer on oath or affirmation, and which made it the duty of the court, when either party required it, to direct an issue or issues to be made up and sent to the court of law most convenient for trying the same. The Act provided that such courts of law "shall have power to direct the jury, and grant a new trial, as if the issue or issues were in a suit therein instituted, and a certificate from such court, or any judge thereof, of the verdict or finding of the jury, under the seal thereof, shall be admitted by the orphans' court to establish or destroy the claim or any part thereof;" also, that "the orphans' court shall give judgment or decree upon the bill and answer, or upon bill, answer, deposition or finding of the jury." 2 Kilty's Laws Md. chap. 101, sub. chap. 8, § 20; Dennis' Probate Laws D. C. 67.

By the Act of March 3, 1863 (12 Stat. 762), the Circuit, District and Criminal Courts of the District were abolished, and the Supreme Court of the District was established with general jurisdiction in law and equity, and with the powers and jurisdiction then possessed and exercised by the circuit court. That Act provided that one of the justices might hold a District Court of the United States for the

District of Columbia in the same manner and with the same powers and jurisdiction possessed and exercised by other district courts of the United States, and a criminal court with the same powers as were exercised by the Criminal Court of the District; that special terms of such supreme court should be held by one of the justices, at such time as the court in general term should direct, and by which non-enumerated motions in suits and proceedings at law and in equity, and suits in equity, not triable by jury, should be heard and determined, such justice, however, having the power to order any such motion or suit to be heard, in the first instance, at the general term; and that "any party aggrieved by any order, judgment or decree, made or pronounced at any such special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term of said supreme court, and upon such appeal the general term shall review such order, judgment or decree, and affirm, reverse or modify the same, as shall be just." § 5. It also provided that "all issues of fact triable by a jury or by the court shall be tried before a single justice; when the trial is by a jury, at a circuit court; and when the trial is without a jury, at a circuit court or special term." § 7.

The eighth and ninth sections of the Act are as follows:

"Sec. 8. If, upon the trial of a cause, an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice, and afterwards settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised, but such case or bill of exceptions need not be sealed or signed. The justice who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages: *Provided*, That such motion be made at the same term or circuit at which the trial was had. When such motion is made and heard upon the minutes, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner.

"Sec. 9. A motion for a new trial on a case or bill of exceptions, and an application for judgment on a special verdict or a verdict taken subject to the opinion of the court, shall be heard in the first instance at a general term."

The next Act of Congress having any bearing upon the question before us is that of June 21, 1870, which provides that the several general and special terms authorized by the Act of March 3, 1863, "which have been or may be held, shall be, and are declared to be, severally, terms of the Supreme Court of the District of Columbia; and the judgments, decrees, sentences, orders, proceedings and acts of said general terms, special terms, circuit courts, district courts and criminal courts, heretofore or hereafter rendered, made or had, shall be deemed judgments, decrees, sentences, orders, proceedings and acts of said supreme court:

Provided, That nothing herein contained shall affect the right of appeal as provided by law."

The same Act abolished the orphans' court and invested the justice holding the special term of the supreme court for that purpose with the powers and jurisdiction then held and exercised by the former court, subject, however, to the provisions of the fifth section of the Act of March 3, 1868, giving an appeal to the general term from any order involving the merits. 16 Stat. 180.

The provisions of the Acts of 1868 and 1870, so far as they regulate the jurisdiction and practice in the courts of this District, are embodied in chapter 23 of the Revised Statutes of the District, without any material change.

When the Revised Statutes of 1874 were enacted, the jurisdiction of this court as to judgments or decrees of the Supreme Court of the District was thus defined: "The final judgment or decree of the Supreme Court of the District of Columbia, in any case where the matter in dispute, exclusive of costs, exceeds the value of one thousand dollars, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same manner and under the same regulations as are provided in cases of writs of error on judgments, or appeals from decrees rendered in a circuit court." Rev. Stat. § 705. But by an Act approved February 25, 1879 (20 Stat. 320), such power of review was extended to cases where the matter in dispute exceeded the value of \$2,500, exclusive of costs; and by an Act passed March 3, 1885, the amount was increased to \$5,000, with the reservation of the right of appeal or writ of error, without regard to the sum or value in dispute, in cases involving the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States. 23 Stat. 443.

It is contended on behalf of the appellees, that, although this court has jurisdiction to re-examine and reverse or affirm the final judgment or decree of the Supreme Court of the District of Columbia, in any case where the value of the matter in dispute, exclusive of costs, exceeds \$5,000, it has not jurisdiction to re-examine the final judgment of that court, in general term, affirming an order of the same court, in special term, admitting a will to probate and record, although such final judgment and order, unless reversed, may affect the ownership or disposition of property of a greater value than that amount. And this view, it is argued, is sustained by the decisions in *Van Ness v. Van Ness*, 47 U. S. 6 How. 62, 67 [12: 344, 345], and *Brown v. Wiley*, 71 U. S. 4 Wall. 165 [18: 384]. We are of opinion that this point was neither involved nor decided in those cases.

Before examining those cases our attention will be first given to that of *Carter v. Cutting*, 12 U. S. 8 Cranch, 251 [3: 553]. That was an appeal, under the Act of 1801, from a judgment of the Circuit Court of this District, affirming a judgment of the Orphans' Court of Alexandria County (which court had the same jurisdiction, and was created by the same Act, as the Orphans' Court of Washington County), dismissing a petition filed for the revocation

and repeal of the probate of a will. Two objections to the appeal were urged in this court: (1) that by the Act of 1801 the circuit court had only the power of the chancellor of Maryland, and that by the laws of Maryland the decree of the chancellor was final; (2) that the decree of dismissal was not a final judgment, order or decree of the circuit court wherein the matter in dispute, exclusive of costs, exceeded \$100. Mr. Justice Story, speaking for the court, said as to the first objection: "We are of opinion that the conclusiveness of its sentence forms no part of the essence of the powers of the court. Its powers to act are as ample independent of their final quality as with it. Besides, the Act of February 27, 1801, has expressly allowed an appeal from 'all final judgments, orders and decrees of the circuit courts,' where the matter in dispute exceeds the limited value, and there is nothing in the context to narrow the ordinary import of the language. We cannot admit that construction to be a sound one which seeks by remote inferences to withdraw a case from the general provisions of a statute, which is clearly within its words and perfectly consistent with its intent. The case of *Young v. Bank of Alexandria*, 8 U. S. 4 Cranch, 384 [2: 655], is, in our judgment, decisive against this objection." In reference to the second objection, it was said: "It is conceded by both parties that the estate devised to the respondent, Sally C. Cutting, is worth several thousand dollars. If, then, the probate of the will had any legal operation and was not merely void, the controversy as to the validity of that probate was a matter in dispute equal to the value of the estate devised away from the heirs." The decree of the circuit court in that case, dismissing the petition, was reversed, and the cause remanded to that court with directions to proceed to a hearing upon the merits. The circuit court was thus required to determine, upon its merits, the validity of the probate of a will.

The case of *Van Ness v. Van Ness* also arose under the Act of 1801. It involved the question whether a particular person was the widow of an intestate, and upon that question depended the right of that person to have letters of administration granted to her. This issue, having been raised in the orphans' court, by petition, was, pursuant to the Maryland Statute of 1798, sent to the circuit court, as originally established, for trial by jury. Under the instructions of that court a verdict was returned against the petitioner; and by its order the finding of the jury was certified, under seal, to the orphans' court, where the petition was dismissed. From that order a writ of error was brought, raising the question whether this court could take cognizance of the case, and inquire whether the circuit court erred in its instruction to the jury. Chief Justice Taney, speaking for the court, said: "It is true the orphans' court has no power to grant a new trial, and is bound to consider the fact to be as found by the jury; and consequently the judgment of that court must be against the plaintiff. But the matter in contest in the orphans' court is the right to the letters of administration. And it is the province of that court to apply the law upon that subject to the fact, as established by the verdict

of the jury, and to make their decree accordingly, refusing to revoke the letters granted to the defendant, and dismissing the petition of the plaintiff. The suit between the parties must remain still pending until that decree is pronounced. The certificate of the circuit court is nothing more than evidence of the finding of the jury upon the trial of the issue. It merely certifies a fact, that is to say, that the jury had so found. And the order of the circuit court, directing a fact to be certified to another court to enable it to proceed to judgment, can hardly be regarded as a judgment, order or decree, in the legal sense of these terms as used in the Act of Congress. Certainly it is not a final judgment or order. For it does not put an end to the suit in the orphans' court, as that court alone can dismiss the petition of the plaintiff which is there pending; and no other court has the power to pass a judgment upon it. A verdict in any court of common law, if not set aside, is in all cases conclusive as to the fact found by the jury, and the judgment of the court must follow it, as the orphans' court must follow the verdict in this case. Yet a writ of error will not lie upon the verdict."

The case of *Brown v. Wiley* is to the same effect. That case arose upon a petition filed in the orphans' court before the Act of 1863 was passed, raising the question whether the petitioner was a child of the intestate, and as such entitled to a certain fund in the hands of an administratrix. After that Act was in force the issues were submitted to a jury empaneled in the Supreme Court of the District, at special term, and was determined in favor of the petitioner. A motion for a new trial, on exceptions duly taken, was heard at general term and overruled. The cause was then remanded with direction to proceed according to law. Thereupon an order was made that the finding of the jury be certified by the clerk to the orphans' court, which was still in existence. From that order a writ of error was brought, and this court, holding that it was not a final order, dismissed the writ. That this was the utmost extent of the decision is manifest from the following extracts from the opinion delivered by Chief Justice Chase:

"The case, in almost every particular, is identical with that of *Van Ness v. Van Ness*. In that case, as in this, an issue of fact was sent out of the orphans' court to the circuit court to be tried by a jury; was tried and found in the negative. Exceptions were taken to the rulings upon the trial, and an order was made certifying the finding to the orphans' court. The proceeding was brought into this court by writ of error, which was dismissed for want of jurisdiction. . . . The order certifying the finding to the orphans' court, in the case of *Van Ness*, was identical in effect with the two orders overruling the motion for new trial, and certifying the finding in the case before us. In each case the exceptions taken at the trial before the jury were overruled, and nothing was left for action in the court before which the issues were tried; but the case went to the orphans' court for final judgment. In that case it was held that the order was not one which could, under the Act, be re-examined on writ of error, and we see no reason for a different ruling in this."

Neither of the above cases involved the precise question now under examination. The decision in *Carter v. Cutting* was, that the final order of the orphans' court, dismissing a petition which sought the revocation of the probate of a will, could be reviewed upon its merits in the circuit court, and that the final order of the latter court could be re-examined in this court. The decision in both *Van Ness v. Van Ness* and *Brown v. Wiley* was, that an order by the circuit court in the first case, and by the Supreme Court of the District in the other case, which directed the finding of the jury to be certified, simply directed a fact to be certified, and therefore was not a final judgment, reviewable by this court. In none of the above cases did the question arise, whether a final order—made after the trial before the jury of the issue of will or no will—admitting to probate a paper presented as the last will of the decedent, was reviewable upon its merits, by the circuit court while the Act of 1861 was in force, or by the Supreme Court of the District after the passage of the Act of 1863. Nor did either of those cases involve any question as to the jurisdiction of this court to re-examine a final judgment affirming an order of probate. The latter question is now, for the first time, presented for determination.

That an order in the Supreme Court of the District, at special term, admitting a will to probate and record, is a final judgment, cannot, it seems to us, be disputed. It was so declared in *Van Ness v. Van Ness* and *Brown v. Wiley*. A will, admitted to probate and record by a court of competent jurisdiction, is a muniment of title for all receiving property under it; and, until the order so admitting it to probate is, by some appropriate proceeding, set aside or reversed, stands in the way of those who may have resisted the probate. In every sense, it is a final adjudication. And that an order of probate made in the Supreme Court of the District, special term, is reviewable by the general term, is made clear by the provision that a party aggrieved by any order, judgment or decree in a special term, involving the merits of the action or proceeding, may appeal to the general term, which "shall review such order, judgment or decree, and affirm, reverse or modify the same, as shall be just." Rev. Stat. D. C. sec. 772; 12 Stat. 763, chap. 91, sec. 5. Clearly, an order of probate, based upon a finding by the jury upon issues as to the competency of the testator to make a will, is one involving the merits. If so, how is it possible, in view of the express words of the Statute, to question the jurisdiction of the general term to review such final order of probate?

In respect to the authority of this court to re-examine the final judgments and decrees of the Supreme Court of this District, the words of the Statute are quite as clear as those defining the jurisdiction of the general term to review the orders and judgments of the special term. It embraces the final judgment or decree of that court "in any case" involving a specified amount. It is true that this re-examination must be upon writ of error or appeal "in the same manner and under the same regulations as are provided in cases of writs of error on judgments, or appeals from decrees rendered in a circuit court." But this language

does not determine the nature of the "case" in the Supreme Court of the District, the final judgment in which is subject to re-examination by this court. It only indicates the mode in which a case may be brought here for review. So that the only question is whether issues framed by the Supreme Court of the District, and which involve an inquiry as to whether the decedent was or was not incompetent, from unsoundness of mind or because of undue influence exerted upon him, to make a will—issues to which there are adversary parties—constitutes a "case," within the meaning of the Act of Congress defining the jurisdiction of this court over the final judgments and decrees of the court below. If it does not, then it would follow that a proceeding in the Supreme Court of the District to revoke the probate of a will is a "case," the final judgment in which, as held in *Carter v. Cutting*, may be re-examined by this court, when the value of the matter in dispute is sufficient, while a proceeding in the same court, involving the validity, as a last will and testament, of an instrument offered for probate, and therefore its admission to probate, is not a "case," the final judgment in which can be here reviewed. We cannot assent to this view. The latter proceeding is as much a "case" as the former. One involves the validity of the probate of a will, the other the validity as a will of a paper offered to probate. Upon the determination of each depend rights of property, and in each are adversary parties. There can be no reason why Congress should extend the jurisdiction of this court to proceedings involving the validity of the probate of wills, and not to proceedings involving the validity of an instrument offered for probate as a will. That the issues in the former may be heard and determined, in the first instance, without a jury, and upon evidence before a court, while the issues in the latter may, and if the parties require, must, be tried, in the first instance, by a jury, with the right in the parties to have bills of exceptions showing the rulings of the court, cannot affect the nature of the "case."

There are other decisions that throw some light upon the inquiry as to the jurisdiction of this court to re-examine the final judgments or decrees of the highest court of this District. In the case of *Curtis v. Georgetown and Alexandria Turnp. Co.*, 10 U. S. 6 Cranch, 288 [8: 209], one of the questions was as to the jurisdiction of this court to review the final order of the Circuit Court for the District of Columbia quashing an inquisition, taken by the marshal, condemning land for a turnpike road. Its jurisdiction was maintained. By the words of the Act constituting the Circuit Court of the District, this court was given the jurisdiction to re-examine "any final judgment, order or decree in said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value," etc. These words, *Chief Justice Marshall* said, were "more ample than those employed in the Judicial Act." It will be found upon comparing the Statute defining the jurisdiction of this court over the judgments and decrees of the Supreme Court of this District, with the Statute of 1801 creating the Circuit Court of the District, that the words of the for-

mer are as broad and ample as the words of the latter. The jurisdiction of this court extends to "the final judgment or decree of the Supreme Court of the District of Columbia, in any case" etc., while the words in the Act of 1801 were "any final judgment, order or decree in said circuit court, wherein the matter in dispute," etc. In *Baltimore & P. R. Co. v. Church*, 86 U. S. 19 Wall. 62 [22: 97], the jurisdiction of this court to re-examine the final order of the Supreme Court of this District confirming an inquisition of damages returned therein, and which was instituted before the marshal and a jury of the District, was sustained. The court said that its power to review the judgments and final orders of the Supreme Court of the District was as ample as its power over the final judgments, orders and decrees of the circuit court which it superseded. These two adjudications illustrate, to some extent, the nature of the cases from the courts of this District which may be re-examined here, and show that the question now before us is to be determined by the Acts of Congress defining the relations between this court and the highest court of this District, and not by reference to the statutes of Maryland, or to the statutes defining our jurisdiction to review the judgments of the circuit courts of the United States, held in the several States. And we may repeat here what *Chief Justice Marshall* said in *Young v. Bank of Alexandria*, 8 U. S. 4 Cranch, 384 [2: 655], in which the main question was as to the power of this court to review the judgments of the Circuit Court of this District in a certain class of cases: "The words of the Act of Congress, being as explicit as language can furnish, must comprehend every case not completely excepted from them."

Whatever difficulties may have arisen, in cases like this, while there existed in this District a separate, distinct tribunal, having original cognizance of the probate of wills and the administration of the estates of deceased persons, cannot arise under existing legislation which brings all such business within the cognizance of the Supreme Court of the District, and makes all orders, whether in its special or general term, the orders of that court. As was said in *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 571, 573 [30:1022, 1026], the Act of 1863 was the introduction into this District of a new organization of its judicial system, under which all the courts previously existing here as separate and independent tribunals, having special and diverse jurisdictions, were consolidated into the new Supreme Court of the District of Columbia. For this reason, it was said that the new statutory provisions should be construed in the sense of the New York system, from which they were imported, rather than in the light of the jurisprudence of Maryland previously prevailing in this District. Referring to the clause in the Constitution declaring that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, the court, speaking by *Mr. Justice Matthews*, said: "But that rule is not applicable as between the special and general terms of the Supreme Court of the District of Columbia as now organized. The appeal from the special to the general term is not an appeal

from one court to another, but is simply a step in the progress of the cause during its pendency in the same court. The Supreme Court sitting at special term, and the Supreme Court sitting in the general term, though the judges may differ, is the same tribunal."

We are of opinion that an appeal to the general term from the final order of probate made in the special term, which is not based upon a judicial determination of facts, but merely upon the finding of a jury, of necessity brings into review before the general term all the questions of law that are properly presented by the bill of exceptions taken at the trial. We say of necessity because: (1) The Statute requires the Supreme Court of the District, at general term, to review, upon appeal, any order, judgment or decree of the special term, involving the merits of the action or proceeding. (2) The judgment of the special term admitting a will to probate and record, pursuant to the verdict of the jury upon issues relating to the competency of the deceased to make a will, clearly involves the merits of the controversy, because it establishes the validity as a will of the writing offered for probate. (3) The right of appeal to the general term from such a judgment of the special term would be of no value whatever, in most cases, unless the former could, upon such appeal, determine the questions of law properly presented in the bill of exceptions taken at the trial before the jury. It could not have been intended that an appeal to the general term from the order of probate should only involve an inquiry as to whether that order was in conformity with the verdict of the jury.

So, an appeal to this court from the final judgment of the Supreme Court of the District, affirming the order of probate, of necessity brings here for re-examination all the questions properly arising upon those bills of exceptions. The presentation of the instrument in question for probate as the last will of the deceased, the division of the adversary parties into plaintiffs and defendants, the framing of the issues to be tried by the jury, the trial before the jury, the allowance of bills of exception, the motion for a new trial and the overruling of that motion, the admission of the will to probate and the affirmance of the order of probate, all occurred, not, as under the old system, in different courts but in the same court—the Supreme Court of the District of Columbia. If this proceeding, in which there are adversary parties, and the issues in which involve rights of property exceeding in value the jurisdictional amount, be, within the meaning of the Statute, as we hold it is, "a case" which has been finally determined by the Supreme Court of the District, our authority to determine the questions of law, properly raised, and which in the court below, in any of its divisions, controlled the right to have the will probated, cannot be affected by the circumstance that the original order of probate simply followed the finding of the jury, and was made by the court below, held by a single justice, not by the court in general term.

Nor is the question before us affected by the consideration that an order of the general term, merely affirming an order of the special term

which overruled a motion for a new trial, where the finding of the jury is favorable to the caveatees, is not itself a final judgment. Such an order is, in legal effect, a direction that a judgment of probate be entered by the same court which denied the new trial. It is only when that judgment is entered in special term, and is followed by judgment of affirmance in general term, to review which a writ of error is sued out, that the jurisdiction of this court attaches. And in exercising this jurisdiction, this court will not, as it was asked to do in *Van Ness v. Van Ness* and in *Brown v. Wiley*, review simply the order directing the finding of the jury to be certified; but it will inquire whether the facts embraced in that finding were ascertained in conformity with law. If that inquiry is not to be fruitless we must regard the court, in which the facts have been found and certified, as a unit for the purposes of the writ of error. And when that court makes an order, in general term, which, under the Statute, may be re-examined here, the appeal therefrom brings up for review the questions upon which the final judgment really depends, namely, those presented by the bills of exception taken at the trial of the issues submitted to the jury. It would be strange, indeed, if our re-examination of the final judgment of the Supreme Court of the District could not reach the errors of law which it may have committed in the conduct of that trial and upon which that judgment is based.

For the reasons which have been stated we are of opinion that the motion to dismiss the writ of error for the want of jurisdiction in this court to review the judgment in question was properly overruled at a former term.

And we are of opinion that the last motion to dismiss, which proceeds upon the ground that this case is one of equitable cognizance to be reviewed here, if at all, only upon appeal, must also be overruled. It is, of course, undisputed that a final decree in equity, in the court below, cannot be reviewed here by means of a writ of error. But a proceeding involving the original probate of a last will and testament is not strictly a proceeding in equity, although rights arising out of, or dependent upon, such probate have often been determined by suits in equity. In determining the question of the competency of the deceased to make a will, the parties have an absolute right to a trial by jury, and to bills of exceptions covering all the rulings of the court during the progress of such trial. These are not the ordinary features of a suit in equity. A proceeding in this District for the probate of a will, although of a peculiar character, is nevertheless a case in which there may be adversary parties, and in which there may be a final judgment affecting rights of property. It comes within the very terms of the Act of Congress defining the cases in the Supreme Court of this District, the final judgments in which may be re-examined here. If it be not a case in equity, it is to be brought to this court upon writ of error, although the proceeding may not be technically one at law, as distinguished from equity. The last motion to dismiss must, consequently, be denied.

We come now to consider the merits of the case as disclosed by the bills of exceptions tak-

en by the caveators at the trial. The principal questions before the jury related to the alleged undue influence exerted upon the testator in the execution of the will, and to his capacity to make a disposition of his property according to a fixed purpose. Upon these points the instructions given, at the instance of the caveators, were certainly as full as they could have desired.

The first exception taken by them relates to the exclusion of evidence tending to prove that the decedent said to the witness that he received the bulk of his estate by breaking the will of his grandfather, who was also the ancestor of the caveators, and that his estate consisted, in a great degree, of that property with its accumulations. Argument is not needed to show that the manner in which the decedent acquired his estate was wholly immaterial upon the issue as to whether the paper in question was or not valid as his last will and testament.

The second and third exceptions refer to the exclusion of testimony tending to show, by the declarations of Mrs. Stewart, one of the principal legatees, made about or after the date of the execution of the will, that she had knowledge at that time of the execution of the will and of its provisions. The exclusion of this evidence was right. The proper foundation being laid, the declarations of Mrs. Stewart could have been proved for the purpose of impeaching or discrediting her testimony as a witness for the caveatees. But such declarations, not under oath, whenever made, were not competent for any other purpose upon the trial of the issue as to competency to make a will. She was not the only legatee who was interested in the issues to be tried.

The fourth exception is based upon the refusal of the court to give this instruction: "In order to establish undue influence it is not necessary to prove the influence to have been exercised at the time of the execution of the will or with reference to that act; but if the jury believe from the evidence that the undue influence existed prior to and near the time of the execution of the will, they may infer that the will was executed under the continuance of such influence." It was not error to the prejudice of the caveators to refuse this instruction, for the reason, if there was no other, that the court had already, at their instance, fully instructed the jury upon the subject of undue influence. Upon the motion of the caveators the jury were instructed that if the alleged will or any part of it was obtained by undue influence they should find in their verdict that it was so obtained; that it was not necessary, in order to prove that he was unduly influenced in the execution of the will, that the mind of the deceased be shown to be so weak as to render him incapable of attending to ordinary business; that it was material to inquire not only whether the will expressed his intention at the time of its execution, but how that intention was produced; that influence obtained by flattery, importunity, threats, superiority of will, mind or character, or by what art soever that human thought, ingenuity or cunning might employ, which would give dominion over the will of the deceased to such an extent as to destroy free agency or

constrain him against his will to do what he was unable to refuse, was such influence as the law condemned as undue, when exercised by anyone immediately over the testamentary act, whether by direction or indirection, or obtained at one time or another; and that if they believed, from all the facts and circumstances in evidence, that the alleged will was the result of an unsound mind or of the undue influence or importunities of the person or persons surrounding the alleged testator at the time of the execution thereof, or both, they should so say in their verdict.

Under these instructions the jury were at liberty to determine from all the evidence—that bearing directly on the execution of the will as well as that showing that the testator was, in respect to his affairs, generally under the control of others—whether in the execution of the will he was a free agent. This view disposes of the sixth exception, relating to the refusal of the court to instruct the jury that evidence that the legatee, Harriet C. Stewart, improperly influenced the testator as to other important matters and things than the execution of this will was proper to be considered as tending to show that she could and did improperly influence him to make the bequests in her favor or to exclude others of his next of kin and heirs-at-law from a participation in his estate. The evidence upon this subject was before the jury, and under the instructions given, in determining the question whether the undue influence exercised by Mrs. Stewart in respect to other matters extended to or controlled the execution of the will, they could give it such weight as they deemed proper.

The instruction set out in the fifth exception was so manifestly wrong that it is unnecessary to give it special consideration.

The instructions contained in the seventh and eighth exceptions were properly refused upon the ground that the jury had already been instructed that it was both their right and duty to consider all the proof before them, and make such answer to the questions as the whole evidence justified.

The only remaining assignment of error to be noticed is that referring to the following instruction given by the court: "If the jury shall believe the evidence of Mrs. Harriet C. Stewart upon the subject of undue influence, given by her in this case, then the verdict must be in favor of the defendants and in support of the will." It is clear from the record that if Mrs. Stewart did not exercise undue influence over the testator there was no ground to suppose that anyone else did, or to doubt the validity of the paper in question as a last will and testament. Her evidence covered the whole case so completely that if the jury believed what she said they were bound to sustain that paper as a valid will. With her evidence, taking it to be true, the caveators had no ground upon which to contest the probate of the will. While this instruction is apparently liable to the objection that it gave undue prominence to the testimony of a single witness, we are not satisfied, looking at all the evidence, that the court erred in saying to the jury that if Mrs. Stewart told the truth, the case was for the propounders of the will.

Upon the whole case we do not perceive any ground upon which to disturb the finding of the jury.

The judgment of the Supreme Court of the District, in general term, which affirmed the judgment in special term, admitting the paper in question to probate and record as the last will and testament of Levin M. Powell, must be affirmed.

It is so ordered.

Mr. Justice Gray, not having heard the whole argument, took no part in the decision.

H. J. McMURRAY ET AL., *Appts.*,
v.
CHARLES MORAN ET AL.

(See S. C. Reporter's ed. 150-180.)

Railroad bonds—agreement as to issue—priority in payment—notice to subsequent holders—holders for value without notice—pre-existing debts—jurisdictional amount—separate holders of bonds.

1. Where a railroad company issued certain of its bonds under an agreement with the person to whom they were issued that it would issue no more of its bonds, the holder of such bonds has a right of priority in payment from the proceeds of a foreclosure sale of the railroad under the mortgage securing the bonds, over holders of other subsequently issued bonds of the company secured by the same mortgage, who took their bonds with actual notice of the agreement.
2. No one receiving the bonds, thus improperly issued, who had notice of the restriction which the company, by such agreement, imposed upon its authority, can be deemed a bona fide holder for value, although they were used in payment of the company's debts and obligations and in discharge of obligations assumed by some of its officers.
3. If any of the holders paid value for them without actual notice of the restriction imposed by the company upon its authority to issue them, they would be deemed bona fide holders for value, unaffected by the said agreement and entitled to share in the proceeds of the sale upon terms of equality with the person holding the bonds issued under the agreement.
4. And they would be deemed holders for value, even if they took the bonds in payment of, or as security for, the company's pre-existing debts.
5. Where the amount of bonds at par value, held by any one of the respective appellants owning them, is not sufficient to give this court jurisdic-

tion to review the decree below, so far as it affects him, the appeal will be dismissed as to him.

6. Each claim is distinct and separate from the claims of all other appellants; and the right of each claimant to be regarded as a bona fide holder for value depends upon the special circumstances under which he took the bonds now held by him.

[No. 198.]

Argued Jan. 30, 1890. Decided March 3, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Nevada that the complainants were entitled to payment of their bonds first out of the proceeds of the mortgaged premises and that after such payment the defendants were entitled to participate equally in a surplus remaining, each in proportion to the amount of his bond. *Decree affirmed as to certain of the defendants and reversed as to others, and appeal dismissed as to others.*

Opinion below, 20 Fed. Rep. 80.

Statement by *Mr. Justice Harlan*:

The "Nevada and Oregon Railroad Company," a corporation of the State of Nevada, by its mortgage or deed of trust, executed April 25, 1881, bargained, sold and conveyed to the Union Trust Company of New York all of the property, franchises and estate, real and personal, then existing and to be acquired, including its line of road constructed or to be constructed or completed, to secure the payment of three thousand bonds of one thousand dollars each, to be issued by the mortgagor, and made payable on the first day of June, 1890, at the City of New York, with interest, semi-annually, at the rate of eight per cent per annum. Each bond contained an agreement that if there was a continuous default for six months in the payment of interest, the principal and all arrearages of interest thereon should, at the option of the holder, become immediately due and payable.

Of the three thousand bonds authorized to be executed by the railroad company, only six hundred were issued and certified by the trustee. The appellees, Moran Brothers, became the holders for value of 810 of the bonds so certified, paying therefor \$248,000. In respect to those bonds, there was such default in meeting the interest thereon that appellees became entitled to declare the principal due and payable. And having so declared, the Union Trust Company brought suit in the court below for the foreclosure of the mortgage or deed of trust, the sale of the mortgaged property, and the application of the proceeds of sale in payment of the bonds held by Moran Brothers,

NOTE.—As to municipal bonds as affected by change in the ruling of the highest court of a State, or by change in the Constitution, see note to *Mitchell v. Burlington*, Bk. 18, p. 350.

As to negotiability of railroad bonds, see note to *White v. Vermont etc.* R. R. Co. Bk. 18, p. 221.

As to suits on coupons detached from bonds, see note to *Kenosha v. Lamson*, Bk. 19, p. 725.

As to overdue coupons; right of holders of; effect of, on bonds to which they are attached,—see note to *Texas v. White*, Bk. 19, p. 839.

As to mandamus to compel city, town or county to levy tax to pay bonds or interest on bonds, see note to *City of Davenport v. U. S.* Bk. 19, p. 704.

As to recitals in negotiable bonds or securities, as evidence of the fact recited and as an estoppel, see note to *Mercer County v. Hackett*, Bk. 17, p. 548.

As to municipal bonds; reference to statute in,—see note to *Ogden v. Daviess County*, Bk. 20, p. 263.

and of such other bonds as were entitled to share in the proceeds.

The present suit was brought by Moran Brothers against the appellants as the holders of 147 of the 600 bonds certified by the trustees. It proceeds upon the theory that as between the appellees holding the 310 bonds first issued, and the appellants holding the 147 subsequently issued, the former were entitled to priority in the distribution of the proceeds of the sale of the mortgaged property.

It appears from the evidence that "The Nevada and Oregon Railroad Company," a Nevada corporation, entered into a written contract, of date August 26, 1880, with one Thomas Moore, for the construction by him of certain divisions of its road, whose aggregate length was one hundred and eighty-five miles. A part of the consideration for Moore's undertaking this work was the representation of the company, embodied in the contract, that "fifty-year eight per cent first-mortgage bonds, to the extent only of ten thousand dollars per mile, and capital stock to the extent only of twenty thousand dollars per mile for the first one hundred and eighty-five miles will be issued, making a total of eighteen hundred and fifty thousand dollars in first-mortgage bonds, and thirty-seven hundred thousand dollars, par value in stock, upon the entire one hundred and eighty-five miles." The contract further provided for the payment to Moore of \$100,000 in lawful money, \$310,000 in first-mortgage bonds, and \$450,000 in the stock of the railroad company, at par, for the Reno division as far as Beckwith Pass. The contractor was to have all the first-mortgage bonds as the work of construction progressed.

This contract was supplemented by another one, executed December 4, 1880, whereby the time and order of performance as well as of payments were changed. It provided that the Reno division, from Reno to Beckwith Pass, should be first constructed; that "upon the shipment of 1,000 tons of rails and splices the company should pay to the contractor \$200,000 in cash, and upon arrival of same at Reno \$150,000 in first-mortgage bonds and \$300,000 in stock, and upon shipment of balance of rails for the present work \$160,000 in first-mortgage bonds and \$150,000 in stock;" that "the company shall deposit with the trustee in New York, on or before January 10, 1881, \$10,000 in cash, and the \$450,000 in stock, and, on or before January 25, 1881, the \$310,000 in the first-mortgage bonds;" that this contract should not be "construed as abating or impairing any portion of the contract of August 26, 1880;" and that "the entire stock to be issued upon the line from Reno to the temporary terminus as herein stated [Beckwith Pass] shall be limited to \$600,000, without reference to any excess in distance over thirty miles, and the first-mortgage bonds upon the same to \$310,000."

A separate contract was made on the same day with reference to the construction of the road from Beckwith Pass to the Oregon line.

The company having failed to make payments to Moore, as it had agreed to do, on account of work done on the Reno division, another contract was made February 1, 1881, by which the company stipulated to deliver to the contractor the \$450,000 of stock and the \$310,000 first-mortgage bonds as soon as the

certificates and bonds could be engrossed and signed. It was provided that this contract should not impair the contracts previously made between the parties.

On the 25th of April, 1881, the "Nevada and Oregon Railroad Company," the company first above named, was organized. It was the successor, and acquired all the rights, franchises and property of "The Nevada and Oregon Railroad Company" of 1880, and assumed to meet all the contract obligations, and to pay all the debts, of the old company. The mortgage, heretofore referred to, of April 25, 1881, was executed by the new company.

By contract, of date April 26, 1881, the new company adopted, confirmed and renewed Moore's contracts with the old company, and, subsequently, May 24, 1881, the contract for the construction of the road from Beckwith Pass to the Oregon line was extended one year.

Between the last two dates, namely, on March 28, 1881, the appellees, Moran Bros., and Moore entered into a contract, by which the former agreed to pay the latter the sum of \$248,000, in specified installments, upon completion, within certain periods named, of five, ten, twenty-one, twenty-six and thirty-one miles of Reno division against the delivery of the first-mortgage eight per cent bonds of the "Nevada and Oregon Railroad Company." By that contract Moran Bros. became entitled to receive the bonds on installments, as the above number of miles were constructed.

Subsequent transactions between the parties are so clearly and succinctly stated in the opinion delivered in this cause by Judge Sabin (20 Fed. Rep. 80), that the following extract is made from it:

"Moore went on under these various contracts and graded 32 miles on the first section north from Reno and commenced grading on the 170 miles running north from Beckwith Pass. He also laid about 17 miles of track from Reno northerly, and provided certain rolling stock and other materials. Moore became embarrassed, and on about November 16, 1881, abandoned his contracts and left the State. From that time forward the company assumed the management of the road and conducted its future operations as best it could. The company was in a very embarrassed condition. It was largely in debt and without money or resources of any kind to meet its liabilities. It had attempted to build and equip a railroad without first having provided any adequate means for so doing.

"On the twenty-fifth of March, 1882, Moore, as party of the first part, the railroad company, defendant, of the second part, D. W. Balch, H. J. McMurray, A. H. Manning, W. F. Berry and C. A. Bragg, of the third part, and Alvin Burt, as trustee, of the fourth part, entered into an agreement, the object of which was to adjust, as therein provided, the then unsettled business matters between Moore and the railroad company. This contract recognizes the fact that the railroad company had issued to Moore these 310 first mortgage bonds; that he had negotiated them with Moran Bros., complainants in the second above-entitled suit; that he had been paid for 210 of said bonds by Moran Bros. and that they held the remainder of said

bonds subject to contract with Moore, to be paid for as the road was completed. By this contract Moore surrendered his rights in these bonds for the benefit of the railroad company, which subsequently drew the money due upon them. Section 11 of this contract is as follows:

"The parties of the second and third part hereby covenant and agree for themselves and the other stockholders, and for the creditors of the party of the first part as follows, viz.: . . . (b) That no second mortgage shall be made, issued or recorded upon said railroad or any portion thereof.

"That the issue of first-mortgage bonds thereon shall be limited to \$10,000 per mile of completed road, or such an amount that the annual interest charge thereon shall not exceed \$300 per mile of completed road, and also that the issue of capital stock of said company shall be limited to \$20,000 per mile of said railroad."

"Pursuant to this contract, on the twenty-sixth of April following, Moore and Moran Bros. join in a communication to Balch, as president of said railroad company, informing him of the terms upon which he can, as the road is completed, draw upon complainants for \$75,000, the balance due upon these 100 bonds. These funds were so drawn and with them the road was completed the 81 miles. It should be noted that this contract of March 25, 1882, was entered into by Balch as president of, and on behalf of, said railroad company, pursuant to a resolution of the board of directors of said company adopted January 13, 1882, prior to his departure from Reno to New York for the purpose of endeavoring to effect a settlement of the business of the company. And this contract, if not formally ratified by the directors of the company by resolution adopted to that effect, was actually ratified by the company by its acting upon it, carrying out to some extent, at least, its provisions, and accepting the benefits arising therefrom, and especially in drawing and using the balance due upon the 100 bonds paid by Moran Bros. after its execution. Now, all of these various contracts conclusively show this: that this railroad company, defendant, and its predecessor had repeatedly contracted with Moore and promised and held out to the public that upon no part of the line of its road should there be issued more than \$10,000 in first-mortgage bonds for each mile of completed road. It was upon this condition and agreement that Moran Bros. purchased these bonds. Charles Moran, one of the complainants, testifies that the railroad company issued its circulars to that effect; that he saw them; that this limitation was the condition in the purchase of the bonds; that they would not have advanced \$11,000 per mile upon the road. He is supported in this by the testimony of Moore, Fowler and Balch, and by every contract in evidence executed either by the railroad company, defendant, or by its predecessor, and subsequently ratified by the Nevada and Oregon Railroad Company; and this testimony is wholly uncontradicted."

The decree below was accompanied with a finding of facts. Among the facts so found were the following:

"That before and at the time the 810 bonds were sold the railroad company, in considera-

tion of their purchase, obligated itself in writing that it would not issue or sell any more than ten of said bonds, or \$10,000 worth, for each mile of completed road, and no more than 310 for or upon the Reno division, the defendants and each of them having notice of such agreement;

"That while these agreements were in force, and after Moran Bros. had purchased and paid for the 810 bonds now held by them, the company, by and through its then officers and trustees, defendant Balch, trustee and president; King, trustee and secretary; Bragg, Manning and Berry, trustees; McMurray, stockholder; and Deal and Webster, attorneys, issued and advised, caused and procured to be issued the bonds mentioned in the answer, 147 in number, the defendants and each of them well knowing at the time the terms and conditions of the contracts limiting the issue of bonds, and that complainants had purchased for value the 810 bonds mentioned in the bill of complaint;

"That the 147 bonds, and each of them, were procured from the Union Trust Company of New York by defendant Balch, under and in pursuance of a resolution of the board of trustees of the railroad company, adopted by Balch, Bragg, Manning, Berry and King, acting as such board, and for the purpose expressed in the resolution, and represented to the Union Trust Company, of negotiating them for value, and after said bonds were so procured the board delivered them to the original holders thereof without payment therefor of any sum of money whatever;

"That, except the 10 bonds issued to the defendants Webster and Deal, the remaining 137 of the 147 bonds were delivered for and in consideration of pre-existing debts, and principally for debts owing by Moore and not debts owing by the company, and in large part for claims that Balch, McMurray, Manning, Berry and Bragg had assumed and agreed to pay; the bonds issued to Webster and Deal having been delivered in consideration of professional legal services to be rendered by them as solicitors for the defendants, and not delivered until after this suit was commenced; and,

"That the defendants, who in the answer are alleged to hold a portion of the 147 bonds, and each of them, received such bonds and hold the same as security for debts which existed at and before the time the bonds were acquired by them, and none of such persons are bona fide purchasers of said bonds for value."

Upon this state of facts it was decreed that the complainants were entitled to have the amount of their bonds, principal and interest, paid out of the proceeds of the mortgaged premises, and that none of the defendants were entitled to participate in or share such proceeds until after the payment in full of the principal and interest of the 310 bonds, nor unless there should be a surplus remaining; and if there should be such surplus, then the defendants were entitled to participate in the distribution, each in proportion to the amount of the bonds held by him.

Messrs. W. E. F. Deal and Horatio C. King, for appellants:

The position of Balch as president did not

make it improper that the company should employ and pay him.

Ang. & A. Corp. §§ 317, 318, p. 316; *Rosborough v. Shasta River Canal Co.* 22 Cal. 562; *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 87 Kan. 606; *Citizens Nat. Bank v. Elliott*, 55 Iowa, 106, 107; *Oheeney v. Lafayette B. & M. R. Co.* 68 Ill. 570; *Chandler v. Monmouth Bank*, 13 N. J. L. 260; *Santa Clara M. Assn. v. Meredith*, 49 Md. 889.

The only obligation upon a director is that he must act honestly and fairly; he has the right to recover the money he has loaned and to receive a reasonable compensation for his services.

1 Morawetz, Priv. Corp. § 527, p. 495; 1 Waterman, Priv. Corp. 424; *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193; *Seeley v. San José, I. M. & M. Co.* 59 Cal. 22; *Harte v. Brown*, 77 Ill. 230; *Marine & R. Phosphate Min. & Mfg. Co. v. Bradley*, 105 U. S. 183 (26: 1087); *Twin Lick Oil Co. v. Marbury*, 91 U. S. 588 (23: 329); *Saltmarsh v. Spaulding*, 6 New Eng. Rep. 593, 147 Mass. 224; *Holt v. Bennett*, 6 New Eng. Rep. 72, 146 Mass. 437.

A director should not pay more for the securities of the corporation than others do, nor buy them for less than others pay for them.

Clafin v. South Carolina R. Co. 8 Fed. Rep. 118, 4 Am. & Eng. R. R. Cas. 231; *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 190, 4 Am. & Eng. R. R. Cas. 293, and note, 306.

The beneficiary may avoid the act of the trustee, but cannot do so without restoring what it has received.

York Buildings Co. v. Mackenzie, 8 Bro. Parl. Cas. 42; *Smith v. Lansing*, 22 N. Y. 520.

The holder is protected by the authentication of the bonds in the manner provided in the mortgage.

Jones, R. R. Securities, §§ 194, 208, 210, 218, 214; *Stanton v. Alabama & C. R. Co.* 2 Woods, 523, 528.

It was not only necessary that complainants should allege the facts constituting the fraud, but that they should prove the fraud as alleged.

1 Dan. Ch. Pl. and Pr. (4th ed.) 326; Story, Eq. Pl. § 257.

It is only the record of such instruments as are entitled to be recorded that is even constructive notice.

Pitcher v. Barrows, 17 Pick. 364; *Beekman v. Frost*, 18 Johns. 544; *Sawyer v. Adams*, 8 Vt. 172; *James v. Morey*, 2 Cow. 246, and note, 14 Am. Dec. 512; *Grellet v. Heilshorn*, 4 Nev. 532; *Sharon v. Minnock*, 6 Nev. 390; *Mesick v. Sunderland*, 6 Cal. 314, 315; *Stafford v. Lick*, 7 Cal. 490; *Brannan v. Mesick*, 10 Cal. 107; Wade, Notice, § 119, and authorities cited in note.

The holders of the bonds were bound to take notice of what was contained in the bonds and what was contained in the deed of trust, and that was all.

Stanton v. Alabama & C. R. Co. 2 Woods, 523, 528.

Mr. Wheeler H. Peckham for appellees.

Mr. Justice Harlan delivered the opinion of the court:

It appears satisfactorily from the evidence

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that when appellees purchased the 310 bonds from Moore, the latter had contracts with the railroad company, by which it was restricted in issuing bonds to \$10,000, par value, for each mile of completed road. It was that feature of the several contracts between the company and Moore that gave value, in the commercial world, to the bonds delivered to him. And the benefit of that restriction upon the issuing of bonds necessarily passed to those who purchased them from Moore. The issuing of bonds in excess of those delivered to Moore, and by him sold to Moran Bros., was in palpable violation of the company's agreement with him; for, as is conceded, the 310 bonds, held by appellees, represented, on the above basis, all of the completed road. No one receiving the bonds, thus improperly issued, who had notice of the restriction which the company, by the contracts with Moore, imposed upon its authority, could be deemed a bona fide holder for value. The circumstances under which the 147 bonds were obtained by the railroad company from the trustee, the Union Trust Company, are stated, with substantial accuracy, in the finding of facts made by the court below. Those who procured those bonds to be issued by the railroad company had knowledge of the want of authority in the company to put them on the market to the prejudice of the rights of the appellees as the holders of the 310 bonds. They were used in payment of the company's debts and obligations and in discharge of obligations assumed by some of its officers. The purpose for which they were issued and used, however meritorious in itself, as between the company and those who originally took them, cannot affect the rights of the appellees arising under the company's contracts with Moore, as the original owner of the 310 bonds.

We do not mean to say that the 147 bonds and each of them are absolutely void for every purpose and by whomsoever held. If the present holders paid value for them without actual notice of the restriction imposed by the company upon its authority to issue them, they would be deemed bona fide holders for value, unaffected by the agreements between Moore and the railroad company. And they would be deemed holders for value, even if they took the bonds in payment of, or as security for, the company's pre-existing debts. *Brooklyn City & N. R. Co. v. National Bank of the Republic*, 102 U. S. 14 [26: 61].

The mortgage of 1881 does not contain any provision that gives priority to some of the holders of the bonds secured by it over other bonds of the same issue. If it did, all holders of the bonds so secured would be bound to take notice of such provisions, the mortgage having been duly recorded in Nevada. Nor is notice of the rights secured to Moore, as the holder of the 310 bonds, to be imputed to the defendants because the contracts between him and the company, or some of them, were put upon record. We do not understand that, by the law of Nevada, such instruments were required to be recorded, or that the record of them carries with it notice to all the world of their contents. Gen. Stat. Nev. 1883, chap. 18, §§ 2571, 2593. The question, therefore, is one

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of actual notice upon the part of the defendants when they took the bonds held by them respectively, of the limitation upon the company's authority to issue bonds in excess of the \$10. We thus limit the inquiry as to notice, because it is clear that the defendants must have known, when they took the bonds, that the \$10 had been previously issued, and that that amount more than represented completed road, on the basis of \$10,000 a mile.

Upon a close scrutiny of the evidence we are of opinion that the decree below is correct as to the 56 bonds held by McMurray, the 28 bonds held by the First National Bank of Reno or by Bender for Manning & Berry, and the fraction of a bond held by Bender for the last-named firm. They were received by McMurray and Manning & Berry, respectively, with actual notice, derived from their relations with the railroad company, of its agreement not to issue on the Reno division more than \$10 bonds, or \$10,000 of bonds for each mile of completed road, and with knowledge, when they took the bonds, that the number thus limited had been previously issued to the contractor Moore. In respect to the 13 bonds held by Wright, the like number held by Watkins, and the 5 bonds held by Schooling, the evidence shows that the present holders took them for value from the first holders, without notice as to the restriction which the company, by its agreements with Moore, had imposed upon its authority to issue bonds on the Reno division. They were entitled to share in the proceeds of the sale of the mortgaged property, in proportion to the amount of bonds held by them respectively, and upon terms of equality with Moran Bros.

As to the remaining bonds, the appeal must be dismissed, because the amount, at par value, held by each of the respective appellants owning them, is not sufficient to give this court jurisdiction to review the decree below, so far as it affects them. No one of those claims, principal and interest, exceeded, at the time of the decree below, the sum of five thousand dollars. Each claim is distinct and separate from the claims of all other appellants; and the right of each claimant to be regarded as a bona fide holder for value depends upon the special circumstances under which he took the bonds now held by him. *Gibson v. Shufeldt*, 122 U. S. 27 [30:1089]; *Jewell v. Knight*, 123 U. S. 426, 432 [31:190, 192].

The decree below as to H. J. McMurray, A. H. Manning and W. F. Berry, partners as Manning & Berry; Charles T. Bender, trustee for Manning & Berry, and the First National Bank of Reno, as trustee for Manning & Berry, must be affirmed; and reversed as to the appellants William Wright, A. A. Watkins and Jerry Schooling, and the cause, as to those parties, must be remanded for further proceedings consistent with this opinion. The appeal by all the other appellants must be dismissed. The appellants Wright, Watkins and Schooling will recover against the appellees their costs in this court.

It is so ordered.

PRENTIS D. CHENEY, *Appt.*,

v.

JACOB LIBBY.

(See S. C. Reporter's ed. 68-84.)

Time, when of the essence of a contract—words of contract—excuse for non-performance—specific performance, when decreed—conduct of parties affecting contract—waiver of condition—forfeiture—tender of performance—bankers, when not agents—when not necessary to bring money into court—offer in bill to perform—condition of decree—interest after tender.

1. Time may be made of the essence of the contract by the express stipulations of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser.
2. Where the parties specify the time of performance, and declare that "time and punctuality are material and essential ingredients" in the contract; and that it must be "strictly and literally" executed, however harsh or exacting its terms may be, a refusal of the court to give effect to

NOTE.—When specific performance decreed, and when refused, see note to Hepburn v. Dunlop, Bk. 4, p. 65; also note to Colson v. Thompson, Bk. 4, p. 253, and to Brashier v. Gratz, Bk. 5, p. 322.

Plaintiff must show performance, or readiness to perform, and offer to perform; decree against subsequent purchaser. See note to Colson v. Thompson, Bk. 4, p. 253; also note to Pratt v. Carroll, Bk. 3, p. 627.

Title may be made any time before decree; necessary parties to action, objection to; unnecessary parties; when objection made, striking out parties. See note to Hepburn v. Dunlop, Bk. 4, p. 65; also note to Morgan v. Morgan, Bk. 4, p. 242.

As to laches of plaintiff; change of circumstances; time, when material,—see note to Pratt v. Carroll, Bk. 3, p. 627; also note to Hepburn v. Dunlop, Bk. 4, p. 65.

When time or excess of price not a bar to action for, see note to Brashier v. Gratz, Bk. 5, p. 322.

When court will decree conveyance of land situated beyond its territorial jurisdiction, see note to Oakley v. Bennett, Bk. 13, p. 568.

Time, when of the essence of the contract, see note to Slater v. Emerson, Bk. 15, p. 626.

Specific performance, when granted or refused.

Specific performance is not an absolute right. It rests in judicial discretion,—exercised according to the principles of equity and with reference to the facts of the case. *Hennessey v. Woolworth*, 128 U. S. 438 (32:500); *Nickerson v. Nickerson*, 127 U. S. 668 (32:314); *Love v. Welch*, 97 N. C. 200; *Barrett v. Foreney*, 82 Va. 269; *Ramsey v. Gheen*, 99 N. C. 215; *King v. Gsantner*, 23 Neb. 795; *Kelly v. Cent. Pac. R. Co.* 74 Cal. 557; *Simon v. Wildt*, 84 Ky. 157; *Knott v. Shepherdstown Mfg. Co.* 30 W. Va. 790; *Minneapolis & St. Louis R. Co. v. Cox*, 76 Iowa, 308.

A court of chancery will not undertake to compel the specific performance of an agreement to take care of and provide for the complainant in case of her general debility or sickness. *Mowers v. Fogg*, 45 N. J. Eq. 120.

Equity will not intervene to compel specific performance of contracts for personal services, involving the exercise of special skill, judgment and discretion, which are continuous in their nature,

them is to make a contract which the parties have not made for themselves.

3. Even where time is made material, by express stipulation, the failure of one of the parties to perform a condition within the particular time limited will not defeat his right to specific performance, if the condition be subsequently performed without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give such relief.
4. The discretion which a court of equity has to grant or refuse specific performance is always exercised with reference to the circumstances of the case and is often controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions.
5. Where a contract is payable in money, the acceptance of numerous payments in current funds justifies the inference that current funds will be accepted for subsequent payments and calls for a notice of intention to only receive coin or legal-tender paper for subsequent payments, and without such notice excuses failure to pay coin or legal-tender on the very day the money is due.
6. To permit the enforcement of a forfeiture of the contract under such circumstances for want of payment of subsequent installments in coin or legal-tender notes, where current funds were offered, and, on refusal to receive them, legal-tender notes and coin were tendered soon afterwards, in payment, would enable the creditor to take advantage of his own wrong.
7. The provision in the contract forbidding its modification or change, "except by entry thereon in writing signed by both parties," coupled with the provision that no court should relieve plaintiff from a failure to comply strictly and literally with the contract, cannot be applied where the efficient cause of his failure to comply strictly and literally with the contract was the conduct of the other party.
8. Under such circumstances, the failure of the plaintiff to pay in coin or legal-tender paper did not work a forfeiture of the contract, and does not stand in the way of a decree for specific performance.
9. After the surrender by defendant of the notes due and his formal notification to plaintiff that he regarded the contract as forfeited and would not receive any money from him, plaintiff was not bound, as a condition of his right to claim specific performance, to go through the useless ceremony of tendering payment of the note.
10. Bankers are not agents of the owner to receive payment of notes by reason simply of the fact that the notes were made payable at their bank,

running through an indefinite period of time. *Iron Age Pub. Co. v. West*. U. Teleg. Co. 83 Ala. 498.

Equity is never bound to decree specific performance unless the justice of the case, as drawn from all the facts, requires it. *Ford v. Euker* (Va.) 13 Va. L. J. 370; *Ramsey v. Gheen*, 99 N. C. 215; *Buckley v. Patterson*, 39 Minn. 250; *Eaton v. Eaton*, 6 New Eng. Rep. 815, 64 N. H. 493; *Duncan v. Cent. Pass. R. Co.* 85 Ky. 525; *Mansfield v. Sherman*, 81 Me. 365.

Fraudulent misrepresentations by which the defendant was induced to enter into a contract constitute a defense to a suit for specific performance. *Kelly v. Cent. Pac. R. Co.* 74 Cal. 567.

Specific performance of a contract of sale will not be enforced where it is shown that there was a mutual mistake as to the thing sold. *Fort Smith v. Brogan*, 49 Ark. 306.

A contract to convey real estate, entered into by defendant under a mistake, will not be specifically enforced. *Buckley v. Patterson*, 39 Minn. 250; *Hess v. Evans* (N. J.) 13 Cent. Rep. 373; *Rushton v. Thompson*, 35 Fed. Rep. 635; *Wilson v. McLaughlin*, 11 Colo. 465; *Mansfield v. Sherman*, 81 Me. 365.

A court of chancery cannot decree specific performance of an agreement to convey property which has no existence, or to which the defendant has no title, although the want of title is caused by the defendant's own act,—as by his conveyance to a bona fide purchaser. *Kennedy v. Hazelton*, 128 U. S. 667 (32: 576).

Specific performance should never be granted unless the terms of the agreement sought to be enforced are clearly proved. *Hennessey v. Woolworth*, 128 U. S. 438 (32: 500); *Nickerson v. Nickerson*, 127 U. S. 668 (32: 314); *Prater v. Sears*, 77 Ga. 28.

Specific performance of a contract will not be enforced, unless the remedy as well as the obligation is mutual, and alike attainable by both parties to the agreement. *Iron Age Pub. Co. v. West*. U. Teleg. Co. 83 Ala. 498; *Anson v. Townsend*, 73 Cal. 415; *Simon v. Wildt*, 84 Ky. 157.

This rule does not not apply where the condition originally lacking has been supplied by filing a bill for specific performance by the party not bound. *Woodruff v. Woodruff*, 1 L. R. A. 380, 44 N. J. Eq. 349.

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Unilateral contracts for the purchase of lands, signed by the purchaser, may be enforced by the vendor. *Miller v. Cameron*, 1 L. R. A. 554, 45 N. J. Eq. 95.

Specific performance may be enforced of agreements by parol for conveyance of lands. *Quinn v. Quinn*, 78 Iowa, 585; *Barrett v. Forney*, 82 Va. 299; *Griggsby v. Osborn*, 82 Va. 371; *Burlingame v. Rowland*, 1 L. R. A. 829, 77 Cal. 315; *Welch v. Whelpley*, 62 Mich. 15; *Young v. Young*, 45 N. J. Eq. 27; *Wallace v. Scorgin*, 17 Or. 478; *Everett v. Dilley*, 80 Kan. 73.

When time is not of the essence of the contract, it may be specifically enforced by the purchaser after the time agreed. *Day v. Hunt*, 112 N. Y. 191; *Cannfield v. Tillotson*, 25 Neb. 357.

Specific performance will not be granted after an unreasonable delay. *Nickerson v. Nickerson*, 127 U. S. 668 (32: 314); *Requa v. Snow*, 76 Cal. 590; *Simpson v. Atkinson*, 39 Minn. 238; *Love v. Welch*, 97 N. C. 200; *Northrup v. Stevens*, 39 Minn. 105.

Specific performance is not barred by delay of complainant occasioned by defendants tendering a deed defectively acknowledged by one of them and not joined in by the wife of another. *Johnston v. Jones*, 85 Ala. 286.

A purchaser cannot specifically enforce an agreement to sell which was upon a condition that has never been performed. *Wainman v. Hampton*, 110 N. Y. 429; *Butler v. Archer*, 78 Iowa, 551.

A demand for a deed need not be made as a condition of specific performance, where the party bound to give the deed has repudiated the contract or denied the right of the other to receive the deed. *Harshman v. Mitchell*, 117 Ind. 312.

A formal tender of the purchase money before commencing a suit to specifically enforce a contract for the sale of land is rendered unnecessary by a refusal to consider the question of sale under the contract, and a denial of liability thereon. *Bradford v. Foster*, 87 Tenn. 4.

Specific performance will not be granted where inequitable. *Stevens v. Comstock*, 12 Cent. Rep. 327, 109 N. Y. 655; *Conger v. New York, W. S. & B. R. Co.* 45 Hun, 296.

Specific performance will not be decreed in cases of fraud, or when the decree would produce injustice. *Veth v. Gierth*, 10 West. Rep. 43, 92 Mo. 97.

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and moneys left with them to be used as payment are not thereby the moneys of the owner of the notes.

11. Under the circumstances it was not absolutely necessary that plaintiff should have brought the money into court for the defendant at the time he filed his bill; his offer in the bill to perform all the conditions and stipulations of the contract was sufficient to give him a standing in court.
12. But the decree of specific performance ought not to become operative until he brings into court for the defendant the full amount necessary to pay off the notes for principal and interest.
13. The defendant is not entitled to interest after the respective tenders were made, because it does not appear that the plaintiff has, since the tenders, realized any interest upon the moneys left by him for defendant at the bank.

[No. 724.]

Submitted Dec. 4, 1889. Decided March 3, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Nebraska in favor of plaintiff in a suit to compel specific performance of a contract for the sale of lands. *Affirmed, but the decree suspended and not to become operative until plaintiff pays into court the amount of the notes given for the unpaid portion of the purchase money.*

The facts are stated in the opinion.

Mr. Adams A. Goodrich, for appellant:

Where a note is made payable at a bank it is the maker's duty to be at the bank to pay the same.

United States Bank v. Smith, 24 U. S. 11 Wheat. 171 (6: 448); *United States Bank v. Oneale*, 2 Cranch, C. C. 466; *Burke v. McKay*, 48 U. S. 2 How. 66 (11: 181).

Where a note made payable at a bank is not lodged with the bank, whatever the bank receives from the maker to apply on the instrument, it receives as his agent, not as agent of the payee.

Ward v. Smith, 74 U. S. 7 Wall. 447 (19: 207); *Dan. Neg. Inst.* § 326a, note 3; *Adams v. Hackensack*, 44 N. J. L. 638.

A tender after the day of payment is not good.

Hume v. Peploe, 8 East, 168; *Maynard v. Hunt*, 5 Pick. 240; *Dobie v. Larkan*, 10 Exch. 776; *Poole v. Tunbridge*, 2 Mees. & W. 223.

If the default of Libby can be excused by the court it should be on terms requiring Libby to pay all costs.

Gregg v. Von Phul, 68 U. S. 1 Wall. 274 (17: 536); *Stinson v. Dousman*, 61 U. S. 20 How. 461 (15: 966).

Where the words of a contract have a plain and obvious meaning, all construction in hostility with such meaning is excluded.

Green v. Biddle, 21 U. S. 8 Wheat. 1 (5: 547); *Jennison v. Leonard*, 88 U. S. 21 Wall. 302 (22: 539); *Missouri River, Ft. S. & G. R. Co. v. Brickley*, 21 Kan. 286.

Prior to the Act of March 3, 1863, gold and silver coin was the only legal tender.

Ward v. Smith, 74 U. S. 7 Wall. 447 (19: 207); *Gwin v. Breedlove*, 43 U. S. 2 How. 28 (11: 167).

Mr. Samuel P. Davidson, for appellee:

A forfeiture is not warranted by the proofs.

Robinson v. Cheney, 17 Neb. 680, 681.

Mr. Justice Harlan delivered the opinion of the court:

This is a suit to compel the specific performance by the appellant, Cheney, of a written agreement entered into May 28, 1880, between him and the appellee, Libby, whereby the former demised and let to the latter the possession and use of, and contracted, bargained and agreed to sell to him, two sections of unimproved land in Gage County, Nebraska. The defendant claimed that the contract was forfeited, long before this suit was brought, by Libby's failure to comply with its stipulations. Upon that ground he resists the granting of the relief asked. The circuit court adjudged that the plaintiff was entitled to a decree.

The question to be determined is, whether there was any such default upon the part of the plaintiff, Libby, as deprived him of the right to specific performance.

The sum agreed upon for the possession, use, occupancy and control of the land was \$1,361.00 yearly, represented in Libby's notes, and in the taxes, assessed and to be assessed against the land. The price for the land was \$8,960, of which \$1,600 was paid at the date of the contract. The balance was to be paid, "without notice or demand therefor," in annual installments at the times specified in promissory notes, of even date with the contract, which were executed by Libby to Cheney, at Tecumseh, Nebraska. The notes were made payable to the order of Cheney, at the office of Russell & Holmes, private bankers in that city. Eight of the notes represented the balance of the principal debt—each one being for \$920—and were payable respectively in three, four, five, six, seven, eight, nine and ten years after date. The remaining ten notes represented the annual interest.

Libby agreed to meet the notes as they respectively matured, pay the taxes on the land for 1880 and subsequent years, and, during that year (the weather permitting), break two hundred acres, and build on the land a frame barn of sixteen feet by twenty, and a frame dwelling-house of a story and a half. Cheney undertook to pay the taxes of 1879 and previous years, and bound himself to convey the land, in fee simple, with the ordinary covenants of warranty (reserving the right of way that might be demanded for public use for railways and common roads), upon the payment by Libby of the several sums of money aforesaid at the times limited, and the strict performance of all and singular the conditions of the contract.

It was further stipulated between the parties:

That "time and punctuality are material and essential ingredients in this contract;"

That if Libby failed to perform and complete all and each of the payments, agreements and stipulations in the agreement mentioned, "strictly and literally," the contract should become void, in which event all the interests created by the contract in favor of Libby, or derived from him, should immediately cease and determine, and revert to and revest in Cheney, without any declaration of forfeiture, or re-entry, and without any right in Libby of reclamation or compensation for moneys paid or services performed;

That in case the contract was forfeited, Cheney could take immediate possession of the

land, with all the crops, improvements, fixtures, privileges and appurtenances thereon or appertaining thereto, Libby to remain bound for all taxes then assessed against the premises, and all installments of principal or interest then due on the contract to be regarded as rent;

That whenever one half of the purchase price was paid, with all accrued interest and taxes, Cheney should execute a deed, as provided for in the contract, and take notes and a mortgage for the remaining payments to run the unexpired time; and

That when Libby's right to purchase the land terminated by reason of nonperformance of his covenants, or his failure to make the payments, or any of them, at the time specified, he should be deemed to have only the rights of a tenant, and to hold the land under the contract as a lease, subject to the statute regulating the relation of landlord and tenant, with the right in Cheney to enforce the provisions of the contract, and recover possession of the land, with all the fixtures, privileges, crops and appurtenances thereon, as if the same was held by forcible detainer.

The agreement also contained these stringent provisions: That no court should relieve Libby from a failure to comply strictly and literally with the contract; that no modification or change of the contract could be made except by entry thereon in writing signed by both parties; and that no oversight or omission to take notice of any default by Libby should be deemed a waiver by Cheney of the right to do so at any time.

Libby went into possession under the contract. He and those in possession under him had, prior to the commencement of this suit on the 26th of February, 1887, broken up and cultivated most of the land, and made improvements thereon of a permanent and substantial character. Nearly all of these improvements were made prior to the first of January, 1885. He met all the obligations imposed upon him with respect to the breaking up of the land and its improvement by the erection thereon of buildings. His evidence, which is uncontradicted, was: "We have broken up and cultivated about 1,200 acres; built five houses and stable and outbuildings to each house; made wells to each house; erected two wind-mills; fenced one whole section with wire and posts and fenced half of other section with hedge; we have set out some fruit trees and shrubbery, all to the value of about ten thousand dollars; all was done under and in pursuance of this contract."

He also met promptly all the notes given for principal and interest maturing prior to 1885. The total amount paid by him prior to that date, including \$1,600 paid at the execution of the contract, was in excess of \$5,000.

But the defendant insists that there was such default upon the part of the plaintiff with respect to the notes maturing May 28, 1885, as worked a forfeiture of the contract, and, consequently, that specific performance cannot be decreed. The precise grounds upon which this contention rests, as well as those upon which the plaintiff relies in support of his claim for relief, cannot be clearly understood without a careful scrutiny of all that passed between the parties in reference to the lands in question.

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The plaintiff resided in Iowa, while the defendant resided at Jerseyville, Illinois. The notes given by the former were upon blanks furnished by the latter's agent, who caused them to be made payable in Tecumseh, Nebraska, at the private bank of Russell & Holmes, through whom the defendant had, for many years prior to 1880, made collections, and with whom he had kept an account. The first payment under the contract was made in bank drafts delivered to the defendant's agent in Tecumseh. All the other notes falling due in 1880 to 1884, inclusive (except the interest note maturing in 1882), were paid by bank drafts sent to Russell & Holmes, who placed the proceeds to the credit of Cheney in their bank. The checks of the latter upon that bank, on account of those deposits, were always paid in current funds. The draft to pay the interest note for 1882 was also sent to Russell & Holmes, but as Cheney had not transmitted that note to them, the draft was forwarded to him. He received it and sent the note to Libby. In no single instance prior to 1885 did he make objection to the particular mode in which Libby provided for the payment of his notes, or intimate his purpose to demand coin or legal-tender notes in payment. In every instance, except as to the interest note for 1882, the notes were paid at the banking house of Russell & Holmes, and by drafts sent to and used by them for that purpose.

But it is quite apparent from the evidence that Cheney, in 1885, indulged the hope that he could bring about a forfeiture of the contract for noncompliance upon the part of Libby with its provisions, and that he would, in that or some other way, get the land back. It is proper to advert to the circumstances justifying that conclusion.

On the 4th of March, 1885,—all previous installments having been punctually met—Libby offered, in writing, to pay *all* the principal notes mentioned in the contract, as well as the interest note due May 28, 1885, if a deed was made to him. To this offer Cheney replied, under date of March 19, 1885: "Your letter of the 4th has just reached me. I have no papers with me and cannot attend to the matter as you request. I expect to go to New Orleans to the Exposition and to be at home in time to see to it properly. If I am behind time no harm will come to you." Libby wrote again, under date of May 20, 1885, renewing the offer contained in his letter of March 4. Under date of May 28, 1885—only five days before the notes for 1885 matured—Cheney replied: "Yours of 20th is received. I think it probable that I can do as you suggest, but I will be in Beatrice [the county seat of Gage County, where the lands are] between the 1st and 10th of June on other business, and will then make inquiries and see if I can lend the money to good hands, and will then let you know more certainly."

On the 26th of May, 1885, Libby sent to Russell & Holmes a draft upon the First National Bank of Omaha, Nebraska, made by one Stuart, a private banker doing business at Madison, in the same State, for \$1,251.20, which was the amount of Libby's two notes for principal and interest that matured May 28, 1885. It was sent in payment of those notes, and was received for that purpose by Russell

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& Holmes. They accepted it for the amount of money named in it, and were, therefore, ready to take up Libby's two notes when presented for payment at their office.

On the 28th of May, 1885, A. W. Cross, of the First National Bank of Jerseyville, Illinois—where Cheney resided—appeared at the banking-house of Russell & Holmes, and made a deposit of \$5,000, all in current funds, and a good portion of it *in bills of his own bank*. While there he inquired of Russell & Holmes (without disclosing the reason for his inquiry) whether they kept "a legal-tender revenue [reserve], as national banks were required to do." He was told that they did not, but that a supply of legal-tender was on hand. About two o'clock of the 1st of June—which, as May 31 fell on Sunday, was the last day of grace for Libby's two notes due in 1885 (Neb. Stat. chap. 41, § 8)—one of Cheney's attorneys went into the bank of Russell & Holmes, and asked if he could be given \$5,000 in legal-tender notes in exchange for other currency. His request was complied with. At a later hour of the same day Cheney appeared in the bank, without having responded to Libby's offer, twice made, to pay all the notes for the principal debt, and the interest note maturing in 1885. He came there with checks, drawn by Cross, to be cashed, and asked as an *accommodation* to him that they be paid in legal-tender notes. He was promptly accommodated to the extent of \$2,500. But when he asked for \$2,500 more in legal-tender notes, Holmes suspected there was a scheme to exhaust his bank of legal-tender notes, and refused to comply with this request. After Russell & Holmes had thus, by way of accommodation, paid to Cheney and his attorney seven thousand five hundred dollars in legal-tender notes—but not until the hour for closing the bank, on that day, against the public had passed—Libby's two notes were presented by Cheney, and payment thereof demanded in coin or legal-tender notes. The bank offered to pay in current funds, as they had previously done in respect to Libby's notes, but Cheney declined to take in payment anything except coin or legal-tender notes. The notes were then placed by him in the hands of a notary, who was conveniently present, and the latter presented them for payment, announcing that he would not receive anything except United States notes or legal-tender funds. Payment in such funds was refused by the bank and the usual protest was made. The notary and Cheney then left the room, the latter saying, before leaving, that he would "call in the morning." But he did not call the next or upon any subsequent day.

Within fifteen or twenty minutes after Cheney and his notary left the bank, Holmes, of the firm of Russell & Holmes, went to the office of the notary to find Cheney and pay the notes in the funds demanded. But Cheney was not there, and the notes were in his hands. Inquiry was made at the principal hotel and at other places, but he could not be found. Holmes was informed that he had left town.

Libby having been notified of the protest of the notes, notwithstanding he had, in due time, sent a bank draft to Russell & Holmes to be used in paying them, directed Stuart, the banker at Madison, Nebraska, to go immediately to

Tecumseh. The latter arrived there on the 9th of June, and, having learned what passed between Cheney and Russell & Holmes, determined to pay off the notes in such funds as Cheney demanded. He informed the notary, who had protested the notes for nonpayment, that he was then ready, in behalf of Libby, to pay them in gold. The latter did not have the notes, did not know where Cheney had gone, and said that the latter "did not want the money, but that he wanted the land back."

Stuart having knowledge of Cheney's letter, in which he notified Libby of his purpose to visit Beatrice between the 1st and 10th of June, went to that place in search of Cheney, but could not find him.

Libby wrote to Cheney, under date of June 12, 1885, informing him that gold was deposited at Russell & Holmes' office to pay the two notes due May 28, 1885. This letter was received by Cheney in due course of mail. On the 20th of June, 1885, the latter inclosed to Libby twelve unpaid notes (including the two due May 28, 1885), saying that the contract of May 28, 1880, was "terminated and ended by your failure to pay the two notes due May 28, 1885, and otherwise to comply with the contract, which is now null and void." How Libby had "otherwise" failed to meet his obligations under the contract does not appear. Under date of June 23, 1885, Russell & Holmes advised Cheney by letter of the fact that they were authorized by Libby to pay, and they were ready to pay, the notes due May 28, including protest fees, in legal-tender notes or coin. Libby, under date of June 25, 1885, replied to Cheney's letter, saying: "I refuse to accept said notes, excepting the two which were paid, and have this day sent them to your bankers, Messrs. Russell & Holmes, of Tecumseh, Neb., for your use and benefit and subject to your order. I shall make payments as fast as they become due, and shall require you to execute a conveyance of the land in accordance with the terms of the contract. It will be useless for you to send me any of these notes, except you send them for payment." Under date of June 29, 1885, Russell & Holmes advised Cheney that they had received from Libby his notes, amounting to \$6,679.20, subject to his, Cheney's, order. The latter wrote, July 9, 1885, in reply to Libby's letter of June 25th, that he did not recognize the notes placed with Russell & Holmes as being subject to his order.

On the 20th of August, 1885, Libby, by his attorney, made a tender to Russell & Holmes of \$120 in gold coin as a balance of one half of the purchase money, and offered to surrender the contract and execute a mortgage and notes for the balance of the purchase money, as stipulated in the contract, and demanded a deed; of all which Cheney was notified. The latter replied, under date of August 22, 1885, that he would not receive any money from Libby, and refused to make a deed.

It further appears that the plaintiff punctually paid into the bank of Russell & Holmes the amounts of the notes due in 1886 and 1887. The funds remained in that bank and are now there, subject to Cheney's order, on presenting the notes. Of these payments he was promptly informed.

Shortly before the commencement of this suit Libby again offered to Cheney to pay in cash all the unpaid portion of the principal debt named in the contract, and all interest due at that date. He also renewed his offer to execute a mortgage on the land to secure all unpaid installments not due, and demanded a deed. But those offers being declined, the present suit was brought.

The peculiar wording of the written contract renders it somewhat doubtful whether there was a sale of the lands to the appellee to be made complete by a conveyance of the legal title or defeated altogether, according to his performance or failure to perform the conditions upon which he was to receive a deed; or whether he was simply given possession, paying a fixed amount annually, for use and occupancy, with the privilege of purchasing and with the right to demand a conveyance in fee simple, upon the performance of those conditions. Taking the whole contract together, we incline to adopt the former as the true interpretation. Such was the view taken by the Supreme Court of Nebraska of a similar contract as to land between Cheney and one Robinson. *Robinson v. Cheney*, 17 Neb. 673, 679. But it is not necessary to express any decided opinion upon this question; for, in any view, it is clear from the contract, not only that appellant could retain the legal title until the appellee's obligations under it had all been performed, but that he could resume possession immediately upon the failure of the appellee to meet, punctually, any of the conditions to be performed by him. Time may be made of the essence of the contract "by the express stipulations of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser." *Taylor v. Longworth*, 89 U. S. 14 Pet. 172, 174 [10: 405, 406]; *Secombe v. Steele*, 61 U. S. 20 How. 94, 104 [15: 883, 886]; *Holgate v. Eaton*, 116 U. S. 88, 40 [29: 538, 540]; *Brown v. Guarantee Trust Co.* 128 U. S. 408, 414 [32: 468, 472]. The parties in this case, in words too distinct to leave room for construction, not only specify the time when each condition is to be performed, but declare that "time and punctuality are material and essential ingredients" in the contract; and that it must be "strictly and literally" executed. However harsh or exacting its terms may be, as to the appellee, they do not contravene public policy; and therefore a refusal of the court to give effect to them, according to the real intention of the parties, is to make a contract for them which they have not chosen to make for themselves. 1 Sugd. Vendors (8th Am. ed.) 410 [268]; *Barnard v. Lee*, 97 Mass. 92, 94; *Hipwell v. Knight*, 1 Younge & C. 401, 415. These observations are made because counsel for the appellant insists, with some confidence, that an affirmance of the decree below will necessarily be a departure from the general principles just stated.

But there are other principles, founded in justice, that must control the decision of the present case. Even where time is made material, by express stipulation, the failure of one of the parties to perform a condition within the particular time limited will not in every case defeat his right to specific performance, if the

condition be subsequently performed, without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give such relief. The discretion which a court of equity has to grant or refuse specific performance, and which is always exercised with reference to the circumstances of the particular case before it (*Hennessey v. Woolworth*, 128 U. S. 438, 442 [32: 500, 501]), may, and of necessity must, often be controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions. *Selon v. Slade*, 7 Ves. Jr. 265, 279; *Levy v. Lindo*, 3 Meriv. 81, 84; *Hudson v. Bartram*, 8 Madd. 440, 447; *Lilley v. Fifty Associates*, 101 Mass. 482, 485; *Potter v. Tuttle*, 22 Conn. 512, 519. See also *Ahl v. Johnson*, 61 U. S. 20 How. 511, 518 [15: 1005, 1008].

To this class belongs, in our judgment, the case before us. Although the contract between Cheney and Libby called for payment in dollars, the latter might well have supposed, unless distinctly informed to the contrary, that the former would be willing to receive current funds, that is, such as are ordinarily received by men of business or by banks. And such funds were received in payment of all of Libby's notes falling due in 1880 to 1884, inclusive. While this course of business was not an absolute waiver by Cheney of his right to demand coin or legal-tender paper in payment of notes subsequently falling due, such conduct, during a period of several years, was calculated to produce the impression upon Libby's mind that current or bankable funds would be received in payment of any of his notes. And therefore upon every principle of fair dealing Cheney was bound to give reasonable notice of his purpose, after 1884, to accept only such funds as under the contract, strictly interpreted, he was entitled to demand. No such notice was given. On the contrary, the just inference from the testimony is that Cheney designed to throw Libby off his guard, and render it impossible for the latter, or for the bankers to whom he sent drafts to be used in paying his notes, to supply the requisite amount of coin or legal-tender paper, on the very day the notes matured, and at the moment of their presentation for payment. The efforts of Russell & Holmes, within a few moments after Cheney left their bank on the 1st of June, to find him, and to pay off the notes in legal-tender paper, and the efforts of Libby, by his agent, as soon as he was informed of Cheney's demand for payment in coin or legal-tender paper, to reach him, and to pay off the notes maturing in 1885, in lawful money, and his repeated offers subsequently to pay them in such money, showed the utmost diligence, and sufficiently excuse his failure to pay in coin or legal-tender paper on the very day his notes matured. To permit Cheney, under the circumstances disclosed, to enforce a forfeiture of the contract, would enable him to take advantage of his own wrong, and to reap the fruits of a scheme formed for the very purpose of bringing about the nonperformance of the contract.

But it is contended that the provision in the contract forbidding its modification or change, "except by entry thereon in writing signed by

both parties," coupled with the provision that no court should relieve Libby from a failure to comply strictly and literally with the contract, stands in the way of a decree for specific performance. It is sufficient, upon this point, to say that such provisions—if they could in any case fetter the power of the court to do justice according to the settled principles of law—cannot be applied where the efficient cause of the failure of the party seeking specific performance to comply strictly and literally with the contract was the conduct of the other party. If the defendant had agreed, in writing, signed by himself alone, to accept current funds and not to demand coin or legal-tender notes, and, notwithstanding such agreement, he had demanded coin or legal-tender notes, under circumstances rendering it impossible for the plaintiff to meet the demand on the day limited by the contract, would he be permitted to say that the contract was forfeited for the failure to make payment according to its provisions? We suppose not, although, according to his argument, such an agreement, not having been signed by both parties and indorsed on the contract, would not estop him from insisting upon a strict and literal compliance with its terms.

It results from what has been said that the failure of the plaintiff, Libby, in person or by agent, to pay the notes maturing in 1885 in coin or legal-tender paper at the time they were presented by Cheney for payment at the banking-house of Russell & Holmes did not work a forfeiture of the contract, and does not stand in the way of a decree for specific performance.

In respect to the notes falling due in 1886 and 1887, the evidence satisfactorily shows that the plaintiff, at the times and place appointed for their payment, offered, and was then and there ready, to pay them in lawful money, but the notes not being on either occasion in the hands of Russell & Holmes for collection, he could not make actual payment, but left the money at their bank to be paid over to Cheney whenever the notes were presented at that place. The notes due in those years were, it is true, in the manual possession of Russell & Holmes, but they were not in their custody by direction of Cheney for collection or for any other purpose. Libby did all that he could do with respect to the notes falling due in those years in order to comply "strictly and literally" with the contract. Indeed, after the surrender by Cheney in 1885, of the notes due in that and subsequent years, and his formal notification to Libby that he regarded the contract as forfeited and would not receive any money from him, Libby was not bound, as a condition of his right to claim specific performance, to go through the useless ceremony of tendering payment at the banking house of Russell & Holmes of the notes maturing in 1886 and 1887. *Brook v. Hidy*, 13 Ohio St. 306; *Deichmann v. Deichmann*, 49 Mo. 107, 109; *Crary v. Smith*, 2 N. Y. 60. In *Hunter v. Daniel*, 4 Hare, 420, 423, it was said: "The only remaining point insisted upon was that the making of every payment was a condition precedent to the right of the plaintiff to call for the execution of the agreement, or, in fact, to call for the benefit of it; and it was argued that the bill could not properly be filed before

the plaintiff had, out of court, fully performed his agreement. The general rule in equity certainly is not of that strict character. A party filing a bill submits to do everything that is required of him; and the practice of the court is not to require the party to make a formal tender where, as in this case, from the facts stated in the bill, or from the evidence, it appears that the tender would have been a mere form, and that the party to whom it was made would have refused to accept the money." Whether that be a sound view or not, with reference to the particular contract here in question, Libby did, in fact, make a proper tender of payment as to these notes. Before the bringing of this suit he had paid, and offered to pay, more than one half of the price for the land and all accrued interest and taxes, and therefore was entitled by the terms of the contract to a deed, he executing notes and a mortgage for the remaining payments to run the unexpired time, as stipulated in the agreement.

The court below found that the notes falling due in 1885, 1886 and 1887 were paid; that the plaintiff had deposited with the clerk for the defendant a mortgage on the land to secure the payments due eight, nine and ten years after the date of the contract; and that he had fully done and performed every obligation imposed upon him to entitle him to a deed. It was adjudged that the defendant, within forty days from the decree, execute, acknowledge and deliver to the plaintiff a good and sufficient deed, with the usual covenants of warranty (excepting the right of way that may be demanded for public use for railways or common roads), conveying to him the land in question, and in default of which it was adjudged that the decree itself should operate, and have the same force and effect, as a deed of the above description.

We are not able to concur in the finding that the notes falling due in 1885, 1886 and 1887 had been paid when this decree was passed. If those notes had been placed by Cheney with Russell & Holmes for collection, and the latter had collected the amounts due on them, then they would have been paid; for, in such case, that firm would have been the agent of the payee to collect the notes, and the money received by them would have belonged to him.

In *Ward v. Smith*, 74 U. S. 7 Wall. 447, 450 [19: 207, 209], the question arose as to whether a bank at which certain bonds were made payable was the agent of the holder to receive payment. The court said: "It is undoubtedly true that the designation of the place of payment in the bonds imported a stipulation that their holder should have them at the bank, when due, to receive payment, and that the obligors would produce there the funds to pay them. It was inserted for the mutual convenience of the parties. And it is the general usage in such cases for the holder of the instrument to lodge it with the bank for collection, and the party bound for its payment can call there and take it up. If the instrument be not there lodged, and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future dam-

ages, either as costs of suit or interest, for delay. When the instrument is lodged with the bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no further, and without special authority an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. In the case at bar only one bond was deposited with the Farmers' Bank. That institution, therefore, was only agent of the payee for its collection. It had no authority to receive payment of the other bonds for him or on his account. Whatever it may have received from the obligors to be applied on the other bonds, it received as their agent, not as the agent of the obligee. If the notes have depreciated since in its possession, the loss must be adjusted between the bank and the depositors; it cannot fall upon the holder of the bonds." See also *Adams v. Hackensack*, 44 N. J. L. 638, where this question is elaborately examined; *Hills v. Place*, 48 N. Y. 520; *Williamsport Gas Co. v. Pinkerton*, 95 Pa. 62, 64; *Wood v. Merchants Saving, L. & T. Co.* 41 Ill. 267.

Russell & Holmes, then, did not become the agent of Cheney to receive the amount of the notes by reason simply of the fact that the notes were made payable at their bank. The funds left by Libby with them to be applied in payment of the notes of 1885, 1886 and 1887 are, therefore, his property, not the property of Cheney. The utmost effect of Libby's offer, within a reasonable time after June 1, 1885, to pay the note of that year in lawful money, and of his offers, at the appointed times and place, to pay the notes of 1886 and 1887, was to prevent the forfeiture of the contract, and to save his right to have it specifically performed, so far as that right depended upon his paying those notes. But they must be actually paid by him before he is entitled to a deed, or to a decree that will have the force and effect of a conveyance. Under the circumstances it was not absolutely necessary that he should have brought the money into court for the defendant at the time he filed his bill. His offer in the bill to perform all the conditions and stipulations of the contract was sufficient to give him a standing in court. *Irvin v. Gregory*, 13 Gray, 215, 218; *Hunter v. Bales*, 24 Ind. 299, 308; *Fall v. Hazelrigg*, 45 Ind. 576, 579. But the decree of specific performance ought not to become operative until he brings into court for the defendant the full amount necessary to pay off the notes for principal and interest falling due in 1885, 1886 and 1887. *Caldwell v. Cassidy*, 8 Cow. 271; *Hartun v. Bishop*, 8 Wend. 13, 21; *Hills v. Place*, *supra*; *Wood v. Merchants Saving Co.* *supra*; *Webster v. French*, 11 Ill. 254, 278; *Carley v. Vance*, 17 Mass. 389, 391; *Doyle v. Teas*, 4 Scam. 202, 261, 267; *McDaniel v. Kimbrell*, 3 Greene (Iowa) 335. The defendant is not entitled to interest after the respective tenders were made, because it does not appear that the plaintiff has, since the tenders, realized any interest upon the moneys left by him for Cheney at the bank of Russell & Holmes. *Davis v. Parker*, 14 Allen, 94, 104; *January v. Martin*, 1 Bibb, 586, 590; *Hart v.*

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Brand, 1 A. K. Marsh. 159, 161; 2 Sugd. Vendors (8th Am. ed.) 314, 315 [627, 628].

The decree below is affirmed. But it is adjudged and ordered that the said decree be and is hereby suspended, and shall not become operative until the plaintiff brings into the court below for the defendant the full amount of the notes for principal and interest executed by him to the defendant and made payable on the 28th days of May, 1885, 1886 and 1887, without interest upon any note after its maturity.

JAMES D. CRENSHAW, *Appl.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 99-110.)

Officer's vested right to office—tenure of office and right to salary not a contract—office revocable by Legislature—secs. 1229, 1624, Rev. Stat.—midshipman in U. S. navy—Act of 1862.

1. An officer of the navy, appointed for a definite time or during good behavior, has no vested interest or contract right in his office, of which Congress cannot deprive him.
2. The appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not come within the import of the term "contracts" intended to be protected by the U. S. Constitution.
3. Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege revocable by the sovereignty at will; and one Legislature cannot deprive its successor of the power of revocation.
4. By section 1229 and art. 36 of section 1624 of the Revised Statutes, it was not intended to place an officer beyond the power of Congress to make provision for his removal even by the executive who appointed him.
5. The term of office of a midshipman in the United States navy is not a term for life.
6. In enacting the Statute of 1862, Congress did not assume the power of appointment which belongs to the executive; the appellant came within the terms of that Act.

[No. 1081.]

Argued Jan. 6, 1890. Decided March 3, 1890.

APPEAL from a judgment of the Court of Claims dismissing claimant's petition to recover an alleged balance due him for salary as a midshipman in the United States navy. *Affirmed.*

Opinion below, 24 Ct. Cl. 57.

Statement by Mr. Justice Lamar:

This is an action brought by the appellant, James D. Crenshaw, in the Court of Claims, for the purpose of recovering an alleged balance of \$3,763.66 due him on account of salary as a midshipman in the United States navy. The Court of Claims dismissed the appellant's petition (24 Ct. Cl. 57); and an appeal from that judgment brings the case here.

The material facts in the case are as follows:

NOTE.—As to extra pay or compensation to officers, see note to U. S. v. Macdaniel, Bk. 8, p. 587.

In September, 1877, the appellant was appointed a cadet midshipman at the Naval Academy. At that time the provisions of the Revised Statutes in force and pertinent to this inquiry were as follows:

"Sec. 1520. The academic course of cadet midshipmen shall be six years.

"Sec. 1521. When cadet midshipmen shall have passed successfully the graduating examination at the Academy, they shall receive appointments as midshipmen and shall take rank according to their proficiency as shown by the order of their merit at date of graduation."

"Sec. 1556. The commissioned officers and warrant officers on the active list of the navy of the United States, and the petty officers, seamen, etc., . . . shall be entitled to receive annual pay at the rates herein stated after their respective designations: . . . Midshipmen, after graduation, when at sea, one thousand dollars; on shore duty, eight hundred dollars; on leave, or waiting orders, six hundred dollars. Cadet midshipmen, five hundred dollars."

"Sec. 1229. The President is authorized to drop from the rolls of the army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for re-appointment. And no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

The appellant accepted the appointment and entered on his studies at the Academy. He completed the course of four years, and after passing a successful examination received a certificate from the academic board in the following words, to wit:

"This certifies that Cadet Midshipman James D. Crenshaw has completed the prescribed course of study at the United States Naval Academy, and has successfully passed the required examination before the academic board preparatory to the two years' course afloat.

"June 10, 1881."

On the 25th of August following, appellant was ordered to sea by the Navy Department, and directed to report for duty on board the steamer "Pensacola." This he did. While he was serving on that steamer, under the aforesaid order, Congress passed an Act, approved August 5, 1882, being the Naval Appropriation Act, in which occurs this proviso:

"That hereafter there shall be no appointments of cadet midshipmen or cadet engineers at the Naval Academy, but in lieu thereof naval cadets shall be appointed from each congressional district and at large, as now provided by law for cadet midshipmen, and all the undergraduates at the Naval Academy shall hereafter be designated and called 'naval cadets;' and from those who successfully complete the six years' course, appointments shall hereafter be made as it is necessary to fill vacancies in the lower grades of the line and engineer corps of the navy and of the marine corps: *And provided further*, That no greater number of appointments into these grades shall be made each year than shall equal the number

of vacancies which has occurred in the same grades during the preceding year; such appointments to be made from the graduates of the year, at the conclusion of their six years' course, in the order of merit, as determined by the academic board of the Naval Academy; the assignment to the various corps to be made by the Secretary of the Navy upon the recommendation of the academic board. But nothing herein contained shall reduce the number of appointments from such graduates below ten in each year, nor deprive of such appointment any graduate who may complete the six years' course during the year eighteen hundred and eighty-two. And if there be a surplus of graduates, those who do not receive such appointment shall be given a certificate of graduation, an honorable discharge, and one year's sea pay, as now provided by law for cadet midshipmen," etc., etc. 22 Stat. 284, 285.

As stated above, this Statute was passed while appellant was engaged in his service on the "Pensacola." He continued on that vessel until the 14th of March, 1883, when he was ordered to report to the superintendent of the Naval Academy for examination. He proceeded to the Academy, passed his final examination successfully, and, on the 15th of June, 1883, received from the academic board his certificate of graduation, reciting that, "We, the academic board of the United States Naval Academy, having thoroughly examined Naval Cadet James D. Crenshaw on all subjects, theoretical and practical, taught at this institution, and having found him proficient in each, do hereby, in conformity with the law, grant to him this certificate of graduation. June 15, 1883."

On the 23d of June following he received this order:

"Navy Department, Bureau of Navigation and Office of Detail,

"Washington, June 23, 1883.

"Sir: You are hereby detached from the Naval Academy; proceed home and regard yourself waiting orders.

"By direction of the Secretary of the Navy.
"Respectfully, J. E. Waller, Chief of Bureau."

On the 26th of the same month, an order, as follows, was issued:

"Sir: "Having successfully completed your six years' course at the United States Naval Academy, and having been given a certificate of graduation by the academic board, but not being required to fill any vacancy in the service happening during the year preceding your graduation, you are hereby discharged from the 30th of June, 1883, with one year's sea pay, as prescribed by law for cadet midshipmen, in accordance with the provisions of the Act approved August 5, 1882.

"Respectfully, W. E. Chandler,
"Secretary of the Navy.

"Naval Cadet James D. Crenshaw, U. S. Navy."

Since the date of that order appellant has not been called on to do duty, and has not received any pay except that credited on his claim. In this state of the case he claims that he is still a midshipman in the naval service, and, as such, entitled to pay. This claim is based upon the following propositions

(1) That when he accepted the appointment of cadet midshipman he became an officer of the navy, and, as such, entitled to the benefits of sec. 1229 and art. 36 of sec. 1624 (which is to the same effect), of the Revised Statutes; that such acceptance constituted a statutory contract with the United States based on a valuable consideration, under which he is entitled to hold the office for life, unless removed by sentence of a court-martial or in commutation thereof;

(2) That he was not, therefore, discharged by competent authority—because, first, since the re-enactment by Congress in 1874 of section 1229 and art. 36 of section 1624 of the Revised Statutes, neither Congress, the Secretary of the Navy nor any department of the government is competent in time of peace to discharge an officer from the naval service;

(3) That, independently of the Act of July 18, 1866 (14 Stat. 92), section 1229 and art. 36 of section 1624 aforesaid, the Act of 1882 is unconstitutional, as applied to him, for the reason that he held an office by contract with the United States, and was entitled on graduation to be a midshipman to serve for life or during good behavior;

(4) That not only was the Act of August 5, 1882, inoperative, as to him, for the reason stated, but also for the further reason that to apply it to his class would be to make Congress appoint to the office of naval cadet all such students as were in his situation; but that while Congress had the power, under the Constitution, to create the office, it did not have the power to designate the officers, that being the constitutional duty of the executive; and

(5) That the case of appellant did not fall within the terms of the Act of 1882; that he was not at the date of its passage an undergraduate of the Academy, but had graduated; and that therefore his discharge was not authorized by that Act.

Messrs. H. O. Claughton and Rodolphe Claughton, for appellant:

The question as to whether a right has vested or not is in its nature judicial, and must be tried by judicial authority.

Marbury v. Madison, 5 U. S. 1 Cranch, 137 (2: 60).

The government can contract by a legislative Act, and such contracts are governed by the rules of ordinary contracts.

Chorpenning v. U. S. 94 U. S. 397 (24: 126); *Twenty Per Cent Cases*, 87 U. S. 20 Wall. 179 (22: 339); *Sinking Fund Cases*, 99 U. S. 731, 732 (25: 506).

The Act under which the appointment was made was in its nature a contract, and the appellant acquired vested rights under that contract. The repeal of the law cannot divest those rights.

Fletcher v. Peck, 10 U. S. 6 Cranch, 87 (3: 162); *Terrett v. Taylor*, 13 U. S. 9 Cranch, 43 (3: 650); *Wilkinson v. Leland*, 27 U. S. 2 Pet. 627 (7: 542).

Other authorities relied upon:

As to retroactive legislation—

Wood v. U. S. 41 U. S. 16 Pet. 342 (10: 987); *Arthur v. Homer*, 96 U. S. 137 (24: 811); *Memphis v. U. S.* 97 U. S. 293 (24: 920).

Vested rights—

Chew Heong v. U. S. 112 U. S. 536 (28: 770).
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Vested rights taken under the exercise of police power must be compensated for.

Boston Beer Co. v. Mass. 97 U. S. 32 (24: 989); *Butchers Union Co. v. Crescent City Co.* 111 U. S. 752 (28: 587); *Mugler v. Kansas*, 123 U. S. 661, 668, 669, 674 (31: 210, 213, 214).

Mr. Wm. A. Maury, Assistant Atty-Gen., for appellee.

Mr. Justice Lamar delivered the opinion of the court:

The primary question in this case, one which underlies the first, second and third of appellant's propositions stated above, is whether an officer appointed for a definite time or during good behavior had any vested interest or contract right in his office of which Congress could not deprive him? The question is not novel. There seems to be but little difficulty in deciding that there was no such interest or right. The question was before this court in *Butler v. Pennsylvania*, 51 U. S. 10 How. 402 [18: 472]. In that case, Butler and others, by virtue of a statute of the State of Pennsylvania, had been appointed canal commissioners for a term of one year, with compensation at four dollars per diem; but during their incumbency another statute was passed, whereby the compensation was reduced to three dollars; and it was claimed their contract rights were thereby infringed. The court drew a distinction between such a situation and that of a contract, by which "perfect rights, certain, definite, fixed private rights of property, are vested." It said: "These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government; or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. . . . It follows, then, upon principle, that, in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable

for the preservation of the body politic, and for the safety of the individuals of the community. It is true that this power, or the extent of its exercise, may be controlled by the higher Organic Law or Constitution of the State, as is the case in some instances in the State Constitutions, and as is exemplified in the provision of the Federal Constitution relied on in this case by the plaintiffs in error, and in some other clauses of the same instrument; but where no such restriction is imposed, the power must rest in the discretion of the government alone. . . . We have already shown that the appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term 'contracts,' or, in other words, the vested, private, personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon, to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if indeed they can under any circumstances be justified in surrendering them."

The case of *Newton v. Mahoning County Comrs.*, 100 U. S. 548 [25: 710], is in point. That was a controversy over the projected removal of a county seat; and the statute relied on by the objectors provided that before the seat of justice should be considered as permanently established at the Town of Canfield, the citizens thereof should do certain things, all of which were admitted to have been duly done. The objectors, therefore, claimed a contract right that the county seat should remain at Canfield. This court said: "The legislative power of a State, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation. The police power of the States, and that with respect to municipal corporations, and to many other things that might be named, are of the same absolute character;" citing *Cooley*, Const. Lim. pp. 232, 242; *The Regents v. Williams*, *4 Gill & J. (Md.) 321. "In all these cases there can be no contract and no irrepealable law, because they are 'governmental subjects,' and hence within the category before stated. They involve public interests, and Legislative Acts concerning them are necessarily public laws. Every succeeding Legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstan-

ces and present exigencies touching the subject involved may require. A different result would be fraught with evil."

In *Stone v. Mississippi*, 101 U. S. 814, 820 [25: 1079, 1080], considering the power of a Legislature to grant an irrepealable charter, for a consideration, to a lottery company, the court said: "The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must vary with varying circumstances." See also *Hall v. Wisconsin*, 108 U. S. 5 [26: 302]; *United States v. Fisher*, 109 U. S. 143 [27: 885]. Nor is the holding of this court singular. Numerous decisions to the same effect are to be found in the state courts. *People v. Morris*, 13 Wend. 325; *Com. v. Bacon*, 6 Serg. & R. 322; *Com. v. Mann*, 5 Watts & S. 418; *Hyde v. State*, 52 Miss. 665; *State v. Smedes*, 26 Miss. 47; *Turpen v. Tipton County*, 7 Ind. 172; *Haynes v. State*, 3 Humph. 490; *Benford v. Gibson*, 15 Ala. 521.

In *Blake v. United States*, 108 U. S. 227 [26: 462], the fact is adverted to, and the opinion of the Attorney-General in *Lansing's Case*, 6 Ops. Atty-Gen. 4, quoted approvingly, to the effect that in this respect of official tenure there is no difference in law between officers in the army and other officers of the government.

Applying the above principles, it remains to say that we know of no instance in which their assertion is more imperatively demanded by the public welfare than in this case, and such others as this. If the position taken by the appellant is correct, then a logical and unavoidable result is, that our country, if ever we are so unfortunate as to be again involved in war, will be compelled, after the treaty of peace, to maintain the entire official force of the army and navy, and a host of sinecurists, in full pay so long as they shall live; either that, or to disband the army and navy before the peace shall be made, even this wholly inadmissible alternative being legally possible from one of appellant's positions. It is impossible to believe that such a condition of affairs was ever contemplated by the framers of our Organic or Statute Law.

The effect of the authorities cited above is in no respect modified by section 1229 or by art. 36 of section 1624 of the Revised Statutes. In the first place, if it were granted that those sections mean what appellant claims for them—if they mean beyond question that one appointed as a cadet shall never be dismissed by authority of either the executive or the Legislature, or by both in conjunction—yet that fact would make no difference. The great question of protection to contract rights and vested interests, which forms such an interesting and important feature of our constitutional law, is not dominated by the turn of a phrase.

*Citation correct in this edition, Bk. 25, p. 710, as *The Regents v. Williams*, 9 Gill & J. 365, as it should be here. [Ed.]

Our courts, both state and national, look on these questions through the form to the substance of things; and, in substance, a statute under which one takes office, and which fixes the term of office at one year, or during good behavior, is the same as one which adds to those provisions the declaration that the incumbent shall not be dismissed therefrom. Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege revocable by the sovereignty at will; and one Legislature cannot deprive its successor of the power of revocation. *Butler v. Pennsylvania*, *supra*; *Stone v. Mississippi*, *supra*; *Cooley*, Const. Lim. 283; *United States v. McDonald*, 128 U. S. 471, 478 [33: 506, 507].

In the second place, section 1229 and art. 36 of section 1624 of the Revised Statutes are a reproduction in the Revision of the Act of July 18, 1866, section 5, *supra*; and in *Blake v. United States*, *supra*, the court decided that that Act only operated to withdraw from the President the power previously existing in him of removing officers at will, and without the concurrence of the Senate; and that there was no intention to withdraw from him the power to remove with the advice and concurrence of the Senate. If that construction of the Statute be correct (and we see no cause for altering our view) it necessarily follows that it was not intended to place an officer where he never before had been—beyond the power of Congress to make any provision for his removal even by the Executive who appointed him.

It is claimed, however, that the construction so given to the Act of 1866 was induced by the consideration of certain other statutes *in pari materia*, and that the reintroduction of it in the Revision, unaccompanied by those other statutes, would render that construction inapplicable now. We do not think so. We have already considered the Act of 1866 in its historical relations, and from the circumstances of its enactment deduced its meaning. When it was re-enacted with all other statutes of general interest, the political exigency which furnished the primary motive for its re-enactment had drifted away with the lapse of time; but we do not think it can avail to give to a statute which, after all, is but a re-enactment in the exact language of the original Act, a meaning almost directly the reverse of that given to the original Act. To give such effect to the action of Congress in codifying the statutes would go far to subvert all decisions and introduce chaos into our jurisprudence.

Thus far we have preferred to decide the case upon the broad grounds above stated, and therefore considered it as if the term of office enjoyed by the appellant was what he claims it to have been—a term for life. In fact, however, even if that were true as to other officers, it was not true as to him. The Statute applicable to his case is section 1520 of the Revised Statutes, which fixes the academic course at six years; and when he entered the service under the regulations in such cases provided he executed a bond to serve for 8 years, unless discharged by competent authority, thus recognizing his liability to be discharged.

As to the fourth proposition of appellant, that in enacting the Statute of 1882 Congress assumed the power of appointment which be-

longs to the executive, we do not so regard the Act. Congress did not thereby undertake to name the incumbent of any office. It simply changed the name, and modified the scope of the duties. This we think it had the power to do.

We think, too, that the appellant came within the terms of the Act of 1882. There is a very plain distinction between this case and that of a cadet engineer fully explained in *United States v. Redgrave*, 116 U. S. 474 [29: 607]. The Statute in express terms provides that "the academic course of cadet midshipmen shall be six years." If the Navy Department had assumed to make any regulations by which the final graduation shall take place in less time, such regulations would have been void. But it did not so assume. It arranged for a two years' course afloat as a part of the academic course, and exacted a preliminary examination to test the cadet's qualifications therefor. But the cadet afloat was a member of the Academy. He still was subject to a final examination at that institution, and without such examination successfully sustained never became a graduate. He was not so denominated until then, either in the Naval Register or elsewhere; and it was not until that final test had been sustained that either by the practice of the Academy or by the provision of the Statute he did or could receive his certificate of graduation.

The judgment of the Court of Claims is affirmed.

THOMAS J. BRYAN, *Appl.*,

v.

M. W. KALES ET AL.

(See S. C. Reporter's ed. 126-136.)

Laches, demurrer for—denial of relief for—fraud of administrator—Statute of Limitations in Arizona.

1. Where the bill shows such laches upon the part of the plaintiff that a court of equity ought not to give relief, the defendant need not interpose a plea or answer, but may demur upon the ground of want of equity apparent on the bill itself.
2. A court of equity may deny relief because of laches in suing, but the refusing relief upon that ground must depend upon the special circumstances of each case.
3. In a case of fraud upon the part of an administrator, in which each of the defendants participated, a court of equity should be slow in denying relief upon the mere ground of laches in bringing suit.
4. In Arizona, the limitation for the commencement of an action to recover real property or its possession is five years. An equitable action to set aside deeds and recover real property is not

NOTE.—As to Statute of Limitations, in cases of fraud, in equity, see note to Stearns v. Page, Bk. 12, p. 828.

Statute of Limitations, as applicable to equity cases. See note to Thomas v. Brockenbrough, Bk. 6, p. 287.

As to fraud and undue influence of deed or will, see note to Harding v. Hanly, Bk. 6, p. 429.

As to cancellation of a deed or a contract in equity for fraud, concealment or misrepresentation, see note to Neblett v. Macfarland, Bk. 23, p. 471.

barred by such Statute by a delay of four years in suing.

[No. 1287.]

Submitted Jan. 7, 1890. Decided March 3, 1890.

APPEAL from a decree of the Supreme Court of the Territory of Arizona affirming a judgment of the District Court of the Second Judicial District of that Territory sustaining a demurrer and dismissing a suit in an action to set aside deeds and recover real property. *Reversed.*

Statement by Mr. Justice Harlan :

This suit was brought by the appellant on the 18th of July, 1887, in the District Court of the Second Judicial District of Arizona, and was there heard upon demurrer to the complaint. The demurrer was sustained, and, the plaintiff refusing to amend, the suit was dismissed. That judgment having been affirmed by the Supreme Court of the Territory, the only question is whether the facts alleged in the complaint—assuming, as we must, that they are true—set forth a cause of action entitling the plaintiff to relief.

The case made by the complaint is as follows: Jonathan M. Bryan was the owner at the time of his death on the 29th of August, 1883, (1) of the southeast quarter section number thirty-three, in township two north, of range three east, of the district of lands subject to sale at the land office of the United States at Tucson, Arizona, and of the Gila and Salt River meridian; (2) the northeast quarter of section five, in township one north, of range three east, of the same district and meridian, and lying one half mile north of the City of Phoenix, in Maricopa County, Arizona, such piece of land being once called the "Shortle Ranch," but now commonly known as "Central Place;" (3) the southeast quarter of section nine, in township one north, of range three east, of the same meridian and district; and (4) all of block ninety-eight in the City of Phoenix, according to a map or plat of that city, made by William A. Hancock, surveyor of the town site of such city, and on file in the office of the county recorder of Maricopa County.

On or about the 24th of September, 1883, letters of administration upon his estate were issued by the Probate Court of Maricopa County to M. W. Kales, who immediately qualified and entered upon his duties as administrator, continuing to be and to act as such until December 6, 1884, when he was discharged. Since that date there has been no administrator of the decedent's estate.

While Bryan was the owner and in possession of the above-described real estate, he executed to Kales four promissory notes for the amounts, respectively, of \$1,200, \$2,500, \$1,500 and \$500, dated December 11, 1882, February 23, 1883, February 26, 1883, and March 14, 1883, and payable, respectively, December 11, 1883, February 23, 1884, October 26, 1883, and September 14, 1883,—each note calling for interest payable every three months, at the rate of one and a half per cent per month, and, if not so paid, the note to become due and payable. At the date of each note he executed, acknowledged and delivered to Kales a mortgage upon real estate to secure

its payment; upon the first of the above-described pieces of real estate, to secure the note for \$1,200; upon the second, to secure the note for \$2,500; upon the third, to secure the note for \$1,500; and upon the fourth, to secure the note for \$500. These mortgages were all duly recorded.

Before the notes fell due, and before they were presented for allowance against the estate of Bryan, in the probate court having jurisdiction thereof, and without application to any court for an order to pay the notes or any of them, or to sell any property of the estate to pay them, and "while holding in his hands as administrator sufficient money to pay all the principal and interest which might become due on said notes or any of them," Kales, on the 28th of September, 1883, instituted, in the District Court of the Second Judicial District of Arizona, in and for Maricopa County, in his individual name, an action against himself as administrator. He declared, in that action, upon the notes and mortgages, and prayed judgment against himself as administrator for the sum of fifty-seven hundred dollars, with interest on twelve hundred dollars of [that] sum from the 11th day of June, 1883, on twenty-five hundred dollars from the 23d day of May, 1883, on fifteen hundred dollars from the 26th day of May, 1883, and on five hundred dollars from June 14, 1883, the interest on each sum to be at the rate of one and a half per cent per month; with a like rate of interest upon the principal sum named in any judgment or decree that may be obtained from the date thereof until the same shall be fully paid and satisfied; and for ten per cent for attorneys' fees upon forty-two hundred dollars of the principal sum, and five per cent for attorneys' fees upon twenty-five hundred dollars of the principal sum, and for costs of suit.

He also prayed that the usual decree be made for the sale of the premises by the sheriff according to law and the practice of the court; that the proceeds of sale be applied in payment of the amount due the plaintiff; that the defendant and all persons claiming under him or his decedent subsequent to the execution of the mortgages upon the premises, either as purchasers, incumbrancers or otherwise, be barred and foreclosed of all right, claim or equity of redemption in the premises and every part thereof, and that the plaintiff have judgment against the defendant, as administrator of the estate of J. M. Bryan, deceased, for any deficiency remaining after applying the proceeds of the sale of the premises properly applicable to the satisfaction of the judgment, and that such deficiency be made a claim against the estate of the said J. M. Bryan, deceased, to be paid as other claims against said estate.

He further prayed that the plaintiff or any other party to the suit might become a purchaser at the sale; that the sheriff execute a deed to the purchaser; that the latter be let into the possession of the premises on production of the sheriff's deed therefor; and that the plaintiff have such other or further relief in the premises as to the court seemed meet and equitable.

A summons was sued out by M. W. Kales as an individual against himself as administrator, requiring the latter to appear and answer the complaint. It was personally served on

the day it was issued, and, on the succeeding day, October 6, 1883, in his capacity of administrator, he made the following answer to the complaint filed by himself in his individual capacity:

"The defendant, M. W. Kales, administrator of the estate of J. M. Bryan, deceased, answering the complaint on file in this action, admits each and every material allegation in the said complaint, and consents that judgment and decree be entered in accordance with the prayer thereof."

In other words, M. W. Kales consented that he might as an individual take judgment against himself as administrator.

On the 16th of October, 1883, the court, D. H. Pinney being the judge thereof, rendered a decree of foreclosure and sale, finding, upon the complaint, answer and proofs heard, that there was due to the plaintiff, M. W. Kales, from the defendant, M. W. Kales, administrator, the sums, with interest, specified in the several mortgages, with the attorneys' fee provided for in the mortgages and claimed in the complaint, and directing the proceeds of the sale of each parcel to be applied to the debt secured by the mortgage on that parcel.

The decree further provided:

"That the defendant, M. W. Kales, as administrator as aforesaid, and all persons claiming or to claim from or under him or from or under the said J. M. Bryan, deceased, and all persons having liens subsequent to said mortgages by judgment, decree or otherwise upon the lands described in said mortgages or either of them, and they or their personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their personal representatives, and all persons claiming under them, be forever barred and foreclosed of and from all equity of redemption and claim in, of and to said mortgaged premises and every part and parcel thereof from and after the delivery of said sheriff's deed. . . .

"And it is further adjudged and decreed that if the moneys arising from said sale of any of the separate parcels of said lands described in either of the respective mortgages shall be insufficient to pay the amount so found due to the plaintiff, as above stated, upon each of the respective mortgages, with interest and costs and expenses of sale as aforesaid, the sheriff specify the amount of such deficiency and balance due the plaintiff upon each of the respective mortgages separately in his return of sale, and that on the coming in and filing of said returns of deficiency the same shall become a claim against the estate of J. M. Bryan, deceased, to be paid as other claims are paid."

The remainder of the decree contains a description of the property or parcels of land covered by the respective mortgages.

On the 8th of November, 1883, the district court made an order commanding the sheriff to sell upon notice all the property described in the mortgages and make return thereof. Pursuant to that order, the sheriff, L. H. Orme, advertised, and, on the 15th of December, 1883, sold, the property in parcels, as follows: The first parcel to Robert Garside for \$1,500; the second to M. W. Kales for \$2,975; the third to William Gilson for \$1,850; and the fourth to

M. W. Kales for \$600. The amount bid for each parcel was much less than such parcel was worth in open market, or than it would have brought at the usual sheriff's sale. The sheriff delivered to each purchaser a certificate of sale. He made his return of sales on the 26th of December, 1883, but the sales have never been confirmed by the district court.

After the sales and before the making of any deeds, Kales assigned to J. T. Simms the certificate of sale for the second parcel, and to D. H. Pinney the certificate of sale for the fourth parcel. On the 16th of June, 1884, the sheriff executed a deed for the first parcel to Garside, who, by deed of May 20, 1887, sold and conveyed to J. DeBarth Shorb. Simms, having received from the sheriff, June 10, 1884, a deed for the second parcel, sold and conveyed, by deed of February 28, 1887, to George T. Brasius, who subdivided it into blocks and lots as "Central Place;" and, subsequently, May 3, 1887, sold and conveyed one lot to John W. Jeffries, and, May 5, 1887, another lot to Henry W. Ryder. Gilson received a sheriff's deed for the third parcel, June 19, 1884, and April 6, 1886, sold and conveyed to Cordelia L. Beckett, wife of C. G. Beckett. The fourth parcel was conveyed by the sheriff, June 16, 1884, to D. H. Pinney, who, September 10, 1886, sold and conveyed a portion thereof to the Bank of Napa, a corporation existing under the laws of California. Another portion of the fourth parcel was conveyed by Pinney, November 18, 1886, to F. Q. Story, who sold and conveyed to M. H. Sherman.

Bryan left no descendants. His wife, Vina Bryan, survived him. All the property in question was acquired by him during marriage, and, at the time of his death,—the complaint alleges,—was the common property of himself and wife, and, upon his death, she became and was his sole heir, and to her all of the common property descended, and in her remained until June 29, 1887, when, by deeds of conveyance, she granted, released and conveyed to the present plaintiff all of these lands, together with all her estate, right, interest and claim in the same and every part thereof.

The complaint makes all of the persons hereinbefore named as having purchased at sheriff's sale or received conveyances for these parcels of land defendants to this suit. It alleges that of "all the facts herein alleged, the defendants and each of them, at all the times herein mentioned, had full notice; that the defendant, D. H. Pinney, was the judge of the said district court, and acted as such in all the proceedings had in the said action, wherein said defendant, M. W. Kales, was plaintiff, and said M. W. Kales, as administrator of the estate of J. M. Bryan, deceased, was defendant; and said defendant, D. H. Pinney, rendered and made the said decree of foreclosure and order of sale therein and was so the judge of said District Court at the time of the assignment to him by said defendant, M. W. Kales, of the sheriff's certificate of sale of said block number 98, in said City of Phoenix, and also at the time of the execution and delivery to him by the said sheriff of the said sheriff's deed thereof."

The plaintiff, after alleging that the premises described in the complaint are of the value of \$125,000, prayed—

That the proceedings, judgment, decree and order of sale had, made, rendered or entered in the action brought by Kales be annulled, set aside and declared void;

That the sale of the property, and the certificate of sale and deeds made to Kales, Garside, Gilson, Pinney and Simms, be set aside and declared void, and the parts and portions of the property conveyed to the several defendants be decreed to have been received by them and each of them with notice and in trust for Vina Bryan and her grantee, the plaintiff herein;

That the defendants and each of them, now pretending to claim or own the above property or any part thereof, be decreed to hold the same and each part claimed by them in trust for the plaintiff, and required to convey to him upon his doing whatever the court adjudged should be equitably done by him;

That the defendants and each of them be enjoined from selling, conveying, mortgaging or in any way interfering with the premises; and

That the plaintiff have such other and further relief as may be just and equitable.

Messrs. Goodrich & Street and William A. McKenney, for appellant:

Where an express Statute of Limitations applies to a suit in equity, mere delay to commence the suit for a period less than that of the Statute of Limitations is never a reason for dismissing the proceedings.

Luz v. Haggin, 69 Cal. 267; *Williams v. Conger*, 49 Tex. 602; *Brant v. Virginia Coal & Iron Co.* 98 U. S. 336 (23: 929); *Steel v. St. Louis S. & R. Co.* 106 U. S. 456 (27: 228); *Wood, Limitations*, § 62; *Moss v. Berry*, 53 Tex. 633.

Mere silence, unaccompanied by any act calculated to mislead or deceive another to his hurt, never estops a party from asserting title to his own.

Philadelphia, W. & B. R. Co. v. Dubois, 79 U. S. 12 Wall. 47 (20: 265); *Bigelow, Estoppel*, 4th ed. 575; *Stockman v. Riverside, L. & I. Co.* 64 Cal. 57; *Kelly v. Hurt*, 61 Mo. 463; *Fielding v. Du Bose*, 63 Tex. 637; *Hill v. Epley*, 31 Pa. 334; *Knouff v. Thompson*, 16 Pa. 357; *Bales v. Perry*, 51 Mo. 449; *Strong v. Ellsworth*, 26 Vt. 367; *Sulphine v. Dunbar*, 55 Miss. 255; *Mason v. Philbrook*, 69 Me. 57; *Rice v. Dewey*, 54 Barb. 455; *Mayo v. Cartwright*, 30 Ark. 407; *Neal v. Gregory*, 19 Fla. 356; *Bramble v. Kingsbury*, 39 Ark. 131; *Terre Haute & S. W. R. v. Rodel*, 89 Ind. 128; *Viele v. Judson*, 82 N. Y. 32; *Diffenbach v. Vogeler*, 61 Md. 870; *Meley v. Collins*, 41 Cal. 663, 10 Am. Rep. 279.

Messrs. Clark Churchill and W. Pinkney Whyte, for appellees:

A defense grounded upon the staleness of the claim asserted, or upon the gross laches of the party asserting it, may be made by demurrer.

Lansdale v. Smith, 106 U. S. 398 (27: 220); *Speidel v. Henrici*, 120 U. S. 387 (30: 719).

A judgment against the administrator estops the heir as well as the creditors.

Bayly v. Muehe, 65 Cal. 345; *Cunningham v. Ashley*, 45 Cal. 485; *Freeman, Judgments*, §§ 116, 134, 135.

Plaintiff took whatever interest was conveyed to him, subject to all the irregularities in the foreclosure proceeding.

Freeman, Judgments, § 91, and cases cited; *Rorer, Sales*, § 405; *Perry, Trusts*, §§ 197, 198.

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This case does not show a sufficient degree of diligence to justify the overthrow of a decree of foreclosure, under which new rights and interests must necessarily have arisen.

Dieffendorf v. House, 9 How. Pr. 243; *The Key City*, 81 U. S. 14 Wall. 653 (20: 396); *Harwood v. R. Co.* 84 U. S. 17 Wall. 78 (21: 558); *Badger v. Badger*, 69 U. S. 2 Wall. 95 (17: 838); *Lansdale v. Smith*, 106 U. S. 391 (27: 219).

Equity will refuse relief to a person who has slept upon his rights, and shows no excuse.

Speidel v. Henrici, 120 U. S. 377 (30: 718).

The law of laches, like the principle of limitations of actions, is a distinct defense in equity.

Brown v. Buena Vista County, 95 U. S. 160 (24: 423).

A court of equity has always refused its aid to stale demands.

Smith v. Clay, 3 Bro. Ch. 640, note; *Piatt v. Vattier*, 34 U. S. 9 Pet. 405 (9: 173); *McKnight v. Taylor*, 42 U. S. 1 How. 189 (11: 90); *Wagner v. Baird*, 48 U. S. 7 How. 234 (12: 681); *Badger v. Badger*, 69 U. S. 2 Wall. 87 (17: 836); *Hume v. Beale*, 84 U. S. 17 Wall. 836 (21: 602); *Marsh v. Whitmore*, 88 U. S. 21 Wall. 178 (22: 482); *Sullivan v. Portland & K. R. Co.* 94 U. S. 306 (24: 324); *Godden v. Kimmell*, 99 U. S. 201 (25: 431); *Speidel v. Henrici*, 120 U. S. 387 (30: 715); *Hayward v. Eliot Nat. Bank*, 96 U. S. 617 (24: 857).

Courts of equity frequently treat the lapse of time, even for a shorter period than the one specified in the Statute of Limitations, as a presumptive bar to the claim.

Godden v. Kimmell, 99 U. S. 202 (25: 431); *Sullivan v. Portland & K. R. Co.* 94 U. S. 311 (24: 325).

Mr. Justice Harlan delivered the opinion of the court:

The grounds upon which the district court sustained the demurrer to the complaint are not shown by the record otherwise than from the statement in the opinion of the Supreme Court of the Territory that it was because of laches in bringing suit. The latter court said: "It appears that the grantor of the plaintiff stood by and saw all this property sold, and had a right to redeem the same in six months after the sale; that her residence was Maricopa County at the death of her husband, and its continuance will be presumed to be there, the contrary not having been alleged; that there was no action brought to set aside the judgment; that from the 8th day of November, 1883, till the [2] 9th day of June, 1887—nearly four years—she saw the property greatly enhancing in value, saw it sold time and again, then sells it to the plaintiff, who now comes into a court of equity and asks a cancellation of all those sales. If the bill had shown, and which plaintiff was allowed to show, that any disability existed on the part of anyone having an interest in the property at the time of sale, we would grant the prayer of the bill. No such disability being shown, can we think of allowing the party who has so long slept upon her rights to divest the present owners of their valuable property?"

The difficulty with this view is that it has no foundation in the allegations of the complaint. From the mere fact that Mrs. Bryan's residence at the time of her husband's death was in Mar-

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icopa County, where the real estate in question is situated, the court below presumed not only that it continued there, but that she "stood by" for nearly four years, forbearing to exercise her right to redeem, and "saw the property enhancing in value—saw it sold time and again"—without asserting any interest in it. No such presumption was justified by the allegations of the complaint. The case made by those allegations is that of an administrator, who, having claims against the estate he represented, which were secured by mortgage upon real property of which his intestate died seised, and having in his hands money sufficient to discharge those claims, yet resorted to the expedient of taking judgment in his individual name against himself in his fiduciary capacity, for the amount of the claims and for attorneys' fees, and caused the property to be sold. And of all those facts—the demurrer admits—the defendants and each of them had full notice when they made their respective purchases. Referring to the allegation in the complaint, that the administrator, at the time he sued himself, had in his hands sufficient money to pay off his claims, the counsel for the defendants suggest that this might well be, if those moneys had been applied to the debts in question without providing for the payment of other debts against the estate, the expenses of administration, or preferred claims; and that for aught appearing in the complaint, it may have been the duty of the administrator to apply the moneys in his hands to other debts and claims. A sufficient answer to this suggestion is, that the allegation in the complaint upon this point imports a failure of the administrator to use the moneys in his hands to discharge the debts held by him, when he could properly have so used them.

It is true, as contended, that where the bill shows such laches upon the part of the plaintiff that a court of equity ought not to give relief, the defendant need not interpose a plea or answer, but may demur upon the ground of want of equity apparent on the bill itself. *Lonsdale v. Smith*, 106 U. S. 398 [27: 220]; *Speidel v. Henri*, 120 U. S. 877, 887 [30: 718, 719]. But no such case is made by the bill. The limitation prescribed by the Statutes of Arizona for the commencement of an action to recover real property, or the possession thereof, is five years. If this Statute governs courts of equity as well as courts of law—and such is the plaintiff's contention—the present action is not barred by limitation. If, as contended by the defendants, a court of equity may deny relief because of laches in suing, although the plaintiff commenced his action within the period limited by the Statute for actions at law, still the granting or refusing relief, upon that ground, must depend upon the special circumstances of each case. *Harwood v. R. Co.* 84 U. S. 17 Wall. 78 [21: 558]; *Brown v. Buena Vista County*, 95 U. S. 160 [24: 428]; *Hayward v. Eliot Nat. Bank*, 96 U. S. 617 [24: 857]. The case made by the complaint in this suit is one of fraud upon the part of the administrator, and in that fraud—if the allegations of the complaint are sustained by proof—the defendants and each of them must be held to have participated. The circumstances as detailed in the complaint are so peculiar in their character that a court of equity should be slow in deny-

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ing relief upon the mere ground of laches in bringing suit.

Other questions arise upon the face of the complaint, namely, as to whether Mrs. Bryan had such interest in the property as made her a necessary party to the suit of foreclosure instituted by Kales in his individual capacity, and as to how far the validity of the decree of foreclosure and sale was affected by the very unusual fact that the same person was both plaintiff and defendant in that suit. *Perkins v. Se Ipeam*, 11 R. I. 270; *McElhanon v. McElhanon*, 68 Ill. 457; *Hoag v. Hoag*, 55 N. H. 172. But as these questions were not considered by the court below, and as their correct determination can be best made when all the facts are disclosed, we express at this time no opinion upon them, and place our decision upon the ground that the Supreme Court of the Territory erred in holding that the complaint failed to show that the plaintiff was entitled to relief from a court of equity. The defendants should be required to meet the case upon its merits.

The decree is reversed with directions that the demurrer to the complaint be overruled, and for further proceedings consistent with this opinion.

Field, J.:

I concur in the judgment of this court for the reasons stated; but I wish to add that in my opinion the judgment recovered by Kales against himself as administrator is an absolute nullity.

MCCORMICK HARVESTING MACHINE CO., Plff. in Err.,

CHARLES W. WALTHERS.

(See S. C. Reporter's ed. 41-45.)

Jurisdiction as to parties, of circuit court—citizens of different States—residence of plaintiff.

1. Under section one of the Act of March 3, 1887 (24 Stat. 552), as corrected by the Act of August 13, 1888 (25 Stat. 438), to amend the Act of March 3, 1875, where the jurisdiction of the circuit court is founded upon any of the causes mentioned in this section, except the citizenship of the parties, suit must be brought in the district of which the defendant is an inhabitant.
2. But where the jurisdiction of such court is founded solely upon the fact that the parties are citizens of different States, the suit may be brought in the district in which either the plaintiff or the defendant resides.
3. Where the plaintiff is a citizen and inhabitant of Nebraska and defendant is a citizen and resident of Illinois, the latter may be sued by the former in the Circuit Court of the United States for the District of Nebraska.

[No. 1403.]

Submitted Jan. 27, 1890. Decided March 3, 1890.

IN ERROR to the Circuit Court of the United States for the District of Nebraska to review a judgment for plaintiff in an action for falsely and maliciously and without probable cause suing out attachments against him. On motion to dismiss or affirm. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to jurisdiction of United States circuit court depending on parties and residence, see note to *Emory v. Greenough*, Bk. 1, p. 640.

Messrs. N. S. Harwood and John H. Ames, for defendant in error, in support of motion.

Messrs. Walter J. Lamb, Arnott C. Ricketts and Henry H. Wilson, for plaintiff in error, in opposition.

Mr. Chief Justice Fuller delivered the opinion of the court:

Walters brought his action on the 21st day of July, 1887, in the Circuit Court of the United States for the District of Nebraska, against The McCormick Harvesting Machine Company, alleging that he was a citizen and resident of the State of Nebraska, and that the defendant was a corporation duly incorporated and existing under the laws of the State of Illinois, "but having a local habitation and managing agent in Nebraska," for falsely and maliciously, and without probable or reasonable cause, suing out two attachments against him, and placed his damages at \$10,500, for which he asked judgment and costs. The defendant answered, justifying the issuing of the writs of attachment and denying any liability by reason thereof; and also pleaded in set-off and counterclaim two judgments against Walters, one for \$957.98 and \$28 costs, and one for \$2,394.01 and \$26 costs, both bearing interest at ten per centum per annum from June, 1887; and prayed judgment against the plaintiff for said several sums and for interest and costs. Subsequently leave was granted to the McCormick Company to withdraw its answer and to file a plea, which averred "that now and at the commencement of this action the said Charles W. Walters was a citizen and inhabitant of the State of Nebraska, and this defendant was a corporation duly organized under the laws of the State of Illinois, and was and is a citizen, resident and inhabitant of the State of Illinois, and was not and is not a citizen, resident or inhabitant of the State or District of Nebraska; that a summons in this action was served on this defendant's agent in the State of Nebraska, where this defendant has an office, said agent being only its local managing agent for its business in Nebraska; and this defendant says that this action was brought since the 15th day of March, 1887, and this defendant says that it is not subject to be sued or to be summoned by original process out of this court in this cause in this judicial district;" and defendant prayed judgment that the action might be abated.

This plea was upon hearing overruled, and the defendant ruled to answer in thirty days, and plaintiff to reply in forty-five days, and a reply in general denial of the answer was filed, the answer being treated as if still a pending pleading. The case came on for trial and resulted in a verdict for the plaintiff, assessing his damages in the sum of \$1,358.57, upon which judgment was entered. A motion for new trial was made and denied, and a writ of error sued out from this court, which the defendant in error now moves to dismiss, uniting with that motion a motion to affirm.

No bill of exceptions was taken, and the denial of the jurisdiction of the circuit court is the only question which can be raised upon the record. And this has no relation to the mode of service. The defendant was a foreign cor-

poration, and the Statute of Nebraska provided that "when the defendant is a foreign corporation, having a managing agent in this State, the service may be upon such agent." (Code Civ. Proc. § 75; Comp. Stat. Neb. 1885, p. 687.) The plea admits service upon the Company's local managing agent, and as the defendant entered full appearance and answer, and, after the withdrawal of the answer and the filing of the plea and its disposition, went to trial on the merits upon issue joined on that answer, the objection to the jurisdiction, if it can be urged at all, must be confined to want of power to entertain the suit outside of defendant's own district.

By section 1 of the Act of March 3, 1887 (24 Stat. 552), as corrected by the Act of August 13, 1888 (25 Stat. 438), to amend the Act of March 3, 1875, determining the jurisdiction of the circuit courts of the United States, and regulating the removal of causes from the state courts and for other purposes, it was provided: "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." The jurisdiction common to all the circuit courts of the United States in respect to the subject matter of the suit and the character of the parties who might sustain suits in those courts, is described in the section, while the foregoing clause relates to the district in which a suit may be originally brought. Where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant, but where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit may be brought in the district in which either the plaintiff or the defendant resides. "The concluding lines," said *Mr. Justice Field* in *Wilson v. Western Union Telegraph Co.*, 34 Fed. Rep. 561, "are to be read as a proviso to the general provision that no civil suit shall be brought except in the district whereof the defendant is an inhabitant." This conclusion was reached and announced by many of the circuit courts, and there can be no doubt of its correctness. *Fales v. Chicago, M. & St. P. R. Co.* 32 Fed. Rep. 678; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 33 Fed. Rep. 885; *Loomis v. N. Y. & C. Gas Co.* Id. 358; *Gavin v. Vance*, Id. 84; *Swayne v. Boyleston Ins. Co.* 35 Fed. Rep. 1.

The Judiciary Act of 1789 provided that no civil suit should be brought before the circuit or district courts against an inhabitant of the United States by any original process in any other district than that whereof he was an inhabitant or in which he should be found at the time of serving the writ (1 Stat. 79), and the Act of 1875 (18 Stat. 470) contained a similar provision. This liability of the defendant to be sued in a district where he might be found at the time of serving process was omitted in

the Act of 1887, but he still remained liable to suit in the district of the residence of the plaintiff as well as in his own district; and as he could not be sued anywhere else, we held in *Smith v. Lyon*, 138 U. S. 315 [88: 685], that where there were two plaintiffs, citizens of different States, the defendant, being a citizen of another State, could not be sued in the State of either of the plaintiffs. *Mr. Justice Miller* points out, in delivering the opinion of the court, that the evident purpose of Congress in the Act of 1887 was to restrict rather than enlarge the jurisdiction of the circuit court, "while," he says, "at the same time a suit is permitted to be brought in any district where either plaintiff or defendant resides."

The defendant answered to the merits in this case, and was then permitted to file the plea in question for the purpose of insisting that it was not subject to suit in a United States court in the district of the plaintiff's residence. Upon the overruling of this plea, the cause proceeded to trial on the merits upon the issues made up on the complaint, answer and replication, the trial continuing for several days, both parties appearing by their attorneys, adding testimony and arguing the case to the jury. Under these circumstances, there being no question whatever presented by the record, except whether the defendant was liable to be sued in the Circuit Court of the United States for the District of Nebraska, and it being clear that it was, and there being color for the motion to dismiss, we sustain the motion to affirm, as we do not need further argument on that question.

Judgment affirmed.

Ex parte:

In the Matter of JAMES J. MEDLEY, Petitioner.

(See S. C. Reporter's ed. 160-176.)

Colorado Statute as to murder, ex post facto law—greater punishment—law passed after offense—solitary confinement—secrecy as to time—discharge by habeas corpus—notice—repeal of former law.

1. The Colorado Act of April 9, 1889, prescribing the punishment for murder, which became oper-

ative on the 19th day of July, 1890, is an *ex post facto* law, and is void under the Constitution of the United States as to a murder committed May 13, 1889.

2. Any law which is passed after the commission of the offense for which the party is being tried is an *ex post facto* law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed, or which alters the situation of the accused to his disadvantage.
3. No one can be criminally punished in this country except according to the law prescribed for his government by the sovereign authority before the imputed offense was committed, or by some law passed afterwards by which the punishment is not increased.
4. The solitary confinement to which the prisoner is subjected by the said Statute of Colorado of 1889 is an additional punishment of the most important and painful character, and is therefore forbidden by this provision of the Constitution of the United States.
5. The new power of fixing any day and hour during a period of a week for the execution, given by said Act to the warden of the penitentiary, is a new and important power and is a departure from the law as it existed before, and, with its secrecy causing increased mental anxiety to the prisoner, amounts to an increase of punishment and renders the law *ex post facto* and void.
6. Under the writ of habeas corpus, this court orders the discharge of the prisoner from imprisonment in the penitentiary, under the Statute of Colorado invalid as to this case; but directs that the attorney-general of the State be given ten days' prior notice of such discharge.
7. This court does not remand the prisoner to be proceeded against in the court which condemned him, because, while the Statute under which he is now held in custody is an *ex post facto* law, it repeals the former law.

[No. 5, Original.]

Argued Jan. 15, 1890. Decided March 3, 1890.

PETITION for a writ of habeas corpus to relieve petitioner from imprisonment under sentence of death in the State of Colorado. *Granted, and prisoner discharged from imprisonment.*

The facts are stated in the opinion.

Messrs. A. T. Britton, Henry Wise Garrett and W. V. R. Berry, for petitioner:

Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed is an *ex post facto* law.

NOTE.—*Retrospective statutes, when valid*, see note to *Otoe County v. Baldwin*, 28: 331.

As to constitutionality of ex post facto laws, see notes to *Calder v. Bull*, 1: 643, and *Sturges v. Crowninshield*, 4: 529.

Ex post facto and retrospective laws.

An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed. *Smith v. Cockrill*, 73 U. S. 6 Wall. 756 (18: 973); *Calder v. Bull*, 3 U. S. 3 Dall. 386 (1: 643).

Ex post facto laws relate to penal and criminal proceedings and not to civil proceedings which affect private rights. *Baltimore & S. R. Co. v. Nesbit*, 61 U. S. 10 How. 395 (18: 469); *Carpenter v. Penn.* 53 U. S. 17 How. 456 (15: 127); *Looke v. New Orleans*, 71 U. S. 4 Wall. 172 (18: 334); *Watson v. Mercer*, 33 U. S. 3 Pet. 88 (3: 876).

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Any law passed after the commission of an offense, which, in relation to that offense or its consequences, alters the situation of a party to his disadvantage, is an *ex post facto* law. *Kring v. Missouri*, 107 U. S. 221 (27: 506).

A state law changing the place of trial to another county from that in which the offense was committed or the indictment found, is not an *ex post facto* law. *Gut v. Minnesota*, 78 U. S. 9 Wall. 35 (19: 573).

A statute which deprives a man of his estate, or any part of it, for a crime which was not declared to be an offense by any previous law, is void as an *ex post facto* law. *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87 (3: 132).

A test oath required of a priest as a condition for exercising the functions of his office, to the effect that he had always been loyal, is unconstitutional as an *ex post facto* law. *Cummings v. Missouri*, 71 U. S. 4 Wall. 277 (18: 356).

Calder v. Bull, 8 U. S. 3 Dall. 390 (1: 649); *Kring v. Missouri*, 107 U. S. 221 (27: 506); *Cummings v. Missouri*, 71 U. S. 4 Wall. 320 (18: 362); *Shepherd v. People*, 25 N. Y. 416.

Solitary confinement was a punishment distinctly inflicted as a "further terror," and meant to be a peculiar hardship and pain to the condemned.

Hartung v. People, 22 N. Y. 106; Russell, Crimes, vol. 1, p. 104, vol. 2, pp. 67, 849, 1022; articles on *Prisons* in the Encyclopedia Britannica and American Cyclopaedia.

The Statute of 1889 removes absolutely from the court any and all discretion to prolong the time within which the sentence shall be executed.

Kring v. Missouri, 107 U. S. 230 (27: 509); *Rez v. Hensey*, 1 Burr. 650.

The Act of 1889 renders an act punishable in a manner in which it was not punishable when committed, inflicts a greater punishment than the law annexed to the crime when committed, alters the situation of the accused to their disadvantage and is *ex post facto* and void.

Hartung v. People, 22 N. Y. 95; *Com. v. Mc-*

Donough, 18 Allen, 581; *Shepherd v. People*, 25 N. Y. 406; *Hirschburg v. People*, 6 Colo. 145.

Messrs. Sam. W. Jones, Atty. Gen. of State of Colorado, H. Riddell and H. M. Teller, for respondent:

The Statute does not change the punishment for the offense to the disadvantage of the defendant.

Carter v. Burt, 12 Allen, 425; *Hartung v. People*, 22 N. Y. 95, 105; Cooley, Const. Lim. §§ 271, 272; *Com. v. McDonough*, 13 Allen, 581; *Arnold v. U. S.* 13 U. S. 9 Cranch, 104 (3: 671); Bishop, Crim. Law, § 280 *et seq.*; Whart. Crim. Law, § 31; Wade, Retroactive Laws, § 233; *State v. Arlin*, 89 N. H. 179; *Marion v. State*, 16 Neb. 349, 20 Neb. 233; *Gut v. State*, 76 U. S. 9 Wall. 35 (19: 573); *Randall v. Brigham*, 74 U. S. 7 Wall. 523 (19: 285); *Norton v. Shelby Co.* 118 U. S. 425, 439 (30: 178, 181); *Pease v. Peck*, 59 U. S. 18 How. 595 (15: 518); *Seaborn v. State*, 20 Ala. 15; *State v. Oscar*, 18 La. Ann. 297; *Wilkerson v. Utah*, 99 U. S. 130 (24: 345); *Stokes v. People*, 53 N. Y. 164; *State v. Ryan*, 13 Minn. 370; *Walston v. Com.* 16 B. Mon. (Ky.) 15; *Strong v. State*, 1 Blackf. (Ind.) 193; *Herber v. State*, 7 Tex. 69; *State v. Kent*, 65 N. C. 311;

A statute which simply enlarges the class of persons who may be competent to testify is not *ex post facto* in its application to offenses previously committed. *Hopt v. Utah*, 100 U. S. 574 (23: 262).

There is no inhibition in the Constitution of Indiana against the passage of retrospective statutes. *Johnson v. Wells County*, 5 West. Rep. 240, 107 Ind. 15.

A State Constitution is not a contract, the obligation of which the State is prohibited by the Federal Constitution from impairing. *Church v. Kelsey*, 121 U. S. 332 (30: 960).

The constitutional provision that "no State shall pass any law impairing the obligation of contracts," does not apply to a statute in respect to contracts after its passage. *Lehigh Water Co. v. Borough of Easton*, 121 U. S. 388 (30: 1059).

A state law so affecting the remedy which existed when a contract was made as substantially to impair and lessen the value of the contract is void as impairing its obligation. *Seibert v. Lewis*, 122 U. S. 234 (30: 1161).

A law changing procedure and manner of enforcing punishment after the commission of the offense is not void *ex post facto*. *Marion v. State*, 20 Neb. 233.

A statute cannot affect a title which became vested before the statute was passed, by force of a conveyance previously made. *Zornlein v. Bram*, 1 Cent. Rep. 66, 100 N. Y. 12.

A general law for the punishment of offenses, which endeavors to reach, by its retroactive operation, acts previously committed, as well as to prescribe a rule of conduct for the citizen in future, is void in so far as it is retrospective; but such invalidity will not affect its operation in regard to future cases. *Jaehne v. People*, 123 U. S. 189 (32: 306).

An *ex post facto* law is one which, in its operation, makes that criminal or penal which was not so at the time the act was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of the party to his disadvantage. *Lindzey v. State*, 65 Miss. 542.

A law taking away the right to defend against the carrying of concealed weapons on the ground of good cause to apprehend an attack, and changing the penalty by fixing a minimum fine and period of hard labor, is in both particulars an *ex post facto* law. *Id.*

A mere change in the mode of trial without altering the punishment, is not an *ex post facto* law. *Anderson v. O'Donnell*, 1 L. R. A. 632, 29 S. C. 355.

Iowa Laws of 1886, chap. 66, providing for the closing for one year of a building found to be kept as a liquor nuisance, and for the taxing of an attorney's fee to defendant, does not become an *ex post facto* law when applied to a case begun before its enactment; nor can it be an *ex post facto* law, because an action to abate a liquor nuisance is not a criminal proceeding. *Drake v. Jordan*, 73 Iowa, 707; *Campbell v. Manderscheid*, 74 Iowa, 708.

An ordinance passed and promulgated subsequent to the issuance of a license to a retailer of spirituous liquors, denouncing a penalty of fine against its violation by such person as shall keep his saloon open after 10 o'clock P. M., is not an *ex post facto* law as to acts committed after its passage. *State v. Isabel*, 40 La. Ann. 340.

A statute transferring jurisdiction from one court to another is not such an *ex post facto* law as will forbid the new tribunal from taking jurisdiction of an offense committed prior to the statute. *State v. Cooler*, 3 L. R. A. 181, 30 S. C. 105.

The Alabama Act of 1887 reducing the number of peremptory challenges allowed to defendant in felony cases is not *ex post facto*. *South v. State*, 36 Ala. 517.

The New York Statute of 1888, providing for the infliction of the death penalty by means of electricity, does not apply to a crime committed before it takes effect, and therefore is not *ex post facto* as to crimes committed before it takes effect. *People v. Nolan*, 24 N. Y. S. R. 586, 115 N. Y. 660.

The provision of the Constitution of the United States prohibiting the passage of *ex post facto* state laws applies only to legislation concerning crimes. *Ex parte Sawyer*, 124 U. S. 200 (31: 402).

A law affecting the right to maintain a civil action to recover damages for a tort, or taking the right away, neither impairs the obligation of a contract nor partakes of the character of an *ex post facto* law. *Eastman v. Clackamas County*, 32 Fed. Rep. 24.

The Legislature may pass retrospective laws unless prohibited by the Constitution, or unless they are violative of vested rights affecting substantial equities. *Smith v. Hard*, 4 New Eng. Rep. 113, 59 Vt. 13; *State v. Skinkle*, 8 Cent. Rep. 321, 49 N. J. L. 641.

State v. Johnson, 12 Minn. 476; *State v. Williams*, 2 Rich. L. (S. C.) 418; *Ex parte Karstendick*, 93 U. S. 896 (28: 889).

But should the court consider the Law of 1889 *ex post facto*, as to these petitioners, they should be considered as never having been in jeopardy, and they can be recommitted to the custody of the sheriff to be proceeded with under the same indictments for manslaughter or other offense less than murder.

Packer v. People, 8 Colo. 361; *Garvey's Case*, 7 Colo. 384.

Mr. Justice Miller delivered the opinion of the court:

This is an application to this court by James J. Medley for a writ of habeas corpus, the object of which is to relieve him from the imprisonment in which he is held by J. A. Lamping, warden of the state penitentiary of the State of Colorado.

The petitioner is held a prisoner under sentence of death pronounced by the District Court of the Second District of the State of Colorado for the County of Arapahoe. The petition of the prisoner sets forth that an indictment for the murder of Ellen Medley was found against him by the grand jury of Arapahoe County on the 5th day of June, 1889; that the indictment charges petitioner with this murder, which took place on the 13th day of May of that year; that he was tried in said district court on the 24th day of September thereafter and found guilty by the jury of murder in the first degree; that on the 29th day of November he was sentenced to be remanded to the custody of the sheriff of Arapahoe County, and within twenty-four hours to be taken by said sheriff and delivered to the warden of the state penitentiary, to be kept in solitary confinement until the fourth week of the month of December thereafter, and that then, upon a day and hour to be designated by the warden, he should be taken from said place of confinement to the place of execution, within the confines of the penitentiary, and there be hanged by the neck until he was dead.

Copies of the indictment, of the verdict of the jury and of the sentence of the court are annexed to the petition, as exhibits.

The petitioner then sets forth that he was sentenced under the Statute of Colorado, approved April 19th, 1889, and which went into effect July 19th, 1889, and repealed all Acts and parts of former Acts inconsistent therewith, without any saving clause, and that the crime on account of which the sentence was passed was charged to be and was actually committed on the 13th day of May of the same year.

The petitioner enumerates some twenty variances between the Statute in force at the time the crime was committed and that under which he was sentenced to punishment in the present case, all of which are claimed to be changes to his prejudice and injury, and therefore *ex post facto* within the meaning of section 10, article I., of the Constitution of the United States, which declares that no State shall pass any bill of attainder or *ex post facto* law.

The petitioner applies directly to this court for the writ of habeas corpus instead of to the circuit court of the United States, because, he

alleges, that court has in a similar case, involving the same points, decided adversely to the petitioner.

Upon examining the petition and the accompanying exhibits an order was made that the writ should issue and be returnable forthwith. By an arrangement between the parties and the counsel, it was agreed that the prisoner need not, in person, be brought to Washington. The case was therefore heard on the documents and transcripts of record presented to the court, and the only question argued before us was whether the Act of April 19, 1889, which, by the Constitution of the State of Colorado, became operative on the 19th day of July thereafter, and under which the sentence complained of was imposed by the district court, is an *ex post facto* law, so as to be void under the provision of the Constitution of the United States on that subject, and, if so, in what respect it is in violation of that constitutional provision.

This Statute will be found in the Session Laws of the State of Colorado of 1887, page 118, and is as follows:

"An Act relative to the time, place and manner of infliction of the death penalty, and to provide means for the infliction of such penalty; and making it a misdemeanor, punishable by fine or imprisonment, to disclose or publish proceedings in relation thereto.

"Be it enacted by the General Assembly of the State of Colorado:

Sec. 1. The commissioners of the state penitentiary, at the expense of the State of Colorado, shall provide a suitable room or place inclosed from public view within the walls of the penitentiary, and therein erect and construct, and at all times have in preparation, all necessary scaffolding, drops and appliances requisite for carrying into execution the death penalty; and the punishment of death must, in each and every case of death sentence pronounced in this State, be inflicted by the warden of the said state penitentiary in the room or place and with the appliances provided as aforesaid, by hanging such convict by the neck until he shall be dead.

"Sec. 2. Whenever a person [is] convicted of a crime, the punishment whereof is death, and such convicted person be sentenced to suffer the penalty of death, the judge passing such sentence shall appoint and designate in the warrant of conviction a week of time within which such sentence must be executed; such week, so appointed, shall be not less than two nor more than four weeks from the day of passing such sentence. Said warrant shall be directed to the warden of the state penitentiary of this State, commanding said warden to do execution of the sentence imposed as aforesaid, upon some day within the week of time designated in said warrant, and shall be delivered to the sheriff of the county wherein such conviction is had, who shall within twenty-four hours thereafter proceed to the said penitentiary and deliver such convicted person, together with the warrant as aforesaid, to the said warden, who shall keep such convict in solitary confinement until infliction of the death penalty; and no person shall be allowed access to said convict, except his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with prison regulations.

"Sec. 3. The particular day and hour of the execution of said sentence, within the week specified in said warrant, shall be fixed by said warden, and he shall invite to be present thereat the sheriff of the county wherein the conviction was had, the chaplain and physician of the penitentiary, one practicing surgeon resident in the State, the spiritual adviser of the convict, if any, and six reputable citizens of the State of full age. Said warden may also appoint three deputies or guards to assist him in executing said sentence, and said warden shall permit no person or persons to be present at such execution except those provided for in this section. The time fixed by said warden for said execution shall be by him kept secret and in no manner divulged, except privately to the persons by him invited to be present as aforesaid; and such persons so invited shall not divulge such invitation to any person or persons whomsoever nor in any manner disclose the time of such execution. All persons present at such execution shall keep whatever may transpire thereat secret and inviolate, save and except the facts certified to by them as hereinafter provided. No account of the details of any such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law at the state penitentiary, shall in any manner be published in this State.

"Sec. 4. Upon receiving notice from said warden of such execution, it shall be the duty of said sheriff to be present and witness such execution; and shall receive and cause the certified transcript of record of said execution, hereinafter specified, to be filed within ten days after said execution, in the office of the clerk of the court in which said conviction was had; and the said clerk shall record said transcript at length in the records of the said case. In case of the disability, from illness, or other sufficient cause, of said warden or said sheriff to be present at such execution it shall be the duty of their respective deputies, acting in their place and stead, to execute said warrant, and to perform all other duties in connection therewith and by this Act imposed upon their principals.

"Sec. 5. Said warden shall keep a book of record, to be known as 'Record of Executions,' in which shall be entered at length the reports hereinafter specified. Immediately after said execution a *post mortem* examination of the body of the convict shall be made by the attending physician and surgeon, and they shall enter in said book of record the nature and extent of such examination, and sign and certify to the same. Said warden shall also immediately make and enter in said book a report setting forth the time of such execution, and that the convict (naming him) was then and there executed in conformity to the sentence specified in the warrant of the court (naming such court) to him directed, and in accordance with the provisions of this Act; and shall insert in said report the names of all the persons who were present and witnessed said execution, and shall procure each and every of such persons to sign said report with their full name and place of residence before leaving the place of execution; and said warden shall thereupon attach his certificate to said report, certifying to

the truth and correctness thereof, and shall immediately deliver a certified transcript of said record entry to said sheriff.

"Sec. 6. Any person who shall violate or omit to comply with section 3 of this Act shall be guilty of a misdemeanor, and upon conviction thereof be punished by a fine of not less than \$50 nor more than \$500, or by imprisonment in the county jail for not less than thirty days nor more than six months.

"Sec. 7. The warden or other person acting in his stead who performs the duties imposed upon him by this Act shall be paid for his services out of the moneys provided for the maintenance of said state penitentiary the sum of fifty (50) dollars; and the said sheriff shall be paid for his services by the county where such conviction was had the sum of twenty-five (25) dollars, together with his mileage fees as provided by law.

"Sec. 8. All Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed.

"Approved April 19, 1889."

Section 19 of article V. of the Constitution of the State of Colorado, as amended November 4, 1884, is as follows:

"No Act of the General Assembly shall take effect until ninety days after its passage, unless in case of emergency (which shall be expressed in the preamble or body of the Act) the General Assembly shall, by vote of two thirds of all the members elected to each house, otherwise direct. No bill except the general appropriation for the expenses of the government only, introduced in either house of the General Assembly after the first thirty days of the session, shall become a law."

We think it follows from this provision that neither the repealing clause nor any other part of this Act was in force prior to the 19th of July, 1889, and that the crime, having been committed in May of that year, was to be governed in all particulars, of trial and punishment, by the law then in force, except so far as the Legislature had power to apply other principles to the trial and punishment of the crime. If these were conducted and administered under the Law of 1889, which became a law after the commission of the offense, and its provisions, so far as applied by the court to the case of the prisoner, were such invasions of his rights as to properly be called *ex post facto* laws, they were void.

It is unnecessary to examine all the points in which, according to the argument for plaintiff, the new Statute was *ex post facto*; therefore we shall notice only a few of those which appear to us most deserving of attention, and in doing this we shall compare the new Statute with the one which it superseded and repealed.

The first of these, and perhaps the most important, is that which declares that the warden shall keep such convict in solitary confinement until the infliction of the death penalty. The former law, the Act of 1883, contained no such provision. It declared that every person convicted of murder in the first degree should suffer death, and every person convicted of murder of the second degree should suffer imprisonment in the penitentiary for a term of not less than ten years, which might extend to life;

and it declared that the manner of inflicting the punishment of death should be by hanging the person convicted by the neck until death, at such time as the court should direct, not less than fifteen nor more than twenty-five days from the time sentence was pronounced, unless for good cause the court or governor might prolong the time. The prisoner was to be kept in the county jail under the control of the sheriff of the county, who was the officer charged with the execution of the sentence of the court. Solitary confinement was neither authorized by the former Statute, nor was its practice in use in regard to prisoners awaiting the punishment of death.

This matter of solitary confinement, is not, as seems to be supposed by counsel, and as is suggested in an able opinion on this Statute, furnished us by the brief of the counsel for the State, by Judge Hayt (in the case of Henry Tyson), a mere unimportant regulation as to the safe-keeping of the prisoner, and is not relieved of its objectionable features by the qualifying language, that no person shall be allowed access to said convict except his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with prison regulations.

Solitary confinement, as a punishment for crime, has a very interesting history of its own, in almost all countries where imprisonment is one of the means of punishment. In a very exhaustive article on this subject in the American Encyclopedia, volume XIII., under the word "*Prison*," this history is given. In that article it is said that the first plan adopted when public attention was called to the evils of congregating persons in masses without employment, was the solitary prison connected with the Hospital San Michele at Rome, in 1708, but little known prior to the experiment in Walnut Street Penitentiary in Philadelphia, in 1787. The peculiarities of this system were the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction. Other prisons on the same plan, which were less liberal in the size of their cells and the perfection of their appliances, were erected in Massachusetts, New Jersey, Maryland and some of the other States. But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. It became evident that some changes must be made in the system, and the "separate" system was originated by the Philadelphia Society for Ameliorating the Miseries of Public Prisons, founded in 1787.

The article then gives a great variety of instances in which the system is somewhat modified, and it is within the memory of many persons interested in prison discipline that some thirty or forty years ago the whole subject at-

tracted the general public attention, and its main feature of solitary confinement was found to be too severe.

It is to this mode of imprisonment that the phrase "solitary confinement" has been applied in nearly all instances where it is used, and it means this exclusion from human associations; where it is intended to mitigate it by any statutory enactment or by any regulations of persons having authority to do so, it is by express exceptions and modifications of the original principle of "solitary confinement." The Statute of Colorado is undoubtedly framed on this idea. Instead of confinement in the ordinary county prison of the place where he and his friends reside; where they may, under the control of the sheriff, see him and visit him; where the sheriff and his attendants must see him; where his religious adviser and his legal counsel may often visit him without any hindrance of law on the subject, the convict is transferred to a place where imprisonment always implies disgrace, and which, as this court has judicially decided in *Ex parte Wilson*, 114 U. S. 417 [29: 89]; *Mackin v. United States*, 117 U. S. 348 [29: 909]; *Parkinson v. United States*, 121 U. S. 281 [30: 959], and *United States v. De Walt*, 128 U. S. 398 [32: 485], is itself an infamous punishment, and is there to be kept in "solitary confinement," the primary meaning of which phrase we have already explained.

The qualifying phrase in this Statute is but a small mitigation of this solitary confinement, for it expressly declares that no one shall be allowed access to the convict except certain persons, and these are not admissible unless their access to the prisoner is in accordance with prison regulations, prescribed by the board of commissioners of the penitentiary under section 2558 of the Laws of Colorado in force since 1877. This section declares that "the board of commissioners of the penitentiary shall make such rules and regulations for the government, discipline and police of the penitentiary, and for the punishment of prisoners confined, not inconsistent with law, as they deem expedient." What these may be at any particular time is unknown. How far they may permit access of counsel, physicians, the spiritual adviser and the members of his family is a matter in their discretion, which they exercise by general rules, which may be altered at any time so as to exclude all these persons, and thus the prisoner be left to the worst form of solitary confinement.

Even the statutory amelioration is a very limited one. By the words "his attendants" in the Statute, is evidently meant the officers of the prison and subordinates, who must necessarily furnish him with his food and his clothing, and make inspection every day that he still exists. They may be forbidden by prison regulations, however, from holding any conversation with him. The attendance of the counsel can only be casual, and a very few interviews, one or two, perhaps, are all that he would have before his death, and that of the physician not at all, unless he was so sick as to require it, and the spiritual adviser of his own selection, and the members of his family, are all dependent for their opportunities of seeing the prisoner upon the regulations of the prison. The solitary confinement, then, which is meant

by the Statute, remains of the essential character of that mode of prison life as it originally was prescribed and carried out, to mark them as examples of the just punishment of the worst crimes of the human race.

The brief of counsel for the prisoner furnishes us with the statutory history of solitary confinement in the English law. The Act 25 George II., chapter 37, entitled "An Act for the Better Preventing the Horrid Crime of Murder," is preceded by the following preamble: "Whereas, the horrid crime of murder has of late been more frequently perpetrated than formerly; and whereas it is thereby become necessary that some further terror and peculiar mark of infamy be added to the punishment of death now by law upon such as shall be guilty of the said offense"—then follow certain enactments, the sixth section of which reads as follows: "Be it further enacted, That from and after such conviction and judgment given thereupon, the jailer or keeper to whom such criminal shall be delivered for safe custody shall confine such prisoner to some cell separate and apart from the other prisoners, and that no person or persons whatsoever, except the jailer or keeper, or his servants, shall have access to any such prisoner, without license being first obtained."

This Statute is very pertinent to the case before us, as showing, first, what was understood by solitary confinement at that day, and, second, that it was considered as an additional punishment of such a severe kind that it is spoken of in the preamble as "a further terror and peculiar mark of infamy" to be added to the punishment of death. In Great Britain, as in other countries, public sentiment revolted against this severity, and by the Statute of 6 and 7 William IV., chapter 30, the additional punishment of solitary confinement was repealed.

The term *ex post facto* law, as found in the provision of the Constitution of the United States, to wit, that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," has been held to apply to criminal laws alone, and has been often the subject of construction in this court. Without making extracts from these decisions, it may be said that any law which was passed after the commission of the offense for which the party is being tried is an *ex post facto* law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed (*Calder v. Bull*, 3 U. S. 3 Dall. 386, 390 [1:648,649]; *Kring v. Missouri*, 107 U. S. 221 [27:506]; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87 [3:162]); or which alters the situation of the accused to his disadvantage; and that no one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, or by some law passed afterwards by which the punishment is not increased.

It seems to us that the considerations which we have here suggested show that the solitary confinement to which the prisoner was subjected by the Statute of Colorado of 1889, and by the judgment of the court in pursuance of that Statute, was an additional punishment of the most important and painful character, and is,

therefore, forbidden by this provision of the Constitution of the United States.

Another provision of the Statute, which is supposed to be liable to this objection, of its *ex post facto* character, is found in section 3, in which the particular day and hour of the execution of the sentence within the week specified by the warrant shall be fixed by the warden, and he shall invite to be present certain persons named, to wit, a chaplain, a physician, a surgeon, the spiritual adviser of the convict, and six reputable citizens of the State of full age, and that the time fixed by said warden for such execution shall be by him kept secret, and in no manner divulged except privately to said persons invited by him to be present as aforesaid, and such persons shall not divulge such invitation to any person or persons whomsoever, nor in any manner disclose the time of such execution. And section six provides that any person who shall violate or omit to comply with the requirements of section three of the Act shall be punished by fine or imprisonment. We understand the meaning of this section to be that within the one week mentioned in the judgment of the court the warden is charged with the power of fixing the precise day and hour when the prisoner shall be executed; that he is forbidden to communicate that time to the prisoner; that all persons whom he is directed to invite to be present at the execution are forbidden to communicate that time to him; and that, in fact, the prisoner is to be kept in utter ignorance of the day and hour when his mortal life shall be terminated by hanging, until the moment arrives when this act is to be done.

Objections are made to this provision as being a departure from the law as it stood before, and as being an additional punishment to the prisoner, and therefore *ex post facto*.

It is obvious that it confers upon the warden of the penitentiary a power which had heretofore been solely confided to the court; and is therefore a departure from the law as it stood when the crime was committed.

Nor can we withhold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place. Notwithstanding the argument that under all former systems of administering capital punishment the officer appointed to execute it had a right to select the time of the day when it should be done, this new power of fixing any day and hour during a period of a week for the execution is a new and important power conferred on that officer, and is a departure from the law as it existed at the time the offense was committed, and with its secrecy must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment.

There are other provisions of the Statute pointed out in the argument of counsel, which are alleged to be subject to the same objection, but we think the two we have mentioned are quite sufficient to show that the Constitution of the United States is violated by this Statute

as applied to crimes committed before it came into force.

These considerations render it our duty to order the release of the prisoner from the custody of the warden of the penitentiary of Colorado, as he is now held by him under the judgment and order of the court.

A question suggested itself, however, to the court which is not a little embarrassing, and which was not presented by counsel in the argument of the case. This consideration arises from the fact that there does not seem to be in the record before us any error in the proceedings of the court on the trial and the verdict of the jury, by which the party was convicted of murder in the first degree. It is only when the sentence or judgment of the court upon that verdict is entered that the error of the proceedings commences. When, in the language of the judgment of the court, the prisoner was ordered to be "kept by the warden of the penitentiary in solitary confinement until the day of his execution," and when the knowledge of the day and the hour of his execution was by the Statute to be withheld from him, the Constitution of the United States was violated because the additional punishments were inflicted on him by reason of the direction of the Statute, which we have just seen was an *ex post facto* law, and in those respects void as being forbidden by the Constitution of the United States.

If this were a writ of error to the Supreme Court of Colorado, as *Kring's Case* was a writ of error to the Supreme Court of Missouri, our duty would be plain, namely, to reverse the judgment for the error found in it and remand the case to the state court for further proceedings. If such were the case before us our duty would be to reverse the judgment and remand the case to the court below to deal with the prisoner in the face of the fact that a verdict of guilty, which was valid and legal, remains unenforced. But under the writ of *habeas corpus* we cannot do anything else than discharge the prisoner from the wrongful confinement in the penitentiary under the Statute of Colorado invalid as to this case.

The language of the Act of Congress, however, seems to have contemplated some emergency of the kind now before us. Section 761 of the Revised Statutes declares that the court, or justice or judge (before whom the prisoner may be brought by writ of *habeas corpus*) shall proceed in a summary way to determine the facts of the case by hearing the testimony and argument, and thereupon to dispose of the party as law and justice require.

What disposition shall we now make of the prisoner, who is entitled to his discharge from the custody of the warden of the penitentiary under the order and judgment of the court, because, within the language of section 758, he is in custody in violation of the Constitution of the United States, but who is, nevertheless, guilty, as the record before us shows, of the crime of murder in the first degree? We do not think that we are authorized to remand the prisoner to the custody of the sheriff of the proper county to be proceeded against in the court of Colorado which condemned him, in such a manner as they may think proper, because it is apparent that while the Statute un-

der which he is now held in custody is an *ex post facto* law in regard to his offense, it repeals the former law, under which he might otherwise have been punished, and we are not advised whether that court possesses any power to deal further with the prisoner or not. Such a question is not before us, because it has not been acted upon by the court below, and it is neither our inclination nor our duty to decide what the court may or what it may not do in regard to the case as it stands. Upon the whole, after due deliberation, we have come to the conclusion that the attorney-general of the State of Colorado shall be notified by the warden of the penitentiary of the precise time when he will release the prisoner from his custody under the present sentence and warrant at least ten days beforehand, and after doing this, and at that time, he shall discharge the prisoner from his custody; and such will be the order of this court.

ORDER.

Per Mr. Justice Miller:

On consideration of the application for the discharge of the petitioner, James J. Medley, the writ of *habeas corpus*, directing J. A. Lamping, warden of the state penitentiary of the State of Colorado at Cañon City, Fremont County, State of Colorado, to produce the body of the said James J. Medley before this court, and to certify the cause of his detention and imprisonment, having been duly issued and served, and the said J. A. Lamping, warden as aforesaid, having certified that said James J. Medley is detained in his custody under and by virtue of a writ issued out of the District Court of Arapahoe County, State of Colorado, and the cause of said imprisonment having been duly inquired into by this court upon the return of the said writ of *habeas corpus* heretofore issued herein, and counsel having been heretofore heard and due consideration having been had:

It is now here ordered by this court that the imprisonment of said James J. Medley under said writ issued out of the District Court of Arapahoe County, State of Colorado, is without authority of law and in violation of the Constitution of the United States, and that the said James J. Medley is entitled to have his liberty. Whereupon it is hereby ordered that the said James J. Medley be, and he is hereby, discharged from said imprisonment.

It is further ordered that said J. A. Lamping, warden as aforesaid, do notify the attorney-general of the State of Colorado of the day and the hour of the day when he will discharge the said James J. Medley from imprisonment, and that such notice be given at least ten days before the release of the prisoner.

Mr. Justice Brewer, dissenting:

I dissent from the opinion and judgment as above declared. The substantial punishment imposed by each Statute is death by hanging. The differences between the two, as to the manner in which this sentence of death shall be carried into execution, are trifling. What are they? By the old law, execution must be within twenty-five days from the day of sentence. By the new, within twenty-eight days. By the old, confinement prior to execution was

in the county jail. By the new, in the penitentiary. By the old, the sheriff was the hangman. By the new, the warden. Under the old, no one had a right of access to the condemned except his counsel, though the sheriff might, in his discretion, permit anyone to see him. By the new, his attendants, counsel, physician, spiritual adviser and members of his family have a right of access, and no one else is permitted to see him. Under the old, his confinement might be absolutely solitary, at the discretion of the sheriff, with but a single interruption. Under the new, access is given to him as a matter of right, to all who ought to be permitted to see him. True, access is subject to prison regulations; so, in the jail, the single authorized access of counsel was subject to jail regulations. It is not to be assumed that either regulations would be unreasonable, or operate to prevent access at any proper time. Surely, when all who ought to see the condemned have a right of access, subject to the regulations of the prison, it seems a misnomer to call this "solitary confinement," in the harsh sense in which this phrase is sometimes used. All that is meant is, that a condemned murderer shall not be permitted to hold anything like a public reception; and that a gaping crowd shall be excluded from his presence. Again, by the old law, the sheriff fixes the hour within a prescribed day. By the new, the warden fixes the hour and day within a named week. And these are all the differences which the court can find between the two Statutes, worthy of mention.

Was there ever a case in which the maxim, "*De minimis non curat lex*," had a more just and wholesome application? Yet, on account of these differences, a convicted murderer is to escape the death he deserves and be turned loose on society.

I am authorized to say that *Mr. Justice Bradley* concurs in this dissent.

Ex Parte:

In the matter of JAMES H. SAVAGE,
Petitioner.

(See S. C. Reporter's ed. 176-177.)

Ex parte Medley, ante, p. 885, followed.

The same order entered in *Medley's Case*, ante, p. 885, entered in this case, releasing the prisoner from the custody of the warden, after due notice to the attorney-general of the State of Colorado.
[No. 6, Original.]

Argued Jan. 15, 1890. Decided March 3, 1890.

PETITION for a writ of habeas corpus to relieve petitioner from imprisonment on a conviction for murder in Colorado. *Petitioner discharged.*

Same counsel as in *Medley's Case*, ante, p. 885.

Mr. Justice Miller delivered the opinion of the court:

This case is in every respect the same as that of *Ex parte James J. Medley*. By petition to us we are advised that Savage was indicted by the grand jury of Arapahoe County for the crime of murder in the first degree, charged to have been committed on the 25th day of June, A. D. 1889, by killing one Emanuel Harbert; and that on the 23d of October thereafter he was

found guilty by the jury of murder in the first degree. A similar judgment to that in the case of *Medley* was passed upon him, and he was remanded to the custody of the warden of the penitentiary of the State of Colorado under an order of precisely the same character as that in the case of *Medley*. It will thus be seen that the same Statute involved in that case was the authority under which the court of Colorado rendered its judgment and committed the prisoner to the care of the warden of the penitentiary; that this Statute came into force after the commission of the offense of which Savage was convicted, and is therefore *ex post facto* in its application to his case. The same order, therefore, that we have directed to be entered in *Medley's Case* will be entered in this case, releasing the prisoner from the custody of the warden, after due notice to the attorney-general of the State of Colorado.

ORDER.

Per Mr. Justice Miller:

On consideration of the application for the discharge of the petitioner, James H. Savage, the writ of habeas corpus, directing J. A. Lamping, warden of the state penitentiary of the State of Colorado, at Cañon City, Fremont County, State of Colorado, to produce the body of the said James H. Savage before this court, and to certify the cause of his detention and imprisonment, having been duly issued and served, and the said J. A. Lamping, warden as aforesaid, having certified that said James H. Savage is detained in his custody under and by virtue of a writ issued out of the District Court of Arapahoe County, State of Colorado, and the cause of said imprisonment having been duly inquired into by this court upon the return of the said writ of habeas corpus heretofore issued herein, and counsel having been heretofore heard and due consideration having been had:

It is now here ordered by this court that the imprisonment of said James H. Savage under said writ issued out of the District Court of Arapahoe County, State of Colorado, is without authority of law and in violation of the Constitution of the United States, and that the said James H. Savage is entitled to have his liberty. Whereupon it is hereby ordered that the said James H. Savage be, and he is hereby, discharged from said imprisonment.

It is further ordered that the said J. A. Lamping, warden as aforesaid, do notify the attorney-general of the State of Colorado of the day and the hour of the day when he will discharge the said James H. Savage from imprisonment, and that such notice be given at least ten days before the release of the prisoner.

BERNARD B. HANS, *Plff. in Err.*,

STATE OF LOUISIANA.

(See S. C. Reporter's ed. 1-21.)

A State cannot be sued by one of its own citizens — nor by a citizen of another State or of a

NOTE.—*State, when can be sued; suits by State.*

A State cannot be sued without its consent. Board of Liquidation v. McComb, 92 U. S. 581 (23: 623); Nathan v. Virginia, 1 U. S. 1 Dall. 77 (1: 44);

foreign state—judicial power of U. S.—State may be sued by its own consent—writ of error—violation of property rights.

1. A State cannot be sued in a circuit court of the United States by one of its own citizens, upon the ground that the case is one that arises under the Constitution or laws of the United States.
2. A State cannot be sued by a citizen of another State, or of a foreign state.
3. The cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States.
4. A State may be sued by its own consent; it may, if it thinks proper, waive its privilege and permit itself to be made a defendant in a suit by individuals, or by another State.
5. A writ of error to a judgment recovered by a State, in which the State is necessarily the defendant in error, is not a suit commenced or prosecuted against a State.
6. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void.

[No. 4.]

Argued Jan. 22, 1890. Decided March 3, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana to review a judgment dismissing a suit brought by a citizen of the State of Louisiana against that State to recover the amount of coupons annexed to bonds of the State. *Affirmed.*

The facts are stated in the opinion.

Briscoe v. Bank of Kentucky, 36 U. S. 11 Pet. 257 (9: 709); *Curran v. Arkansas*, 53 U. S. 15 How. 304 (14: 705); *Beers v. Arkansas*, 61 U. S. 20 How. 527 (15: 991); *Memphis & C. R. Co. v. Tennessee*, 101 U. S. 337 (25: 960); *Cunningham v. Macon & B. R. Co.* 109 U. S. 446 (27: 992).

But a State may waive this privilege and permit itself to be made a defendant to a suit by individuals or by another State. *Beers v. Arkansas*, 61 U. S. 20 How. 527 (15: 991); *Clark v. Barnard*, 108 U. S. 436 (27: 780).

The appearance of a State in a court of the United States is a voluntary submission to its jurisdiction. *Clark v. Barnard*, 108 U. S. 436 (27: 780).

An injunction will lie against officers of the State to prevent the execution of laws which violate rights under the Constitution of the United States. *Osborn v. Bank of U. S.* 22 U. S. 9 Wheat. 738 (6: 204); *Davis v. Gray*, 83 U. S. 16 Wall. 208 (21: 447); *Litchfield v. Webster County*, 101 U. S. 773 (25: 925); *Allen v. Baltimore & O. R. Co.* 114 U. S. 311 (29: 200).

The governor of a State may authorize an attorney to bring an action in its name in the supreme court. *Texas v. White*, 74 U. S. 7 Wall. 700 (19: 227).

The State can only be sued with its own consent, and for liabilities which it chooses to assume. *Rexford v. State*, 7 Cent. Rep. 762, 105 N. Y. 229.

A citizen cannot sue the State for injuries from negligence of its agents, except where it has by voluntary legislative enactment assumed such liability. *Spittorf v. State*, 10 Cent. Rep. 702, 108 N. Y. 205.

There is no remedy by suit against the State itself for breach of its contract; and a bill, the object of which is by injunction indirectly to compel specific

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Messrs. J. D. Rouse and William Grant, for plaintiff in error:

The judicial power of the United States is established by the Constitution, and its extent is defined by section 2 of article III. The provision is mandatory, and has always been held to include all that the fullest scope given to the language requires.

Osborn v. Bank of U. S. 22 U. S. 9 Wheat. 738 (6: 204); *Cohens v. Virginia*, 19 U. S. 6 Wheat. 264 (5: 257); *Tennessee v. Davis*, 100 U. S. 257 (25: 648); *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135 (26: 96); *Nashville v. Cooper*, 73 U. S. 6 Wall. 247 (18: 851).

Suits may be brought by a foreign state against a State of the Union, by one State against another or against the citizens of another State.

Wisconsin v. Pelican Ins. Co. 127 U. S. 265 (32: 239); *Rhode Island v. Massachusetts*, 37 U. S. 12 Pet. 677 (9: 1241); *New Hampshire v. Louisiana*, 108 U. S. 90 (27: 660); *Tennessee v. Davis*, 100 U. S. 266 (25: 651); *Poindexter v. Greenhow*, 114 U. S. 270 (29: 185); *Ex parte Ayers*, 123 U. S. 443 (31: 216); *Ames v. Kansas*, 111 U. S. 449 (28: 442); *Civil Rights Cases*, 109 U. S. 12 (27: 837); *Norfolk Trust Co. v. Marye*, 25 Fed. Rep. 654; *Harvey v. Com. of Virginia*, 20 Fed. Rep. 417, note; *Carter v. Greenhow*, 114 U. S. 822 (29: 203).

The third article of the Constitution is mandatory upon the Legislature.

Martin v. Hunter, 14 U. S. 1 Wheat. 334 (4: 104); *Dodge v. Woolsey*, 59 U. S. 18 How. 381 (15: 401).

A State can no more impair the obligation of a contract by her Organic Law than by legis-

performance of a contract by forbidding those acts which constitute breaches, is a suit against the State. *Ex parte Ayers*, 123 U. S. 443 (31: 216).

In such a case, though the State be not nominally a party on record, if defendants are its officers, the suit is still one against the State. *Id.*

A petition for mandamus by supervisors, requiring the auditor-general to pay over taxes, is a suit by the county against the State, and not maintainable. *Ottawa County v. Auditor-Gen.* 13 West. Rep. 166, 69 Mich. 1.

Although the State cannot be sued, yet when it goes into court to recover property, it goes as any other suitor, and must accord to the defendant the right to file a cross-complaint. *State v. Portsmouth Sav. Bank*, 4 West. Rep. 526, 106 Ind. 435.

A State can be sued only by its own consent. *Com. v. Weller*, 82 Va. 721.

The State of Michigan cannot be sued upon a claim against it. *Locke v. Speed*, 62 Mich. 408.

It is a general rule that the sovereign cannot be sued in his own court without his consent; and hence no direct judgment can be rendered against him therein for costs, except in the manner and on the conditions he has prescribed. *State v. Lazarus*, 40 La. Ann. 856.

The rights and immunities of a sovereign State belong to her only within her own jurisdiction and territory, and when she becomes a suitor in the courts of a foreign State, she is treated as a foreign private corporation. *Western Lunatic Asylum v. Miller*, 29 W. Va. 226.

A suit to restrain certain state and county officers from assessing property exempt by statute is not a suit against the State. *Secor v. Singleton*, 35 Fed. Rep. 376.

lative enactment, for her Constitution is a law within the meaning of the contract clause of the National Constitution.

Dodge v. Woolsey, 59 U. S. 18 How. 831 (15: 401); *Mississippi & M. R. Co. v. McClure*, 77 U. S. 10 Wall. 511 (19: 997); *New Orleans Gas Co. v. Louisiana L. & H. Co.* 115 U. S. 672 (29: 523); *Stewart v. Jefferson Police Jury*, 116 U. S. 135 (29: 588); *White v. Hart*, 80 U. S. 18 Wall. 646 (20: 685); *Gunn v. Barry*, 82 U. S. 15 Wall. 610 (21: 212).

And the obligation of her contracts is as fully protected by that instrument against that impairment by legislation as are contracts between individuals exclusively.

New Jersey v. Wilson, 11 U. S. 7 Cranch, 164 (8: 303); *Providence Bank v. Billings*, 29 U. S. 4 Pet. 514 (7: 989); *Green v. Biddle*, 21 U. S. 8 Wheat. 1 (5: 547); *Woodruff v. Trapnall*, 51 U. S. 10 How. 190 (13: 383); *Wolff v. New Orleans*, 103 U. S. 358 (26: 895); *Poindexter v. Greenhow*, 114 U. S. 297 (29: 195); *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87 (3: 162).

To take away all remedy for the enforcement of a right is to take away the right itself. But that is not in the power of the State.

Bronson v. Kinzie, 42 U. S. 1 How. 311, 317 (11: 143, 145); *McCracken v. Hayward*, 43 U. S. 2 How. 608 (11: 397); *Louisiana v. New Orleans*, 102 U. S. 293, 296 (26: 132, 133); *Siebert v. Lewis*, 122 U. S. 284, 295 (30: 1161).

Messrs. Walter H. Rogers, Atty. Gen. of Louisiana, B. J. Sage and A. Porter Morse, for defendant in error:

There can be no jurisdiction over the governing power or its case, without its consent.

Re Ware's Trusts, 25 L. T. N. S. 737; *Atkinson v. Queen's Proctor*, 25 L. T. N. S. 164; *Re Dent Tith Commutation*, 8 Q. B. 43; *Hettiherage Siman Appu v. Queen's Advocate*, L. R. 9 App. Cas. 571; *Tweycross v. Dreyfus*, L. R. 5 Ch. Div. 605.

For a breach of its contract by a State, no remedy is provided by the Constitution of the United States against the State itself.

Antoni v. Greenhow, 107 U. S. 783 (27: 472); *Louisiana v. Jumel*, 107 U. S. 711 (27: 448); *Cohens v. Virginia*, 19 U. S. 6 Wheat. 405 (5: 291); *New Hampshire v. Louisiana*, 108 U. S. 76 (27: 656).

The federal courts never had jurisdiction over contests between States and their citizens.

Cohens v. Virginia, 19 U. S. 6 Wheat. 402 (5: 290); *Ames v. Kansas*, 111 U. S. 466 (28: 489); *New York v. Louisiana*, 108 U. S. 88 (27: 661); *Cunningham v. Macon & B. R. Co.* 109 U. S. 451 (27: 994); 1 Elliot's Debates, 329; *Governor of Georgia v. Madrazo*, 26 U. S. 1 Pet. 110 (7: 73); *Ex parte Ayers*, 123 U. S. 443 (31: 216); *White v. Greenhow*, 114 U. S. 307 (29: 199); *Chaffin v. Taylor*, 114 U. S. 809 (29: 198); *Royall v. Virginia*, 116 U. S. 572 (29: 735); *Davis v. Gray*, 83 U. S. 16 Wall. 203 (21: 447); *Memphis & C. R. Co. v. Tenn.* 101 U. S. 339 (25: 961); *Poindexter v. Greenhow*, 114 U. S. 293 (29: 194); *Ames v. Kansas*, 111 U. S. 470 (28: 448).

The consent of the State must be a continuing consent. Permission to sue may be withdrawn.

Ex parte Ayers, 123 U. S. 443 (31: 216).

Mr. Justice Bradley delivered the opinion of the court:

This is an action brought in the circuit court of the United States, in December, 1884, against the State of Louisiana by Hans, a citizen of that State, to recover the amount of certain coupons annexed to bonds of the State, issued under the provisions of an Act of the Legislature approved January 24, 1874. The bonds are known and designated as the "Consolidated Bonds of the State of Louisiana," and the coupons sued on are for interest which accrued January 1, 1880. The grounds of the action are stated in the petition as follows:

"Your petitioner avers that by the issue of said bonds and coupons said State contracted with and agreed to pay the bearer thereof the principal sum of said bonds forty years from the date thereof, to wit, the first day of January, 1874, and to pay the interest thereon represented by coupons as aforesaid, including the coupons held by your petitioner, semi-annually upon the maturity of said coupons; and said Legislature, by an Act approved January 24, 1874, proposed an Amendment to the Constitution of said State, which was afterwards duly adopted, and is as follows, to wit:

"No. 1. The issue of consolidated bonds, authorized by the General Assembly of the State at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in no wise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof or the levy and collection of the tax therefor. To secure such levy, collection and payment the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until said bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the State to the holders of said bonds as the principal and interest shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection and for such payment from the treasury."

"And petitioner further avers that, notwithstanding said solemn compact with the holders of said bonds, said State hath refused and still refuses to pay said coupons held by petitioner, and by its Constitution, adopted in 1879, ordained as follows:

"That the coupons of said consolidated bonds falling due the first of January, 1880, be, and the same is hereby, remitted, and any interest taxes collected to meet said coupons are hereby transferred to defray the expenses of the state government; and by article 257 of said Constitution also prescribed that 'the Constitution of this State, adopted in 1863, and all amendments thereto, is declared to be superseded by this Constitution; and said State thereby undertook to repudiate her contract obligations aforesaid and to prohibit her officers and agents executing the same, and said State claims that by said provisions of said Consti-

tution she is relieved from the obligations of her aforesaid contract and from the payment of said coupons held by petitioner, and so refuses payment thereof and had prohibited her officers and agents making such payment.

"Petitioner also avers that taxes for the payment of the interest upon said bonds due January 1, 1880, were levied, assessed and collected, but said State unlawfully and wrongfully diverted the money so collected, and appropriated the same to payment of the general expenses of the State, and has made no other provision for the payment of said interest.

"Petitioner also avers that said provisions of said Constitution are in contravention of said contract, and their adoption was an active violation thereof, and that said State thereby sought to impair the validity thereof with your petitioner in violation of article I., section 10, of the Constitution of the United States, and the effect so given to said State Constitution does impair said contract.

"Wherefore petitioner prays that the State of Louisiana be cited to answer this demand, and that after due proceedings she be condemned to pay your petitioner said sum of (\$87,500) eight-seven thousand five hundred dollars, with legal interest from January 1, 1880, until paid, and all costs of suit; and petitioner prays for general relief."

A citation being issued, directed to the State, and served upon the governor thereof, the attorney-general of the State filed an exception, of which the following is a copy, to wit:

"Now comes defendant, by the attorney-general, and excepts to plaintiff's suit on the ground that this court is without jurisdiction *ratione personae*. Plaintiff cannot sue the State without its permission; the Constitution and laws do not give this honorable court jurisdiction of a suit against the State, and its jurisdiction is respectfully declined.

"Wherefore respondent prays to be hence dismissed, with costs, and for general relief."

By the judgment of the court this exception was sustained, and the suit was dismissed. See *Hans v. Louisiana*, 24 Fed. Rep. 55. To this judgment the present writ of error is brought; and the question is presented, whether a State can be sued in a circuit court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the Constitution or laws of the United States.

The ground taken is that, under the Constitution, as well as under the Act of Congress passed to carry it into effect, a case is within the jurisdiction of the federal courts, without regard to the character of the parties, if it arises under the Constitution or laws of the United States, or, which is the same thing, if it necessarily involves a question under said Constitution or laws. The language relied on is that clause of the 3d article of the Constitution, which declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and the corresponding clause of the Act conferring jurisdiction upon the circuit court, which, as found in the Act of March 3, 1875,

is as follows, to wit: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." It is said that these jurisdictional clauses make no exception arising from the character of the parties, and therefore that a State can claim no exemption from suit, if the case is really one arising under the Constitution, laws or treaties of the United States. It is conceded that where the jurisdiction depends alone upon the character of the parties, a controversy between a State and its own citizens is not embraced within it; but it is contended that though jurisdiction does not exist on that ground, it nevertheless does exist if the case itself is one which necessarily involves a federal question; and with regard to ordinary parties this is undoubtedly true. The question now to be decided is, whether it is true where one of the parties is a State, and is sued as a defendant by one of its own citizens.

That a State cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. *Louisiana v. Jumel*, 107 U. S. 711 [27: 448]; *Hagood v. Southern*, 117 U. S. 52 [29: 805]; *Ex parte Ayers*, 123 U. S. 443 [31: 216]. Those were cases arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the Constitutional Amendment of Louisiana complained of in the present case. Relief was sought against state officers who professed to act in obedience to those laws. This court held that the suits were virtually against the States themselves and were consequently violative of the 11th Amendment of the Constitution, and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the Amendment referred to.

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the 11th Amendment, inasmuch as that Amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign state. It is true, the Amendment does so read; and if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts. If this is the necessary consequence of the language of the Constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that under the language of the Constitution and of the Judiciary Act of 1789, a State was liable

to be sued by a citizen of another State, or of a foreign country. That decision was made in the case of *Chisholm v. Georgia*, 2 U. S. 2 Dall. 419 [1: 440], and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the 11th Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the Legislatures of the States. This Amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all Legislatures and all courts, actually reversed the decision of the supreme court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. The language of the Amendment is that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." The supreme court had construed the judicial power as extending to such a suit, and its decision was thus overruled. The court itself so understood the effect of the Amendment, for, after its adoption, Attorney-General Lee, in the case of *Hollingsworth v. Virginia*, 3 U. S. 3 Dall. 378 [1: 644], submitted this question to the court, "Whether the Amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another State?" Tilghman and Rawle argued in the negative, contending that the jurisdiction of the court was unimpaired in relation to all suits instituted previously to the adoption of the Amendment. But, on the succeeding day, the court delivered an unanimous opinion, "that the Amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizen of another State, or by citizens or subjects of any foreign state."

This view of the force and meaning of the Amendment is important. It shows that, on this question of the suability of the States by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of *Chisholm v. Georgia*; and this fact lends additional interest to the able opinion of Mr. Justice Iredell on that occasion. The other justices were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies "between a State and citizens of another State;" and "between a State and foreign states, citizens or subjects," they felt constrained to see in this language a power to enable the individual citizens of one State, or of a foreign state, to sue another State of the Union in the federal courts. Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals (which he conclusively showed was never done before), but only, by proper legislation, to invest the federal courts with juris-

diction to hear and determine controversies and cases between the parties designated, that were properly susceptible of litigation in courts.

Looking back from our present standpoint at the decision in *Chisholm v. Georgia*, we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the States had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people. As some of their utterances are directly pertinent to the question now under consideration, we deem it proper to quote them.

The 81st number of the "Federalist," written by Hamilton, has the following profound remarks:

"It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute the State in the federal courts for the amount of those securities, a suggestion which the following considerations prove to be without foundation:

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of state sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from any constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsory force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

The obnoxious clause to which Hamilton's argument was directed, and which was the ground of the objections which he so forcibly met, was that which declared that "the judicial power shall extend to all . . . controversies between a State and citizens of another State, . . . and between a State and foreign states, citizens or subjects." It was argued by the opponents of the Constitution that this clause would authorize jurisdiction to be given to the federal courts to entertain suits against a State

brought by the citizens of another State, or of a foreign state. Adhering to the mere letter, it might be so; and so, in fact, the supreme court held in *Chisholm v. Georgia*; but looking at the subject as Hamilton did, and as *Mr. Justice Iredell* did, in the light of history and experience and the established order of things, the views of the latter were clearly right,—as the people of the United States in their sovereign capacity subsequently decided.

But Hamilton was not alone in protesting against the construction put upon the Constitution by its opponents. In the Virginia convention the same objections were raised by George Mason and Patrick Henry, and were met by Madison and Marshall as follows. Madison said: "Its jurisdiction" [the federal jurisdiction] "in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens on whom a State may have a claim being dissatisfied with the state courts. . . . It appears to me that this [clause] can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a State should condescend to be a party, this court may take cognizance of it." 3 *Elliot's Debates*, 533. Marshall, in answer to the same objection, said: "With respect to disputes between a State and the citizens of another State, its jurisdiction has been decreed with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of the federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. . . . But, say they, there will be partiality in it if a State cannot be a defendant—if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant which does not prevent its being plaintiff." *Id.* 555.

It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the 11th Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the federal courts, whilst the idea of suits by citizens of other States, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the 11th Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United

States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn. v. Lord Baltimore*, 1 Ves. Sr. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those Articles. 181 U. S. App. 1. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 288, 289 [32: 289, 242, 243], and cases there cited.

The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by *Mr. Justice Iredell* in his opinion in *Chisholm v. Georgia*; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States. *Osborn v. Bank of United States*, 22 U. S. 9 Wheat. 738 [6: 204]; *Davis v. Gray*, 83 U. S. 16 Wall. 203 [21: 447]; *Board of Liquidation v. McComb*, 92 U. S. 581 [23: 623]; *United States v. Lee*, 106 U. S. 196 [27: 171]; *Poindexter v. Greenhow*, 109 U. S. 68 [27: 860]; *Virginia Coupon Cases*, 114 U. S. 269 [29: 185]. In all these cases the effort was to show, and the court held, that the suits were not against the State or the United States, but against the individuals; conceding that if they had been against either the State or the United States, they could not be maintained.

Mr. Webster stated the law with precision in his letter to Baring Brothers & Co. of October 16, 1839. 6 *Webster's Works*, 537. "The security for state loans," he said, "is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established governments, the same basis, for example, as loans made by the United States under the authority of Congress; that is to say, the good faith of the government making the loan, and its ability to fulfill its engagements."

In *Briscoe v. Bank of Kentucky*, 36 U. S. 11 Pet. 257, 321 [9: 709, 784], *Mr. Justice McLean*, delivering the opinion of the court, said: "What means of enforcing payment from the State had the holder of a bill of credit? It is said by the counsel for the plaintiffs that he

could have sued the State. But was a State liable to be sued? . . . No sovereign State is liable to be sued without her consent. Under the Articles of Confederation, a State could be sued only in cases of boundary. It is believed that there is no case where a suit has been brought, at any time, on bills of credit against a State; and it is certain that no suit could have been maintained on this ground prior to the Constitution."

"It may be accepted as a point of departure unquestioned," said *Mr. Justice Miller*, in *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 451 [27: 992], "that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution."

Undoubtedly a State may be sued by its own consent, as was the case in *Curran v. Arkansas*, 56 U. S. 15 How. 304, 309 [14: 705, 706], and in *Clark v. Barnard*, 108 U. S. 436, 447 [27: 780, 783]. The suit in the former case was prosecuted by virtue of a state law which the Legislature passed in conformity to the Constitution of that State. But this court decided, in *Beers v. Arkansas*, 61 U. S. 20 How. 527 [15: 991], that the State could repeal that law at any time; that it was not a contract within the terms of the Constitution prohibiting the passage of state laws impairing the obligation of a contract. In that case the law allowing the State to be sued was modified, pending certain suits against the State on its bonds, so as to require the bonds to be filed in court, which was objected to as an unconstitutional change of the law. *Chief Justice Taney*, delivering the opinion of the court, said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted; and may withdraw its consent whenever it may suppose that justice to the public requires it. . . . The prior law was not a contract. It was an ordinary Act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards if, upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the Legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be al-

lowed to proceed. In exercising this power the State violated no contract with the parties." The same doctrine was held in *Memphis & C. R. Co. v. Tennessee*, 101 U. S. 337, 339 [25: 960, 961]; *South & N. A. R. Co. v. Alabama*, 101 U. S. 582 [25: 873], and *Ex parte Ayers*, 128 U. S. 443, 505 [31: 216, 229].

But besides the presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the Constitution was adopted—an additional reason why the jurisdiction claimed for the circuit court does not exist is the language of the Act of Congress by which its jurisdiction is conferred. The words are these: "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties," etc.—"concurrent with the courts of the several States." Does not this qualification show that Congress, in legislating to carry the Constitution into effect, did not intend to invest its courts with any new and strange jurisdictions? The state courts have no power to entertain suits by individuals against a State without its consent. Then how does the circuit court, having only concurrent jurisdiction, acquire any such power? It is true that the same qualification existed in the Judiciary Act of 1789, which was before the court in *Chisholm v. Georgia*, and the majority of the court did not think that it was sufficient to limit the jurisdiction of the circuit court. *Justice Iredell* thought differently. In view of the manner in which that decision was received by the country, the adoption of the 11th Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer *Justice Iredell's* views in this regard.

Some reliance is placed by the plaintiff upon the observations of *Chief Justice Marshall*, in *Cohens v. Virginia*, 19 U. S. 6 Wheat. 264, 410 [5: 257, 292]. The chief justice was there considering the power of review exercisable by this court over the judgments of a state court, wherein it might be necessary to make the State itself a defendant in error. He showed that this power was absolutely necessary in order to enable the judiciary of the United States to take cognizance of all cases arising under the Constitution and laws of the United States. He also showed that making a State a defendant in error was entirely different from suing a State in an original action in prosecution of a demand against it, and was not within the meaning of the 11th Amendment; that the prosecution of a writ of error against a State was not the prosecution of a suit in the sense of that Amendment, which had reference to the prosecution by suit of claims against a State. "Where," said the chief justice, "a State obtains a judgment against an individual, and the court rendering such judgment overrules a defense set up under the Constitution or laws of the United States, the transfer of this record into the supreme court for the sole purpose of inquiring whether the judgment violates the Constitution of the United States can, with no propriety, we think, be denominated a suit commenced or prose-

cuted against the State whose judgment is so far re-examined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. . . . He only asserts the constitutional right to have his defense examined by that tribunal whose province it is to construe the Constitution and laws of the Union.

The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the Judiciary Act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court. . . . It has never been suggested that such writ of error was a suit against the United States, and therefore not within the jurisdiction of the appellate court."

After thus showing by incontestable argument that a writ of error to a judgment recovered by a State, in which the State is necessarily the defendant in error, is not a suit commenced or prosecuted against a State in the sense of the Amendment, he added that if the court were mistaken in this, its error did not affect that case, because the writ of error therein was not prosecuted by "a citizen of another State" or "of any foreign state," and so was not affected by the Amendment; but was governed by the general grant of judicial power, as extending "to all cases arising under the Constitution or laws of the United States, without respect to parties." Page 412 [293].

It must be conceded that the last observation of the chief justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense *extrajudicial*, and, though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion. With regard to the question then before the court, it may be observed that writs of error to judgments in favor of the crown, or of the State, had been known to the law from time immemorial, and had never been considered as exceptions to the rule that an action does not lie against the sovereign.

To avoid misapprehension it may be proper to add that although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court, yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.

It is not necessary that we should enter upon

an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will, and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (of which the Legislature, and not the courts, is the judge), never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the Legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.

The judgment of the Circuit Court is affirmed.

Mr. Justice Harlan, concurring:

I concur with the court in holding that a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued. Upon this ground alone I assent to the judgment. But I cannot give my assent to many things said in the opinion. The comments made upon the decision in *Chisholm v. Georgia* do not meet my approval. They are not necessary to the determination of the present case. Besides, I am of opinion that the decision in that case was based upon a sound interpretation of the Constitution as that instrument then was.

THE STATE OF NORTH CAROLINA
and WILLIAM P. ROBERTS, Auditor
of the STATE OF NORTH
CAROLINA, *Appts.*,

v.

ALFRED H. TEMPLE.

(See S. C. Reporter's ed. 22-31.)

Suit against auditor is against the State—suit against State cannot be maintained by a citizen thereof.

1. A suit against the auditor of a State to compel the raising a tax to pay interest on the state bonds is virtually a suit against the State.
2. A suit cannot be maintained in the circuit court against a State by a citizen thereof.

[No. 392.]

Argued Jan. 22, 23, 1890. Decided March 3, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of North Carolina that the State of North Carolina, defendant, is indebted to the said Alfred H. Temple, plaintiff, for the amount of coupons of state bonds and interest, and that said State pay same to said Temple; and also that the said William P. Roberts, as Auditor of the State, execute the State Act of Jan. 29, 1869, by raising taxes to pay such amount.

NOTE.—As to when States can be sued; suits by States.—see note to *Hans v. Louisiana*, ante, p. 842.

On certificate of division of opinion. *Decree reversed and cause remanded with instructions to dismiss the suit.*

The facts are stated in the opinion.

Messrs. R. H. Battle, T. F. Davidson, Thomas Ruffin and John W. Graham, for appellants:

The King of England was not suable in the courts of that country except where his consent had been given on petition of right.

U. S. v. Lee, 106 U. S. 196 (27: 171); *Bankers Case (Rex v. Hornby)*, 5 Mod. 29; *Smith v. Upton*, 6 Man. & Gr. 251; *Thomas v. Reg. L. R. 10 Q. B. 81*; *Windor & A. R. Co. v. Reg. L. R. 11 App. Cas. 607*.

The exemption of the United States, and of the several States, from being subjected as defendants to ordinary actions in the courts, is an established doctrine of this court.

Beers v. Arkansas, 61 U. S. 20 How. 527 (15: 991); *Board of Liquidation v. McComb*, 92 U. S. 581 (23: 623); *Allen v. Batt. & O. R. Co.* 114 U. S. 815 (29: 201); *Coupon Cases*, 114 U. S. 277, 278 (29: 187); *Nicholl v. U. S.* 74 U. S. 7 Wall. 122 (19: 125).

Where any breach of public faith on the part of a State is complained of, the only power to give relief is its Legislature.

Cunningham v. Macon & B. R. Co. 109 U. S. 446 (27: 992); *Bank of Washington v. State*, 61 U. S. 20 How. 580 (15: 998).

This court will not entertain jurisdiction of an action, the purpose of which is to constrain a state officer to disobey the positive orders of the supreme political power of his State.

Louisiana v. Jumel, 107 U. S. 711 (27: 448); *Hagood v. Southern*, 117 U. S. 52 (29: 805).

The reason that no express protection was given to the States against suits by their own citizens was, as declared by Justice Bradley in *Marye v. Parsons*, 114 U. S. 325 (29: 205), because no jurisdiction in such cases had ever been granted, under the Constitution, to the courts of the United States, or any of them, and it was not therefore deemed necessary to prohibit it.

This is an action against the State by name, in which its creditor is seeking to compel specifically the performance of its contract by process of law, and to compel officers of the State to do certain acts which, in themselves, amount to a performance of its contract by the State. It falls, therefore, clearly under the ban, as laid down in *Antoni v. Greenhow*, 107 U. S. 769 (27: 468), as distinguished from *Poindexter v. Greenhow*, 114 U. S. 272 (29: 185).

Messrs. S. F. Phillips and E. L. Andrews, for appellee:

A debt by the government creates a right of property.

Comegys v. Vasee, 26 U. S. 1 Pet. 193 (7: 108); *Milnor v. Metz*, 41 U. S. 16 Pet. 221 (10: 943); *Erwin's Case*, 97 U. S. 892 (24: 1065); *Phelps v. McDonald*, 99 U. S. 298 (25: 473); *Bachman v. Lawson*, 109 U. S. 659 (27: 1067).

A petition of right is in the nature of an action against the King or of a writ of right for the party, though chattels, real or personal debts or unliquidated damages may be recovered under it.

Daniell, Ch. Pl. and Pr. (ed. 1846) chap. 84, § 2; *Monckton v. Atty-Gen.* 2 Macn. & G. 412; Manning, Exch. Pr. (ed. 1827) 84; *U. S. v.*

O'Keefe, 78 U. S. 11 Wall. 178 (20: 131); *Sadler's Case*, 4 Coke, 54b.

By incurring a debt the government not only creates a right, but such a right as is necessarily attended by a remedy in court.

Hartman v. Greenhow, 102 U. S. 675 (26: 272); *Kendall's Case*, 37 U. S. 12 Pet. 615 (9: 1217); *Ex parte Virginia*, 100 U. S. 348 (25: 679).

Petition of right is a remedy against the crown for debt, as well as for disseins.

Thomas v. Reg. L. R. 10 Q. B. 31; *The Liberty of the Subject*, 3 How. St. Tr. 60-230; *Ashby v. White*, 14 How. St. Tr. 695; *Jenkins (First Century) Case XLI.*; 1 Brown, Parl. Cas. 45; 4 Inst. 21.

Petition of right was also employed in England to obtain the crown's permission for proceedings to avoid its charters and letters-patent wherever these conflicted with private right and was *ex debito justitie*.

Smith v. Upton, 6 Man. & Gr. 251.

The English King in early times was coercable before the courts, even by writ, like his subjects.

The Mirror of Justices, 4, 10, 225; 3 Bl. Com. 271; Stephen, Pl. App. note 2; 2 Inst. 855; 1 Dan. Ch. Pr. chap. 8; *Re Baron DeBode*, 2 Phill. Ch. 86; *Smith v. Upton*, 6 Man. & Gr. 251.

Some recent English cases of petition of right are as follows: *Windor & A. R. Co. v. Reg. L. R. 11 App. Cas. 607*; *Reg. v. Doutre*, L. R. 9 App. Cas. 745; *Thomas v. Reg. L. R. 10 Q. B. 31*; *Re Reg. and Von Frantz*, 2 De. G. & J. 126; *Tobin v. Reg.* 16 C. B. N. S. 310; *Feather v. Reg.* 6 Best & S. 257; *Viscount Canterbury v. Atty-Gen.* 1 Phill. Ch. 306; *Monckton v. Atty-Gen.* 2 Macn. & G. 402; *Frith v. Reg. L. R. 7 Exch. 385*; *De Bode v. Reg.* 3 H. L. Cas. 449; *Rustomjee v. Reg. L. R. 2 Q. B. Div. 69*; *Ohurchward v. Reg. L. R. 1 Q. B. 173*; *Kirk v. Reg. L. R. 14 Eq. 558*; *Palmer v. Hutchinson*, L. R. 6 App. Cas. 619; *Irwin v. Grey*, 8 Fost. & F. 635.

The amenability of high executive officers in North Carolina to the writ mandamus in cases otherwise proper for its issue is established.

Cotten v. Ellis, 7 Jones, L. 545; *Wiley v. Worth*, Phill. L. (N. C.) 171; *University R. Co. v. Holden*, 63 N. C. 410; *Northwestern N. C. R. Co. v. Jenkins*, 65 N. C. 173; *Boner v. Adams*, 65 N. C. 639; *King v. Hunter*, 65 N. C. 603; *Bayne v. Jenkins*, 66 N. C. 356; *Bailey v. Caldwell*, 68 N. C. 472; *Raleigh & A. A. L. R. Co. v. Jenkins*, 68 N. C. 502; *Belmont v. Reilly*, 71 N. C. 260; *Wilson v. Jenkins*, 72 N. C. 5; *Richmond & D. R. Co. v. Brogden*, 74 N. C. 707; *Moore v. Roberts*, 87 N. C. 11; *Shaffer v. Jenkins*, 72 N. C. 275.

The objects, the verbiage and the spirit of the Constitution authorize the federal courts to protect, and enforce against the States, any rights arising under the Constitution, in favor of any litigant.

Jameson, 113, 115; McMaster's History of U. S. 22, 583; *Martin v. Hunter*, 14 U. S. 1 Wheat. 331-348 (4: 106, 111).

The decisions rendered since the Amendment maintain the plenitude of the subject matter jurisdiction over States.

Cohens v. Virginia, 19 U. S. 6 Wheat. 264 (5: 257); *Ames v. Kansas*, 111 U. S. 469-472

(28: 488, 489); *Harvey v. Com.* 20 Fed. Rep. 411, 414; *Hans v. Louisiana*, 24 Fed. Rep. 55.

The opinion in this last case cites *Louisiana v. Jumel*, 107 U. S. 711 (27: 448); *The Federalist* (ed. 1818) No. 81; 2 Elliot's Debates, 890.

The refusal to collect the special tax is under color of Acts of North Carolina in violation of the Constitution.

White v. Greenhow, 114 U. S. 807 (29: 199).

Mr. Justice Bradley delivered the opinion of the court:

This suit was commenced in the Circuit Court of the United States for the Eastern District of North Carolina by bill in equity filed by Alfred H. Temple, a citizen of North Carolina, on behalf of himself and other bondholders in like interest, against the State of North Carolina and William P. Roberts, the auditor of said State. The object of the bill is to compel said State and its officials, including the auditor, to execute and carry into effect a certain Statute of the State, passed January 29, 1869, which provided for raising taxes to pay the interest on certain bonds of the State, called "special tax bonds of the State of North Carolina," issued under the provisions of said Act, and held by the plaintiff and others. In other words, it is a suit, in the nature of a bill for a specific performance of a contract, brought to compel the State of North Carolina to raise a tax for the payment of the arrear of interest due on the state bonds held by the plaintiff and others.

The Act referred to authorized a subscription on the part of the State of \$4,000,000 of the capital stock of The Wilmington, Charlotte and Rutherford Railroad Company, and the issue of state bonds for the payment thereof, payable thirty years after date, with interest at six per cent per annum, payable semi-annually, to be represented by coupons. The subscription was made and 8,000 of the bonds, for \$1,000 each, were issued, of which the bonds of the plaintiff, which constitute the ground of the present suit, are a part.

By the sixth section of the Act it was provided as follows:

"Sec. 6. For the purpose of providing for the payment of the interest upon the bonds hereby authorized and the principal at its maturity, an annual tax of one eighth of one per cent is hereby imposed upon all the taxable property of the State, which shall be levied, collected and paid into the state treasury as other public taxes, and the surplus, after paying the interest, shall be invested in securities of the United States or other safe securities and kept as a sinking fund for the payment of the principal money at maturity."

The bill alleges that the plaintiff is the bona fide holder of ten of said bonds (giving their numbers), and that the over-due coupons attached thereto, unpaid, amount to \$9,900; that in the year 1869 the collection of the special tax was duly made, and a portion of the coupons was paid; but that in the month of January, 1870, and while large amounts of money arising from the collection of the special tax aforesaid remained in the hands of the state treasurer, applicable to the payment of said coupons, the State of North Carolina, in viola-

tion of the Constitution of the United States, did by legislative resolution direct the appropriation of the said moneys then in the hands of the treasurer to other purposes; and that after all of said 8,000 bonds had been issued according to law the State of North Carolina undertook to impair the obligation of the contract, and to that end, on the 20th of January, 1870, formally enacted the following resolution:

"Resolved, That the treasurer be instructed and directed not to pay any more interest on the special tax bonds until authorized and directed so to do by this General Assembly."

That to the same end, upon the 8th of March, 1870, the State also passed an Act declaring as follows:

"Section 1. The General Assembly of North Carolina do enact that all Acts passed at the last session of this Legislature making appropriations to railroad companies be, and the same are hereby, repealed; that all bonds of the State which have been issued under the said Acts now in the hands of any president or other officers of the corporation be immediately returned to the treasurer.

"Sec. 2. The moneys in the state treasury which were levied and collected under the provisions of the Acts mentioned in section one of this Act are hereby appropriated to the use of the state government, and shall be credited to the counties of the State upon the tax to be assessed for the year one thousand eight hundred and seventy, in proportion to the amounts collected from them, respectively."

That with the same view, upon the 28d of November, 1874, the General Assembly passed an Act containing the following provisions:

"Sec. 2. That the treasurer shall not pay or discharge any claim for interest upon any portion of the bonded debt of this State, except as hereinafter provided for by law.

"Sec. 3. That the auditor shall not audit or recognize any claim for principal or interest upon any portion of the bonded debt of this State heretofore made or pretended to be made by authority of this State, except as hereafter provided for by law.

"Sec. 4. That any money in or which may be paid into the treasury on account of special taxes heretofore levied for the payment of the interest on bonds or pretended bonds of this State is hereby transferred and appropriated to the general fund."

That in like connection, on the third day of November, 1880, the following Constitutional Amendment was adopted by the State:

"Nor shall the General Assembly assume or pay or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred or issued by authority of the convention of the year 1868, or any debt or bond incurred or issued by the Legislature of the year 1868, at its special session of 1868, and at its regular session of 1868 and 1869 and 1870, except the bonds issued to fund the interest of the public debt, unless the purposing to pay the same shall have been submitted to the people or by them ratified, by the vote of a majority of qualified voters of the State at a regular election held for that purpose."

The bill further alleges that since the 20th day of January, 1870, none of the coupons belonging to said bonds, which have fallen due, have been paid, though payment of the same has been duly demanded; that the above-mentioned special taxes have not been collected; that none of the contracts performable under said Act of January 29, 1869, have been performed, and that the government of the State has constantly enforced upon its officials compliance with the subsequent nullifying enactments above set forth.

The bill then avers that by virtue of the provisions of the Constitution of North Carolina and of the said Act of the General Assembly of January, 1869, and of the issue of bonds thereunder, a contract was constituted between the State and the holders of said bonds which was in the same connection a contract executed by said State, by the levying of the tax and the committing of its collection to state taxing officials and the direction to other state officials for the regular payment of the coupons and the investment of the surplus arising from the taxes in good securities, to be kept as a sinking fund for the payment of the principal.

It further avers that the Statutes of North Carolina, hereinbefore set forth, which attempt to impair the contract in question, have not taken legal effect for the reason that the said laws are violations of the Constitution of the United States, both in its contract clause and in the Fourteenth Amendment thereto.

After showing the manner of levying taxes in North Carolina, and several matters as grounds of equitable jurisdiction, the bill prays, amongst other things, that the respondents be perpetually enjoined from obstructing or impeding the collection and payment of the special tax in question; and that the respondent, the State of North Carolina, its executive agents and officials, and William P. Roberts, the auditor of the State, be decreed to execute the said Act of January 29, 1869, and to cause the proper statutory lists to be sent to the boards of county commissioners containing provisions for the special tax above described; and for general relief.

A subpoena was issued, and served upon the governor, attorney-general and auditor of the State. The attorney-general, on behalf of the State, filed a motion to dismiss the bill as against the State, alleging that the State did not consent to be a party defendant. The auditor filed a demurrer to the bill, on the ground that by the showing of the bill itself he had no personal interest in the matters complained of, and that the bill is against him in his official capacity only, and requires him as an officer of the State to act contrary to the commands of the Legislature of the State, in raising money by taxation.

On the main question, the circuit judge and the district judge, who held the court, were opposed in opinion, the opinion of the former being in favor of the complainant; in pursuance of which the following decree was made, to wit:

"This cause coming on to be heard, the parties named as defendants thereto, by their counsel, announce to the court that they will not farther plead or answer thereto, but will

abide, the one by its motion and the other by his demurrer; that they also waive the taking of any account in regard to the coupons alleged by the plaintiff to be by him held.

"Whereupon it is declared by the court that the said State of North Carolina is indebted to the said Alfred H. Temple for coupons held by him as in his bill alleged, and now by him deposited with the clerk of this court, to the amount of nine thousand nine hundred dollars, principal money, together with five thousand five hundred and forty-five dollars for interest due thereon up to the present term of this court, and also for interest upon said principal money until paid, which amounts the said State is hereby adjudged and decreed to pay to the said Temple.

"And it is further ordered that the said William P. Roberts, as auditor of the State of North Carolina, proceed in due course of his office to execute the provisions of the Act passed by said State on the 29th of January, 1869, entitled 'An Act to Amend the Charter of the Wilmington, Charlotte and Rutherford Railroad Company, to Provide for the Completion of Said Road and to Secure for the State a Representation in This Company,' so far as such execution may be necessary to satisfy this decree."

The point on which the judges differed is stated as follows:

"It appearing to the court that the case made in the record against Roberts as auditor, etc., was merely incidental to that against the State of North Carolina, it occurred as a question—

"Whether such suit could be maintained in this court against said State by the complainant, he being one of the citizens thereof.

"Upon which question the opinions of the judges were opposed, his honor Judge Bond being of opinion that it was so maintainable, and his honor Judge Seymour being of opinion to the contrary.

"Whereupon the above question was during the same term stated as above, under the direction of the judges, and certified, and such certificate ordered to be entered of record."

We think it perfectly clear that the suit against the auditor in this case was virtually a suit against the State of North Carolina. In this regard it comes within the principle of the cases of *Louisiana v. Jumel*, 107 U. S. 711 [27: 448]; *Cunningham v. Macon & B. R. Co.* 109 U. S. 446 [27: 992]; *Hagood v. Southern*, 117 U. S. 52 [29: 805], and *Ex parte Ayers*, 128 U. S. 443 [31: 216]. We do not think it necessary to consider that question anew.

The other point, the suability of the State, is settled by the decision just rendered in *Hans v. Louisiana* [ante, 842].

To the question on which the judges of the circuit court were opposed in opinion, our answer is in the negative, namely, that the suit could not be maintained in the circuit court against the State of North Carolina by the plaintiff, a citizen thereof.

The decree of the Circuit Court is reversed, and the cause remanded with instructions to dismiss the bill of complaint.

Mr. Justice Harlan, dissenting:

I dissent from so much of the judgment in this case as holds that this suit cannot be main-

tained against the auditor of the State of North Carolina. The legislation of which complaint is here made impaired the obligation of the State's contract, and was therefore unconstitutional and void. It did not, in law, affect the existence or operation of the previous Statutes out of which the contract in question arose. So that the court was at liberty to compel the officer of the State to perform the duties which the Statutes, constituting the contract, imposed upon him. A suit against him for such a purpose is not, in my judgment, one against the State. It is a suit to compel the performance of ministerial duties, from the performance of which the State's officer was not, and could not be, relieved by unconstitutional and void legislative enactments.

ALEXANDER M. KENADAY, *Appt.*,

v.

SUSAN W. EDWARDS ET AL.

JAMES B. GREEN, *Trustee, Appt.*,

v.

SUSAN W. EDWARDS ET AL.

(See S. C. Reporter's ed. 117-125.)

Jurisdictional amount—order involving merits—resignation of trustee—appointment of successor—sale without consent of court—deed from old trustee—notice.

1. The value of the specific property which is in litigation must determine the jurisdiction of this court. The value of the trust estate, the ownership of which is involved, is the value of the matter in dispute for the purposes of an appeal by the trustee.
2. In a proceeding to set aside a sale by a trustee as fraudulent and to remove the trustee, an order denying the relief asked is an order involving the merits of the proceeding.
3. A trustee has the right to surrender his trust, and it is competent for a court of equity to appoint another person to take the title to the trust property.
4. Where the order appointing a new trustee expressly declared that he should at all times be subject to the control and order of the court touching the trust, his subsequent sale of the property was subject to confirmation or rejection by the court, and he could not pass the title without its consent.
5. A deed from the old trustee, after he had ceased to be trustee, did not add to the new trustee's powers, or place him or the trust estate beyond the control of the court which appointed him.
6. The order approving the sale was improvidently passed, because made without notice to the beneficial owners of the property, who were entitled to its income, and who were before the court for the protection of their rights.

[Nos. 1236, 1237.]

Submitted Jan. 9, 1890. Decided March 3, 1890.

APPPEALS from a decree of the Supreme Court of the District of Columbia vacating a sale and removing a trustee from his office and denying his commissions as trustee and requiring him to pay into court the property held by him as trustee. *Affirmed.*

184 U. S.

Statement by *Mr. Justice Harlan*:

Mary E. Macpherson, by clause 6 of her last will and testament, gave, devised and bequeathed to her nephews, Chapman Maupin and Robert W. Maupin, of Virginia, in fee simple, lot five hundred and eleven, with the improvements thereon, on F Street, between Fifth and Sixth Streets, in the City of Washington, to be held (using the words of the will) "by them and the survivor of them, and by such person or persons as may be appointed to execute the trusts declared by this my will, by the last will and testament of such survivor, or by other instrument or writing executed for that purpose by such survivor; but in trust, nevertheless, to manage and control the same and to take the rents, profits and income thence arising, and to pay the one half of the net amount received from such rents, profits and income monthly, quarterly, half yearly or yearly, according to the discretion of my said trustees, to my daughter, Susan W. Edwards, wife of John S. Edwards, for and during her natural life, to her own sole and separate use, free from the control of her present or any future husband and from responsibility for his debts or engagements; it being my design that the income thus provided for my said daughter shall not be assigned, disposed of or pledged in advance or by way of anticipation, but shall be employed to supply her current wants."

Upon the death of said Susan W. Edwards, the above moiety of net income, profits and rents was, by clause 7, to be invested by the trustees and held by them in trust for the sole and separate use of the testator's granddaughter, Susan W. Edwards, during her life, and upon her death that moiety, with its accumulations, was to be distributed by the trustees among the children and the surviving descendants of the children of the granddaughter *per stirpes*. If the granddaughter died without children or descendants living at her death, this moiety and its accumulations were to belong to the testator's great-granddaughter, Alice Tyler, subject to certain conditions, which need not be here stated.

The remaining moiety of the net income, rents and profits of the property was, by clause 8, devised to the same trustees in trust for the sole and separate use of the testator's great-granddaughter, Alice Tyler, with power to invest such income, rents and profits as in their best judgment was proper, and with authority to her, by last will, to appoint the said moiety and its accumulations to and among her children and their descendants surviving her, in such proportions as she might think fit. If she died without making a will, then the property was to be distributed among her children and their surviving descendants in fee simple and *per stirpes*. In case she died without children or surviving descendants of such children, then the net income, rents and profits of the estate were to go to her mother, Mary M. Tyler, a granddaughter of the testator, during her life, and upon the death of the latter the next of kin of Alice Tyler were to take the estate and its accumulations.

The will further provided: "I give, devise and bequeath all my other property whereof I may die seised, possessed or entitled, of whatsoever kind, real, personal or mixed,

unto the said Chapman Maupin and Robert W. Maupin and the survivor of them, and such person or persons as may be appointed to execute the trusts of this my will, by the last will and testament of such survivor, or by other instrument of writing executed for that purpose by such survivor, in trust, to hold the same for the purposes and upon the trusts hereinbefore declared in the sixth, seventh and eighth clauses of this my will in respect to the real estate and the accumulations therein named; and I do hereby confer upon my said trustees full power and authority, at his or their discretion, from time to time to sell by public or private sale and to convey to the purchaser or purchasers all or any part of the trust property in this will devised and bequeathed to my said trustees, and to receive, grant acquittance for and reinvest the proceeds of such sales, and I do expressly relieve purchasers of such property from the obligation to see to the application of the purchase money."

Robert W. Maupin died in 1876, leaving Chapman Maupin the sole surviving trustee.

Chapman Maupin having expressed a desire to surrender his trust, the present suit was brought in the court below by Susan W. Edwards, widow, and by Alice Tyler, by her next friend, for an accounting in respect to the rents and profits of the trust estate, and for the appointment by the court of a new trustee. After answer by the surviving trustee, the cause was referred to an auditor for the statement of the accounts. The report of the auditor, showing the amounts in the hands of the trustee to be accounted for, was approved. And it was adjudged by the court, March 29, 1882, that the fee-simple estate in the lands devised by the will of Mary E. Macpherson to Chapman Maupin and Robert Maupin, upon certain trusts therein declared, "be, and the same is hereby, taken out of the said Chapman Maupin, the survivor of the said co-trustees, and vested in James B. Green, of the City of Baltimore, together with all the rights, powers, duties and obligations incident thereto under the said last will and testament; and it is further adjudged, ordered and decreed that all the trusts vested by the said will in the said co-trustees and surviving to the said Chapman Maupin be, and they are hereby, abrogated and repealed as to him and conferred upon the said James B. Green, subject to the terms of the said last will and testament, and that the retiring trustee pay over and deliver to his successor hereby appointed all money, books, papers and other property belonging or relating to the said trust estate.

"And it is further adjudged, ordered and decreed that the said James B. Green, trustee, as herein provided, shall file with this court, before any sale of the said real estate under the powers contained in the said will, a bond in the sum of eight thousand dollars, with a surety or sureties, to be approved by this court, for the faithful performance of his duty in connection with the said sale, and that he shall at all times be subject to the control and order of this court in matters touching the trust, and that the costs of this proceeding are payable out of the principal of the trust estate."

It having been suggested to Chapman Maupin—presumably by Green—that the de-

cree in this cause could not be fully carried into effect without a conveyance by him of the trust property, with all the powers of the surviving trustee, to his successor, he executed, March 8, 1888, to Green a deed, granting and assigning to him and to his successors all the grantor's right, title and estate in and to the property devised to the grantor by the will of Mary E. Macpherson, "in trust for the uses and purposes set out in said will, and coupled with all the powers thereby conferred on the trustees therein named."

On the 7th of March, 1888, Green, as trustee, reported, in this cause, a sale he had made, through agents, on the 31st of January, 1888, to A. M. Kenaday, of the lot and improvements on F Street for \$11,000 in cash to be paid on the ratification of the sale. While he expressed a belief that his powers under the will were sufficient to enable him to execute a valid deed to the purchaser, he was unwilling to do so without the approval of the court. The sale was thereupon, on the day this report was made, ratified and confirmed by the court, but, so far as the record shows, without notice of the sale or of the above application to the court being given to either of the present plaintiffs or to anyone representing them.

Green and Kenaday, upon the petition of the plaintiffs, were required, March 17, 1888, to show cause, within a time named, why the order ratifying and confirming the sale to Kenaday should not be set aside as having been improvidently made, the sale itself vacated, and Green removed from the office of trustee. This order was served upon Green March 19, 1888, and Kenaday filed an affidavit, alleging that he purchased in good faith, and insisting upon his right to hold the property. His affidavit shows that the sale was consummated on the 7th of March, 1888, the day on which it was approved by the court.

By an order made March 23, 1888, Green was directed to pay into the registry of the court, on or before March 28, 1888, all the fund of every kind and description in his hands as trustee in this cause, and to make answer within one week. He filed an answer on the 29th of March, 1888, in which he denied that the order confirming the sale was improvidently made, or that the price paid for the property was inadequate. He rested his authority to make the sale upon the decree appointing him trustee, and upon the deed made to him by Chapman Maupin.

All the prayers of the petition of the plaintiffs, filed March 17, 1888, were, upon final hearing, denied. From that order the plaintiffs prosecuted an appeal to the general term.

In pursuance of an order of court, Green deposited in its registry one bond of the City of Richmond, Virginia, numbered 67, and standing in his name as trustee, and also \$4,921.22 in cash. The last-named sum was, by an order passed May 23, 1888, directed to be invested in notes secured upon real estate, and, until the court otherwise directed, the interest accruing upon the above bond was directed to be paid to the plaintiffs or to their authorized attorney, and not to Green.

Notwithstanding these orders, Green collected the interest upon the bond of the City of Richmond, and paid it to brokers in discharge

of his personal indebtedness to them. He was therefore ordered, July 5, 1888, forthwith to pay into the registry of the court the whole of the interest upon that bond accrued and payable on the 2d of July, 1888. He subsequently moved to rescind that order. And Kenaday filed his petition, in general term, praying that the appeal from the decree in special term be dismissed for want of jurisdiction.

Upon final hearing in the general term it was adjudged that the order of March 7, 1888, confirming the sale by Green, be set aside; that the sale itself be vacated; that Green be removed from his office and denied commissions as trustee; that he be required to pay into the registry of court the full sum received by him as the price of the property referred to in his report, and all other money, stock, certificates of deposit and evidences of indebtedness received or held by him as trustee under his appointment in this cause; and that the cause be remanded to the court in special term to ascertain the amount to be paid by him, and to appoint a trustee in his place.

From that decree separate appeals have been prosecuted by Kenaday and Green.

Messrs. George F. Appleby and Calderon Carlisle, for Kenaday:

When the surviving trustee conveyed the title and estate in the premises to the succeeding trustee, he obtained the title and estate, not under the decree, but *instantly* as a devisee under the will.

Games v. Stiles, 39 U. S. 14 Pet. 326 (10: 478); *Hanrick v. Neely*, 77 U. S. 10 Wall. 865 (19: 947); *Barton*, *Maxims of Conveyancing*, 828.

In a judicial sale, the purchaser is never affected by the disposition of the purchase money, however unwise or illegal.

Knotts v. Stearns, 91 U. S. 641 (23: 253). Enumerated motions are such as must involve the merits of the suit.

Met. R. Co. v. Moore, 121 U. S. 566 (30: 1024); *Fenn v. Holme*, 62 U. S. 21 How. 481 (16: 198); *Doddrige v. Gaines*, 1 Mac A. 343, 344.

Appeals are given in equity causes from orders or decrees involving the merits.

Hovey v. McDonald, 109 U. S. 156, 157 (27: 890).

An order of special term opening or refusing to open a decree of sale, is not appealable to general term.

Kingsland v. Bartlett, 8 Abb. Pr. 42, 28 Barb. 480; *Young v. Bloomer*, 23 How. Pr. 883; *Buffalo Savings Bank v. Newton*, 23 N. Y. 160; *Boucher v. Boucher*, 8 MacA. 453; *Phillips v. Negley*, 2 Mackey, 236.

The denial of a motion or petition to reopen a decree is not appealable.

Brockett v. Brockett, 43 U. S. 2 How. 240 (11: 252); *Wylie v. Cox*, 55 U. S. 14 How. 2 (14: 801).

The general term had no appellate jurisdiction in the premises, and its decree against the sale to this appellant is *coram non iudice*, and this court has the authority to set aside the said decree.

Blossom v. Milwaukee & C. R. Co. 68 U. S. 1 Wall. 655 (17: 673); *Hovey v. McDonald*, 109 U. S. 155 (27: 889).

The decree of the general term setting aside
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the sale to the appellant is a final decree as to him.

Butterfield v. Usher, 91 U. S. 248 (23: 319).

The appointment of a new trustee is not complete until the property is vested in him.

Miller v. Sherry, 69 U. S. 2 Wall. 248, 249 (17: 829, 830); *Glenn v. Busey*, MacA. & Mack. 454.

Messrs. H. O. Claughton and Casenove G. Lee, for Green:

A trustee may appeal when the property under his charge is of sufficient amount, although he had no interest in the estate.

McPherson v. Cox, 96 U. S. 404 (24: 746); *Carter v. Cutting*, 12 U. S. 8 Cranch, 251 (3: 553); *Atkinson v. McCormick*, 76 Va. 791.

If the trustees exercise their discretionary powers in good faith, and without fraud or collusion, the court cannot review or control that discretion.

Aleyn v. Belchier, 1 Lead. Cas. in Eq. *377; *Read v. Patterson*, 12 Cent. Rep. 830, 44 N. J. Eq. 211; *Perry, Trusts*, §§ 277, 511.

Messrs. Leigh Robinson and Henry Wise Garnett, for appellees:

Powers that imply a personal confidence in the donees can only be exercised by the persons to whom they are expressly given.

Hill, Trustees, 211, 226, 331; *Cole v. Wade*, 16 Ves. Jr. 45; *Newman v. Warner*, 1 Sim. N. S. 457.

The power of changing the character of the fund is reposed in the discretion of judicial tribunals.

Quick v. Fisher, 9 N. J. Eq. 805; *Lewin, Trusts*, 846, 855.

Where the acts or omissions of a trustee are such as to show a want of reasonable fidelity, a court of equity will remove him.

Cavender v. Cavender, 114 U. S. 472 (29: 214).

Commissions are allowed to trustees as a compensation for services in the execution of their trust, and in case of gross neglect or of unfaithfulness the court may properly disallow them.

Cook v. Lowry, 95 N. Y. 104; *Cram v. Cram*, 2 Redf. 244.

When trustees depart from that rule of conduct which their duty prescribes to them, neither they nor those who claim under them, with notice of the trust and of its breach, can sustain an interest derived from their breach of trust.

Adair v. Shaw, 1 Sch. & Lef. 262; *Hoven-den*, *Frauds*, 484.

A purchaser by a deed from a grantor who is a trustee and so styles himself has notice of the trust.

Pom. Eq. §§ 630, 659, 770.

When the *cestui que trust* is of age or *sui juris* the trustee has no right (unless express power is given) to change the nature of the estate, as by converting land into money or money into land, so as to bind the *cestui que trust*.

2 Story, Eq. § 978.

It is competent for the trustee to sell trust property by and with the consent and approbation of the *cestui que trust*, provided there be no restriction upon his powers in the deed and no limitation over to children or third persons.

Arrington v. Cherry, 10 Ga. 429.

It may be questioned whether the power of the court extends to a case where the trust is for a class of persons some of whom may, but have not yet, come into existence.

Troy v. Troy, 1 Busb. Eq. 85; *Clarke v. Hayes*, 9 Gray, 428; *Re Jones*, 2 Barb. Ch. 22.

Mr. Justice Harlan delivered the opinion of the court:

The appellees have moved to dismiss each of these appeals upon the ground that the value of the matter in dispute is not sufficient to give this court jurisdiction; and with the motions to dismiss was joined a motion to affirm the decree as to each appellant. Both motions to dismiss are overruled. As to Kenaday, the decree denies his right to property of which he claims to be the owner, and which is of the value of eleven thousand dollars. He paid that sum for it in cash to Green as trustee. It is true that there are funds in the registry of the court below, which, in the event of the affirmance of the decree, can be paid over to him, and he be thus far reimbursed for what he paid to Green on the purchase of the property. But we think that the value of the specific property which is in litigation must determine the jurisdiction of this court. And the same principle must control the right of Green to appeal. It cannot be said that his right to commissions as trustee constitutes the whole matter in dispute between him and the appellees. He claims, as trustee, the right to hold and control the proceeds of the sale made to Kenaday. The order removing him as trustee involves his ownership and control of the trust estate for the objects expressed in the will, and therefore the value of that estate is the value of the matter in dispute for the purposes of an appeal by him.

We pass to the consideration of the case upon its merits.

It is contended by the appellants that the general term cannot exercise any jurisdiction in equity unless (1) a suit or proceeding or motion be ordered by the court holding the special term, to be heard by the general term in the first instance, or (2) a motion be filed in a suit that by the rules of the general term is designated as an enumerated motion, or (3) an appeal by a party aggrieved be taken from an order, judgment or decree of the special term which involves the merits of the action or proceeding. The argument is: As the application to set aside the order confirming the sale to Kenaday was heard and determined in special term; as such application could not be regarded as an enumerated motion; as an application to reopen the decree of confirmation was addressed to the discretion of the court, and not appealable, and, for that reason, did not involve the merits of the proceeding, and as there was no appeal from the order confirming the sale,—the general term was without jurisdiction to review the order of the special term refusing to set aside the previous order confirming the sale.

This argument is based upon a misconception of the object and scope of the proceeding instituted by appellees on the 17th of March, 1888. By their petition filed on that day they assailed, as fraudulent, the sale made by Green to Kenaday, and asked that the order confirming it be

set aside and Green removed from the trusteeship. Upon that petition Green and Kenaday were ruled to show cause why the order of March 7, 1888, ratifying and confirming the sale, should not be set aside, the sale itself vacated, and the trustee removed. They both appeared to that petition; Kenaday, by affidavit, insisting upon his right to hold the property, and Green by formal answer. The case was heard in special term upon this petition, and it was ordered that all of its prayers be denied. From that order the petitioners appealed to the general term. It was clearly an order involving the merits of the proceeding; because, unless reversed or modified, it sustained the sale to Kenaday, confirmed his right to hold the property as against the appellees, and held Green in the position of trustee. It was not an appeal simply from an order refusing to set aside the decree of confirmation, but one that involved the integrity of the order confirming the sale, and therefore the merits of the whole case made by the petition. As said by **Mr. Justice Merrick**, in the opinion delivered by him when the court below overruled a petition for rehearing: "It is apparent that in this case the most substantial rights of the parties were involved. Here is an application at the same term at which an order is passed ratifying a sale, which, being passed and not appealed from or corrected in any other mode, would definitively settle the rights of the parties and deprive the petitioners absolutely and forever of a title to real estate by the conversion of the realty into a sum of money, whether the full or an inadequate price for the value of the land need not be considered."

The next contention of the appellant Kenaday is that he is a bona fide purchaser for value of this property from a trustee who had full power, under the will creating him trustee, in connection with the deed to him from Chapman Maupin, the surviving trustee, to sell and convey; and that his right to hold the property cannot be affected unless there was such inadequacy of price as indicated collusion between him and the trustee. It may be that the surviving trustee, under the broad powers of sale given by the will, could in his discretion have sold this property if he had not surrendered his position as trustee, and if the title had not, by the decree of the court, been taken out of him. And it may be that it was competent for him, while holding the trusteeship, to transfer to someone else, by a written instrument, the powers the will gave him. But he had not exercised any such powers prior to the decree of March 29, 1882, divesting him of title, and substituting Green in his place as trustee. After that date he had no connection with the trust estate, and his powers as trustee ceased. That he had the right to surrender his trust, and that it was competent for a court of equity to appoint another person to take the title to the trust property, cannot, in our opinion, be successfully questioned. But the order appointing a new trustee expressly declared that he should at all times be subject to the control and order of the court touching the trust. His subsequent sale, therefore, of the property was subject to confirmation or rejection by the court. He could not pass the title

without its consent. The deed from Chapman Maupin, after he had ceased to be trustee, did not add to Green's powers, or place him or the trust estate beyond the control of the court which appointed him.

It results, from what has been said, that the rights acquired by Kenaday, under his purchase from Green, were subject to the power of the court to ratify or disapprove the sale. The order approving the sale was improvidently passed, because made without notice to the beneficial owners of the property, who were entitled to its income, and who were before the court for the protection of their rights. The confirmation was obtained by the trustee with knowledge that the appellees, if notified of the application to the court, would oppose its ratification.

Under all the circumstances disclosed by the record—and which it will serve no useful purpose to state in detail—we are of opinion that the court below did not err in setting aside the confirmation of the sale, vacating the sale itself, and removing the trustee without allowing him any commissions.

The decree below is in all particulars affirmed.

AMELIA A. GUNTHER ET AL., EXRS.
and Trustees, Plffs. in Err.,
v.

THE LIVERPOOL AND LONDON AND
GLOBE INSURANCE COMPANY.

(See S. C. Reporter's ed. 110-116.)

Policy, construction of—privilege to keep kerosene for lights—breach of condition, by whom—act of lessee or other person—cause of fire—verdict, when court may direct.

1. Where a policy of fire insurance permits the use of kerosene or like oil "for lights, if the same is drawn and the lamps are filled and trimmed by daylight only," the words "for lights" are restricted in meaning to lighting the insured premises only, and the words "by daylight" are intended to prevent the use of artificial light from which the oil might catch fire.
2. The clause written in the margin of the policy, granting a privilege "to keep not exceeding five barrels of oil on said premises," does not dispense with the printed regulations as to precautions in handling or using it.
3. Where the use of gas apparatus had been discontinued before the fire, the privilege to use it in the policy does not affect the case.
4. A breach of the conditions by anyone permitted by the assured to occupy the premises is equivalent to a breach by the assured himself.
5. The assured was chargeable with any acts of his lessee in keeping on the premises any of the prohibited articles, although they were not intended to be used there but for lighting other places.
6. The policy was avoided if kerosene or like oil was drawn upon the premises near a lighted lamp by any person acting by the direction or under the authority of the lessee.
7. The testimony in this case held to establish be-

yond a reasonable doubt that the fire was caused by a breach of the conditions of the policy.

8. Where the court would deem it its duty to set aside a verdict for plaintiff if given by a jury, on account of the want of sufficient evidence, the court is not bound to submit the case to the jury, but may direct a verdict for defendant.

[No. 1367.]

Argued Jan. 16, 1890. Decided March 3, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of New York to review a judgment for defendant upon the direction of the court in an action on policies of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. C. Bainbridge Smith, for plaintiffs in error:

When a witness has made contradictory statements in relation to the same subject or is contradicted by other witnesses, his credibility is a question of fact for the jury.

Koehler v. Adler, 78 N. Y. 287.

When the court directs a verdict, the party against whom the verdict is directed is entitled not only to all the facts proved by the evidence introduced, but also the facts which that evidence legally may conduce to prove.

Young v. Black, 11 U. S. 7 Cranch, 565 (3: 440); *Pleasants v. Fant*, 89 U. S. 22 Wall. 107 (22: 783); *Sherry v. N. Y. C. & H. R. R. Co.* 6 Cent. Rep. 357, 104 N. Y. 652, 657.

The court below had no power to direct a verdict for the defendant because the facts upon which that direction was based were in dispute.

Boston Merchants Nat. Bank v. Boston State Bank, 77 U. S. 10 Wall. 604 (19: 1008); *Rountree v. Smith*, 108 U. S. 269 (27: 722).

There was no violation of any of the conditions in the policies.

Shaw v. Robberds, 6 Ad. & El. 75; *Dobson v. Sotheby*, 1 Mood. & Malk. 90; *Jones v. Howard Ins. Co.* 10 N. Y. S. R. 129.

The written parts of a policy of insurance always control the printed parts, and in the case at bar the printed privilege is entitled to the same consideration and weight as if it were written.

1 Wood, Fire Ins. (2d ed.) 161, § 60; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 406; *Harper v. Albany Mut. Ins. Co.* 17 N. Y. 194; *Harper v. N. Y. City Ins. Co.* 23 N. Y. 441; *Moulton v. Am. L. Ins. Co.* 111 U. S. 885 (28: 447); *Northern Mut. Ins. Co. v. Hazlett*, 2 West. Rep. 690, 105 Ind. 212.

The privilege to use kerosene oil is independent; no forfeiture is provided in the privilege.

Marcus v. St. Louis Mut. L. Ins. Co. 68 N. Y. 625; *Hosford v. Germ. F. Ins. Co.* 127 U. S. 399 (32: 196).

The word "keep" is a very general term.

Hynds v. Schenectady Co. Mut. Ins. Co. 11 N. Y. 554, 561.

The defendant, in granting the privilege, is presumed to know the assured would avail himself of it.

Bennett v. North Brit. & M. Ins. Co. 81 N. Y. 278; *Van Schoick v. Niagara F. Ins. Co.*

NOTE.—As to insurance; breach of conditions by third parties; when policy invalidated,—see note to *Liverpool & L. & G. Ins. Co. v. Gunther*, 29: 575.

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Misrepresentation or fraud vitiates policy. See note to *M'Lehahan v. Universal Ins. Co.* 7: 96; also note to *Columbian Ins. Co. v. Lawrence*, 7: 336.

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68 N. Y. 424; *Richmond v. Niagara F. Ins. Co.* 79 N. Y. 280, 239.

If the insurance company issue a policy with full knowledge or notice of the facts which are in violation of the provision in the policy, it is, after the destruction of the property by fire, estopped from claiming that in consequence of those facts the policy is invalid.

Germania F. Ins. Co. v. Hick, 15 West. Rep. 158, 125 Ill. 361; *Dwelling-House Ins. Co. v. Brodie*, 40 Alb. L. J. 834; 1 Wood, Fire Ins. (2d ed.) 161, § 60, and cases cited.

The error of the court below is in holding that the two privileges granted to the assured are restrictions.

Benedict v. Ocean Ins. Co. 41 N. Y. 398; *Harper v. N. Y. City Ins. Co.* 22 N. Y. 441; *Stout v. Commercial U. Assur. Co.* 12 Fed. Rep. 554; *Phoenix Ins. Co. v. Slaughter*, 79 U. S. 12 Wall. 404 (20: 444); *Barry v. Hamburg F. Ins. Co.* 12 Cent. Rep. 787, 110 N. Y. 1; *Herrman v. Merchants Ins. Co.* 81 N. Y. 184.

Courts in interpreting conditions in a policy of insurance will construe them strictly against the insurer.

Hoffman v. Aetna Ins. Co. 32 N. Y. 405; *Rann v. Columbus Home Ins. Co.* 59 N. Y. 887; *McMaster v. North American Ins. Co.* 55 N. Y. 223, 282; 1 Wood, Ins. (2d ed.) 161.

The defendant having moved the court to direct a verdict for the defendant and the court having in accordance with that request made such direction, the defendant is estopped from claiming there was any question of fact to be passed upon by the jury.

Pauling v. U. S. 8 U. S. 4 Cranch, 219 (2: 601); *Columbian Ins. Co. v. Catlett*, 25 U. S. 12 Wheat. 389 (8: 666); *Schuchardt v. Allens*, 68 U. S. 1 Wall. 869 (17: 645); *Pleasants v. Fant*, 89 U. S. 22 Wall. 117 (22: 780); 26 Meyer, Fed. Dec. § 1572; *People v. Roe*, 1 Hill, 470, and cases cited in note.

This rule is not inconsistent with that which obtains in the State of New York.

Colligan v. Scott, 58 N. Y. 670; *Excelsior Fire Ins. Co. v. Royal Ins. Co.* 55 N. Y. 343; *Ormes v. Dauchy*, 82 N. Y. 443, 449; *Dillon v. Cockcroft*, 90 N. Y. 649.

Mr. William Allen Butler, for defendant in error:

The cause was first tried November 15, 1881, and a verdict rendered for plaintiff. The judgment entered on this verdict was reversed.

Liverpool & L. & G. Ins. Co. v. Gunther, 116 U. S. 118 (29: 575).

It is the clear duty of the court to set aside the verdict of a jury founded on a disbelief of clear, uncontradicted and undisputed evidence.

Lomer v. Meeker, 25 N. Y. 361.

Even where there may be a scintilla of evidence, the question for the court is whether there is any evidence upon which the jury can properly proceed to find a verdict.

Schuykill & D. Imp. Co. v. Munson, 81 U. S. 14 Wall. 442 (20: 867); *Pleasants v. Fant*, 89 U. S. 22 Wall. 116 (22: 780); *Marion County v. Clark*, 94 U. S. 278 (24: 59); *Dwight v. Germania Life Ins. Co.* 4 Cent. Rep. 529, 103 N. Y. 341, 359; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615 (29: 224), and cases cited, 619 (236).

The privilege attached to the policies as a rider and pasted on the face of each policy, "to

use kerosene oil for lights; lamps to be filled and trimmed by daylight only," was not a waiver of the condition of the policy against drawing the oil by daylight.

McMaster v. North Am. Ins. Co. 55 N. Y. 232; *Mack v. Rochester German Ins. Co.* 9 Cent. Rep. 277, 106 N. Y. 560, 564, 565; *Warrington v. Early*, 2 El. & Bl. 768; *Dewey v. Reed*, 49 Barb. 16, 21.

The written privilege on the margin of the policy, "to keep not exceeding five barrels of kerosene oil on said premises," did not annul the restriction as to the drawing the oil and filling and trimming the lamps by daylight.

Savage v. Howard, 52 N. Y. 502, 504.

In the absence of express proof from which the intention to permit the keeping for sale can be inferred, the prohibitory or restrictive provisions of the policy control.

Matson v. Farm Bldgs. Ins. Co. 78 N. Y. 310; *Beer v. Ins. Co.* 39 Ohio St. 109; *Birmingham Fire Ins. Co. v. Kroegher*, 83 Pa. 64; *Lancaster Fire Ins. Co. v. Lenheim*, 89 Pa. 497; *Pittsburgh Ins. Co. v. Frazee*, 107 Pa. 521; *Carlin v. Western Assur. Co.* 57 Md. 515; *Collins v. Farmville Ins. & B. Co.* 79 N. C. 279; *Putnam v. Commonwealth Ins. Co.* 18 Blatchf. 368.

The test must be, in every case, the intention of the parties as expressed in the contract, viewed in the light of the circumstances surrounding it.

Williams v. People's F. Ins. Co. 57 N. Y. 274; *Matson v. Farm Buildings Ins. Co.* 78 N. Y. 310; *Sperry v. Springfield F. & M. Ins. Co.* 26 Fed. Rep. 234.

Mr. Justice Gray delivered the opinion of the court:

This was an action brought by a citizen of New York against a British corporation on two policies of fire insurance, dated November 16, 1877, and extended to July 15, 1880, the one on buildings, and the other on fixtures, furniture and other personal property in and about the same.

Each policy described the principal building as follows: "The two-story frame hotel building, with one-story frame kitchen and two-story frame pavilion adjoining and communicating, situated on Gravesend, Bay of Bath, Kings County, Long Island (it is understood that the above property is to be occupied by a family when not in use as a hotel); privilege to use gasoline gas, gasometer, blower and generator being under ground about sixty feet from main building in vault, no heat employed in process."

Among the printed conditions of each policy were the following:

"If the assured shall keep gunpowder, fireworks, nitro-glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then and in every such case this policy shall be void."

"Petroleum, rock, earth, coal, kerosene or carbon oils of any description, whether crude or refined, benzine, benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, gasoline, phosgene or any other inflammable liquid are

not to be stored, used, kept or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene or other carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise this policy shall be null and void."

Attached to and pasted on the face of each policy at the time of its issue was a printed slip, signed by the defendant's agents, and in these words: "Privileged to use kerosene oil for lights, lamps to be filled and trimmed by daylight only." And on the margin of the first policy were written and signed by the defendant's agents these words: "September 17, 1878. Privileged to keep not exceeding five barrels of oil on said premises."

At the first trial, a verdict was returned for the plaintiff, which was set aside and a new trial ordered by this court. 116 U. S. 113 [29: 575].

Afterwards the plaintiff died, and the action was revived in the name of his executors; and the answer was amended by leave of court, so as to set up, among other defenses, as a breach of the second condition above quoted, "that kerosene, carbon oil or other inflammable liquid, so stored, used, kept or allowed on said premises as aforesaid, was drawn, not by daylight, but at or after dusk or dark and with a lighted lamp or lantern near, in violation of the express terms of the said condition, and that the fire which destroyed said premises was caused by such proximity of said lighted lamp; and the defendant further avers that it is advised and believes that the said policies thereby became and were null and void."

A second verdict for the plaintiffs was set aside by the circuit court, for the reasons stated in its opinion reported in 84 Fed. Rep. 501.

At the third trial, the plaintiffs introduced in evidence the policies, and renewal receipts continuing them in force until July 15, 1890, and proved the assured's ownership of the property insured; and the parties agreed that it was destroyed by fire on August 15, 1879, and that the amount of the loss, with interest, was \$41,116.64.

The defendant proved by uncontradicted evidence that a barrel of about fifty gallons of kerosene was bought by Walker, the lessee of the premises, on August 18, 1879, and on the next day put by him in the oil room under the pavilion, which was a low room about twelve feet square, with doors opening into other rooms only. There was conflicting evidence upon the question whether any gasoline, naphtha or benzine was kept in the oil room at the time of the fire. It was admitted that in 1878 the pavilion had been lighted by gasoline generated in a gasometer under the privilege in the first clause of the policy, but that its use was discontinued in the fall of 1878, and it was not used in 1879.

The only testimony introduced as to the cause of the fire was in substance as follows:

The defendant proved that the assured testified at the first trial that on August 15, 1879, about dusk, he was seated on the piazza of the hotel, in sight of the pavilion, and saw some men with pails and a light; that his attention was attracted by shouts of children playing

about in front, and he immediately looked back again and saw the men come out "as though they were afire," and it did not occur to him that there was a fire in the oil room, although he saw it; that he called to the men to roll in the high grass, and one of them did so, and another ran into the water, and in another instant, he saw the oil room burning, and the building immediately caught fire and in an hour or less was level with the ground.

The defendant called as witnesses the two men last mentioned, who testified that they had been sent from another hotel a mile off with two ordinary wooden pails to get five gallons of gasoline; that Walker directed one Schuchardt, a man in his employ, to let them have the oil; that Schuchardt, carrying a lighted glass stable-lantern with small holes around the top, took them into the oil room, and drew the oil from a barrel, through a piece of pipe used as a faucet, into the pails, one of which leaked, and much oil was spilled upon the floor; that the lantern was very near the barrel, and presently there was a blue flame across the floor, and the whole room was in a blaze of fire; that Schuchardt got out first, and died of his burns; that one of the witnesses rolled in the grass and was little injured, and the other, who ran into the water, was so severely burned as to be obliged to keep his bed for three months.

The defendant moved the court to direct a verdict for the defendant, "on the ground that as the established cause of the fire was the drawing in the oil room of the insured premises about dusk, in the vicinity of a lighted lamp, of a fluid product of petroleum under the circumstances shown by the evidence, not for filling lamps on the insured premises, but for another and different purpose, this of itself, and irrespective of other questions in the case, constitutes a violation of the several contracts of insurance in force at the time of the fire, as contained in the policies respectively, thereby rendering the said policies and each of them void, and defeating the right of the plaintiffs to recover in this action."

The plaintiffs requested the court to submit to the jury the questions "whether there was any naphtha, gasoline or benzine on the insured premises at the time of the fire," and "whether the fluid which was drawn from a barrel in the oil room at the time of the fire was so drawn in the presence of a lighted lamp."

The court denied the plaintiff's requests and directed a verdict for the defendant. The plaintiffs excepted to these rulings and sued out this writ of error.

Each of the policies in suit contains two conditions concerning the keeping or use, without written permission in or upon the policy, of naphtha, gasoline, benzine or any burning fluid or chemical oil, upon the premises. By the general terms of the first of these conditions, the policy is avoided if the assured shall "keep or use" any of these articles. By the more specific provisions of the other condition, the prohibited articles "or any other inflammable liquid are not to be stored, used, kept or allowed" on the premises, "temporarily or permanently, for sale or otherwise," except certain articles named, and for the purpose and with the precautions therein specified, namely, "excepting the use of refined coal, kerosene or other car-

bon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise the policy shall be null and void."

The printed slip, bearing the words "Privileged to use kerosene oil for lights, lamps to be filled and trimmed by daylight only," was attached to each policy and delivered with it, and must therefore be construed in connection with and as part of it, and not as superseding any consistent clause in the body of the policy. It is suggested that there is an inconsistency between the slip and the exception above referred to. But the two, upon being compared with one another, disclose no such inconsistency; and differ only in that the exception regulates the drawing of the oil, which the slip does not, while the slip regulates the trimming of the lamps, which the exception does not. Taking the exception and the slip together, the effect is the same as if they had been incorporated into a single sentence, so as to permit the use of kerosene or like oil "for lights, if the same is drawn and the lamps are filled and trimmed by daylight only."

In the exception, as well as in the slip, the words "for lights" are clearly restricted in meaning to lighting the insured premises only, and the words "by daylight" are intended, not to denote day-time as opposed to night-time, but to prevent the use of any artificial light from which the oil might catch fire.

The clause written in the margin of one policy, granting a privilege "to keep not exceeding five barrels of oil on said premises," cannot reasonably be construed as intending to dispense with any of the carefully prepared printed regulations concerning the precautions to be taken in handling and using it.

The clause following the description of the principal buildings in each policy, "Privilege to use gasoline gas, gasometer, blower and generator being under ground about sixty feet from main building in vault, no heat employed in process," does not affect the case; for the use of the gas apparatus had been discontinued some time before the fire; and, as has already been decided, when this case was before us at a former term, that clause did not sanction the keeping or use of gasoline or other burning fluid except for actual use in that apparatus. 116 U. S. 180 [29: 581].

It has also been decided that a breach of the conditions by any person permitted by the assured to occupy the premises was equivalent to a breach by the assured himself; and that the assured was chargeable with any acts of his lessee in keeping upon the premises any of the prohibited articles, although they were not intended to be used there, but for lighting other places. 116 U. S. 128, 129 [29: 580].

There can be no doubt, therefore, that both policies were avoided if kerosene, gasoline or any other carbon oil was drawn upon the premises near a lighted lamp by any person acting by the direction or under the authority of the lessee; and what the particular kind of carbon oil so drawn was, is quite immaterial.

The testimony of the assured himself, that just before the fire he saw some men with pails and a light near the pavilion under which the oil room was, and presently afterwards saw two of the men come out "as though they were on fire," and in another instant saw the oil room

burning, and the building immediately caught fire and within an hour was level with the ground, of itself strongly tended to the conclusion that the fire was caused by such a breach of the conditions of the policy.

But this conclusion was established beyond all reasonable doubt by the testimony of the two men whom he saw come out, the substance of which has been already stated, and the accuracy and credibility of which is not impaired in any essential point by the thorough cross-examination to which they were subjected at the trial, or by a careful comparison with their testimony given before a coroner's jury ten days after the fire, and introduced in connection with their cross-examination.

If the case had been submitted to the jury upon the testimony introduced, and a verdict had been returned for the plaintiff, it would have been the duty of the court to set it aside for want of any evidence to warrant it. Under such circumstances, it is well settled that the court was not bound to go through the idle form of submitting the case to the jury, but rightly directed a verdict for the defendant. *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 619 [29: 224, 225], and cases there cited; *Robertson v. Edelhoff*, 132 U. S. 614, 626 [33: 477, 481].

Judgment affirmed.

WILLIAM D. McKEY, *Pff. in Err.*,
v.
THE VILLAGE OF HYDE PARK.

(See S. C. Reporter's ed. 84-99.)

Boundary line—dedication of street to the public—mere knowledge and non-action—question for jury.

1. Where the evidence as to the boundary line of land is conflicting, in the absence of an official survey the intention of the parties, when ascertainable, must be carried out.
2. In Illinois, a dedication of a street or highway may be inferred from a long and uninterrupted user by the public with the knowledge and consent of the owner.
3. Mere knowledge and non-action or failure to assert one's rights are not conclusive evidence of such dedication, for they may be rebutted; and the party is always allowed to show facts and circumstances to overcome such presumption.
4. Whether the facts proved are sufficient to explain the non-action of the plaintiff, and to negative the presumption of a dedication or not, is a question for the jury.

[No. 1421.]

Submitted Jan. 7, 1890. Decided March 3, 1890.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment in favor of defendant in an action of ejectment. *Reversed.*

The facts are stated in the opinion.

Mr. J. R. Doolittle, for plaintiff in error:

The act, declaration or deed of one tenant in common is of no effect as an admission against his co-tenant, and cannot bind or affect his rights.

Freeman, Co-tenancy, §§ 199, 205; *Gates v. Salmon*, 85 Cal. 588; *Sutter v. San Francisco*, 86 Cal. 115.

It is the settled law of the State of Illinois that mere non-action,—in other words, a mere omission to assert title as against the public,—will not raise any implication of an intention to dedicate private property to public use.

Bloomington v. Bloomington Cemetery Assn. 126 Ill. 221; *McIntyre v. Storey*, 80 Ill. 127, 130; *Chicago v. Stinson*, 14 West. Rep. 404, 124 Ill. 510; *Kelly v. Chicago*, 48 Ill. 888.

A *fortiori*, when the land is uninclosed.

Chicago v. Johnson, 98 Ill. 618; *Herhold v. Chicago*, 108 Ill. 467; *Peyton v. Shaw*, 15 Ill. App. 192, 196.

There must be deliberate, unequivocal and decisive acts and declarations manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use, to make a common-law dedication.

Bigelow, Estoppel, 558; *Irwin v. Dixon*, 50 U. S. 9 How. 10 (13: 25); *Kelly v. Chicago*, 48 Ill. 888; *Kyle v. Logan*, 87 Ill. 87; *Chicago v. Johnson*, 98 Ill. 618; *Herhold v. Chicago*, 108 Ill. 467; *Peyton v. Shaw*, 15 Ill. App. 192, 196; *Robertson v. Wellsville*, 1 Bond, 88; *Lonsdale v. Portland*, Deady, 44; *Bloomington v. Bloomington Cemetery Assn.* 126 Ill. 221; *McIntyre v. Storey*, 80 Ill. 127, 130; *Chicago v. Stinson*, 14 West. Rep. 404, 124 Ill. 510.

Any party who is before the court *pendente lite* and who acts under a decree, becomes *pro tanto* a party to the proceeding.

Requa v. Rea, 2 Paige, 339, 341.

Mr. James H. Roberts, for defendant in error:

No particular formalities are required to make a common-law dedication.

Cincinnati v. White, 81 U. S. 6 Pet. 458 (8: 458), and cases cited; *Jarvis v. Dean*, 3 Bing. 447.

From use, with the assent of the owner, the law presumes a dedication, the use being for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.

Macon v. Franklin, 12 Ga. 239; *Case v. Favier*, 12 Minn. 89; *Cady v. Conger*, 19 N. Y. 256; *Barclay v. Howell*, 31 U. S. 6 Pet. 513 (8: 482).

If the owner of the land intentionally or by gross negligence leads the public to believe that he has dedicated the premises to public use, he will be estopped from contradicting his representations to the prejudice of those he may have misled.

Wilder v. St. Paul, 12 Minn. 192; *Forney v. Cuthoun County*, 84 Ala. 215.

A dedication once made cannot be recalled, and the intention of the owner at the time is to be considered, not his intention at any subsequent time.

Ruch v. Rock Island, 5 Biss. 95; *Adams v. Saratoga & W. R. Co.* 11 Barb. 414.

Mr. Justice Lamar delivered the opinion of the court:

This is an action of ejectment brought in the Circuit Court of the United States for the Northern District of Illinois by William D. McKey against the Village of Hyde Park, to recover

possession of a strip of land 28 feet wide and 150 long, used and occupied by the Village as a part of a street known as Forty-first Street. The ground of McKey's complaint is that the Village, in locating and opening that street, entered upon, and unlawfully took possession of, his land to the extent of the above-mentioned strip, ejected him therefrom, and withholds from him the possession thereof. The defendant filed a plea of not guilty, and at the trial contended that the street, including that strip, was properly located and was rightfully used as a public highway by virtue of a common-law dedication, and also under a deed from plaintiff's co-tenant, with the acquiescence of plaintiff, through a long period of years.

The controversy in the case is as to the location of a boundary line, there being, according to the bill of exceptions, no contention as to the title of the premises in dispute. The land in dispute is in the south ten acres of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 8, township 88 N., R. 14 E. of the third principal meridian, in Cook County, Illinois. Upon the trial it was shown that the trustees of the Illinois and Michigan Canal had owned the N. E. $\frac{1}{4}$ of section 8, deriving their title by grant from the State of Illinois; and that they conveyed the northwest quarter of this N. E. $\frac{1}{4}$ to P. F. W. Peck, describing it in the deed as the northwest quarter of the N. E. $\frac{1}{4}$ of the section, containing forty acres, more or less. By mesne conveyances the title to the south ten acres of this N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 8, in June, 1866, became vested in two brothers, Edward and Michael McKey, living in Wisconsin, as tenants in common, and was held by them until the death of Michael McKey, intestate, September 29, 1868, upon whose death his interest therein descended to his four minor children, one of whom, William D. McKey, the plaintiff, became of age on September 18, 1874. Edward McKey died intestate August 14, 1875.

In order to show his title to the premises in dispute the plaintiff put in evidence the proceedings of the Circuit Court of Cook County in chancery in a suit for the partition of the McKey tract among the heirs and owners thereof. As shown by this evidence that court in that case appointed commissioners to partition the land, and authorized them to subdivide it into blocks, lots, streets and alleys, which they did, and attached to the record a plat entitled "McKey's Addition to Hyde Park."

The plaintiff also put in evidence the final decree in that cause entered October 6, 1882, the said plat being a part of it. The decree reads as follows:

"It appearing to the court that the plat in said report attached, marked 'E,' which said commissioners have entitled 'McKey's Addition to Hyde Park,' being a subdivision made by circuit court commissioners in partition of that part of the south ten acres of the northwest quarter, etc., represents their subdivision of the land above described under description No. 5, and was by them duly submitted to the president and board of trustees of said Village of Hyde Park, and was approved by them on the eighth of September, A. D. 1882, as ap-

pears by the certificate of the clerk of said Village thereon, the pieces or parcels of land designated on this plat 'E' as streets and alleys being laid out for public streets and alleys as on said plat 'E' shown. It is further ordered, adjudged and decreed that the several maps or plats by said commissioners prepared and the subdivision by them made and shown thereon, and the respective titles given thereto, be, and the same are hereby, in all respects approved, ratified and confirmed, and it is ordered that the originals now here in court be recorded in the recorder's office of said Cook County, as required by law. And it is further ordered that the clerk of this court certify, under his hand and seal of this court, on each of said original maps or plats a minute of the order of this court approving the same, in words and figures as follows, to wit:

"State of Illinois, }
"County of Cook. } ss.

"This plat approved in all particulars by the court; and it is ordered that the same be recorded in the recorder's office of the County of Cook aforesaid. This certificate is made in pursuance of a decree of the Circuit Court of Cook County, in the State of Illinois, entered on the 6th day of October, 1882, in case number 39,801, in which William D. McKey and others are complainants and Richard M. McKey and others are defendants."

The plat shows that the lots embraced 23 feet of the street, and that the stakes of the lots were set 23 feet south of the north line of the street, leaving a strip thirty-three feet wide south of the lots to be thereby dedicated for use as a public street. The plaintiff, for the purpose of showing that the line thus indicated by the plat as the southern boundary of the McKey tract was intended by the canal trustees to be the southern line of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of sec. 3, offered in evidence, in addition to their conveyance to Peck, the purchaser from them of that tract, all the other conveyances made by them of the said northeast quarter of said section 3, as follows: (1) a deed to Robert S. Wilson, dated April 1, 1857, for the north half of the southwest quarter of that quarter-section which was stated in the deed to contain 19 $\frac{1}{100}$ acres, more or less, in consideration of \$985; (2) a deed to John C. Dodge, dated October 6, 1855, for the south half of the southwest quarter of that quarter-section, stated in the deed to contain 20 acres, at the rate of \$50 per acre, amounting to the sum of \$1,000; (3) a deed to Isaac Cook, dated August 16, 1852, conveying the northeast quarter of that quarter-section, containing 40 acres, more or less, at the rate of \$15 per acre, amounting to the sum of \$600; (4) a deed to William B. Egan, dated January 28, 1856, conveying the north half of the southeast quarter of that quarter-section, containing 19 $\frac{1}{100}$ acres; and, (5) a deed to Margaret Johnson, dated July 1, 1859, conveying the south half of the southeast quarter of that quarter-section, containing 19 $\frac{1}{100}$ acres.

It was admitted, as stated above, that the canal trustees had held title to the whole of the said northeast quarter, and that the above deeds placed all the titles to said quarter-section in the grantees aforesaid.

The plaintiff then introduced one Henry J.

Goodrich, who testified "to his signature upon the plat, and that he was one of the commissioners appointed by the court to make the partition, and was at the same time president of the board of trustees of the Village of Hyde Park; that he knew where the stakes were driven by the surveyors who made the plat, and he knew that the land as staked took 23 feet off the street; that at the time the board approved the plat they knew it was taking more land than what 'was intended to be given;' that they wanted to change the street; they wanted to leave that question in court and approve of the plat as it then stood; that the board was then in favor of changing the location of that street. The witness further testified that he had known that land ever since 1865 or 1866, and that it was then inclosed with a fence; that the fence was an old fence; that the fence was south of the center line of the street as opened by the authorities of Hyde Park; and that he remembered the circumstance of a street being run through there. . . . It was admitted by stipulation of counsel that 41st Street was opened through the property in question in 1878."

Alexander Taylor, a witness for the plaintiff, testified that he resided very near this property for eighteen years, and had known it ever since 1869, and at one time lived on part of it. That "it was always fenced in until the time it was opened as a street, in 1878. There was a fence on the south line of it in 1869, which was quite an old fence then and which the gardener made into a reed fence to give shelter to his garden from the north winds, and on the south side of it was the Bowen lot, cultivated as a vegetable garden; on the north side it was also inclosed. There was no fence on the north side of the ten-acre lot deeded to the McKeys, but the whole piece up to the railroad, including Mr. Hill's and Mrs. Smith's land, was all fenced in together. One half of it belonged to the McKey estate and one half belonged to Mrs. Smith and Mr. Hill, but it was inclosed on all sides and was used for a pasture by the witness. The fence on the south line between the McKey land and the Bowen land was an old fence which used to blow down; the pressure of the wind would break it down, and he had to patch it up. It was an old fence in 1869, made on cedar posts, a straight fence running through from Vincennes Avenue to Grand Boulevard. The wind would blow it down sometimes three or four lengths at a time. When the street was put through and the fence was moved south they turned the tops of the fence into the ground; they were so rotten they could not use them again. When the street was put through, the fence was moved south into Mr. De Lat's garden."

Frank McLeane testified to the same effect as to the existence of the old fence which ran straight through from Vincennes Avenue to Grand Boulevard, immediately south of which was Bowen's land, used as a garden.

The plaintiff then called S. S. Greeley, who testified that he was the surveyor who made the plat pursuant to the order of the court; that he staked the south line of the lots and the north line of the street; and that the stakes were all driven in the grade of the street. He stated that when he made the survey of McKey's addition he was informed of how the canal trustees

had conveyed the whole of the quarter-section by the certificates and conveyances above mentioned; that the United States plat of section 8 showed that the N. E. $\frac{1}{4}$ was a fractional quarter-section—not full 160 acres, but $157\frac{23}{100}$ acres; and that before making the survey it was necessary to know how the canal trustees had conveyed the land.

He further stated: "I found then there were six conveyances by the canal trustees to six different parties in the northwest quarter of section 8; two of the pieces were conveyed as the northwest quarter of the northeast quarter and the northeast quarter of the northeast quarter, each being 40 acres, more or less; then there were four conveyances—one conveying the north half of the southwest quarter of the northeast quarter of section 8, containing $19\frac{1}{100}$ acres, more or less, one the south half of the southwest quarter of the northeast quarter, containing $19\frac{1}{100}$ acres, and one the north half of the southeast quarter of the northeast quarter, containing $19\frac{1}{100}$ acres, and one the south half of the southeast quarter of the northeast quarter, containing $19\frac{1}{100}$ acres. The south half of the southwest quarter of the northeast quarter was marked in two ways; it was marked $19\frac{1}{100}$ acres with a pencil mark through it. . . . I then found that the line between what is technically called the north half and the south half of the northwest quarter was not really the middle line of the quarter-section, but was a line far enough south of that to give the proportion of 80 acres in the north half and $77\frac{2}{3}$ acres in the south half. I then divided it upon that basis, giving the north half $\frac{2}{3}$ of the width north and south, and giving the south half $\frac{1}{3}$ and a fractional $\frac{1}{17}$ of the width north and south; that made the north part of the quarter-section 1,834 feet long on the west line, and the south part 1,288 $\frac{2}{3}$ feet, and the true dividing line between the northwest quarter and the southwest quarter of the quarter-section, which is properly the south line of the McKey property."

In reply to a question by the judge, he stated that he put the dividing line "just where the canal trustees seem to have done in their deeds." Witness further testified "that he had made surveys in the northwest quarter of this quarter-section, and that he had surveyed the property immediately south of the McKey ten acres, which is in dispute, and that he had located the fence along the north line of said property and the south line of 41st Street as laid out by the Village; that he had located this fence running east and west an equal distance between the north and south boundary lines of the quarter-section, but that he had done this simply by retracing the subdivision which had been made before, and that he made the north line of the southwest quarter of the quarter-section at the midway point, because he discovered that it was the way it had been made before."

The defendant to maintain the issues on its part introduced Henry McKey, son of Edward McKey, to show that the Village of Hyde Park in 1873 opened 41st Street through the land in question, in pursuance of a deed from his father, who was the original owner of an undivided half of the McKey tract; that the plaintiff, though a minor at the time, became of age in the year 1874, and did not commence this

suit until 1887; that in the meantime the Village of Hyde Park proceeded to open and improve the street, to lay sidewalks and to put in sewers without objection or interruption from the plaintiff; that witness was the only agent the McKeys had in the management of their property, and was present at the time the street was laid out; that he saw that the fence had been moved; that more of the street had been taken from the McKey tract than from the land adjoining it on the south; that he thought the location of the fence might have been wrong, and therefore made no objection; and that the location was not questioned until Mr. Greeley informed him of the alleged error of said location, and that the southern line of the lots extended 56 feet below the north line of the street. He also testified that in selling lots in their addition the McKeys followed the description in the plat thereof, but inserted in the deed a condition that they did not warrant the title to any portion of the lots claimed by the Village as a part of the street.

In support of its contention that the 28-foot strip involved in this suit was rightfully included within the limits of the street, and that the same is located where it ought to be, the defendant introduced as witnesses McLennan, Rossiter, Lee and Foster, all surveyors of experience. Each of those witnesses testified that the center line of 41st Street, as laid out by the Village of Hyde Park, is the true southern boundary of the McKey tract.

Jacob T. Foster, county surveyor, said if he were called upon to survey the northwest quarter of the northeast quarter, containing forty acres, more or less, he would ascertain the southern line of the quarter by measuring the west line of the quarter-section and dividing it in the middle, then measuring the east line of the quarter-section and dividing it in the middle, and run a line through from one point to the other, so that if the west line of the quarter-section was 2,622 $\frac{1}{2}$ feet long he would make the west line of the quarter-quarter one half of that, and make the south line of the quarter-quarter that many feet south of the north line. That is the correct principle in surveying.

The witness McLennan, a surveyor of thirty years, testified that "if this northeast quarter of section 8 be subdivided into four quarters by dividing the quarter section by equally distant lines, such a survey would locate 41st Street in exactly the position where it is now occupied by the Village, and in that case the true line between the northwest quarter and the southwest quarter of this northeast quarter of the quarter-section would be in the center of 41st Street as now laid out and occupied."

Defendant's other witnesses testified to the same effect.

Several exceptions were taking to rulings of the court below during the progress of the trial, and also to the general charge to the jury. The jury returned a verdict in favor of the defendant, upon which judgment was rendered. The plaintiff then sued out this writ of error.

The first assignment of error which we think necessary to consider relates to the following charge of the court:

"If you believe from the evidence that the center of the street is the center east and west

line of the quarter-section, then you are also instructed that it was and still is the true boundary line, and that the plaintiff is not entitled to the land described in the declaration on the theory that the Greeley survey was correct."

He preceded this charge by the following statement:

"In 1873 the Village of Hyde Park laid out and opened 41st Street sixty-six feet wide from Grand Boulevard to Vincennes Avenue, the center of which was a line equidistant from the north and south lines of the quarter-section, on the theory that this line was the true east and west boundary between the four quarters of the quarter-section and the true southern boundary of the McKey tract."

In our opinion that instruction was erroneous. It in effect directed the jury to find that the center of the street, which is a line equidistant from the north and south lines of the quarter-section, is the true southern boundary of the McKey tract, and that the plaintiff was not entitled to recover the premises described in the declaration. The question in this branch of the case is, whether, as is contended by the plaintiff, the line designated in the plat of partition, adopted by the decree of the Chancery Court of Cook County, and approved by the president and board of trustees of the Village of Hyde Park, is the true southern boundary of the McKey tract, or whether, as is insisted by the defendant, the center line of 41st Street is that boundary.

The facts adduced by the plaintiff in support of his contention are, that the whole of the northeast quarter of section 3 was owned by the canal commissioners; that it contained, as shown by the plat of the governmental survey, 157 $\frac{1}{100}$ acres; that there was never any official subdivisional survey of that quarter; that the canal commissioners, by six different deeds, conveyed to different parties and in different quantities the whole quarter-section, 80 acres in the north part of the quarter and four times 19 $\frac{1}{100}$ or 77 $\frac{1}{100}$ acres in the south part; that S. S. Greeley, a surveyor of forty years' experience, employed by the court commissioners in the partition suit, with those deeds before him, proceeded to survey the property into subdivisions, and, as he testified, by tracing the lines of the various subdivisions just as the canal commissioners seemed to have placed them by their deeds, and, locating it "exactly as it was originally subdivided," he fixed the boundary line twenty-three feet south of that indicated by the center of the street; and that the line thus certified to by him, adopted by the court and approved by the president and board of trustees of the Village of Hyde Park, coincided exactly with an ancient dividing fence between the McKey tract north and the Bowen tract south, running across the western half of the quarter-section, which, by its rotted condition, furnished a strong presumption that it had been built there by the original purchasers in accordance with a survey made upon the same principle as the one on which the partition plat was prepared.

The evidence as to the true southern boundary is at least conflicting; and its weight and value was a question to be determined by the jury.

Assuming that the rule laid down by the

court is the usual one prescribed by the government for the direction of surveying officers in subdividing sections of the public lands for disposal under the Public Land Law, it does not necessarily relate to the subdivision of private lands by the owners after they have been granted by the government without official subdivisions having been made. If the northeast quarter of section 3 had been subdivided by the surveying officers of the United States and recorded on the plat prior to the grant to the State, such general description as that contained in the deed from the canal company to Peck might properly be presumed to convey only an official quarter of the quarter-section. But in the absence of such official subdivisional survey the intention of the parties, as to the amount of land conveyed, must, when ascertainable, be recognized and carried out. We think, therefore, the court erred when in its charge it withdrew from the consideration of the jury the evidence which had been submitted, very properly, we think, tending to prove, both by the location of the old fence, and by the deeds of adjoining lands executed by the canal commissioners, the southern boundary line of the premises in dispute.

Another assignment of error urged by counsel for plaintiff is, that the court erred in giving the following charge to the jury: "If you believe from the evidence that in 1874, when the plaintiff attained his majority, he knew of the action of the Village of Hyde Park in laying out, opening and improving the street, and that thereafter and until the partition suit was commenced, in 1881 or later, the street was maintained and used with his knowledge and without objection by him, you are authorized to infer that he consented to a dedication to that use of so much of the McKey tract as is embraced within the present limits of the street."

This instruction was repeated in the following more unqualified language: "The plaintiff became of age in 1874, and if the Village of Hyde Park took possession of this strip of land in 1873, and he knew of that possession and the continued use and improvement of the street and made no objection, if with full knowledge of everything that was done from 1874, when he was of age, until Mr. Greeley informed him for the first time that he was the owner or part owner of the 23 feet, then he cannot recover as against the Village of Hyde Park."

However correct technically, as an abstract proposition, the first part of this charge may be, we do not think the last paragraph of it, above quoted, states the law of Illinois as to what constitutes a dedication of real property in that State, as interpreted by her supreme court. In *Bloomington v. Bloomington Cemetery Assn.*, 126 Ill. 221, 227, 228, the court laid down the principle that mere "non-action will not raise an implication of an intention to dedicate private property to public use, nor will it estop the owner to deny such intention." After repeating the doctrine in the language of preceding cases, the court proceeded thus: "But it is said that he, and his grantee, the plaintiff, should be estopped to deny a dedication because of the public user of the land in question as a part of the street without objection on their part. Had the plaintiff, or its

grantor, by any equivocal overt rights or declarations, given evidence of an intention to have the land in question included in the street, and thereby induced the public to use and the city to improve it as a part of the street, possibly the doctrine of estoppel might have been invoked. No such acts or declarations however are shown. All that is proved is mere non-action on their part, or, in other words, a mere omission to assert their title as against the public. Mere non-action will not raise an implication of an intention to dedicate private property to public use, nor will it estop the owner to deny such intention." See also *Herhold v. Chicago*, 108 Ill. 487; *Peyton v. Shaw*, 15 Ill. App. 192.

In *Kyle v. Logan*, 87 Ill. 64, 66, 67, the court states the same doctrine as follows: "In order to justify a claim that title to a tract of land has been devoted by dedication, the proof should be very satisfactory, either of an actual intention to dedicate or of such acts and declarations as should equitably estop the owner from denying such intention. . . . The owner of the land must do some act, or suffer some act to be done, from which it can be fairly inferred he intended a dedication to the public. Acquiescence, with knowledge of the use by the public, without objection, is not, as held by the circuit court, conclusive evidence of a dedication, for it may be rebutted. The second instruction for appellees, announcing this principle, was erroneous. A dedication, from an user of twenty years, and for a shorter time, may be presumed, but it is not conclusive. The owner might show any fact which would overcome the presumption."

In *Chicago v. Johnson*, 98 Ill. 618, 624, 625, the court laid down the doctrine on this subject as follows: "A dedication of private property to public uses will not be held to be established, except upon satisfactory proof, either of an actual dedication, or of such acts or declarations as should equitably estop the owner from denying such intention. This proposition is so clearly the law, it needs the citation of no authorities in its support."

In the still earlier case of *McIntyre v. Storey*, 80 Ill. 127, 130, the court said: "A dedication of the right of way for a highway may be variously proven. It may be established by grant or written instrument, or by the acts and declarations of the owner of the premises. It may be inferred from long and uninterrupted user by the public, with the knowledge and consent of the owner; but this court has had frequent occasion to say, there must be a clear intent shown to make the dedication. The evidence offered for that purpose should be clear, either of an actual intent so to do or of such acts or declarations as will equitably estop the owner from denying such intent."—citing *Marcy v. Taylor*, 19 Ill. 634; *Kelly v. Chicago*, 43 Ill. 888; *Godfrey v. Alton*, 12 Ill. 29.

In *Chicago v. Stinson*, 124 Ill. 510, 518, 514 [14 West. Rep. 404], the court said: "Before title can be devoted by dedication, the proof must be very satisfactory either of an actual intention to dedicate, or of such acts or declarations as should equitably estop the owner from denying such intention."—citing *Kelly v. Chicago*, 43 Ill. 888. "Long use and long acquiescence in such use by the owner of land are sometimes regarded as, in and of themselves,

evidence of a dedication. In cases, however, of implied or presumed acquiescence or consent on part of the owner, very much depends upon the location of the road or street, the amount of travel, the nature of the use of the public, the rights asserted by the public, the knowledge of the owner, and like circumstances,"—citing *Onstott v. Murray*, 22 Iowa, 457. "We have said: 'Acquiescence, with knowledge of the use by the public, without objection, is not . . . conclusive evidence of a dedication, for it may be rebutted,'—citing *Kyle v. Logan*, 87 Ill. 64. The two prominent elements to be considered, in determining whether there has been a common-law dedication or not, are the intention of the owner to dedicate, and the acceptance by the public of the intended dedication. 'The owner of the land must do some act, or suffer some act to be done, from which it can be fairly inferred he intended a dedication to the public,'"—citing *Kyle v. Logan*, *supra*.

Under these authorities we think the court below committed error in that part of the charge to which we have just referred. The principle established by them is, that a dedication of a street or highway may be inferred from a long and uninterrupted user by the public with the knowledge and consent of the owner; but that mere knowledge and non-action or failure to assert one's rights are not conclusive evidence of such dedication, for they may be rebutted; and the party is always allowed to show facts and circumstances to overcome such presumption.

In the case at bar the facts were shown that at the time the Village opened the street through the property of the plaintiff he was a minor and a nonresident; that though he became of age the year after, he was then, and up to a short time before this suit was brought, a nonresident, living at Janesville, Wisconsin; and there was no evidence to show that he had ever until then seen the premises or been in Chicago. There was evidence also to show that during a great part of that period he was a co-tenant with other minors who resided out of the State of Illinois. Whether these facts were sufficient to explain the non-action of the plaintiff, and to negative the presumption of a dedication or not, was a question for the jury, which the court, by its charge, in effect withdrew from their consideration.

We do not deem it necessary to refer to any of the other assignments of error, as those we have discussed are sufficient to dispose of the case.

It results from what we have said that the judgment of the court below should be, and it hereby is, reversed, with a direction to order a new trial, and to take such further proceedings as shall not be inconsistent with this opinion.

CHARLES H. WIGHT, *Appt.*,

JOSEPH H. NICHOLSON, Superintendent
of the DETROIT HOUSE OF CORRECTION.

(See S. C. *Re Wight*, Reporter's ed. 136-150.)

Power of court to enter order nunc pro tunc in a criminal case—omissions in record—order remanding cause—habeas corpus, matters inquirable into—embezzling letters—question of fact.

1. Where a person was convicted of embezzling letters, in the district court, and, pending a motion for new trial, the cause was transferred to the circuit court, where the motion was denied, and subsequently, in the district court, without the entry of the order previously made remitting the cause to that court, he was sentenced to imprisonment, the circuit court has power subsequently to enter the order *nunc pro tunc* upon its own motion and recollection, remitting the cause to the district court, according to the facts, to supply the omission to enter it previous to remitting the cause.
2. The court may make *nunc pro tunc* entries to supply omissions in the record of what was done at the time of the proceedings.
3. The action of the circuit court in making the order for a *nunc pro tunc* record, which showed that the case had been remanded from that court to the district court prior to the time when the sentence was passed upon the prisoner, was a legitimate exercise of power.
4. In a writ of habeas corpus nothing can be inquired into but the jurisdiction of the court.
5. In an indictment under sec. 5487, Rev. Stat., for embezzling a letter which was intended to be conveyed by mail, the failure to allege that the letter had not been delivered to the person to whom it was directed does not render the conviction void.
6. This court will not examine into the question whether the letter was put into the mail as a mere decoy or not. The question whether it was intended to be conveyed by the mail or by the letter carrier was a question of fact to be ascertained by the jury.

[No. 1521.]

Argued Jan. 10, 1890. Decided March 3, 1890.

APPEAL from a judgment of the Circuit Court of the United States for the Eastern District of Michigan, discharging a writ of habeas corpus by which the appellant, Charles H. Wight, sought to be relieved from imprisonment after a conviction for unlawfully secreting and embezzling certain letters which came into his possession in the course of his official duty and were intended to be carried by a letter carrier. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry M. Duffield, for appellant:

This court will, upon habeas corpus, examine an indictment sufficiently to determine whether, under it, the prisoner could be convicted of any offense against the laws of the United States.

Ex parte Parks, 93 U. S. 22 (23: 788); *Ex parte Yarbrough*, 110 U. S. 653 (28: 274).

If the indictment does not describe any offense of which the court below could lawfully take jurisdiction, the prisoner will be discharged.

Ex parte Siebold, 100 U. S. 377 (25: 719).

The indictment in question does not contain the necessary jurisdictional averments.

1 Chitty, Crim. Law, 283; 1 Bish. Crim. Proc. § 636; *U. S. v. Carl*, 105 U. S. 611 (26: 1135); *U. S. v. Britton*, 107 U. S. 655 (27: 520).

The second and fourth counts do not allege that the letter was intended to be conveyed by mail, and are therefore fatally defective.

U. S. v. Matthews, 35 Fed. Rep. 890; *U. S. v. Denicke*, 35 Fed. Rep. 407; *U. S. v. Rapp*, 30 Fed. Rep. 818; *U. S. v. Taylor*, 37 Fed. Rep. 201.

This court will, upon habeas corpus, examine

the testimony under which a person has been convicted, sufficiently to determine whether there was any evidence tending to prove an offense of which the court below had jurisdiction.

Cuddy, Petitioner, 181 U. S. 286 (33: 157).

If there is a fair doubt whether the act charged in the indictment and established by the evidence was embraced in the criminal prohibition of the statute, that doubt is to be resolved in favor of the accused.

U. S. v. Morris, 39 U. S. 14 Pet. 464 (10: 543); *U. S. v. Wittberger*, 18 U. S. 5 Wheat. 76 (5: 37); *U. S. v. Sheldon*, 15 U. S. 2 Wheat. 119 (4: 199); *U. S. v. Clayton*, 2 Dill. 219; *U. S. v. Taylor*, 37 Fed. Rep. 201.

The entry of the *nunc pro tunc* order on the hearing of the petition for habeas corpus, amending the record of the circuit court, was without jurisdiction and void.

Jenkins v. Eldredge, 1 Woodb. & M. 61; *Brush v. Robbins*, 3 McLean, 486; *Medford v. Dorsey*, 2 Wash. C. C. 433; *Taylor v. Starr*, 2 Root (Conn.) 293; *Harbor v. Pacific R. Co.* 32 Mo. 423; *Harrison v. Missouri*, 10 Mo. 686; *Sibbald v. U. S.* 37 U. S. 12 Pet. 491 (9: 1168).

The court had no authority to make the order *nunc pro tunc* upon its own unaided recollection.

Hyde v. Curling, 10 Mo. 359.

Mr. O. W. Chapman, Solicitor-Gen., for appellee:

The court below properly corrected the record.

Gardner v. People, 20 Ill. 490; *Johnson v. People*, 22 Ill. 314; *Green v. State*, 19 Ark. 189; *State v. Clark*, 18 Mo. 432; *State v. Pearce*, 14 Ind. 426; *Galloway v. McKeithen*, 5 Ired. L. 12; *Lathrop v. Page*, 26 Me. 119; *Nelson v. Barker*, 3 McLean, 879; *Robinson v. State*, 25 Tex. App. 111; *Bilanaky v. State*, 8 Minn. 427.

A test letter sent to a fictitious address is within the protection of the statute, and such a letter addressed by any inspector to a fictitious person is a letter intended to be conveyed by mail, and its embezzlement will sustain an indictment.

U. S. v. Cottingham, 2 Blatchf. 470; *U. S. v. Whittier*, 5 Dill. 35; *U. S. v. Foye*, 1 Curt. 366; *Bates v. U. S.* 10 Fed. Rep. 92; *U. S. v. Matthews*, 35 Fed. Rep. 890; *Reg. v. Young*, 1 Denison, Cr. Cas. 194; *Reg. v. Shepherd*, 25 L. J. N. S. M. C. 52.

Mr. Justice Miller delivered the opinion of the court:

This is an appeal from a judgment of the Circuit Court for the Eastern District of Michigan discharging a writ of habeas corpus on a hearing before that court. By this writ the appellant here, Charles H. Wight, sought to be relieved from imprisonment in the Detroit House of Correction, under sentence of the District Court of the United States for the Eastern District of Michigan. The petitioner was indicted in that court upon the charge that on the 28th day of June, 1888, while he was employed in one of the departments of the postal service of the United States, to wit, as superintendent of letter carriers in the post-office at Detroit, he wrongfully and unlawfully secreted and embezzled certain letters which came into his possession in the regular

course of his official duty, and which were intended to be carried by a letter carrier, and which letters contained obligations and securities of the United States of pecuniary value, called treasury notes. There were six other counts for a similar offense.

Upon the trial in the district court, the jury found a verdict of guilty against petitioner. He thereupon made a motion in that court for a new trial, and likewise a motion in arrest of judgment. Pending the argument of these motions, the district court made an order transferring the cause to the Circuit Court for said District, which order is in the following language:

"It is now by the court ordered that this case be certified and remitted to the next Circuit Court of the United States for this District."

These motions were heard in the circuit court on the 11th day of March, 1889, before Judges Howell E. Jackson, circuit judge, and Henry B. Brown, district judge, and on the 12th day of March, 1889, the following order was entered of record:

"United States of America }
v.
Charles Wight. }

"In this cause the defendant's motion to set aside verdict and in arrest of judgment, after mature deliberation thereon, are by the court here now denied."

And on the same day, at the district court room in the City of Detroit, that court made the following entry:

"The United States }
v.
Charles Wight. } Convicted on indictment
forembezzling letters, etc.

"The court now deliver judgment on the motions to set aside the verdict rendered by the jury herein and for a new trial, heretofore argued and submitted; and, thereupon, it is ordered that said motions be, and the same are hereby, denied, and that the order heretofore made herein certifying this cause to the Circuit Court of the United States for this District be, and the same is hereby, vacated as having been improvidently made.

"And the said defendant being now placed at the bar of the court for sentence, thereupon the court do now sentence him, the said Charles Wight, to be imprisoned and kept at hard labor, at and in the Detroit House of Correction, in the City of Detroit, Wayne County, Michigan, for the term of two years from and including this day, and to stand committed until the terms of this sentence are complied with."

On the 25th of August, thereafter, an application was made to Mr. Justice Harlan of this court, who was the justice assigned at that time to the Sixth Circuit, for a writ of habeas corpus, to deliver the petitioner, Wight, from restraint in the Detroit House of Correction, by Joseph Nicholson, its superintendent. On this application Justice Harlan made an order that a rule issue from the circuit court against the marshal of the United States for the Eastern District of Michigan and the superintendent of the Detroit House of Correction, re-

turnable before that court within three days after service of process, to show why the habeas corpus should not issue as prayed in the petition. To this rule Nicholson made a return, in which he said that he held the said Wight in restraint of his liberty as a prisoner in the Detroit House of Correction, by virtue of the judgment and sentence of the District Court of the United States for the Eastern District of Michigan, rendered on the 12th day of March, 1889, a copy of which he set out. To this return Wight, by his counsel, made exception by way of answer, in which he said that the District Court for the Eastern District of Michigan had not, at the time of the sentence referred to in said return, any jurisdiction over him, the said Wight, or any authority to pass sentence against him, because the said cause in which it pretended to pass sentence upon him on the 12th of March, 1889, had been duly certified and remitted from said District Court into the Circuit Court of the United States in said District, and the transcript thereof duly filed, and that up to the date of said alleged sentence, to wit, the 12th day of March, 1889, was and at the date hereof is still pending in the circuit court of the United States, as more fully and at length alleged and shown by the certified copies of the proceedings in said cause, in the petition filed in this matter.

Petitioner Wight also averred that the District Court of the United States for the Eastern District of Michigan never had or obtained jurisdiction over him for the following reasons: that the indictment on which petitioner was arraigned and tried in said court did not charge the commission of any offense over which said court had jurisdiction, and because the evidence in the case did not establish any offense against the laws of the United States, of which said district court had jurisdiction.

Upon examination of the record of the circuit court in the case at this stage of the proceeding on the writ of habeas corpus, it was ascertained that no order remanding the case from the circuit court to the district court had been entered on the journals of the former court, the last order on the subject being the one which we have already recited, overruling the motion for a new trial and the motion in arrest of judgment. Thereupon the judges of the circuit court caused the following order to be made:

"United States of America }
v.
Charles Wight. }

"The defendant, being personally present in court, as well as by his counsel, Henry M. Duffield, Esq., and the court having its attention called to its records made and entered in the above-entitled cause on the twelfth day of March, A. D. 1889, by the return of Joseph H. Nicholson, superintendent of the Detroit House of Correction, to the writ of habeas corpus heretofore allowed by this court on the petition of the above-named Charles Wight, and upon inspection of said records, so made and entered as aforesaid, it satisfactorily appears to the court that the same is not a full and correct record of the order which was in fact made by this court on the 12th day of

March aforesaid, in this, that it fails to show the order of this court which was duly made on the said 12th day of March, remitting said cause out of this court into the District Court of the United States for the Eastern District of Michigan; therefore, after hearing the said Charles Wight, by his counsel, in opposition thereto, this court, upon its own motion, based upon its recollection of the facts of the making of said order remitting said cause as aforesaid into said district court, now orders and directs that the same be entered now as of the said twelfth day of March, one thousand eight hundred and eighty-nine, according to the facts thereof, which are as follows:

"At a session of the Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan, continued and held, pursuant to adjournment, at the district court room, in the City of Detroit, on the twelfth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

"Present: The Hon. Howell E. Jackson, circuit judge; the Hon. Henry B. Brown, district judge.

"United States of America }
v.
Charles Wight. }

"The defendant being personally present in court, as well as by his counsel, Henry M. Duffield, Esq., said United States being represented by C. P. Black, United States attorney, and Charles T. Wilkins, assistant United States attorney, and the said United States attorney objecting to the consideration of said cause on the part of this court for the reason that there was no authority in law for the district court to remit said cause to this court after verdict had in said district court; therefore the court, upon its own motion, hereby remits said cause back into the said District Court for the Eastern District of Michigan for such action as said district court shall see fit to take."

Thereupon the circuit court on the 30th day of September, 1889, on the same day that it had ordered the *nunc pro tunc* entry of the order remanding the cause to the district court, being of the opinion that this order cured the defect of the record, which showed the case to be still pending in the circuit court, and being further of opinion, as appears from their judgment in the matter, that the case had never been lawfully removed from the district into the circuit court, and that therefore said district court had always retained jurisdiction of the case, made an order discharging the writ of habeas corpus.

It is mainly upon these orders about the several removals of the case from one court into the other that appellant relies to show that the district court at the time of pronouncing its judgment of imprisonment against appellant had no jurisdiction of the case. But there is also a further point made, that the letters which the appellant embezzled were never put into the mail with intent that they should be carried, within the meaning of the Statute.

Of course, if the judge of the district court is right in the opinion expressed by him in the orders which he made, that he had no power after the verdict in the district court to transfer it to the circuit court, then the case had really

never been withdrawn from the jurisdiction of the district court, and the question arising upon the absence of any record in the circuit court of an order remanding it back to the district court is of no consequence, because all that was done in the circuit court, in that view, was without jurisdiction, and the case never was lawfully in that court, and the district court had the right to make the order, which it did make, setting aside its former order transferring the case to the circuit court. In this view of the subject, the case having always been really under the jurisdiction and control of the district court, its judgment sentencing the prisoner on the verdict was within its power, and is not examinable on this writ of habeas corpus.

But we are not satisfied that this view of the powers of the two courts is a sound one. While we do not decide the question now, because it is not necessary (as our judgment is the same in either event), we shall, for the purposes of the present case, treat it as if the order transferring the case from the district court into the circuit court was a valid order, so that it could only be remanded from the circuit court into the district court by some order or action of the former. No such order was found upon the records of the circuit court at the time sentence was imposed upon the prisoner in the district court; if no such order had been made previous to that judgment, the case was still pending in the circuit court, and the district court had no authority to pass the sentence it did upon the prisoner. This view of the subject calls upon us to inquire whether the *nunc pro tunc* order of September 30 was a valid order, and one within the power of the circuit court to make.

Our first impression was that whatever might be the powers of the courts in this regard over their records during the term in which the transactions are supposed to have occurred, the record of which, or failure to make any record of which, is the subject of amendment, yet when it was attempted to do this after an adjournment and at a subsequent term of the court, the powers of the court in making such changes in the records of the proceedings were limited to those in which there remained written memoranda of some kind in the case, and among the files of the court, by which the record could be amended, if erroneous, or the proper entry could be supplied, if one had been omitted. And especially that in criminal procedure this power to make such entries, at a subsequent term of the court, of what had transpired at a former term, as would establish the authority of the court to pass a sentence of fine or imprisonment, either did not exist at all, or, if it did, was limited to cases in which some written evidence of what was done remained in the papers connected with the case.

We are satisfied, however, upon an examination of the authorities, that this restriction upon the power of the court does not exist. Mr. Bishop, in his first volume on Criminal Proceedings, section 1160, states the doctrine in the following terms:

"When the term of the court has closed, it is too late to undo, at a subsequent term, what was done at the former term. A judgment of

the court, for instance, cannot then be opened, and modified or set aside. Neither, it has been held, can the clerk, at a subsequent term, make an entry of what truly transpired at the preceding term. But this refers to the power of the clerk, proceeding of his own motion. The court may order *nunc pro tunc* entries, as they are called, made to supply some omission in the entry of what was done at the preceding term; yet this is a power the extent of which is limited, and not easily defined. In general, mere clerical errors may be amended in this way. So of the mistake of the clerk in the name of the judge before whom the indictment was found."

The present case comes within the clause of this section which declares the power of the court to make *nunc pro tunc* entries to supply some omission in the record of what was done at the time of the proceedings. An extensive list of authorities is cited in the foot note of Mr. Bishop, and among those which support the power of the court to make a record of some matter which was done at a former term, of which the clerk had made no entry, the following cases directly affirm that proposition: *Galloway v. McKeithen*, 5 Ired. L. 12; *Hyde v. Curling*, 10 Mo. 359; *State v. Clark*, 18 Mo. 432; *Nelson v. Barker*, 8 McLean, 379; *Bilansky v. State*, 3 Minn. 427.

The opinion of the court in this latter case contains a somewhat full reference to the history of this subject, as it is found in the reports of the English cases, and in Blackstone's Commentaries, Vol. 3, p. 408, the result of which is to show that at an early day the English courts exercised this power so recklessly, when the pleadings were all *ore tenus*, and great liberality was necessarily allowed in amendments, that the abuse was corrected by the King, who made the declaration that "although we have granted to our justices to make record of pleas pleaded before them, yet we will not that their own records shall be a warranty for their own wrong, nor that they may raise their rolls, nor amend them, nor record them contrary to their original enrolment." This, Blackstone declares, meant only that the justices should not by their own private rasure change a record already made up, or alter the truth to any sinister purpose.

In the Minnesota case, the plaintiff in error had been convicted of the crime of murder, and after trial and verdict, and after the case had been carried to the Supreme Court of the State, the record of the proceedings on the trial was amended so as to show affirmatively that each juror was sworn as prescribed by law; that they were put in charge of the officer to keep them as prescribed by law; and that they were polled at the request of defendant on their coming in with their verdict; matters which, it seems, had been omitted in the record of the judgment. The supreme court in that case, as we think, stated with force and precision the true rule on this subject. They said: "While we should go as far as any court in reprobating a rule to place the proceedings of a court almost entirely at the mercy of the subordinate officials thereof, we should be scrupulously careful in adopting any rule which would tend to destroy the sanctity or lessen the verity of the records. And while we admit the

power to amend a record after the term has passed in which the record was made up, we deprecate the exercise of the power in any case where there was the least room for doubt about the facts upon which the amendment was sought to be made. . . . But when the facts stand undisputed, and the objection is based upon the technical point alone that the term is passed at which the record was made up, it would be doing violence to the spirit which pervades the administration of justice in the present age to sustain it. It is our opinion that this power of necessity exists in the district court, and that its exercise must in a great measure be governed by the facts of each case."

The case in 5 Iredell, although a civil suit, established the doctrine that a court has a right to amend the records of any preceding term by inserting what had been omitted either by the act of the court or clerk, and that when so amended it stands as if it had never been defective, or as if the entries had been made at the proper time.

The case of *Hyde v. Curling*, 10 Mo. 359, which was also a civil suit, and seems to have been very well considered, is thus stated in the syllabus of the report: "A court has power to order entries of proceedings had by the court at a previous term to be made *nunc pro tunc*, but where the court has omitted to make an order which it might or ought to have made, it cannot at a subsequent term be made *nunc pro tunc*."

In the case in 18 Mo. of *State v. Clark*, it appeared that the prisoner had been tried on an indictment which was not signed at the time of the trial by the foreman as a true bill, and that the clerk had not marked the time of filing the same on the indictment. It was held, on writ of error to the supreme court, that the court had a right, on motion at a subsequent term, to amend its record by a statement of these facts, not only by the indorsement upon the bill, but by a regular entry on the journal, that "the grand jury returned into court the following true bills of indictment" (naming the one under which the defendant was convicted). The court said that, if these acts had taken place, the failure of the clerk to make proper and formal entries on the records of the court might have been supplied or corrected by having such entries made *nunc pro tunc*.

In *Nelson v. Barker*, 8 McLean, 379, Mr. Justice McLean, observed, in regard to an amendment of a declaration under a plea of misnomer, that it was objected to on the ground that there was nothing to amend by, to which he replied that at common law the court could only give leave to amend when there was something to amend by, and anciently amendments were required to be made at the term at which the error occurred, but now an amendment may be made at any time before judgment, and in some cases after judgment; and he refers to the 32d section of the Judiciary Act of 1789.

This, which has been commonly called the Statute of Jeofails and Amendments of the United States, may be found in section 954, Revised Statutes, and is as liberal in the powers which it confers on the courts to make amendments as any of those enacted in more modern times. We are forced to the conclusion that

the action of the circuit court in making the order for a *nunc pro tunc* record, which showed that the case had been remanded from that court to the district court prior to the time when the sentence was passed upon the prisoner, was a legitimate exercise of power.

With regard to the proposition which denies that the indictment in the district court and the evidence by which it is sustained conferred jurisdiction on that court, we do not think it needs much comment. The grand jurors charged in the first count of this indictment that "the said Wight, who was then and there a person employed in one of the departments of the postal service of the United States, to wit, employed as an assistant to the superintendent of letter carriers in the post-office at Detroit aforesaid, unlawfully and wrongfully did secrete and embezzle a letter which came into his possession in the regular course of his official duties, and which was intended to be carried by a letter carrier, which letter then and there contained five pecuniary obligations and securities of the government of the United States," and were the property of one Angus M. Smith, and with the letter were then and there inclosed in an envelope addressed to "Oscar Singleton, Montevideo, Cook Co. Mich." A similar statement is in effect made in all the other counts.

The law under which the prisoner was indicted is section 5467 of the Revised Statutes of the United States, the language of which, applicable to the case, is as follows:

"Any person employed in any department of the postal service who shall secrete or embezzle or destroy any letter, packet, bag or mail of letters, intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail or carried or delivered by any mail-carrier, mail-messenger, route-agent, letter-carrier or other person employed in any department of the postal service, or forwarded through or delivered from any post-office or branch post-office established by authority of the Postmaster-General, and which shall contain any note, bond, draft, check, warrant, revenue stamp, postage-stamp, stamped envelope, postal-card, money-order, certificate of stock or other pecuniary obligation or security of the government, . . . any such person who shall steal or take any of the things aforesaid out of any letter, packet, bag or mail of letters, which shall have come into his possession, either in the regular course of his official duties or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punishable by imprisonment at hard labor for not less than one year nor more than five years."

The argument of counsel assumes that in this proceeding, by writ of habeas corpus, we can inquire into and correct nearly all errors which may have been committed by the district court in the control of the case originally. This has been so often denied by this court, and the proposition is so clear, that in a writ of habeas corpus nothing can be inquired into but the jurisdiction of the court, that it is unnecessary to pursue the entire line of argument of counsel for appellant. *Cuddy, Petitioner,*

131 U. S. 280 [83: 154]. We are of opinion, notwithstanding the allegation of counsel that there was no jurisdiction because the indictment did not charge that the letter embezzled was intended to be carried by a letter carrier, that it so alleged in the exact terms of the Statute just cited, and is therefore sufficient.

With regard to the proposition "that the failure to allege in some of these indictments that the letter had not been delivered to the party to whom it is directed renders the whole proceeding void," we think it is unsound. While the purpose for which this clause was inserted in the Act is not very clear, it was probably intended to repel the idea that the stealing or embezzling of such a letter, after it had been carried through the mail or delivered by the letter carrier to its owner and its purpose served, did not render the party guilty under this Statute. At all events, the fact of its delivery being a matter of defense, when it was proved that the party in the course of his employment had embezzled the letter and stolen the money, it will be presumed that the defendant made the most he could of that defense on the trial. We are not of opinion that it is necessary for us to examine into the question raised on the evidence at the trial as to whether the securities were put into the letter, and that into the mail, as a mere decoy or not. The question whether it was intended to be conveyed by the mail or by the letter carrier was a question of fact to be ascertained by the jury, and in a case like this, where the party has been convicted of embezzling a letter and valuable property in a letter passing through the regular course of the mail and the hands of the letter carrier, where the indictment is a good one, and where the party has been found guilty and sentenced, we are not disposed to inquire into the motives for which the letter was put into the mail, even though the object was to detect or intrap the party in his criminal practices. For these reasons the judgment of the Circuit Court is affirmed.

The Chief Justice, with whom concurred *Mr. Justice Harlan*, dissenting:

I am compelled to withhold my assent to the conclusion reached by the court in this case. In my judgment the district court had power after the verdict to transfer the cause to the circuit court, and, having done so, it required an order remitting the cause from the circuit court to the district court, before the latter court could pronounce a lawful sentence. The petitioner was sentenced by the district court, which, as the record then stood, has no jurisdiction, and was committed accordingly, and while undergoing imprisonment under that sentence sued out the writ of habeas corpus. The circuit court then entered an order *nunc pro tunc* as of the previous term, remitting the cause into the district court, basing its action upon "its recollection of the facts of the making of said order." The record before us does not disclose the existence of any minutes of the clerk or notes of the judge that the entry of such an order had been directed, or of any other official evidence to that effect, and I do not understand it to be contended that there was any such. Granting that, as has been said, the judge during the term is a living record,

and may alter and supply from memory any order, judgment or decree which has been pronounced, and this because he is presumed to retain his own action in his recollection, yet after the term has elapsed, the exercise of such a power to the extent of supplying an order upon which jurisdiction depends, in the absence of any entry, minute or memorandum to proceed by or of any statutory provision expressly allowing it, ought not to be conceded in criminal cases. The Statute of Amendments and Jeofails has no application.

Upon this ground, my brother Harlan and myself are of opinion that the judgment should be reversed.

Mr. Justice Gray did not sit in the argument of this case and took no part in its decision.

THE RICHMOND AND DANVILLE
RAILROAD COMPANY, *Appt.*,

v.

NICHOLAS THOURON ET AL.

THE RICHMOND AND WEST POINT
TERMINAL RAILWAY AND WARE-
HOUSE COMPANY, *Appt.*,

v.

NICHOLAS THOURON ET AL.

(See S. C. Reporter's ed. 45-47.)

Order of circuit court remanding case not appealable—Acts of March 3, 1887, and Aug. 13, 1888—sec. 673, Rev. Stat.—Act of Feb. 25, 1889.

1. Orders of the circuit court remanding cases to the state court are not final judgments or decrees from which an appeal will lie to this court.
2. By the Act of March 3, 1887 (24 Stat. 552, 555), as corrected by the Act of August 13, 1888 (25 Stat. 438), it was provided that no appeal or writ of error should be allowed from the decision of the circuit court remanding a case.
3. An appeal or writ of error in such a case will not lie under sec. 693 of the Revised Statutes, because that section applies only to final judgments or decrees, and an order remanding is not a final judgment.
4. In the Act of February 25, 1889 (25 Stat. 693), the words "a final judgment or decree" are used in the same sense as in the prior Statutes.

[Nos. 1262, 1263.]

Submitted Feb. 3, 1890. Decided March 10, 1890.

APPEALS from orders of the Circuit Court of the United States for the Eastern District of Tennessee remanding these cases to the State Court.

On motion to dismiss for want of jurisdiction. *Dismissed.*

The facts are stated in the opinion.

Messrs. Ingersoll & Peyton, Charles M. DaCosta and Samuel Dickson, for appellees, in favor of motion:

The Act of February 25, 1889 (25 Stat. at L. 693), under which the appeal was allowed,

NOTE.—What is a final decree or judgment of state or other court from which appeal lies. See note to *Gibbons v. Ogden*, 5. 302.

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does not confer on this court appellate jurisdiction to review an order of remand made by the circuit court.

Chicago & A. R. Co. v. Wiswall, 90 U. S. 28 Wall. 507 (23: 103); *Babbitt v. Clark*, 108 U. S. 606 (26: 507); *Turner v. Farmers L. & T. Co.* 106 U. S. 552, 555 (27: 273); *Morey v. Lockhart*, 123 U. S. 56 (31: 68); *Wilkinson v. Nebraska*, 123 U. S. 286 (31: 152); *Sherman v. Grinnell*, 123 U. S. 679 (31: 278); *Ex parte Sherman*, 124 U. S. 364 (31: 423); *Chicago, B. & Q. R. Co. v. Gray*, 131 U. S. 396 (33: 212).

Words, the meaning of which in a statute have been judicially interpreted, are, when used in a subsequent statute, to be understood in the same sense.

Sewing Machine Cases, 85 U. S. 18 Wall. 584 (21: 921), and cases cited; *Bishop, Written Laws*, § 97; *Mason v. Pearson*, 50 U. S. 9 How. 248, 257 (18: 125, 128); *The Abbotsford*, 98 U. S. 440-444 (25: 168, 169); *Maxwell, Interpretation of Statutes*, 41.

Messrs. Hoadley, Lauterbach & Johnson, Taylor & Hodd and Pope Barrow, in opposition:

An order to remand is final whenever the action previously taken in the state court has substantially disposed of the case upon the merits; and under the Act of February 25, 1889, whenever the order is based upon the ground of a want of jurisdiction, an appeal will lie.

French v. Shoemaker, 79 U. S. 12 Wall. 86, 98 (20: 270, 274); *Withenbury v. U. S.* 72 U. S. 5 Wall. 819 (18: 613); *Thomson v. Dean*, 74 U. S. 7 Wall. 342 (19: 94); *Milwaukee & M. R. Co. v. Soutter*, 69 U. S. 2 Wall. 440 (17: 860); *Bronson v. La Crosse & M. R. Co.* 67 U. S. 2 Black. 524 (17: 359); *Whiting v. Bank of U. S.* 38 U. S. 18 Pet. 15 (10: 35); *Forgay v. Conrad*, 47 U. S. 6 How. 203 (12: 404); *Beebe v. Russell*, 60 U. S. 19 How. 235 (15: 668); *Ex parte Farmers Loan & T. Co.* 129 U. S. 206 (32: 656); *Williams v. Morgan*, 111 U. S. 684 (28: 559); *Winthrop Iron Co. v. Meeker*, 109 U. S. 180 (27: 396); *Hess v. Reynolds*, 113 U. S. 80 (28: 929); *Lewis v. Smythe*, 2 Woods, 117-119.

Mr. Chief Justice Fuller delivered the opinion of the court:

These are appeals from orders of the circuit court remanding the above-entitled cases to the state court, which appeals the records show were "granted under the provisions of the Act of February 25, 1889, on the ground that the court has no jurisdiction of the cause."

Before the Act of 1875, chap. 137 (18 Stat. 470), we held that an order by the circuit court remanding a cause was not such a final judgment or decree in a civil action as to give us jurisdiction for its review by writ of error or appeal. The appropriate remedy in such a case was then, by mandamus, to compel the circuit court to hear and decide. *Babbitt v. Clark*, 108 U. S. 606, 609 [26: 507, 508]; *Turner v. Farmers L. & T. Co.* 106 U. S. 552, 555 [27: 273]; *Chicago & A. R. Co. v. Wiswall*, 90 U. S. 23 Wall. 507 [23: 103]. The Act of 1875 made such order reviewable (without regard to the pecuniary value of the matter in dispute); but by the Act of March 3, 1887 (24 Stat. 532, 555), as corrected by the Act of August 13, 1888 (25 Stat. 438), the provision to that effect

was repealed, and it was also provided that no appeal or writ of error should be allowed from the decision of the circuit court remanding a cause. In *Morey v. Lockhart*, 128 U. S. 56, 57 [31: 68], Mr. Chief Justice Waite, speaking for the court, said: "It is difficult to see what more could be done to make the action of the circuit court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such a case, and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed." And the court held that the language of the Act was broad enough to cover all cases, and also that an appeal or writ of error would not lie under § 693 of the Revised Statutes, because that section applied only to final judgments or decrees, and an order remanding was not a final judgment.

The Act of February 25, 1889 (25 Stat. 693), provides that "in all cases where a final judgment or decree shall be rendered in a circuit court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review such judgment or decree, without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of five thousand dollars the supreme court shall not review any question raised upon the record except such question of jurisdiction."

The words "a final judgment or decree," in this Act, are manifestly used in the same sense as in the prior Statutes which have received interpretation, and these orders to remand were not final judgments or decrees, whatever the ground upon which the circuit court proceeded. *Graves v. Corbin*, 132 U. S. 571, 591 [33: 462, 468].

Appeals dismissed for want of jurisdiction.

THOMAS JEFFERIS, *Appt.*,
v.

THE EAST OMAHA LAND COMPANY.

(See S. C. Reporter's ed. 178-198).

Alluvion, right to—Missouri River—what is alluvion—reference to a plat of land, in a deed—government lands—patent passes title to accretions—meander lines—water line.

1. The person whose land is bounded by a stream of water, which changes its course gradually by

alluvial formations, will still hold by the same boundary, including the accumulated soil, and is without remedy for his loss by the same means.

2. This rule is applicable to land which borders on the Missouri River.
3. Alluvion is an addition to riparian land made by the water to which the land is contiguous so gradually and imperceptibly that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.
4. Where a plat is referred to in a deed as containing a description of land, the courses, distances and other particulars appearing upon the plat are to be as much regarded, in ascertaining the true description of the land and the intent of the parties, as if they had been expressly enumerated in the deed.
5. This rule is applicable to government lands bounded by the Missouri River, as the same are surveyed and platted under the Acts of Congress.
6. The patent passes the title of the United States to the land, not only as it was at the time of the survey, but as it is at the date of the patent, so that the United States does not retain any interest in any accretion formed between the survey and the date of the patent.
7. Meander lines are run in surveying public lands bordering upon navigable rivers, not as boundaries of the tract, but to ascertain the quantity of the land subject to sale; and the water-course, and not the meander line, as actually run on the land, is the boundary.
8. Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed side line and conveys all accretion thereto.

[No. 1539.]

Submitted Jan. 13, 1890. Decided Mar. 10, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Nebraska to review a decree granting an injunction restraining defendant from taking possession of or asserting any right in certain land, and declaring that the land became, by accretion, a part of land conveyed by the United States to plaintiff by patent, and further decreeing that the deed to the defendant be canceled. *Affirmed.*

The facts are stated in the opinion.

Reported below, 40 Fed. Rep. 386, 390.

Mr. Finley Burke, for appellant:

The court will take judicial notice of the characteristics of the Missouri River.

U. S. v. Lavton, 46 U. S. 5 How. 10, 26 (12: 27, 34); *Peyroux v. Howard*, 32 U. S. 7 Pet. 324 (8: 700).

The Great Lakes and other navigable waters of the country, above as well as below the flow

NOTE.—As to alluvion or accretion and reliction; right to, and ownership of; by what law title to is determined; rule of division among riparian owners.—see note to *Kennedy v. Hunt*, 12: 829; also note to *St. Clair County v. Livingston*, 23: 59.

As to right of the United States and the States to shore lands and accretions against piers, see note to *Hallett v. Beebe*, 14: 35.

As to what is seashore; how far lands bounded on extend.—see note to *U. S. v. Pacheco*, 17: 865.

As to title to water by appropriation; common-law

rule; rule of mining States.—see note to *Atchison v. Peterson*, 22: 414.

Accretion and alluvion, right to.

Land formed by accretion on a fractional quarter-section is a part thereof, and passes by a deed conveying the fractional quarter by its number. *Tappendorff v. Downing*, 76 Cal. 189.

A riparian owner on a navigable river, whose land is washed away by rapid and perceptible stages, and lodged in the river opposite, during spring floods, is entitled to so much of the land as

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of the tide, are navigable in a sense to render them amenable to the admiralty jurisdiction.

The Genesee Chief v. Fitzhugh, 53 U. S. 12 How. 448 (18:1058); *Barney v. Keokuk*, 94 U. S. 324 (24:224).

The test of whether the doctrine of accretion should apply is whether the land is formed so slowly as to be imperceptible. If the new formation can be discerned, the doctrine does not apply.

Rex v. Yarborough, 8 Barn. & C. 91, 2 Bligh, N. R. 147, 1 Dow. & C. 178.

Some area, however narrow, had formed between the original lot and the river after the date of the survey and before the time when the land was entered. Said strip belonged to the United States.

Saulet v. Shepherd, 71 U. S. 4 Wall. 502 (18:442); *Granger v. Swart*, 1 Woolw. 88; *Lammers v. Nisson*, 4 Neb. 245; *Bissell v. Fletcher*, 19 Neb. 725; *Jones v. Johnston*, 59 U. S. 18 How. 150 (15:320).

Messrs. J. M. Woolworth and C. J. Greene, for appellee:

The person whose land is bounded by a stream of water shall still hold its course by the same boundary, including the accumulated soil.

New Orleans v. U. S. 85 U. S. 10 Pet. 662, 717 (9:573, 594); *Banks v. Ogden*, 69 U. S. 2 Wall. 57, 67 (17:818, 821).

The rule as to accretions is applicable to lands bordering on the Missouri River.

Saulet v. Shepherd, 71 U. S. 4 Wall. 502 (18:442); *St. Clair County v. Livingston*, 90 U.

S. 23 Wall. 46 (23:59); *Jones v. Soulard*, 65 U. S. 24 How. 41 (16:604).

Alluvion is an addition of soil to land by a river so gradual that in short periods the change is imperceptible.

Just. lib. II, tit. 1, § 20; Bracton, bk. II, chap. 2; Callis, Sewers, 24, 28; Dyer, 326 b; Davies (Sir John), 59; *Woodward v. Fox*, 2 Vent. 188; 3 Bl. Com. 262; *Re Hull & S. R. Co.* 5 Mees. & W. 329; *Scrutton v. Brown*, 4 Barn. & C. 485; *New Orleans v. U. S.* 85 U. S. 10 Pet. 662 (9:573); *St. Clair County v. Livingston*, 90 U. S. 23 Wall. 46 (23:59).

The changes in the cases decided in this court were very rapid, and yet the doctrine of accretion was enforced in them.

Schools v. Risley, 77 U. S. 10 Wall. 110 (19:856); *Jones v. Soulard*, 65 U. S. 24 How. 41 (16:604); *Jones v. Johnston*, 59 U. S. 18 How. 150 (15:320).

When the change is so gradual as not to be perceived in any moment of time, the proprietor whose land on the bank of a river is thus increased is entitled to the addition.

Halsey v. McCormick, 18 N. Y. 147; *Mulry v. Norton*, 1 Cent. Rep. 748, 100 N. Y. 424; *Hopkins Academy v. Dickinson*, 9 Cush. 544; *Camden & Atl. Land Co. v. Lippincott*, 45 N. J. L. 405.

The official plat of the survey showed the river as the north boundary.

Fox v. Union Sugar Refinery, 109 Mass. 292.

Meander lines are run as the means of ascertaining the quantity of the land subject to sale.

St. Paul & P. R. Co. v. Schurmeier, 74 U. S.

forms in the river by this process between the adjacent shore and the thread of the river, together with accumulations caused by the gradual washing of an island above his land, and which fills the space between the shore and the new formation in the river. *Rutz v. Seeger*, 36 Fed. Rep. 188.

Upon formation of alluvion on lands on unnavigable rivers, owned by conterminous proprietors, the rule for distribution of accretions is to extend the side lines of each owner to the nearest river bank, giving to each the alluvial deposits in front of his own land. *Hubbard v. Maxwell*, 6 New Eng. Rep. 772, 60 Vt. 235.

The owner of an island between two channels of a river, which, by a change in the course of the channels, has gradually pushed up stream as the result of natural accretions, so as to cover the whole front of the lands of a riparian owner, which formerly extended higher up than the island, where the channels continue to be distinct, although the one between the lands mentioned has become unnavigable except at high tide, is entitled to the accretions, under Cal. Civ. Code, sec. 1014, which is merely declaratory of the law as it has always been. *Fillmore v. Jennings*, 78 Cal. 634.

The title of a riparian owner on a non-navigable stream to accretions is not limited by the middle line of the stream. *Welles v. Bailey*, 4 New Eng. Rep. 841, 55 Conn. 232.

The law of accretion and reliction is the same in the case of both navigable and non-navigable rivers. *Id.*

Land formed in a river is the property of the owner of the river bed. *Linthicum v. Coan*, 64 Md. 439, 2 Cent. Rep. 623.

A person owning land bounded by a stream which changes course gradually holds the same boundary, including the accumulated soil. *Id.*

Alluvion passes to the grantee of shore land, without express mention. *Id.*

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While the title of a riparian proprietor is liable to be lost by erosion or submergence, the erosion to effect that result must be accompanied by a transportation of the land beyond the owner's boundary, and it may be returned by accretion, in which case the ownership temporarily lost may be regained. *Mulry v. Norton*, 100 N. Y. 424, 1 Cent. Rep. 748.

If, after submergence, the water disappears from the land either by its gradual retirement or the elevation of the lands by natural or artificial means, the proprietorship returns to the original owner. *Id.*

No lapse of time during which the submergence has continued bars the right of the owner. *Id.*

And so, if an island forms upon the land submerged, it belongs to the original owner. *Id.*

A riparian proprietor, conveying lands adjacent to navigable waters, may so limit his grant as to reserve to himself not only his riparian privileges in the waters, but also subsequent accretions to the soil formed by the operation of natural causes. *People v. Jones*, 112 N. Y. 598.

When soil has been wrongfully deposited by human hands in the ocean or other public waters, in front of the uplands, so that the water-line is carried further out, the same rule applies as when such a deposit has been gradually made by natural causes, i. e., the accretion becomes the property of the owner of the upland, and his title still extends to the water line. *Steers v. Brooklyn*, 101 N. Y. 51, 1 Cent. Rep. 798.

If an island in a non-navigable stream results from accretion, it belongs to the owner of the bank on the same side of the *flum aquæ*. 2 Washb. Real Prop. 452, 453; 2 Sharswood, Bl. Com. 261, note; 3 Kent, Com. 428; Hargrave, Law Tr. 5; Hale, De Jur. Mar. 14; *Rex v. Yarborough*, 8 Barn. & C. 91, 107; *Ex parte Jennings*, 6 Cow. 537, note; *Ingraham v. Wilkinson*, 4 Pick. 268; *Deerfield v. Arms*, 17 Pick. 41; *Woodbury v. Short*, 17 Vt. 387.

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7 Wall. 272 (19:74); *Kraut v. Crawford*, 18 Iowa, 549.

The construction given it by the parties may always be called in when the meaning of a contract is ambiguous.

Steinbach v. Stewart, 78 U. S. 11 Wall. 566, 576 (20:56, 59).

The best and surest mode of expounding an instrument is by referring to the time when and circumstances under which it was made.

Smith, Con. Const. § 512; *Sheets v. Selden*, 69 U. S. 2 Wall. 177, 187 (17:822, 826); *People v. Dayton*, 55 N. Y. 367, 375.

When a name has become impressed on an estate, as here "lot 4," a conveyance by such description will pass all that is implied thereby, although the quantity may exceed that stated in the conveyance.

Hathaway v. Pincer, 6 Hill, 453; *Varick v. Smith*, 5 Paige, 187, 9 Paige, 547.

And under the name will also pass all additions which have been made thereto.

Lamb v. Rickets, 11 Ohio, 311; *Powers v. Jackson*, 50 Cal. 429.

Mr. Justice Blatchford delivered the opinion of the court:

This is a suit in equity brought in the Circuit Court of the United States for the District of Nebraska, on the 9th of February, 1889, by The East Omaha Land Company, a Nebraska corporation, against Thomas Jefferis. The case was heard on a demurrer to the bill, which makes it necessary to state with particularity the allegations of the bill. They are as follows:

The lands which are the subject of the suit are of the value of \$2,000 or more. In 1851 the deputy surveyors of the United States, then engaged in surveying the public lands in township 75 north, range 44 west, of the fifth principal meridian, in the State of Iowa, ran, marked and made field-notes and plats on the meander line of the left bank of the Missouri River, and returned the said field-notes and plats to the surveyor-general of Iowa, who filed the same in the General Land Office, and they were thereupon duly approved; and since that time no resurvey has been made by the United States of the lands lying along, upon or near said river, or of the premises which are the subject of the bill.

Section 21 in that township was properly surveyed and subdivided by the deputy surveyors, and the plats and notes thereof were duly made, returned and approved as aforesaid. By the surveys the section was found, and by the plats and notes thereof returned, as fractional; and a part thereof, designated as lot 4 was formed, containing 37.24 acres, the north boundary thereof being on the Missouri River. The meander line of the river was described in the field-notes as beginning at meander corner No. 6, the same being at a point on the line between sections 16 and 17 in said township and range, about 100 feet north of the intersection of the exterior lines of said sections 16 and 17 and sections 20 and 21; thence south 71 degrees east, 2.68 chains to meander post No. 7, on the north line of lot 4; thence south 79 degrees 50 minutes east, 54 chains; thence north 85 degrees east, 4.50 chains; thence east 15 chains; thence north 87 degrees east, 5.25 chains to the corner of sections 21 and 22. A map is annexed,

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marked "Exhibit A," being a true copy of the plat so made, returned and approved, showing the meander line of the river and the lines of the subdivisions of sections 16, 17, 21 and 22.

On the 10th of October, 1858, one Edmund Jefferis entered lot 4 at the United States land office for the district of land subject to sale at Kanesville, Iowa, paid the proper officer of the office the legal price thereof, and received therefor the usual register's certificate; and, on the 15th of June, 1855, the usual patent of the government was duly issued to him for the land. In the certificate and patent the land was described as lot 4 in fractional section 21, in township 75 north, range 44 west, of the fifth principal meridian, containing 37.24 acres, according to the official plat of the survey of the land returned to the General Land Office by the surveyor-general. At the time of the entry, the meander line of the left bank of the river was the same, or nearly the same, as shown by such field-notes and plat.

On the 14th of July, 1856, said Jefferis duly conveyed the land to Joseph Still and Joseph I. Town, describing the same simply as lot 4 in section 21 in township 75 north, range 44 west, of the fifth principal meridian. On the 21st of September, 1857, Town conveyed the undivided half of the premises, with warranty, to one McCoid, who, on the 16th of October, 1857, quit-claimed the premises to one Coleman. On the 25th of May, 1858, Coleman conveyed them, with warranty, to Mrs. Ruth A. Town. On the 27th of April, 1859, Joseph I. Town and Ruth A. Town conveyed them, with warranty, to one Boin, who on the 30th of May, 1861, quit-claimed them to one McBride; and McBride, on the 30th of September, 1861, quit-claimed them to one Schoville. Schoville having died, his widow and heirs quit-claimed them to the plaintiff, on the 22d of March, 1888. On the 9th of March, 1888, Still quit-claimed the other undivided half of the premises to Lyman H. Town, who on the 28th of March, 1888, conveyed the same to the plaintiff. In each of the deeds made by those several parties, the premises were described as lot 4 in fractional section 21, township 75 north, range 44 west, of the fifth principal meridian, and the deeds were duly recorded in the registry of Pottawattamie County, Iowa, in which county the premises were situated.

About the time of the original entry of lot 4 by Edmund Jefferis, new land was formed along and against the whole length of the north line thereof, and from that time continued to form until 1870, so that in that year, at a distance of 20 chains and more from the original meander line before described, and within the lines of the lot on the east and west running north and south, a tract of 40 acres and more had been formed by accretion to the lot, and ever since had been and now is a part thereof. The said land was so formed by natural causes and imperceptible degrees, that is to say, by the operation of the current and waters of the river, washing and depositing earth, sand and other material against and upon the north line of the lot; and the waters and current of the river receded therefrom, so that the new land so formed became high and dry above the usual high-water mark, and the river made for itself its main course far north of the original me-

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ander line. Such process, begun in 1858 and continued until 1870, went on so slowly that it could not be observed in its progress; but, at intervals of not less than three or four months, it could be discerned by the eye that additions greater or less had been made to the shore.

In 1877, the river, at a point more than a mile south of the north line of the lot, suddenly cut through its bank and made for itself a course through the same, leaving all of section 21 north of its bank. A plat marked "Exhibit B," is annexed, upon which is delineated the river both before and after such sudden change.

The river is and always has been navigable for steamers of large tonnage. The United States never claimed any interest in the land so formed by accretion to lot 4. The plaintiff submits that by such several mesne conveyances, whereby the title to lot 4 has come to it, it has become seised in fee, not only of the land included within the boundaries of the lot at the time of such survey, but also of the land so formed by accretion thereto, so that the east and west boundaries of the lot are formed by the protraction of the east and west lines north to the left bank of the river as the same was in 1877 when the river suddenly changed its course, and the north boundary of the lot is the said left bank at that time.

When the plaintiff became seised of the land, it entered into the same and made large and valuable improvements thereon; and it has projected the enterprise of redeeming the land and other land adjoining it, of improving the same so that the whole will be available for railroad and manufacturing purposes, of building railroad tracks, station-houses, depots, warehouses and manufacturing establishments, and selling parcels of the land to others for such purposes, and has expended more than \$20,000, and has in hand \$100,000 which it purposes to expend in grading, and in building roads, bridges, etc.

In 1888, one Counzeman and others, without any authority of law, entered upon the land so formed by accretion, and for a time occupied it, but afterwards abandoned it. Recently, Counzeman has made to the defendant a deed of quit-claim purporting to convey a certain parcel of the land so formed by accretion to lot 4. The south line of the land so conveyed to the defendant is about two hundred feet north of the original meander line of lot 4, as that line was so run, marked and platted by the United States surveyors; and the deed purports to convey about twenty acres, which are within the above-recited boundaries of the land formed by accretion to lot 4. When Counzeman entered upon the land and when he made the deed to the defendant, each of them well knew of the plaintiff's plan and purposes in respect thereof, and that they had no right so to enter; and the defendant threatens to, and, unless restrained by injunction, will, dispossess the plaintiff and seriously interfere with its plans and purposes. The defendant is insolvent and unable to answer for the damage to which he will subject the plaintiff by entering into the premises and dispossessing the plaintiff.

The bill waives an answer on oath, and prays for an injunction restraining the defendant from entering into, taking possession of or intermeddling with any part of the premises con-

veyed to him by Counzeman, and for a decree declaring that the land so formed against lot 4, including that conveyed to the defendant, became and was a part of lot 4 and included within its description; that the title to it has become and is vested in the plaintiff; that the deed made to the defendant be delivered up to be canceled; that he be perpetually enjoined from asserting the same or any title or interest thereunder against the plaintiff; and for general relief.

The defendant interposed a general demurrer to the bill, for want of equity.

The case was heard before *Mr. Justice Brewer*, then circuit judge, who filed an opinion on the 1st of March, 1889, directing that the demurrer be sustained. (40 Fed. Rep. 386.) On a petition for a rehearing, which was heard by the same judge, he filed an opinion (40 Fed. Rep. 390) directing that the demurrer be overruled. Thereupon a decree was entered, on the 13th of November, 1889, overruling the demurrer; granting a perpetual injunction restraining the defendant from entering into, taking possession of or in any manner intermeddling with the premises, and from asserting any right or interest therein; and declaring that the land in question was formed by process of accretion and imperceptible degrees against the premises known and described as lot 4 of section 21 in township 75 north, of range 44 west, of the fifth principal meridian, in the State of Iowa, as the same was originally surveyed and platted by the surveyors of the United States, and became, by such accretion, a part of said lot and was included within such description, and the title thereto passed by such description from the original patentee of the United States to the plaintiff, by divers mesne conveyances, and is now vested in the plaintiff. It was further decreed that the deed made to the defendant by Counzeman, purporting to convey the premises, be delivered up to the plaintiff to be canceled, and that the plaintiff recover its costs to be taxed. The premises upon which the decree operated were described in it as follows: Beginning at a point 1,520 feet north of the southwest corner of lot 4 in section 21, township 75 north, range 44 west, of the fifth principal meridian, running thence north 660 feet; thence east 1,320 feet, to the extension due north of the east boundary line of said lot 4, as originally surveyed and platted by the United States; thence south on that line 660 feet; and thence west to the place of beginning; containing 20 acres. The decree further states that the defendant prayed an appeal to this court, and that it was allowed.

The grounds upon which the circuit court proceeded in overruling the demurrer to the bill are stated by it in its opinion to be these: (1) It being alleged in the bill that the added land was formed by "imperceptible degrees," although the increase was great, resulting in the addition of many acres, yet the time during which it was made was nearly twenty years, and an increase might have been going on, imperceptible from day to day and from week to week, which, during the lapse of so many years might result in the addition of all the land; and hence the averment of the bill cannot be overthrown, notwithstanding what is known of the character of the Missouri River and the soil

through which it flows, and of the rapid changes in its banks which are constantly going on. (2) Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary; and a deed describing the lot by number or name conveys the land up to such shifting water line, exactly as it does up to the fixed side lines; so that, as long as the doctrine of accretion applies, the water line, no matter how much it may shift, if named as the boundary, continues to be the boundary, and a deed of the lot carries all the land up to the water line.

The propositions contended for by the defendant are these: (1) Taking the allegations of the bill with those facts in relation to the Missouri River of which the court will take judicial notice, it appears that the formation in question was not accretion. (2) Taking the allegations of the bill most strongly against the plaintiff, it must be assumed that some area, however narrow, had formed between the time when the survey was made, in 1851, and the time when the land was entered by the patentee, in October, 1858. (3) The patentee, by the deed made by him to Still and Joseph I. Town, conveyed only "lot 4;" and, while the successive grantees held the title to that lot, accretions were formed of greater or less extent, which were never conveyed to the plaintiff, the deeds to it calling only for lot 4. The substance of this contention is that, as the conveyance by the patentee to Still and Joseph I. Town described the land simply as "lot 4," it passed the title to that lot as it was at the date of the survey in 1851, and not at the date of the deed, in 1856, and thereby excluded the new land formed after the survey of 1851; and, that, as accretions of greater or less extent were formed while the several successive grantees held the title, such accretions did not pass by their respective deeds, and the title thereto has not come to the plaintiff.

It is distinctly alleged in the bill that the new land is an accretion to that originally purchased by the patentee from the United States. The rule of law applicable to such a state of facts is thus stated by this court in *New Orleans v. United States*, 85 U. S. 10 Pet. 662, 717 [9: 578, 594]: "The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain." And in *Banks v. Ogden*, 69 U. S. 2 Wall. 57, 67 [17: 818, 821], it is said: "The rule governing additions made to land bounded by a river, lake or sea, has been much discussed and variously settled by usage and by positive law. Almost all jurists and legislators, however, both ancient and modern, have agreed that the owner of the land thus bounded is entitled to these additions. By some, the rule has been vindicated on the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may

bring by accretion; by others, it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore itself."

It is contended by the defendant that this well-settled rule is not applicable to land which borders on the Missouri River, because of the peculiar character of that stream and of the soil through which it flows, the course of the river being tortuous, the current rapid and the soil a soft, sandy loam, not protected from the action of water either by rocks or the roots of trees; the effect being that the river cuts away its banks, sometimes in a large body, and makes for itself a new course, while the earth thus removed is almost simultaneously deposited elsewhere, and new land is formed almost as rapidly as the former bank was carried away.

But it has been held by this court that the general law of accretion is applicable to land on the Mississippi River; and, that being so, although the changes on the Missouri River are greater and more rapid than on the Mississippi, the difference does not constitute such a difference in principle as to render inapplicable to the Missouri River the general rule of law.

In *Jones v. Soulard*, 65 U. S. 24 How. 41 [16: 604], it was held that a riparian proprietor on the Mississippi River at St. Louis was entitled, as such, to all accretions as far out as the middle thread of the stream; and that the rule well established as to fresh-water rivers generally was not varied by the circumstance that the Mississippi at St. Louis is a great and public water-course. The court said that from the days of *Sir Matthew Hale* all grants of land bounded by fresh-water rivers, where the expressions designating the water line were general, conferred the proprietorship on the grantee to the middle thread of the stream, and entitled him to the accretions; that the land to which the accretion attached in that case was an irregular piece of 79 acres, and had nothing peculiar in it to form an exemption from the rule; that the rule applied to such a public water-course as the Mississippi was at the City of St. Louis; and that the doctrine that, on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark, had no application to the case, nor did the size of the river alter the rule.

In *Sault v. Shepherd*, 71 U. S. 4 Wall. 502 [18: 442], the doctrine of accretion was applied in respect of a lot of alluvion or *batture* in the Mississippi River fronting the City of New Orleans, in favor of the riparian proprietor; and it was held that the right to the alluvion depended upon the fact of the contiguity of the estate to the river, and that where the accretion was made to a strip of land which bordered on the river, the accretion belonged to such strip and not to the larger parcel behind it, from which the strip, when sold, was separated.

In *St. Clair County v. Livingston*, 90 U. S. 23 Wall. 46 [28: 59], the same doctrine was applied to a piece of land situated on the east bank of the Mississippi River opposite St. Louis. It was there held that where a survey

began "on the bank of the river," and was carried thence "to a point in the river," the river bank being straight and running according to such line, the track surveyed was bounded by the river; that alluvion meant the addition to riparian land, gradually and imperceptibly made, through causes either natural or artificial, by the water to which the land was contiguous; that the test of what was gradual and imperceptible was that, although the witnesses might see from time to time that progress had been made, they could not perceive it while the process was going on; and that it was alluvion whether the addition was made on a stream which overflowed its banks, or on one which did not. The authorities on the subject are collected in the opinion in that case.

The rule is as applicable to the Missouri River as it is to the Mississippi, whether the principle on which it rests be that the riparian owner is entitled to the addition to his land because he must bear without compensation the loss of land caused by the action of the water and any consequent expense of repair to the shore, or whether that principle be one of public policy, in that it is the interest of the community that all lands should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore.

In the present case, the land in question is described in the bill as a tract of 40 acres and more. How much, if any of it, was formed between the date of the original survey in 1851 and the time of the entry in October, 1858, cannot be told; nor how much was formed between 1858 and 1866, while the patentee owned the lot; and so in regard to the time when it was owned by each successive owner. There can be, in the nature of things, no determinate record, as to time, of the steps of the changes. Human memory cannot be relied on to fix them. The very fact of the great changes in result, caused by imperceptible accretion, in the case of the Missouri River, makes even more imperative the application to that river of the law of accretion.

The bill must be held to state a fact, in stating that the land in question was formed by "imperceptible degrees," and that the process, begun in 1858 and continued until 1870, resulting in the production by accretion of the tract of 40 acres and more, "went on so slowly that it could not be observed in its progress, but at intervals of not less than three or more months it could be discerned by the eye that additions greater or less had been made to the shore." The fact, as thus stated, is that the land was formed by imperceptible degrees, within the meaning of the rule of law on the subject, and it is not capable of any construction which would result in the conclusion that the land was not formed by imperceptible degrees.

In the Roman law, it was said in the Institutes of Gaius (Book II. § 70): "Alluvion is an addition of soil to land by a river, so gradual that in short periods the change is imperceptible; or, to use a common expression, a latent addition." Justinian says (Institutes, Book II. title 1, § 20): "That is added by alluvion, which is added so gradually that no one can perceive how much is added at any one moment of time."

The same rule was introduced into English jurisprudence. Bracton says (Book II. chap. 2): "Alluvion is a latent increase, and that is said to be added by alluvion, whatever is so added by degrees that it cannot be perceived at what moment of time it is added; for although you fix your eyesight upon it for a whole day, the infirmity of sight cannot appreciate such subtle increments, as may be seen in the case of a gourd, and such like." Blackstone says (2 Com. 262): "And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*; and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss."

The whole subject was fully considered in England, in the case of *Rez v. Lord Yarborough*, in the King's Bench, 3 Barn. & C. 91; 8 C., in the House of Lords, 2 Bligh, N. R. 147, and 1 Dow & C. 178; *S. C. sub nom. Gifford v. Lord Yarborough*, in the House of Lords, 5 Bing. 163, where it was decided in effect that in cases of alternate accretion and decretion, the riparian proprietors had movable freeholds, that is, moving into the river with the soil as it was imperceptibly formed, and then again receding, when by attrition it was worn away. Lord Yarborough owned lands immediately adjoining the sea, to prevent the encroachment of which upon his lands he built sea walls on two sides. The ooze, sand and soil from the sea were gradually deposited outside of and against these walls, until, by the accretion, some 450 acres of land were made in a short time, which the crown claimed against him. But the court of King's Bench held, and the decision was affirmed by the House of Lords, that, the land being formed by the gradual and imperceptible action of the sea, Lord Yarborough, and not the crown, was entitled to it. See also *Re Hull & S. R. Co.* 5 Mees. & W. 327; *Scrutton v. Brown*, 4 Barn. & C. 485.

The doctrine of the English cases is that accretion is an addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived, and does not admit of the view that, in order to be accretion, the formation must be one not discernible by comparison at two distinct points of time.

In *New Orleans v. United States*, *supra*, the accretion was 140 feet in width, formed in 22 years. In *St. Clair County v. Livingston*, *supra*, the court says: "In the light of the authorities, alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. . . . The test as to what is gradual and imperceptible in the sense of the rule is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." To the same effect are *Jones v. Johnston*, 59 U. S. 18 How. 150 [15:320]; *Jones v. Soulard*, 65 U. S. 24 How. 41 [16:604]; *Schools v. Risley*, 77

U. S. 10 Wall. 91 [19: 850]; *Halsey v. McCormick*, 18 N. Y. 147; *Mulry v. Norton*, 1 Cent. Rep. 748, 100 N. Y. 424; *Hopkins Academy v. Dickinson*, 9 Cush. 544; *Camden & Atl. Land Co. v. Lippincott*, 45 N. J. L. 405.

The accretion set forth in the bill is alleged to have taken place between 1853 and 1870; and it is not alleged that the sudden change in the course of the river in 1877 caused any accretion. There is no suggestion in the bill that the land made by the accretion can be identified as having been previously the land of any particular person. There can be no identification unless there is a sudden change, and that is the very opposite of an imperceptible accretion.

We come now to consider the question of what passed by the description in the patent of the land as lot 4, containing 37.24 acres, according to the official plat of the survey of the land, returned to the General Land Office by the surveyor-general.

The bill alleges that in 1851, when the township was surveyed, the meander line of the river, as marked on the plat, ran along the bank of the river, and that at the time of the entry in 1858 the meander line of the left bank of the river was the same, or nearly the same, as that shown by the field-notes and on the plat made, returned and approved in 1851. On these facts it is contended for the defendant that the title to any new land which may have been made between 1851 and 1858, by accretion, did not pass to the patentee by the grant of lot 4 in the patent, but remained in the United States. The plaintiff, on the other hand, contends that the description in the patent of the land as lot 4 in effect made the river the boundary on the north, and passed the title of the United States to any new land that might have been formed before that time.

The bill states that the register's certificate and the patent described the land as lot 4 in fractional section 21, in township 75 north, range 44 west, of the fifth principal meridian, containing 37.24 acres, according to the official plat of the survey of said land, returned to the General Land Office by the surveyor-general. That plat, of which a copy is annexed to the bill and marked "Exhibit A," shows the Missouri River as the north boundary of lot 4, and that lot is marked on the plat as containing 37.24 acres.

It is a familiar rule of law that, where a plat is referred to in a deed as containing a description of land, the courses, distances and other particulars appearing upon the plat are to be as much regarded, in ascertaining the true description of the land and the intent of the parties, as if they had been expressly enumerated in the deed. *Fox v. Union Sugar Refinery*, 109 Mass. 292. This rule is applicable to government lands bounded by the Missouri River, as the same are surveyed and platted under the Acts of Congress; and the patent passed the title of the United States to lot 4, not only as it was at the time of the survey in 1851, but as it was at the date of the patent in 1855, so that the United States did not retain any interest in any accretion formed between the survey in 1851 and the date of the patent.

No different rule is established by the Acts of Congress which provide for the survey and sale of the public lands. The provisions found

in sections 2395 *et seq.* of the Revised Statutes, in regard to the survey of the public lands, are re-enactments of Statutes passed in 1790, 1800, 1805, 1820 and 1832. According to these provisions, section 21 being a fractional section, because the river cut through it on its north side, the east and west side lines of lot 4 were to be run north to the river. No provision was made for running the north boundary line of lot 4, but the river formed such north boundary without the running of any line there. The Statute provided that, where the course of a navigable river rendered it impracticable to form a full township of six miles square, and in those portions of fractional townships where no opposite corresponding corners could be fixed, to which to run straight lines from established corners, the boundary lines should be ascertained by running from the established corners, due north and south or east and west lines, as the case might be, to the water-course, Indian boundary line or other external boundary of such fractional township.

In the present case, the plat was made in accordance with the Statute, showing the river as the northern boundary of fractional section 21 and of lot 4 therein; and as the patent referred to the official plat of the survey, and thus made that a part of the description of lot 4, that description made the river the boundary of lot 4 on the north.

In *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272 [19: 74], this court said: "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction, subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field-notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the water-course, and not the meander line, as actually run on the land, is the boundary."

We are therefore of opinion that the patent of June 15, 1855, which described the land conveyed as lot 4, according to the official plat of the survey, of which a copy is annexed to the bill, marked "Exhibit A," conveyed to the patentee the title to all accretion which had been formed up to that date.

The case of *Jones v. Johnston*, 59 U. S. 18 How. 150 [15: 820], is cited by the defendant as holding that a grantee can acquire by his deed only the land described in it by metes and bounds, and cannot acquire, by way of appurtenance, land outside of such description. But that case holds that a water line, which is a shifting line and may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as a permanent object, such as a street or a wall; and it justifies the view announced by the circuit court in its opinion, that where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed side line. See also *Lamb v. Rickets*, 11 Ohio, 311; *Girard v. Hughes*, 1 Gill & J. 249; *Kraut v. Crawford*, 18 Iowa, 549.

These views result in the conclusion that the side lines of lot 4 are to be extended to the river, not as the river ran at the time of the survey in 1851, but as it ran at the date of the patent in 1855, and that all the land which existed at the latter date, between the side lines so extended and between the line of the lot on the south and the river on the north, was conveyed by the patent.

All the grantors in the deeds made subsequently to the patent, including the patentee, described the land in their successive deeds as lot 4. It is contended by the defendant that this description conveys the land as it was at the date of the entry, or, at most, at the date of the patent; that as, from the allegations in the bill, it must be intended that some accretion was formed between July 14, 1856, the date of the deed by the patentee, and September 21, 1857, the date of the deed by Joseph I. Town to McCoid, the description of the land as lot 4 in the latter deed was not adequate to pass to the grantee the new land, and therefore all the land which was formed afterwards belonged to Still and Joseph I. Town, and not to McCoid; also, that if, in point of fact, there was no accretion between July, 1856, and September, 1857, there must have been accretion subsequently, while some of the successive grantees held the title, prior to 1870.

But we think that in all the deeds the accretion passed by the description of the land as lot 4. In making every deed the grantor described the land simply as lot 4, and did not, by his deed, nor does it appear that he has since or otherwise, set up any claim to any accretion. It must be held, therefore, that each grantor, by his deed, conveyed all claim not only to what was originally lot 4, but to all accretion thereto. When McCoid, in 1854, conveyed his interest in the premises by the description of lot 4, as he had taken a deed of the undivided half of the premises by the same description from Joseph I. Town, in September, 1857, and had title thereby up to the river, his north line was the river, which was gradually adding land to his land. How much was added during the time he owned his undivided half he could not tell, and he conveyed his interest to Coleman (without any reservation. The same is the case with each successive grantor, and each must be held to have passed by his deed his title to all the land up to the river, as the river was at the date of his deed. When each successive owner took his title, lot 4 was a water lot, having the rights of wharfage, landing and accretion; and although new land was formed during his ownership, yet when he conveyed the premises he conveyed them by the same description by which he had received the valuable rights referred to.

The decree of the Circuit Court is affirmed.

Mr. Justice Miller did not take any part in the decision of this case.

JAMES G. TRACY *et al.*, *Pliffs. in Err.*,

LOUIS TUFFLY, Assignee.

(See S. C. Reporter's ed. 206-229.)

Repeal of statute—Texas law as to assignment by limited partnership—power of one partner to assign—property of special partner—assignment, when not void—notice—estoppel.

1. A previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern.
2. In Texas, a limited partnership, when it is insolvent or contemplates insolvency, may make an assignment of its property for the benefit only of such creditors as will accept their proportional share of the proceeds of the effects assigned, and discharge their claims.
3. In that State, one partner may make, in good faith, in the name of the firm, an assignment of the partnership property for the benefit of creditors.
4. An assignment of a limited partnership which covers the interest of the special partner in the firm property need not convey his individual property, which cannot be taken for the debts of the firm.
5. A deed of assignment, under the Texas Statute, is not void because the verified schedule annexed to it may embrace a debt that cannot be paid ratably with the claims of other creditors.
6. The legal existence of the special partnership did not depend upon the notice of its formation; the only effect of the failure to publish the required notice was that the partnership should be deemed general.
7. If the attaching creditors recognized and dealt with the firm as a limited partnership, they are estopped from insisting that there was no such partnership or that the notice was insufficient.

[No. 184.]

Argued Nov. 22, 25, 1889. Decided Mar. 3, 1890.

NOTE.—Assignments for benefit of creditors, with preferences, when valid and when not. See note to Marbury v. Brooks, 5: 522.

As to application of partnership assets to debts; rights of individual and partnership creditors therein.—see note to U. S. v. Hack, 8: 941.

When partner liable on contracts in firm name after dissolution; what notice of dissolution is necessary to avoid liability. See note to Lovejoy v. Spafford, 23: 851.

As to effect of admissions of partner, after dissolution, on his copartners, see note to Thompson v. Bowman, 18: 738.

As to rights and powers of surviving partners, see note to Moore v. Huntington, 21: 642.

Power of partner to assign or dispose of assets of firm.

Each partner has an implied power to dispose of the whole firm property for any purpose within the scope of the partnership. *Clark v. Rives*, 38 Mo. 579; *Cullum v. Bloodgood*, 15 Ala. 34; *Knowlton v. Reed*, 38 Me. 246; *Woodward v. Cowing*, 41 Me. 9; *Hennessey v. Western Bank*, 6 Watts & S. 310; *Clark v. Wilson*, 19 Pa. 414; *Halstead v. Shepard*, 23 Ala. 558; *Arnold v. Brown*, 24 Pick. 80; *Fromme v. Jones*, 18 Iowa, 474; *Hyrschfelder v. Keyser*, 59 Ala. 338; *Quiner v. Marblehead S. Ins. Co.* 10 Mass. 476, 482;

IN ERROR to the Circuit Court of the United States for the Eastern District of Texas to review a judgment in favor of the assignee of an insolvent firm against attaching creditors. *Affirmed.*

Statement by Mr. Justice Harlan:

The principal questions in this case arise under the laws of Texas relating to limited partnerships, and to assignments for the benefit of creditors. Before examining those laws, the facts out of which this litigation arises will be stated.

Prior to March 26, 1884, R. W. McLin and W. T. Tuffly were partners doing business at Houston, Texas, under the name of R. W. McLin & Co. On that day McLin died, his widow and two minor children surviving him. No administration was had upon his estate. At the time of his death the firm was largely indebted to various individuals and partnerships. Among the latter were Morrison, Heriman & Co., Dunham, Buckley & Co. and W. H. Lyon & Co., who are plaintiffs in error. After consultation with the agent of many of the creditors—the firms just named among the number—the surviving partner and the widow determined to form a limited partnership under the name of “W. T. Tuffly,” which should assume the debts of R. W. McLin & Co. in consideration of the release, by creditors of the old firm, of the estate of R. W. McLin from liability for their debts. From a trial balance of the accounts of the old firm which Tuffly caused to be made, it appeared that after the payment of its debts the share belonging to R. W. McLin's estate was \$6,419.36. Mrs. McLin having sold and transferred to Tuffly all the goods and merchandise belonging to the old firm, they executed the following certificate of the formation of a special partnership:

“State of Texas, County of Harris:

“We, W. T. Tuffly and Mrs. Christine E. McLin, hereby certify that we have formed a copartnership, under the firm name of W. T. Tuffly, under which firm name the business of such copartnership shall be conducted.

“The general nature of the business intended to be transacted is a general retail and wholesale, if they see proper, fancy and staple dry-goods and notion establishment in the City of Houston, Texas. W. T. Tuffly is and will be the general partner of such partnership, resident of the City of Houston, Texas, and Mrs. Christine E. McLin is and will be the special partner of such partnership, whose residence is also in said City of Houston, Texas.

“The said Mrs. Christine E. McLin has contributed the sum of six thousand four hundred and nineteen and 36-100 dollars to the common stock. The said partnership is to commence on the 16th day of April, 1884, and to continue for the space of two years, to end on the 16th day of April, 1886.

“W. T. Tuffly,

“Christine E. McLin.”

This certificate was duly acknowledged by Tuffly and Mrs. McLin on the day of its date, before a notary public of the county, who certified the fact under the seal of his office. And on the same day, as appears from the official certificate of that officer, W. T. Tuffly, as the general partner named in the certificate of partnership, certified, under oath, that Christine E. McLin, the special partner therein, “has contributed to the common stock of said partnership the sum specified in said certificate, and the said sum has in good faith actually been paid in cash.” The record also contains the certificate of the county clerk, under the seal of his office, to the effect that the certificate of

Graser v. Stellwagen, 25 N. Y. 315; *Mabbett v. White*, 12 N. Y. 444; *Anderson v. Thompkins*, 1 Brock. 456.

A partner may transfer the whole stock in trade of the partnership bona fide in payment of the debts of the firm, especially where his copartner has absconded; and the fact that the assignment is under seal is immaterial. *Deckard v. Case*, 5 Watts, 22, 30 Am. Dec. 287.

One partner has no power, while his copartners are at hand, to make a general assignment without their consent. Their subsequent ratification will not cut off intervening rights; and where a copartner, while not actively objecting, refused to assent, and did not assent until after service of garnishment process on the assignee, the garnishing creditor's right is an intervening right not cut off by the ratification. *Coleman v. Darling*, 66 Wis. 155, 57 Am. Rep. 253.

Where one partner undertakes to sell the entire stock, if the other acquiesces or declines to enforce his equitable rights, a partnership creditor cannot attack the sale except on grounds which would avoid a sale by the partnership. *Ellis v. Allen*, 80 Ala. 515.

Each partner has an implied power to execute a chattel mortgage to secure a debt due from the firm. *Willett v. Stringer*, 17 Abb. Pr. 152; *Sweetzer v. Mead*, 5 Mich. 107; *Milton v. Mosher*, 7 Met. 244; *Gates v. Bennett*, 33 Ark. 475; *Woodruff v. King*, 47 Wis. 261; *Nelson v. Wheelock*, 46 Ill. 25.

Aliter, for his individual debt. *Smith v. Andrews*, 49 Ill. 28; *Binns v. Waddill*, 32 Gratt. 588; *Rogers v. Batchelor*, 87 U. S. 12 Pet. 221 (9: 1063).

A lease by one partner of partnership realty to be binding on the other partners must be made in the prosecution of the partnership business, and where the making of the lease is in the exercise of an authority necessarily implied from the nature and object of the partnership. *Mussey v. Holt*, 24 N. H. 248, 55 Am. Dec. 234.

One or more members of a copartnership firm cannot execute a general assignment for the benefit of creditors, with or without preferences, without the consent of the other member or members of the firm. *Welles v. March*, 30 N. Y. 344; *Klumpp v. Gardner*, 114 N. Y. 153.

A sole surviving partner of an insolvent firm may make a general assignment of its assets for the benefit of its creditors, with preferences, and without the assent of the representatives of the deceased partner, and, in the absence of fraud, such an assignment cannot be disturbed by an unpreferred creditor. *Williams v. Whedon*, 12 Cent. Rep. 227, 109 N. Y. 833, 39 Hun, 96; *Havens v. Hussey*, 5 Paige, 30; *Sweet v. Taylor*, 36 Hun, 256; *Nehrboss v. Biles*, 88 N. Y. 600; *Egberts v. Wood*, 3 Paige, 517; *Hutchinson v. Smith*, 7 Paige, 26; *Loeschigk v. Hatfield*, 5 Robt. 26; *Cushman v. Addison*, 52 N. Y. 628; *Haynes v. Brooks*, 42 Hun, 528; *Nelson v. Tenney*, 36 Hun, 327; *Beste v. Burger*, 110 N. Y. 644, 17 Abb. N. C. 162; *Emerson v. Senter*, 118 U. S. 3 (30: 49).

Mere temporary insanity of one partner does not authorize the remaining partner to make a general assignment of the firm property. *Welles v. March*, 30 N. Y. 344; *Palmer v. Myers*, 43 Barb. 500; *Williams v. Whedon*, 39 Hun, 98; *Stadelman v. Loehr*, 47 Hun, 327; *Friedburgher v. Jaberger*, 30 Abb. N. C. 279.

partnership, with the certificate of its authentication, was filed for registration in his office on the 25th day of April, 1884, and was duly recorded on the 26th day of May of the same year.

In conformity with the direction of the clerk of the county court, the following notice was published in a designated newspaper for six successive weeks from April 26, 1884: "The undersigned give notice that they have formed a copartnership under the firm name of W. T. Tuffly, having the following terms, as will appear by their executed and recorded certificate: W. T. Tuffly is the general partner; Mrs. Christine E. McLin is the special partner, and has contributed to the common stock the sum of six thousand four hundred and nineteen \$6-100 dollars. W. T. Tuffly. Christine E. McLin."

On the day of the formation of this partnership, April 24, 1884, numerous creditors of R. W. McLin & Co.—among the number, Morrison, Herriman & Co., Dunham, Buckley & Co., W. H. Lyon & Co.—executed a written release in these words: "The undersigned, creditors of the late firm of R. W. McLin & Company, in consideration of the assumption of all the indebtedness of said late firm by the firm of W. T. Tuffly, composed of W. T. Tuffly, general, and Christine E. McLin, special partner, as appears by the certificates by them signed, hereby release the estate of R. W. McLin, deceased, from any and all liability on account of the obligations of said firm of R. W. McLin & Co., either by note or open account or otherwise."

W. T. Tuffly entered upon the business contemplated by the partnership between himself, as general partner, and Mrs. McLin, as special partner, and continued in its prosecution until the 23d of March, 1885, when he executed a writing of assignment, upon the construction and legal effect of which the decision of some of the questions in this case depends. It is in these words:

"State of Texas, County of Harris:

"Whereas the firm of W. T. Tuffly, composed of W. T. Tuffly, the general partner, and C. E. McLin, as special partner, finding it impossible to pay its debts as they mature, and being desirous to have a distribution of all the property of said firm and the property of the said W. T. Tuffly, partnership and individual, and wishing to avail himself of the provisions of the General Assignment Law in such cases made and provided: Now, therefore, in consideration of the premises and one dollar to me in hand paid, I, W. T. Tuffly, hereby assign and convey and deliver possession of all and singular my property and effects, of whatever name and nature, both personal and real, which I own as copartner and individually, and intend to include all property of which or in which I have any interest whatever, wherever the same may be, to Louis Tuffly, as assignee, for the purposes aforesaid, taking possession of the same and sell the same, collect and convert the same, and when so sold, collected and converted, to appropriate the same ratably or in full payment, as the case may be, of all my debts and the debts of the firm of W. T. Tuffly, said assignee to proceed under the law aforesaid. This assignment is intended
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for the benefit of all such of my creditors only as will consent to accept their proportional share of said property and estate so hereby conveyed and discharge me, as aforesaid, from their respective claims, said assignee to take lawful compensation for his services herein and expenses and counsel fees necessary to aid him and enable him to carry out the purposes of this conveyance.

"Schedules are hereto attached, and made as particular as I can do at this time, but in any particular where they may be incorrect or insufficient in detail they will be corrected by me.

"In witness whereof I hereunto set my hand, at Houston, this March 23d, 1885.

"W. T. Tuffly."

That deed of assignment was duly acknowledged, and to it were attached exhibits duly verified by the oath of W. T. Tuffly. These exhibits consisted of an inventory of the estate assigned and a schedule of the debts. In the latter appears a claim of Mrs. McLin of "\$7,798, notes, borrowed money." Louis Tuffly, the assignee, indorsed his acceptance of the trust on the back of the deed, and gave bond as assignee, which was approved by the judge of the 11th Judicial District of Texas, March 23, 1885, on which day the deed of assignment and bond were filed for record in the proper office. The assignee took immediate possession of the stock of goods, wares and merchandise, belonging to the firm of "W. T. Tuffly," also of the furniture, shelves, counters and stationery in the store-house. The assignment was accepted by creditors (excluding Mrs. McLin) whose debts aggregated \$7,116.26. It was not accepted by Morrison, Herriman & Co., Dunham, Buckley & Co. or W. H. Lyon & Co. The assignee remained in possession of the property until March 31, 1885, on which day, under attachments sued out from the Circuit Court of the United States for the Eastern District of Texas, by the three firms just named, against the property of W. T. Tuffly, they were levied upon and taken by Tracy, marshal of the United States for that district. The latter refused to make a levy, and did not levy, until indemnifying bonds were executed in behalf of the attaching creditors, the latter knowing, when they sued out the attachments, that the property was in the possession of the defendant in error in virtue of the above deed of assignment.

Under the order of the court the attached property was sold and the proceeds of sale were brought into court and paid into its registry.

The present suit was brought by the assignee, in one of the courts of the State of Texas, against the marshal and the sureties on his official bond, the breach alleged being the illegal and wrongful seizure of the property in question, which was alleged to be of the value of \$29,972.22. It was removed, upon the petition of the defendants, into the court below, upon the ground that their defense arose under and involved the construction of the Constitution and laws of the United States. *Rachrack v. Norton*, 132 U. S. 337 [33: 377]. The plaintiffs in the attachment suits were, upon their motion, made parties defendant, as were also

the various parties who executed indemnifying bonds to the marshal.

The result of a trial before a jury was a verdict and judgment for \$17,000 against Tracy and the sureties on his official bond, and against the attaching creditors. There was also a verdict and judgment in favor of Tracy (upon the several indemnifying bonds given to him by those creditors) for the following amounts: \$2,500 against Dunham, Buckley & Co. and their sureties; \$2,600 against W. H. Lyon & Co. and their sureties; and \$17,000 against Morrison, Herriman & Co. and their sureties. A motion for a new trial having been overruled, the defendants have brought the case here, and assign various errors of law as having been committed by the court below in its instructions to the jury, and in its refusal to grant instructions asked by the defendants.

Mr. George Hoadly, for plaintiffs in error:

By "insolvency" as used in the Bankrupt Act when applied to traders and merchants, is meant inability of a party to pay his debts, as they become due, in the ordinary course of business.

Toof v. Martin, 80 U. S. 13 Wall. 40 (20:481); *Buchanan v. Smith*, 88 U. S. 16 Wall. 277 (21:280).

The Act of March 24, 1879, contains no repealing clause. Repeals by implication are not favored.

Harford v. U. S. 12 U. S. 8 Cranch, 109 (8:504); *Wood v. U. S.* 41 U. S. 16 Pet. 342, 362 (10:987,994); *McCool v. Smith*, 66 U. S. 1 Black, 459 (17:218); *Ex parte Yenger*, 75 U. S. 8 Wall. 85, 105 (19:332, 339); *State v. Stoll*, 84 U. S. 17 Wall. 425, 430 (21:560,562); *Arthur v. Homer*, 96 U. S. 137, 140 (24:811,813); *Ex parte Crow Dog*, 109 U. S. 556, 570 (27:1030,1032); *Cheo Heong v. U. S.* 112 U. S. 536, 550 (28:770, 775).

One partner had no authority to make this assignment:

Pore v. Hitson, 70 Tex. 517; *Bishop*, Insolvent Debtors, 121; 1 Bates, Partnership, § 338, note 1; 1 Lindley, Partnership (Rapalje's ed.) 129, note 9; *Re Lawrence*, 5 Fed. Rep. 349; *New York & F. N. Bank v. New Orleans & C. R. Co.* 78 U. S. 11 Wall. 624 (20:82).

The priority of the claim of partnership creditors to partnership assets is well settled.

Rogers v. Nichols, 20 Tex. 719; *Converse v. McKee*, 14 Tex. 20; *Warren v. Wallis*, 38 Tex. 225; *DeForest v. Miller*, 42 Tex. 34; *DeCaussey v. Baily*, 57 Tex. 665.

Mr. W. C. Oliver, for defendant in error:

An assignment made in good faith, by one member of a firm composed of two members, of the assets of the firm for the benefit of creditors, is valid.

Graves v. Hall, 32 Tex. 666; *Schneider v. Sansom*, 62 Tex. 201; *Baldwin v. Richardson*, 33 Tex. 27, 28; *Burrell*, Assignments (4th ed.) § 86 et seq. pp. 121, 125.

The deed of assignment is sufficient to convey the firm and individual effects.

McIlhenny Co. v. Miller, 68 Tex. 357; *Donoho v. Fish*, 58 Tex. 166; *Coffin v. Douglass*, 61 Tex. 407.

In construing this Assignment Act this court will accept the interpretation of the Supreme Court of the State.

Spear, Law of Fed. Judiciary, 649-651; *Aaronson v. Deutsch*, 24 Fed. Rep. 465; *Rice v. Frayser*, 24 Fed. Rep. 480; *Livermore v. Jencken*, 62 U. S. 21 How. 126 (16:55); *Peeler*, Law of Equity in U. S. Courts, 217, 218.

Restricting the benefits of the assignment to accepting creditors only who should discharge the debtor did not invalidate the assignment.

Keating v. Vaughn, 61 Tex. 521.

The Act provides for the removal of the assignee in case of fraud and the administration of the assigned estate in accordance with the law.

Fant v. Elebury, 68 Tex. 1; *Gen. Laws of Texas* 1883, p. 47; *Keller v. Smalley*, 63 Tex. 515; *Blum v. Welborne*, 58 Tex. 157; *Wert v. Schneider*, 64 Tex. 327; *McCart v. Maddox*, 68 Tex. 459.

To persons who had actual notice of the limited liability of one partner and dealt with the firm with that understanding, it was in law a limited partnership.

Story, Partnership, § 130; *Barter v. Clark*, 4 Ired. L. 127; *Lachomette v. Thomas*, 5 Rob. (La.) 172; *Parsons*, Partnerships, 538.

The law favors an equitable distribution of the effects of an insolvent.

Windham v. Patty, 62 Tex. 494; *Coffin v. Douglass*, 61 Tex. 406.

Mr. Justice Harlan delivered the opinion of the court:

Our attention will be first given to the Statutes of Texas, relating to limited partnerships, and to assignments for the benefit of creditors.

By the Revised Civil Statutes of that State, which went into effect on the 1st day of September, 1879, it is provided that limited partnerships for the transaction of any mercantile, mechanical, manufacturing or other business, except banking or insurance, may be formed by two or more persons, with the rights and powers, upon the terms and subject to the conditions and liabilities, prescribed in chapter 68 of that Revision.

Such partnerships may consist of one or more persons as general partners, and of one or more persons as special partners, the latter contributing in actual cash payments a specific sum to the common stock, but without liability for the debts of the partnership, beyond the fund so contributed by him or them to the capital. Art. 3443. The general partners only are authorized to transact business and sign for the partnership and to bind the same. Art. 3444. Persons desirous of forming such partnership are required to make and severally sign a certificate, containing: "1. The name or firm under which the partnership is to be conducted; 2. The general nature of the business to be transacted; 3. The names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence; 4. The amount of capital which each special partner shall have contributed to the common stock; 5. The period at which the partnership is to commence and the period at which it is to terminate." Art. 3445.

The certificate must be acknowledged before, and certified by, an officer authorized to take acknowledgments of conveyances of land, be filed in the office of the clerk of the county court of every county in which the partnership shall have places of business, and be recorded at large in each of such counties, in a book to be kept for that purpose, open to public inspection. With the original certificate and the evidence of its acknowledgment must be filed an affidavit of one or more of the general partners, stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock have been actually and in good faith paid in cash. Arts. 3446, 3447, 3448. "No such partnership shall be deemed to have been formed until a certificate shall have been made, acknowledged, filed and recorded, nor until an affidavit shall have been filed as above directed; and if any false statement be made in such certificate or affidavit all the persons interested in such partnership shall be liable for all the engagements thereof as general partners." Art. 3449. "The partners shall publish the terms of the partnership, when registered, for at least six weeks immediately after such registry, in such newspapers as shall be designated by the clerk in whose office such registry shall be made, and if such publication be not made the partnership shall be deemed general." Art. 3450. The affidavit of the publication, by the publisher of the newspapers in which the notice is published, filed with the clerk, is evidence of the facts therein contained. Art. 3451. "Every alteration which shall be made in the names of the partners, in the nature of the business or in the capital or shares thereof, or in any other matter specified in the original certificate, shall be deemed a dissolution of the partnership; and every such partnership which shall in any manner be carried on after any such alteration shall have been made shall be deemed a general partnership, unless renewed as a special partnership according to the provisions of the last article." Art. 3453. "The business of the partnership shall be conducted under a firm in which the names of the general partners only shall be inserted, without the addition of the word 'company,' or any other general term; and if the name of any special partner be used in such firm, with his privity, he shall be deemed a general partner." Art. 3454. "Suits in relation to the business of the partnership may be brought and conducted by and against the general partners in the same manner as if there were no special partners." Art. 3455. "No part of the sum which any special partner shall have contributed to the capital stock shall be withdrawn by him, or paid or transferred to him in the character of dividends, profits or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest shall not reduce the original amount of such capital; and if, after the payment of such interest, any profit shall remain to be divided he may also receive his portion of such profits." Art. 3456. "If it shall appear that by the payment of interest or profits to any special partner the original capital has been reduced, the partner receiving the same shall be bound to restore the amount necessary to

make good his share of the capital with interest." Art. 3457.

Article 3460, which is the subject of much discussion by counsel, is in these words: "Every sale, assignment or transfer of any property or effects of the partnership made by such partnership when insolvent or in contemplation of insolvency; or after, or in contemplation of insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of such partnership; and every judgment confessed, lien created or security given by any such partnership under the like circumstances and with like intent, shall be void as against the creditors of such partnership." Article 3461 is as follows: "In case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as creditor until the claims of all other creditors of the partnership shall be satisfied."

The Revision of 1879 was adopted by an Act passed March 17, 1879, the latter Act going into effect July 24, 1879. It should be here stated that chapter 68 of the Revised Statutes is a reproduction, without material change, of the provisions of the Act of May 12, 1846, entitled "An Act for the Regulation of Limited Partnerships." Laws of Texas 1846, p. 279.

On the 24th of March, 1879, the Legislature passed an Act, entitled "An Act in Relation to Assignments for the Benefit of Creditors, and to Regulate the Same, and the Proceedings Thereunder." Gen. Laws Texas 1879, p. 57. The first section of that Act provides: "That every assignment made by an insolvent debtor, or in contemplation of insolvency, for the benefit of his creditors, shall provide, except as herein otherwise provided, for a distribution of all his real and personal estate, other than that which is by law exempt from execution, among all his creditors in proportion to their respective claims, and, however made or expressed, shall have the effect aforesaid, and shall be so construed to pass all such estate, whether specified therein or not, and every assignment shall be proved or acknowledged and certified and recorded in the same manner as is provided by law in conveyances of real estate or other property." The second section requires the debtor to annex to the assignment an inventory showing a full and true account of all his creditors, their place of residence, the sum due each, the nature and consideration of each debt, any existing judgment, mortgage or security for such debt, and the character of the debtor's estate of every kind (excepting such as the law exempts from execution) with the incumbrances thereon. To this schedule must be annexed the affidavit of the debtor that it is a just and true account to the best of his knowledge and belief.

The third section, upon which the assignment involved in this suit rests, is in these words:

"Section 3. Any debtor, desiring so to do, may make an assignment for the benefit of such of his creditors only as will consent to accept their proportional share of his estate, and discharge him from their respective claims, and in such case the benefits of the assignment shall be limited and restricted to the creditors consenting thereto; the debtor shall thereupon be

and stand discharged from all further liability to such consenting creditors on account of their respective claims, and when paid they shall execute and deliver to the assignee for the debt or a release therefrom." Gen. Laws Tex. 1879, pp. 57, 58.

The ninth section declares that "all property conveyed or transferred by the assignor, previous to and in contemplation of the assignment, with the intent or design to defeat, delay or defraud creditors, or to give preference to one creditor over another, shall pass to the assignee by the assignment, notwithstanding such transfer."

The remaining sections of the Act prescribe the duties of the assignee, and regulate the administration of the trust.

The third section of the Act of 1879 was amended by an Act approved April 7, 1883, so as to provide that "such debtor shall not be discharged from liabilities to a creditor who does not receive as much as one third of the amount due and allowed in his favor as a valid claim against the estate of such debtor." Gen. Laws Texas, 1883, p. 46.

1. We have seen that article 3460 of the Revised Statutes of Texas declares void, as against the creditors of a limited partnership, every sale, assignment or transfer of any of its property or effects, made when such partnership was insolvent or contemplated insolvency, and with the intent to give a preference of some over others of its creditors. The first proposition of the defendants is that the assignment to the plaintiff of March 23, 1895—which was confessedly made by a partnership unable to meet its debts as they matured, and therefore insolvent (*Cunningham v. Norton*, 125 U. S. 77, 90 [31: 624, 628])—was void, as giving a preference to consenting creditors over those who did not consent. This contention is based upon the assumption that the Act of March 24, 1879, as amended by that of 1883, has no application to limited partnerships; in other words, insolvent individual debtors and insolvent general partnerships may, but insolvent limited partnerships cannot, assign their property for the benefit, primarily, of only such creditors as will consent to take their proportional share of the effects assigned, and discharge the assignor or assignors. The bare statement of this proposition suggests the inquiry, Why should the Legislature make any such discrimination against limited partnerships? The same considerations of public policy that require legislation under which an insolvent individual debtor and an insolvent general partnership may turn over their property to such creditors as will release their debts, would seem to have equal force in the case of limited partnerships that are insolvent or contemplate insolvency. Counsel for the defendants suggests that the reason for the discrimination—which, he insists, is made by the Statutes of Texas—is, that the creditors of a limited partnership trust only the liability of the general partner, and the fund contributed by the special partner, and when they lose recourse upon that fund they have recourse only to the liability of the general partner. We do not perceive, in this statement of the relations between a limited partnership and its creditors, any just ground

upon which to rest the supposed discrimination.

The argument that the Statutes of 1879 and 1883 have no application to limited partnerships is based upon these propositions: that those enactments do not, in terms, repeal or modify article 3460 of the Revised Civil Statutes; that repeals by implication merely are not favored; that article 3460 constitutes a part of a title in the Revision, which relates—as did the Act of 1846, from which it was taken—exclusively to limited partnerships; and as the recent statutes do not, in terms, refer to limited partnerships, the duty of the court is to so construe the earlier and later statutes as, if possible, to give full effect to each according to the reasonable import of its words, a result, it is contended, that cannot be attained, unless the Acts of 1879 and 1883 are interpreted as not embracing assignments by limited partnerships.

We have not been referred to any decision of the Supreme Court of Texas sustaining this view, and we cannot adopt any such interpretation. The recent enactments cover, substantially, the whole subject of assignments by insolvent debtors for the benefit of their creditors. The first section of the Act of 1879 provides, as we have seen, that every assignment by an insolvent debtor, for the benefit of his creditors, shall provide for the distribution of all his real and personal estate, other than that exempted from execution, among all of his creditors, and, however made or expressed, the assignment shall have the effect, and be construed, to pass all such estate. This accomplishes all and more than was accomplished by article 3460 of the Revised Statutes. Will it be contended that this section applies only to assignments by individual debtors, and by general partnerships, and not to assignments by limited partnerships? That section, in terms, embraces "every assignment" by insolvent debtors for the benefit of their creditors. And the third section, enabling the debtor to surrender his estate for the exclusive benefit of creditors who will take their proportional share, and discharge him, embraces the case of "any debtor" who is insolvent or contemplates insolvency. The object of the Act of 1879 was to encourage insolvent debtors to make an assignment of their property for the benefit of creditors. *Cunningham v. Norton*, 125 U. S. 77, 81 [31: 624, 625]. It establishes a complete system for the administration of the estates of insolvent debtors conveyed for the benefit of creditors; and the mere fact that it does not, in terms, modify article 3460 of the Revised Statutes, or the section of the same purport in the Act of 1846, will not justify the courts in excepting from its operation the cases of debtors constituting a limited partnership, and including within its provisions debtors constituting a general partnership. The special object of its third section was to open the way for the discharge of insolvent persons from their debts. Creditors who would not consent to their discharge were left to stand upon their rights, and take the chance of collecting their debts in full, if the debtor got upon his feet, and was fortunate enough to acquire other property. The Statute is remedial in its character and should be liberally con-

strued so as to give effect to the legislative will. And while it is true that repeals by implication are not favored by the courts, it is settled that, without express words of repeal, a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern. *United States v. Tynen*, 78 U. S. 11 Wall. 88, 95 [20: 153, 155]; *Cook County Nat. Bank v. United States*, 107 U. S. 445, 451 [27: 537, 538]. We are of opinion, therefore, that in so far as article 3460 forbids a limited partnership, when it is insolvent, or contemplates insolvency, from making an assignment of its property for the benefit only of such creditors as will accept their proportional share of the proceeds of the effects assigned, and discharge their claims—the share received being sufficient to pay one third of the debts of the consenting creditor—it is modified by the Act of 1879, as amended by that of 1883.

2. If in error upon this point, the defendants contend that Tuffly had no authority in his own name to execute an assignment of the firm's property for the benefit of creditors; it not appearing that Mrs. McLean was absent, or incapable of acting in the matter, and the assignment being out of the common course. While there is some conflict in the adjudged cases as to the circumstances under which one partner may assign the entire effects of his firm for the benefit of creditors, the Supreme Court of Texas, in *Graves v. Hall*, 32 Tex. 665, sustained the authority of one partner to make, in good faith, in the name of his firm, an assignment of the partnership property for the benefit of creditors. Besides, under the law of that State, in the case of limited partnerships, the general partners only are authorized to transact business and sign for the partnership, and bind the same, and suits in relation to the business of the partnership may be brought and conducted by and against the general partners, in the same manner as if there were no special partners. Rev. Stat. Texas, §§ 3444, 3455.

3. It is also contended that the assignment does not purport to convey the firm property or the individual property of Mrs. McLin, and was, for that reason, void under the decisions in *Donoho v. Fish*, 58 Tex. 164, and *Coffin v. Douglass*, 61 Tex. 406. In those cases it was held that an assignment by partners which did not purport to pass title to all the property owned by the partnership, and by the members thereof in their separate rights, and not exempted from forced sale, could not be sustained as a valid assignment under the Act of March 24, 1879, and would interpose no obstacle to creditors collecting their debts by the usual process.

We do not assent to the defendants' interpretation of the assignment. It is inaptly expressed, but was intended to convey, and does convey, to the assignee all of the effects of the firm of "W. T. Tuffly," as well as the individual property of W. T. Tuffly. There was, it is true, proof tending to show that Mrs. McLin had individual property not exempt from execution, which was not embraced in the assignment. But the cases of *Donoho v. Fish* and *Coffin v. Douglass* were not cases of limited

partnerships, and do not decide that an assignment under the Act of 1879 must embrace the individual property of a special partner. The Statute authorizing the formation of limited partnerships exempts a special partner from liability for the debts of the partnership beyond the fund contributed by him to the capital. The assignment in question covers the interest of Mrs. McLin as special partner, and need not have conveyed her individual property, which could not have been taken for the debts of the firm.

4. It is contended that an unlawful preference was given by the assignment in this: That Mrs. McLin was named in the schedule attached to the assignment as a creditor to the extent of \$7,798 for borrowed money. This, it is claimed, makes the assignment void under the provision that "in case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as creditor until the claims of all other creditors of the party shall be satisfied." Texas Code, art. 3463. We are of opinion that a deed of assignment, under the Texas Statute, is not void because the verified schedule annexed to it may embrace a debt that cannot be paid ratably with the claims of other creditors. In *Fant v. Elsbury*, 68 Tex. 1, 8, 6, it was held that an assignment which on its face preferred some creditors over others, in violation of the 18th section of the Act of 1879, was not therefore void. The court said: "By the express terms of that section the attempted preference and not the assignment is void. The estate is still administered under the Act, and is distributed among all the creditors in proportion to their respective claims, notwithstanding the attempted preference." Again: "All that is necessary is, that the assignment be made for the benefit of creditors by an insolvent, or one contemplating insolvency, and the Statute dictates everything requisite to be performed in order that the property conveyed may be distributed according to its own provisions, whether the assignor has so requested or not. Should the assignor prescribe a course to be pursued by the trustees different from that directed by the Statute, his wishes would not be respected." See also *McCart v. Maddox*, 68 Tex. 456, to the same general effect.

5. It is contended that the publication of the notice of the formation of the partnership between Tuffly and Mrs. McLin was so defective that the partnership did not come into legal existence as a limited partnership. The certificate of partnership contained, substantially, all that was required by article 3445. It was duly verified by the general partner and was duly registered in the proper office. The required certificate having been made, acknowledged, filed and recorded, and the required affidavit having been filed, the limited partnership was, under article 3449, to be deemed as formed. But article 3450 requires that the partners shall publish the terms of the partnership or registry in such newspaper as shall be designated by the clerk in whose office the registry shall be made, and if such publication be not made, the partnership shall be deemed general. Now, the point is made that the "terms" of the partnership were not set forth in the newspaper notice, and consequently the partner-

ship was to be deemed general, in which event no valid assignment could be made, unless Mrs. McLin joined in it with Tuffly.

Precisely what the Statute means by the "terms" of the partnership is not clear. The notice did state that W. T. Tuffly was the general partner, and Mrs. McLin the special partner, and that the latter had contributed to the common stock the sum of \$6,419.36. And it disclosed the fact that the certificate of the partnership had been executed and recorded. Without deciding whether the notice sufficiently disclosed the terms of the partnership, it is clear that the legal existence of the partnership did not depend upon the notice or its contents. The only effect of the failure to make the required publication was that "the partnership shall be deemed general." But that is immaterial in view of the finding of the jury in respect to certain facts, constituting an estoppel against the defendants, and which were submitted to them by the instructions. To these facts, and the instructions relating to them, we will next refer.

6. The jury were instructed: "If you shall find from the evidence that the limited partnership as stated and claimed by plaintiff was recognized as such in its inception by the three attaching creditors, defendants herein, and likewise during its existence was dealt with and credited as such by them, as well as sued therefor and its property attached as such after its assignment, and that its other creditors also treated and dealt with it, and accepted its assignment to plaintiff, as such, and that Mrs. McLin, named therein as the special or limited partner, and W. T. Tuffly, named therein as the general partner, and whose name constituted the firm name, always treated it as a special or limited partnership, and that Mrs. McLin loaned it money as claimed, and subsequently sued the plaintiff as its assignee therefor, then and in such case you likewise may deem the same a limited partnership and regard the assignment to plaintiff as valid.

"If you shall also find that the same was made at a time when the 'W. T. Tuffly' paper was maturing faster than it could be met in the ordinary and usual course of business, and that such assignment was made in good faith in contemplation of insolvency; and if you shall further find that the defendant Tracy, as United States marshal, seized the property so assigned, under and by virtue of the attachments of the three attachment creditors who have made themselves defendants herein, then you will find for the plaintiff herein as against defendant Tracy and the sureties on his official bond and the three firms of attaching creditors for the value of the goods as they were at the time and place of their seizure under such writs of attachment, such value to be ascertained from all the facts detailed in evidence before you.

"But if you shall otherwise find as to the facts constituting the rights of the parties as hereinbefore set forth, then and in such case your verdict will be for the defendants."

According to the bills of exceptions there was evidence tending to prove all the facts stated in these instructions. The attaching creditors, with other creditors, described them in the release executed by them at about the time of the formation of the limited partner-

ship as constituting a limited partnership, in which W. T. Tuffly was the general, and Mrs. McLin the special, partner. If the attaching creditors thus recognized and dealt with W. T. Tuffly and Mrs. McLin as a limited partnership, they are estopped from insisting that there was no such partnership, or that the assignment was not valid as an assignment by a limited partnership. They cannot be permitted thereafter to raise the objection that the terms of the partnership were not sufficiently stated in the published notice of its formation. Those terms were fully set forth in the recorded certificate of the partnership.

But as the defendants contended that their recognition of the limited partnership was in ignorance of material facts bearing upon that question, and therefore they were not estopped, the court, at their instance, further instructed the jury:

"If the proof shows you that Mrs. McLin never in fact contributed the amount to the common stock necessary to make her a special partner, or that she afterwards altered and diminished the amount of her capital stock, and that these facts, or either of them, were unknown to the attaching creditors who are defendants herein at the time they dealt with the firm and sued W. T. Tuffly, then you are instructed that neither the recognition and dealing by them with Tuffly and Mrs. McLin as a limited partnership, nor the suing of W. T. Tuffly in ignorance of said facts, estops or precludes them, or any of the defendants, from showing that said partnership was never in fact legally formed as a limited partnership, for the reason above stated, nor from showing that it afterwards, by reason of the alteration and diminution of Mrs. McLin's capital stock, was rendered a general partnership."

This instruction gave the defendants the full benefit of all the facts upon which they could rely to defeat the estoppel referred to in the other instruction.

7. A considerable part of the discussion at the bar, and of the briefs of counsel, was directed to the question whether the court erred in refusing to give to the jury a certain charge which was prepared and submitted by the defendants. So much of that charge as constituted an argument rather than an instruction in behalf of the defendants may be omitted from this opinion. The material part of it was to the effect that if Mrs. McLin's husband had a net interest, at or about the time of his death, in the firm of R. W. McLin & Co., and that in consideration of the arrangement by W. T. Tuffly, for full settlement of all claims against the firm, and the obtaining of a release of R. W. McLin's estate from liability on account of the same, she assigned and transferred to W. T. Tuffly all the goods, wares, merchandise and other property of the firm, "and that the interest so conveyed constituted her contribution to the common stock to make her a special partner, this would not be such contribution of actual cash as the law requires or contemplates, no matter what the outward form of the transaction was, and in such case Mrs. McLin would have thereupon become a general partner and liable as such, and no advance, loan or payment thereafter made by her to W. T. Tuffly or to the firm would change her status from

that of a general partner, and if you so find, then you are instructed that it was essential to the validity of the assignment that she should have joined in it and conveyed to the assignee her individual property not exempt, and that as she did not do so the assignment would be illegal and void, and that your verdict should be for the defendants."

We shall not extend this opinion by a discussion of the several propositions embodied in this instruction. It is sufficient to say: (1) The issues as to whether Mrs. McLin made the contribution to the common stock necessary to make her a special partner, or whether there was an alteration or diminution of her capital stock, were fairly submitted to the jury in the instruction that the court gave at the instance of the defendants. (2) The instruction now in question was in conflict with the first one given by the court upon its own motion; if given, it might have resulted in a verdict for the defendants, although the jury may have found that the partnership between Tuffly and Mrs. McLin was recognized by the attaching and other creditors, in its inception, and was dealt with by all of them during its existence, as a limited partnership, in which Mrs. McLin was known by them to be the special partner, and W. T. Tuffly the general partner.

Many other instructions were asked by the defendants which the court refused to grant. But it is unnecessary to discuss them, as what has been said is sufficient to indicate our opinion touching the essential issues in the case.

Upon the whole case we are of opinion that no error was committed by the court below, and the judgment must be affirmed.

WILLIAM HILL, *Piff. in Err.*,

v.

THE CITY OF MEMPHIS, MISSOURI.

(See S. C. Reporter's ed. 198-204.)

Town bonds, authority to issue—power of town, and of municipal corporations—Missouri Railroad Law—constitutional prohibition against issuing bonds by town.

1. The Missouri Act of February 9, 1857, to incorporate the Alexandria and Bloomfield Railroad Company, gives no authority to any town of the State to issue bonds for stock subscribed by it.
2. The power of a town to subscribe for stock does not of itself include the power to issue bonds of the town in payment of it.
3. Municipal corporations are established for purposes of local government, and in the absence of specific delegation of power cannot engage in any undertakings not directed immediately to the accomplishment of those purposes.
4. Section 17 of the General Railroad Law of Missouri must be construed in subordination to the Constitution of the State, which prohibits the Legislature from authorizing any town to loan

its credit to any corporation unless two thirds of the qualified voters of the town, at a regular or special election, shall assent thereto.

5. The Constitution of the State controls the construction of the Missouri Act of March 24, 1868, and prevents the issue of any bonds by a town of the State without the previous assent of two thirds of its voters expressed at an election, general or special, called for that purpose.

[No. 68.]

Argued Nov. 6, 1889. Decided March 10, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment in favor of the City of Memphis, defendant, in a suit to recover the amount of certain coupons of bonds purporting to have been issued by the Town of Memphis. *Affirmed.*

Opinion below, 28 Fed. Rep. 872.

Statement by *Mr. Justice Field*:

This is an action against the City of Memphis, a municipal corporation of Missouri, alleged to have been known and designated on the first day of March, 1871, as the Town of Memphis, and styled the Inhabitants of the Town of Memphis. It is brought to recover the amount of one hundred and thirty-eight coupons, each for eighty dollars, detached from certain railroad bonds purporting to have been issued by that Town. These bonds, except in their number, are in the following form:

"Number 4. Dollars 1,000.
United States of America.
Eight per cent railroad bond. Town of Memphis, County of Scotland.
Twenty years.

"Know all men by these presents that the Town of Memphis, in the County of Scotland, in the State of Missouri, acknowledges itself indebted to the Missouri, Iowa and Nebraska Railway Company, a corporation existing under and by virtue of the laws of the States of Missouri and Iowa, formed by a consolidation of the Alexandria and Nebraska City Railroad Company (formerly Alexandria and Bloomfield Railroad Company), of the State of Missouri, and the Iowa Southern Railway Company, of the State of Iowa, in the sum of one thousand dollars, which sum the said Town hereby promises to pay to the said Missouri, Iowa and Nebraska Railway Company, or bearer, at the Farmers' Loan and Trust Company in New York, on the first day of March, A. D. 1891, with interest thereon from the first day of March, 1871, at the rate of eight per cent per annum, which interest shall be payable annually, in the City of New York, on the first day of March in each year, as the same shall become due, on the presentation of the coupons hereto annexed. This bond being issued under and pursuant to an order of the board of trustees of the Town of Memphis, for subscription to the stock of the Missouri, Iowa and Ne-

NOTE.—Municipal bonds as affected by change in the ruling of the highest court of the State, or by change in the Constitution. See note to *Mitchell v. Burlington*, 18: 350.

As to suits on coupons detached from bonds, see note to *Kenosha v. Lamson*, 19: 725.

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As to mandamus to compel city, town or county to levy tax to pay bonds or interest on bonds, see note to *Davenport v. U. S.* 19: 704.

Recitals in negotiable bonds or securities, as evidence of the fact recited and as an estoppel. See note to *Mercer County v. Hackett*, 17: 548.

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braska Railway Company, as authorized by an Act of the General Assembly of the State of Missouri, entitled 'An Act to Incorporate the Alexandria and Bloomfield Railroad Company, Approved February 9, 1857.' In testimony whereof the said Town of Memphis has executed this bond by the chairman of the board of trustees signing his name hereto, and the clerk of said board of trustees under the order thereof attesting the same and affixing thereto the seal of said board. Thus done at the Town of Memphis, in the County of Scotland, in the State of Missouri, this first day of March, A. D. 1871.

" [Seal Town of Memphis,
Scotland Co., Missouri.]

"H. H. Byrne,

"Chairman of the Board of Trustees of the Town of Memphis.

"Attest: William L. Kays, Clerk."

The coupons, excepting in their number and dates, are in the following form:

"Railroad Bond Coupon. 80.

"Memphis, Mo., March 1, 1871.

"The Town of Memphis, State of Missouri, will pay to the bearer on March 1, 1885, at the Farmers' Loan & Trust Company, in New York, eighty dollars, being one year's interest on Bond No. 4, for \$1,000.

"H. H. Byrne, Chairman."

The bond, on its face, purports to have been issued on the 1st day of March, 1871, by order of the board of trustees of the Town of Memphis, for subscription to the stock of the Missouri, Iowa and Nebraska Railway Company, as authorized by an Act of the General Assembly of the State of Missouri, entitled "An Act to Incorporate the Alexandria and Bloomfield Railroad Company," approved February 9, 1857. That Act provided that the company should in all things be subject to the same restrictions, and be entitled to all the privileges, rights and immunities which were granted to the North Missouri Railroad Company by its Act of Incorporation, so far as the same were applicable, as fully and completely as if they were thereby re-enacted. The fourteenth section of this latter Act is as follows:

"Sec. 14. It shall be lawful for the county court of any county, in which any part of the route of said railroad may be, to subscribe to the stock of said company, and it may invest its funds in the stock of said company, and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper measures to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it and receive its dividends; and (any) incorporated city, town or incorporated company may subscribe to the stock to said railroad company, and appoint an agent to represent its interests, give its vote and receive its demands (dividends), and may take proper steps to guard and protect the interests in (of) such city, town or corporation."

The plaintiff also relied as authority for issuing the bonds, though not recited in them, upon section 17 of the General Railroad Law of Missouri, which went into effect August 1, 1866. That section is as follows: "Sec. 17. It

shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county city or town in, or loan the credit thereof to, any railroad duly organized under this or any other law of the State, provided that two thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription." (Gen. Stat. of Mo. 338.) He also relied upon the Act of March 24, 1868, entitled "An Act to Enable Counties, Cities and Incorporated Towns to Fund Their Respective Debts," which is as follows:

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. That the various counties of this State be, and they are hereby, authorized to fund any and all debts they may owe, and for that purpose may issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached; and all counties, cities or towns in this State which have or shall hereafter subscribe for the capital stock of any railroad company may, in payment of such subscriptions, issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached. The bonds authorized by this Act shall be payable not more than twenty years from date thereof.

"This Act to take effect from and after its passage.

"Approved March 24, 1868."

Article eleven of the Constitution of Missouri, which went into effect in 1865, declares that "the General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two thirds of the qualified voters of such county, city or town, at a regular or special election to be held therefor, shall assent thereto."

The Town of Memphis was incorporated by Act of the Legislature of Missouri, November 4, 1857, but that Act was repealed on the 31st of December, 1859. An attempt was made to show that the people of the same area of country, in the following year, organized themselves into a municipality under the General Law of the State, by the name of "The Inhabitants of the Town of Memphis," and so continued until 1880; that by its trustees an election was ordered to determine whether it should subscribe \$30,000 to the stock of the railroad in question; that such election was accordingly had; that the subscription was voted by a two-thirds vote; and that in pursuance of it the stock was subscribed and bonds of the Town were issued. The evidence on these points was very unsatisfactory, but, in the view taken of the want of power in the Town to issue the bonds, it becomes immaterial. The court instructed the jury that on the face of the record produced before them they must find for the defendant, as no authority was shown, on the part either of the Town or City of Memphis, to issue the bonds in question. The jury accordingly found for the defendant, upon which judgment was entered, to review which the case is brought here on writ of error. 28 Fed. Rep. 872.

Messrs. John H. Overall and F. T. Hughes, for plaintiff in error:

The power conferred upon the Town of Memphis by the railroad charter of 1851, to subscribe for its stock, necessarily implied, as incidental to the execution of said power, authority to issue municipal bonds to provide for payment of the subscription.

Dillon, Mun. Corp. § 507; *Seibert v. Pittsburg*, 68 U. S. 1 Wall. 272 (17: 558); *Rogers v. Burlington*, 70 U. S. 8 Wall. 654 (18: 79); *Police Jury v. Britton*, 82 U. S. 15 Wall. 566 (21: 251); *Lynde v. Winnebago County*, 83 U. S. 16 Wall. 6 (21: 872); *Wells v. Pontotoc County*, 102 U. S. 625 (26: 122); *Nashville v. Ray*, 86 U. S. 19 Wall. 468 (22: 164); *Claiborne County v. Brooks*, 111 U. S. 400 (28: 470); *Gause v. Clarksville*, 5 Dill. 165.

The issuance of these bonds was authorized by the Act of March 24, 1868, entitled "An Act to Enable Counties, Cities and Towns to Fund Their Respective Indebtedness."

Ogden v. Daviess County, 102 U. S. 684 (26: 263); *Ritchie v. Franklin County*, 89 U. S. 22 Wall. 67 (22: 825); *St. Louis County Ct. v. Griswold*, 58 Mo. 198; *Jarroll v. Moberly*, 5 Dill. 253, 108 U. S. 555 (26: 493); *James v. Milwaukee*, 83 U. S. 16 Wall. 159 (21: 267); *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625 (23: 628).

Mr. Henry A. Cunningham, for defendant in error:

Every purchaser was bound to inquire as to the power of those who executed the bonds.

Chambers County v. Clews, 88 U. S. 21 Wall. 324 (22: 518); *Cromwell v. Sac County*, 96 U. S. 51 (24: 681); *Merchants Bank v. Bergen County*, 115 U. S. 391 (29: 432).

Power to subscribe stock does not imply power to issue bonds.

Norton v. Dyersburg, 127 U. S. 160 (32: 85); *Kelley v. Milan*, 127 U. S. 130 (32: 77); *McClure v. Oxford*, 94 U. S. 433 (24: 130).

The bond does not recite the condition precedent of an election; therefore there is no estoppel because of recitals.

Independent Public School v. Stone, 106 U. S. 183 (27: 90); *Carroll County v. Smith*, 111 U. S. 556 (28: 517); *Marsh v. Fulton County*, 77 U. S. 10 Wall. 676 (19: 1040); *Carpenter v. Lathrop*, 51 Mo. 483.

No election is valid, unless preceded by registration.

State v. Albin, 44 Mo. 349; *State v. Brassfield*, 67 Mo. 331; *Ensworth v. Albin*, 46 Mo. 453; *Zeiler v. Chapman*, 54 Mo. 505.

Omission to hold election at proper time makes same void.

State v. Jenkins, 43 Mo. 261.

Recitals, whether in bonds or in records, do not extend to matters of law, of which all persons are bound to take notice.

Dixon County v. Field, 111 U. S. 83 (28: 360); *Rates County v. Winters*, 97 U. S. 83 (24: 933); *South Ottawa v. Perkins*, 94 U. S. 267 (24: 156); *McClure v. Oxford*, 94 U. S. 433 (24: 130).

There was no proof of the existence of a lawfully incorporated Town of Memphis.

Plaintiff in error was bound to inquire as to authority of the chairman of board of trustees and the clerk who signed and sealed the bonds in the name of a defunct corporation.

Hoff v. Jasper County, 110 U. S. 53 (28: 68); 184 U. S.

The Floyd Acceptances, 74 U. S. 7 Wall. 666 (19: 169).

The above propositions are sustained in *Hopkins v. Kansas City, St. J. & C. B. R. Co.* 79 Mo. 99; *Hambleton v. Dexter*, 4 West. Rep. 784, 89 Mo. 191; *Norton v. Shelby County*, 118 U. S. 443 (30: 186); *South Ottawa v. Perkins*, 94 U. S. 267 (24: 156); *Daviess County v. Dickinson*, 117 U. S. 665 (29: 1029); *State v. Miller*, 66 Mo. 328; *St. Louis v. Bell Teleph. Co.* 2 L. R. A. 278, 96 Mo. 628; 1 *Dillon*, Mun. Corp. (3d ed.) § 89; *Leach v. Cargill*, 60 Mo. 316.

The Act of March 24, 1868, was repugnant to the fourteenth section, art. eleven, of the Constitution of Missouri, so far as it authorized subscription to stock of railway companies.

Webb v. Lafayette County, 67 Mo. 370; *Louisiana v. Taylor*, 105 U. S. 455 (26: 1133); *Johnson County v. January*, 94 U. S. 205 (24: 111); *State v. Curators of State University*, 57 Mo. 181; *Jarroll v. Moberly*, 108 U. S. 580 (26: 492).

Subscriptions of stock and bonds thereafter to be made were different subjects from the existing debts contemplated by the title of such Act.

State v. Lafayette County, 41 Mo. 39; *State v. Persinger*, 76 Mo. 346.

The mandamus proceedings mentioned in the record, by the summons wherein alleged trustees of the inhabitants of the Town of Memphis were required to answer a petition of the State of Missouri at the relation of the Town of Memphis, bound only those made parties and could constitute no estoppel concerning entirely different coupons herein involved.

Cromwell v. Sac County, 94 U. S. 353 (24: 195); *Aspden v. Nixon*, 45 U. S. 4 How. 407 (11: 1059); *Lewis v. Shreveport*, 108 U. S. 232 (27: 728); *Russell v. Place*, 94 U. S. 606 (24: 214); *Daviess County v. Dickinson*, 117 U. S. 665 (29: 1029); *Norton v. Shelby County*, 118 U. S. 443 (30: 186); *Barkley v. Levee Comrs.* 93 U. S. 258 (23: 893); *Anthony v. Jasper County*, 101 U. S. 693 (25: 1005); *Marsh v. Fulton County*, 77 U. S. 10 Wall. 676 (19: 1040); *Rugles v. Collier*, 43 Mo. 353; *Ottawa v. Carey*, 108 U. S. 110 (27: 689); *Boyd v. Alabama*, 94 U. S. 643 (24: 303); *State v. Everett*, 52 Mo. 89; *State v. Holladay*, 65 Mo. 76; *Tapping*, Mandamus, 5, 322, 323.

Mr. Justice Field delivered the opinion of the court:

The Act of the Legislature of Missouri of February 9, 1857, to incorporate the Alexandria and Bloomfield Railroad Company, gives no authority to any town of the State to issue bonds for stock subscribed by it. The fourteenth section, which is the one upon which the plaintiff relies, empowers the county court of a county in which any part of the route of a railroad may lie to subscribe to stock of the company, to invest its funds in that stock, to issue the bonds of the county to raise the funds to pay for the stock thus subscribed, to take proper steps to protect the interest and credit of the county and to appoint an agent to represent the county and receive its dividends. The same section also empowers any incorporated city or town to subscribe stock to such railroad and to

appoint an agent to represent its interest, give its votes and receive its dividends, and take proper steps to guard and protect its interest. But it does not authorize the town to issue any bonds for the stock thus subscribed. It leaves the town to provide for the payment of the stock in the ordinary way in which debts contracted by a town are met, that is, by funds arising from taxation. It is well settled that the power to subscribe for stock does not of itself include the power to issue bonds of a town in payment of it. All grants of power in such cases to subscribe for stock in railways are to be construed strictly and not to be extended beyond the terms of the law. Whilst a municipal corporation, authorized to subscribe for the stock of a railroad company or to incur any other obligation, may give written evidence of such subscription or obligation, it is not thereby empowered to issue negotiable paper for the amount of indebtedness incurred by the subscription or obligation. Such paper in the hands of innocent parties for value cannot be enforced without reference to any defense on the part of the corporation, whether existing at the time or arising subsequently. Municipal corporations are established for purposes of local government, and in the absence of specific delegation of power cannot engage in any undertakings not directed immediately to the accomplishment of those purposes. Private corporations created for private purposes may contract debts in connection with their business, and issue evidences of them in such form as may best suit their convenience. The inability of municipal corporations to issue negotiable paper for their indebtedness, however incurred, unless authority for that purpose is expressly given or necessarily implied for the execution of other express powers, has been affirmed in repeated decisions of this court.

In *Police Jury v. Britton*, 82 U. S. 15 Wall. 566 [21: 251], it was held that the trustees or representative officers of a parish, county or other local jurisdiction in Louisiana, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, had no implied authority to issue negotiable securities for the purpose of raising money or funding a previous debt. Whilst the court did not insist that express authority is in all cases required for municipal bodies to issue negotiable paper, as such power may be implied from other express powers, it held that such implications should not be encouraged or extended beyond the fair inferences to be gathered from the circumstances of each case. "It is one thing," said the court, "for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent. If it be once conceded that the trustees or other local representatives of townships, counties and parishes have the implied power to issue coupon bonds, payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the frauds that will be perpetrated."

In *Nashville v. Ray*, 86 U. S. 19 Wall. 468,

475 [22: 164, 166], the power of municipal bodies to issue negotiable paper for debts contracted by it was largely considered, and from the nature and the purposes of such municipalities it was held that they could not make such paper in the absence of express authorization. After speaking of municipal corporations as subordinate branches of the domestic government of a State, instituted for public purposes only, having none of the peculiar qualities or characteristics of trading corporations created for purposes of private gain, except that of acting in a corporate capacity, the court said: "Their powers are prescribed by their charters and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation." And again (p. 477 [169]): "If in the exercise of their important trusts the power to borrow money and to issue bonds or other commercial securities is needed, the Legislature can easily confer it under the proper limitations and restraints, and with proper provisions for future repayment. Without such authority it cannot be legally exercised."

In *Claiborne County v. Brooks*, 111 U. S. 400, 406 [28: 470, 472], this doctrine is reiterated and reaffirmed with emphasis. Said the court: "Our opinion is, that mere political bodies, constituted as counties are, for the purpose of local policy and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it." See also *Kelley v. Milan*, 127 U. S. 139 [32: 80]; *Young v. Clarendon Township*, 132 U. S. 340, 347 [33: 356, 358].

The same doctrine prevails in Missouri. It follows that there was no authority in the Town of Memphis to issue the bonds from which the coupons in suit are detached, under the law referred to in the bonds as authorizing them.

Nor can any authority for the issue of the bonds be derived from section 17 of the General Railroad Law of the State, which went into effect June 1, 1866. Though that section in terms empowers the trustees of an incorporated town to loan its credit to any railroad company organized under a law of the State, and the issue of its bonds to such company may be considered as a loan of its credit, it must be construed in subordination to the Constitution of the State which took effect the previous year, and prohibits the Legislature from authorizing any town to loan its credit to any corporation unless two thirds of the qualified voters of the town, at a regular or special election, shall assent thereto. No assent was ever given by the voters of the Town of Memphis to the issue in 1871 of its bonds to the Missouri, Iowa and Nebraska Railway Company, but only to its subscription to stock in that company; and no

subsequent loan of credit by the issue of bonds to the company could be authorized by the Legislature except under the restrictions of the Constitution.

The same answer may be made to the claim of authority under the Act of the State of March 24, 1868, enabling counties, cities and towns to fund their debts. The Constitution of the State controls its construction and prevents the issue of any bonds by a town of the State without the previous assent of two thirds of its voters expressed at an election, general or special, called for that purpose.

Judgment affirmed.

THE STATE OF LOUISIANA, *ex rel.* THE
NEW YORK GUARANTY AND INDEMNITY
COMPANY, *Plff. in Err.*,

v.

OLIVER B. STEELE, Auditor of Public Accounts of LOUISIANA.

(See S. C. Reporter's ed. 230-232.)

Suit against State, what is—11th Amendment, U. S. Constitution—jurisdiction.

1. Mandamus proceedings to compel the auditor of the State of Louisiana to require the sheriffs in the State to levy a tax to pay interest on state bonds, contrary to present state laws, is a suit against the State.
2. Such suit is within the prohibition of the 11th Amendment of the U. S. Constitution, forbidding jurisdiction to federal courts of a suit against a State.
3. Conceding that the present state laws, repealing the previous law in favor of bondholders, are unconstitutional and void, as impairing the obligation of the contract, that does not remove the objection that the suit is one against the State.

[No. 140.]

Argued Jan. 23, 1890. Decided March 10, 1890.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment affirming a judgment of the District Court for the Parish of Orleans in favor of defendant in mandamus proceedings against the Auditor of the State of Louisiana to compel him to require the state sheriffs to levy a tax to pay interest on state bonds. *Affirmed.*

The facts are stated in the opinion.

Messrs. William Allen Butler and W. W. Howe, for plaintiff in error:

The Legislature levies the tax and the auditor simply acts as an arithmetician in calculating the amount which each taxpayer is to pay.

Flower v. Legras, 24 La. Ann. 205; *State v. Maginnis*, 26 La. Ann. 558.

If the relator had a contract right under the Act of 1869, it could not be taken away by any provision, general or special, of the Constitution of 1879, any more than by any statute subsequent to 1869.

NOTE.—When mandamus will issue. See note to *McCluney v. Silliman*, 4: 263.

As to mandamus to compel city, town or county to levy tax to pay bonds or interest on bonds, see note to *Davenport v. U. S.* 19: 704.

As to States, when can be sued; suits by States,—see note to *Hans v. Louisiana*, ante, p. 842.

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White v. Hart, 80 U. S. 13 Wall. 646 (20: 685); *State v. New Orleans*, 37 La. Ann. 440; *Louisiana, Nelson, v. St. Martin's Parish*, 111 U. S. 716 (28: 574), 32 La. Ann. 884; *Fisk v. Police Jury*, 116 U. S. 181 (29: 587).

The right of relator to have the tax estimated and collected was not taken away by the Acts Nos. 3 and 55 of 1874.

Von Hoffman v. Quincy, 71 U. S. 4 Wall. 535 (18: 403); *Woodruff v. Trapnall*, 51 U. S. 10 How. 190 (18: 888); *Hartman v. Greenhow*, 102 U. S. 672 (26: 271); *Louisiana v. Pillsbury*, 105 U. S. 301 (26: 1098), and cases cited; *Walker v. Whitehead*, 83 U. S. 16 Wall. 814 (21: 357).

The grant of state aid was not repealed by the Acts of 1874, in such way as to take away the right claimed herein by the relator and abolish the duty imposed on the respondent.

Walker v. Whitehead, 83 U. S. 16 Wall. 814 (21: 357); *Von Hoffman v. Quincy*, 71 U. S. 4 Wall. 535 (18: 403).

As to the contract rights of relator acquired in 1871 under bonds issued in 1869 and 1870, no provision of the Constitution of 1879 can have any legal effect to impair the same.

White v. Hart, 80 U. S. 13 Wall. 646 (20: 685); *Hartman v. Greenhow*, 102 U. S. 672 (26: 271); *Louisiana v. Pillsbury*, 105 U. S. 300 (26: 1098); *Wolff v. New Orleans*, 103 U. S. 358 (26: 395); *State v. New Orleans*, 34 La. Ann. 1149, 36 La. Ann. 687.

The recitals operated a complete estoppel in favor of the bona fide purchaser for value.

Mercer County v. Hackett, 68 U. S. 1 Wall. 83, 84 (17: 548); *Myer v. Muscatine*, 68 U. S. 1 Wall. 393 (17: 567); *Grand Chute v. Winegar*, 82 U. S. 15 Wall. 355 (21: 174); *Anderson County v. Beal*, 118 U. S. 227 (28: 966); *Coloma v. Eaves*, 92 U. S. 487 (28: 580).

The relator has a right to the mandamus.

Gunn v. Barry, 82 U. S. 15 Wall. 610 (21: 212); *Edwards v. Kearzey*, 96 U. S. 595, 607 (24: 793, 796).

The remedy by mandamus against the auditor is the sole remedy to compel him to perform the duties attached to his office.

State v. New Orleans, 35 La. Ann. 68; *State v. Bordelon*, 6 La. Ann. 68; *Parker v. Robertson*, 14 La. Ann. 249; *State v. Jumel*, 30 La. Ann. 861; *State v. Steele*, 37 La. Ann. 853; *State v. Burke*, 33 La. Ann. 969; *State v. Secretary of State*, 32 La. Ann. 579.

The enactments subsequent to 1871 are unconstitutional, null and void.

Fletcher v. Peck, 10 U. S. 6 Cranch, 87 (3: 162); *Von Hoffman v. Quincy*, 71 U. S. 4 Wall. 535 (18: 403); *Butz v. Muscatine*, 75 U. S. 8 Wall. 575 (19: 490); *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 175 (17: 520); *Havemeyer v. Iowa County*, 70 U. S. 3 Wall. 294, 303 (18: 38, 41); *Cohens v. Virginia*, 19 U. S. 6 Wheat. 264 (5: 257).

The cases of *Louisiana v. Jumel* and *Elliot v. Wiltz*, 107 U. S. 712 (27: 448), are not against our contention.

Mr. B. J. Sage and Alexander Porter Morse for defendant in error.

Mr. Justice Bradley delivered the opinion of the court:

This case arose upon a petition filed in the Civil District Court for the Parish of Orleans

in February, 1864, by the New York Guaranty and Indemnity Company, a corporation of New York, as relators, in the name of the State of Louisiana, for a mandamus to compel Allen Jumel, the auditor of public accounts of the State, to proceed under a certain Act of the Legislature, passed March 8, 1869, to require the several sheriffs throughout the State to levy a tax sufficient to pay the interest due on the state bonds authorized to be issued by said Act in aid of the Mississippi and Mexican Gulf Ship Canal Company. Jumel having been succeeded in office by Oliver B. Steele, the latter, on application of the relators, was substituted as defendant by order of the court. Steele, in answer to the petition, set up, amongst other things, that taxation is an act of sovereignty which can only be performed by the legislative department of the government; that by the present Constitution and laws of Louisiana, the defendant, as auditor, has no power to raise said tax; that the Act of 1869, referred to, has been repealed by an Act (No. 3) passed in 1874; and that by another Act (No. 55) of 1874 the respondent and all other officers of the State are prohibited from complying with the mandamus, and deprived of all power and authority to assess, collect or enforce the payment of the tax asked for by the relator, and the court is prohibited from entertaining jurisdiction of the suit.

The 7th section of the Act of 1869, which the relators seek to have executed, is as follows:

"Sec. 7. Be it further enacted, etc., That in order to provide a fund for the semi-annual payment of interest upon the bonds issued in accordance with this Act, and the final redemption of said bonds, should the Mississippi and Mexican Gulf Ship Canal Company fail to meet the obligations set forth in the fourth and sixth sections of this Act, when the deficit in interest to the year 1879 (one thousand eight hundred and seventy-nine), or the deficit and the annual instalment of thirty thousand dollars (\$30,000) from that date to the final redemption of said bonds, shall have reached the sum of one hundred thousand dollars (\$100,000), and as often thereafter as the said deficit shall have reached that sum, the auditor is hereby directed to determine, by accurate calculation, what rate of taxation on the total assessed value of all movable and immovable property in the State will be sufficient for the purpose of paying said deficit in interest or annual instalments, or both, and it shall also be his duty to notify the several sheriffs and tax collectors of the rate of taxation as ascertained and fixed for the purpose aforesaid; and said tax, as ascertained and fixed, is hereby levied upon all the movable and immovable property that may be assessed in this State; and it shall be the duty of the several sheriffs and tax collectors to collect said tax, and the collection of the same shall be enforced as the law provides, or may hereafter provide, for the collection of taxes."

There is no question but that, by constitutional and legislative enactment of the State of Louisiana, the above provisions of the Act of 1869 have been repealed and abrogated; and that, as set forth in the answer, the auditor has no longer, under the state laws, any power to execute them. The contention of the relators

is that the Repealing Acts, and all Acts abrogating the provision made by the Act of 1869 in favor of the bondholders, are unconstitutional and void, as impairing the obligation of the contract. Conceding this to be true, the objection still remains that this is virtually a suit against the State. The auditor is sued in his official capacity, and it is sought to compel him to act in that capacity in order to raise the tax in question, contrary to subsequent legislation and the present laws of the State. The case is clearly within the principle of the decisions in *Louisiana v. Jumel*, 107 U. S. 711 [27: 443]; *Cunningham v. Macon & Brunswick R. Co.*, 109 U. S. 446 [27: 992]; *Haygood v. Southern*, 117 U. S. 52 [29: 805]; *Re Ayers*, 123 U. S. 443 [31: 216], and *North Carolina v. Temple* [ante, p. 349], just decided.

The judgment of the Supreme Court of Louisiana is affirmed.

THE BELL'S GAP RAILROAD COMPANY, *Plff. in Err.*,

THE COMMONWEALTH OF PENNSYLVANIA.

(See S. C. Reporter's ed. 232-240.)

Federal question—motion to dismiss—tax on corporate securities—14th Constitutional Amendment—intention of—Pennsylvania method of taxation—notice—due process of law—payment of tax by corporation.

1. The objection to a tax that it is taking property without due process of law, and denies to the taxpayers the equal protection of the laws, raises a question under the Constitution of the United States, and, where the question was necessarily involved in the final decision of the case, the writ of error cannot be dismissed.

2. Where the state court does not seem to have expressly passed upon the federal question, although it was clearly in the record, there is color for making the motion to dismiss.

3. An assessment of a tax of three mills upon the nominal or face value of corporate securities, instead of assessing upon the actual value, is not a discrimination which the State is not competent to make, where all corporate securities are subject to the same regulation.

4. The provision in the XIVth Amendment, that no State shall deny to any person the equal protection of the laws, does not prevent a State from adjusting its system of taxation in all proper and reasonable ways, nor compel the States to adopt an iron rule of equal taxation.

5. The XIVth Amendment intended only that equal protection and security should be given to all under like circumstances, and that no greater burdens should be laid upon one than are laid upon others in the same calling and condition.

6. The method of assessing the tax in question, on the face value of corporate securities in Pennsylvania, is not violative of the XIVth Amendment to the Constitution.

7. The process of taxation does not require the same kind of notice as is required in a suit at law. It involves no violation of due process of law when it is executed according to customary forms and established usages.

8. The corporation is not taxed for property it

does not own, where, as the debtor of its bondholders, holding money in its hands for their use, namely, the interest to be paid, it is merely required to pay out of this fund the proper tax due on the security. The tax is on the bondholder, not on the corporation.

[No. 1497.]

Submitted Jan. 27, 1890. Decided Mar. 10, 1890.

IN ERROR to the Supreme Court of Pennsylvania to review a judgment in favor of the Commonwealth for the amount of tax on bonds of the plaintiff in error owned by residents of Pennsylvania and reversing the decision of the Court of Common Pleas of Dauphin County.

On motions to (1) revoke the *allocatur* and quash the writ of error, (2) dismiss the cause and (3) affirm the judgment below. *Affirmed.*

The facts are stated in the opinion.

Messrs. John F. Sanderson, Deputy Atty-Gen., and William S. Kirkpatrick, Atty-Gen., for plaintiff in error, in support of motion:

To give this court jurisdiction because of a denial by a state court of any right under the Constitution, it must appear that such right was claimed and that the decision was against the right.

Spies v. Illinois, 128 U. S. 181, 181 (81: 80, 91); *Brooks v. Missouri*, 124 U. S. 894 (81: 454); *Chappell v. Bradshaw*, 128 U. S. 132 (82: 369).

In this case no matter of law or fact appears of record by points submitted or by bills of exception.

Com. v. Lehigh Valley R. Co. 104 Pa. 97; *Miller v. Dunlap* (Pa.) 12 Cent. Rep. 184.

The motion to affirm is based upon the settled doctrine of the court that a cause ought not to be held for argument where the federal question, on which jurisdiction depends, was manifestly decided right.

Eastern Trans. Line v. Cooper, 99 U. S. 78 (25: 382); *Micas v. Williams*, 104 U. S. 556 (26: 842); *Swope v. Leffingwell*, 105 U. S. 8 (26: 989); *New Orleans Ins. Co. v. Albro County*, 113 U. S. 506 (28: 809); *Church v. Kelsey*, 121 U. S. 282 (30: 960); *Arrowsmith v. Harmoning*, 118 U. S. 194 (80: 243); *Spies v. Illinois*, 128 U. S. 181 (81: 80); *Walston v. Nevin*, 128 U. S. 578 (82: 544).

The Legislature has rightfully fixed the rate and no assessment or valuation is required to ascertain the amount of the tax.

Dollar Sav. Bank v. U. S. 86 U. S. 19 Wall. 227, 240 (22: 80, 82); *King v. U. S.* 99 U. S. 229 (25: 373); *U. S. v. Erie R. Co.* 107 U. S. 1 (27: 885); *U. S. v. Ferrary*, 93 U. S. 625 (28: 832); *Nat. Bank v. Com.* 76 U. S. 9 Wall. 853 (19: 701).

In such case no notice or hearing is required. *Hagar v. Reclamation Dist.* 111 U. S. 701, 709 (28: 569, 571).

There is no violation of a contract arising from the deduction of the tax from the obligation by the debtor acting as a collector of the tax.

Haight v. Pittsburg, Ft. W. & C. R. Co. 78 U. S. 6 Wall. 15 (18: 818) *U. S. v. Baltimore & O. R. Co.* 84 U. S. 17 Wall. 822 (21: 597).

The state laws furnish a remedy to the bondholder.

Banger's App. 109 Pa. 79.

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The existence of this equitable remedy answers the objection made.

McMillen v. Anderson, 95 U. S. 87 (24: 835); *Arrowsmith v. Harmoning*, 118 U. S. 194 (80: 243); *Davidson v. New Orleans*, 96 U. S. 97 (24: 616).

The federal questions sought to be litigated do not relate to the rights of the plaintiff in error (the tax collector), but to those of the bondholder (the taxpayer). The parties bear this relation.

Maltby v. Reading & C. R. Co. 52 Pa. 140; *Com. v. Lehigh Valley R. Co.* 104 Pa. 89; *Com. v. Delaware Div. Canal Co.* 2 L. R. A. 798, 128 Pa. 594.

The title, right, privilege or immunity set up under the Constitution of the United States must be set up by the party for himself, not for a third person.

Owings v. Norwood, 9 U. S. 5 Cranch, 344 (3: 120); *Montgomery v. Hernandez*, 25 U. S. 12 Wheat. 129 (6: 575); *Henderson v. Tennessee*, 51 U. S. 10 How. 311 (13: 434); *Hale v. Gaines*, 63 U. S. 22 How. 144, 160 (16: 264, 269); *Verden v. Coleman*, 68 U. S. 1 Black, 472 (17: 161); *Austin v. Boston*, 74 U. S. 7 Wall. 694 (19: 224); *Long v. Converse*, 91 U. S. 105 (28: 233); *Miller v. Lancaster Bank*, 106 U. S. 543 (27: 239).

Mr. James W. M. Newlin, for defendant in error, in opposition:

The federal questions were raised in the state courts.

Murray v. Charleston, 96 U. S. 482 (24: 760); *Crowell v. Randall*, 35 U. S. 10 Pet. 368 (9: 458).

The appellant had a right to raise the federal questions for its own benefit.

State Tax on Foreign-Held Bonds, 82 U. S. 15 Wall. 300 (21: 179).

The tax is void for want of notice to the bond-owner.

Philadelphia v. Miller, 49 Pa. 448; *Cooley, Taxation*, 265, 266; *Insurance Co. v. Yard*, 17 Pa. 338; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *San Mateo County v. Southern Pac. R. Co.* 18 Fed. Rep. 722; *Vienne v. McCarty*, 1 U. S. 1 Dall. 155 (1: 79); *Davidson v. New Orleans*, 96 U. S. 104 (24: 619); *Hagar v. Reclamation Dist.* 111 U. S. 709 (28: 572); *South Nashville St. R. Co. v. Morrow*, 3 L. R. A. 858, 87 Tenn. 406.

The tax is void for want of an assessment.

Stuart v. Palmer, 74 N. Y. 188.

Legislature cannot prescribe artificial valuation.

Atlantic & N. C. R. Co. v. Carteret County, 75 N. C. 475.

On this point and want of "due process of law" under the Fourteenth Amendment to the Constitution of the United States, the following cases are referred to:

Brown v. Hummel, 6 Pa. 90; *Dartmouth College Case*, 17 U. S. 4 Wheat. 581 (4: 645); *Stuart v. Palmer*, 74 N. Y. 191; *Hobbs v. Tip-ton County*, 1 West. Rep. 589, 103 Ind. 575; *Hurtado v. California*, 110 U. S. 535 (28: 288); *Re Lake*, 40 La. Ann. 142; *Strode v. Washer*, 17 Or. 50; *Hutson v. Woodbridge Protection Dist.* 79 Cal. 90; *Santa Clara County v. Southern Pac. R. Co.* 18 Fed. Rep. 433; *People v. Hastings*, 29 Cal. 449; *State v. Eastabrook*, 8 Nev. 179; *Danville v. Shelton*, 76 Va. 825; *Assessment Board v. Alabama Cent. R. Co.* 59 Ala. 551;

Pickard v. Pullman Southern Car Co. 117 U. S. 43 (29: 788); *People v. Lothrop*, 8 Colo. 456.

The tax is void, because it impairs the corporation's obligations to its creditors.

Murray v. Charleston, 96 U. S. 482 (24: 760); *Hartman v. Greenhow*, 102 U. S. 683 (28: 376).

Leave was granted to counsel in other cases to file briefs.

Messrs. Wm. B. Lamberton and Geo. R. Kaercher filed a brief for North Pennsylvania Railroad Company.

Messrs. M. E. Olmstead and Wayne Mac Veagh filed a brief for W. W. Jennings.

Mr. M. E. Olmstead filed a brief for Delaware Division Canal Co. and others.

Mr. Justice Bradley delivered the opinion of the court:

Motion is made in this case to revoke the *allocatur* of the writ of error, and to quash the writ, and, in the alternative, to affirm the judgment. The first motion is based on the assumption that the writ was improperly allowed by the judge, and questions the propriety of his action. It is probable that the counsel who makes the motion does not intend it in that sense, but is merely unfamiliar with the practice of this court, by which the ordinary proceeding to vacate a writ of error is a motion to dismiss it.

In the present case we think that the writ was demandable, and cannot be dismissed, as will more fully appear from the following statement:

By the law of Pennsylvania all moneyed securities are subject to an annual state tax of three mills on the dollar of their actual value, except bonds and other securities issued by corporations, which are taxed at three mills on the dollar of the nominal or par value. If the treasurer of a corporation fails to make return of its loans, as required by law, the auditor-general makes out and files an account against the company, charging it with the tax supposed to be due. This account, if approved by the state treasurer, is served upon the corporation, which must pay the tax within a specified time, or show good cause to the contrary. If it objects to the tax, it is authorized, in common with all others who are dissatisfied with the auditor's stated accounts, to appeal to the court of common pleas of the county where the seat of government is (at present Dauphin County), which appeal is served on the auditor-general, and by him transmitted to the clerk of said court, to be entered of record, subject to like proceedings as in common suits. A declaration is then filed on the stated account in behalf of the State, and the cause is regularly tried.

In the present case, on failure of the Company (The Bell's Gap Railroad Company) to make return except under protest, the auditor-general made out an account against it, containing the following charge:

"Nominal value of scrip, bonds and certificates of indebtedness owned by residents of Pennsylvania, \$539,000—tax three mills \$1,617 00"

The Company thereupon tendered an appeal, which was filed in the Court of Common Pleas of Dauphin County, a declaration was

filed on the part of the State, and the cause was tried by the court, a jury being waived.

The appeal filed by the corporation (which was the basis of the proceedings in the court) contained eight grounds of objection to the tax. Most of these objections were founded upon the Constitution or laws of Pennsylvania, and need not be noticed here. The second objection, which refers to the Constitution of the United States, was as follows, to wit:

"II. The report of the Company's treasurer was made under protest and does not constitute an assessment, and the tax sought to be imposed on so much of the Company's loans as the Commonwealth claims to be held by residents of Pennsylvania for their nominal or face value, which varies from the market value on account of the differing rates of interest, etc., is illegal, and the said tax cannot be lawfully deducted by the Company's treasurer from the interest payable to the holders of said loans, and the Commonwealth's demands contravene section one of the XIVth Amendment to the Constitution of the United States, for the following reasons:"

Amongst the reasons then assigned are:

1. That the nominal value of the bonds is not their real value.

2. That the owners of the bonds have no notice, and no opportunity of being heard.

3. That the Company is taxed for property it does not own.

4. That the deduction of the tax from the interest payable to the bondholders is taking their property without due process of law, and denies to them the equal protection of the laws, since all other personal property in the State is taxed at its actual value, and upon notice to the owners.

The seventh objection is as follows: "VII. The tax is void as impairing the Company's obligation to its creditors."

On the trial of the cause the State offered in evidence the stated account, and the plaintiff in error offered the appeal and specification of objections and an affidavit of its treasurer. The court of common pleas decided in favor of the Company, but its decision was reversed on writ of error by the Supreme Court of Pennsylvania, and judgment was rendered in favor of the Commonwealth for \$666, being the amount of tax on bonds shown to have been owned by residents of Pennsylvania.

It cannot be denied that the plaintiff in error, in its appeal and specification of objections to the tax, did raise a question under the Constitution of the United States. That question remained in the record as the foundation of the proceedings in the court, and, whether adverted to or not, was necessarily involved in the final decision of the case. We think it clear, therefore, that the writ of error cannot be dismissed. Our only doubt is whether, under our Rules, there was sufficient color for the motion to dismiss to justify us in considering the motion to affirm. As, however, the Supreme Court of Pennsylvania, in its opinion, does not seem to have expressly passed upon the federal question, although it was clearly in the record, we may consider that there was color for making the motion to dismiss.

On the merits we have no serious doubt.

1. *As to the assessment of the tax of three mills upon the nominal or face value of the bonds, instead of assessing it upon the actual value.* This might have been subject to question under the state laws; but the state courts have upheld the assessment as valid. We are to accept it, therefore, as part of the state system of taxation, authorized by its Constitution and laws. Then how does it violate any provision of the Constitution of the United States? It is contended that it violates the 1st section of the XIVth Amendment, which forbids a State to withhold from any person the equal protection of the laws. We do not perceive that the assessment in question transgresses this provision. There is no unjust discrimination against any persons or corporations. The presumption is that corporate securities are worth their face value. Besides, the person that holds them is not affected by the tax unless he receives his interest from which the tax is deducted. So long as the interest is paid the security has to him full productive value; when it is not paid he pays no tax.

But, be this as it may, the law does not make any discrimination in this regard which the State is not competent to make. All corporate securities are subject to the same regulation. The provision in the XIVth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the XIVth Amendment was not intended to compel the States to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intem-

perance and vice, and which every State, in one form or another, deems it expedient to adopt.

The general purpose and scope of the XIVth Amendment, and the general qualifications necessary to be applied to it, are well stated in *Barbier v. Connolly*, 113 U. S. 27, 31 [28: 923, 924]. *Mr. Justice Field*, in delivering the opinion of the court, there said: "The XIVth Amendment, in declaring that no 'State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and their property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the Amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes called the police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

With due regard to these considerations, we are clearly of opinion that the method of assessing the tax in question, on the face value of corporate securities in Pennsylvania, is not violative of the XIVth Amendment to the Constitution.

2. *As to want of notice to the owners of the bonds.* What notice could they have which the law does not give them? They know that their bonds are to be assessed at their face value, and that a tax of three mills on the dollar of that value will be imposed; and that they will only be required to pay this tax when, and as, they receive the interest. If the State may assess the tax upon the face value of the bonds, notice *in pais* is not necessary. We think that there is nothing in this objection which shows any infraction of the Federal Constitution. It is urged that it is a taking of the bondholder's property without due process of law. We must confess that we cannot see it in this light. The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them. We see nothing in the process of taxation com-

plained of which is obnoxious to constitutional objection on this score. Stockholders in the national banks are taxed in this way, and the method has been sustained by the express decision of this court. *National Bank v. Kentucky*, 76 U. S. 9 Wall. 353 [19: 701].

3. *That the corporation is taxed for property it does not own.* This objection is not true in point of fact. The corporation, as the debtor of its bondholders, holding money in its hands for their use, namely, the interest to be paid, is merely required to pay to the Commonwealth out of this fund the proper tax due on the security. The tax is on the bondholder, not on the corporation. This plan is adopted as a matter of convenience, and as a secure method of collecting the tax. That is all. It injures no party. It certainly does not infringe the Constitution of the United States by making one party pay the debts and support the just burdens of another party, as is implied in the objection.

The other objections are embraced in those which we have already considered, and need no further notice.

We would say, in conclusion, that there are several decisions of this court which virtually dispose of most of the questions involved in the present case. We refer particularly to *National Bank v. Kentucky*, 76 U. S. 9 Wall. 353 [19: 701]; *Dollar Savings Bank v. United States*, 86 U. S. 19 Wall. 227, 240 [22: 80, 83]; *King v. United States*, 99 U. S. 229 [25: 373]; *Hagar v. Reclamation Dist.* 111 U. S. 701 [28: 569]; *Davidson v. New Orleans*, 96 U. S. 97 [24: 616]; *Walston v. Nevins*, 128 U. S. 578, 581 [32: 544].

The motion to dismiss the writ of error is denied, and the judgment of the Supreme Court of Pennsylvania is affirmed.

THE CITY OF CHESTER, *Plff. in Err.*,

THE COMMONWEALTH OF PENNSYLVANIA.

(See S. C. Reporter's ed. 240.)

This case is similar to that of *The Bell's Gap Railroad Company v. The Commonwealth of Pennsylvania*, ante, p. 302, and is governed by the decision in that case.

[No. 1498.]

Submitted Jan. 27, 1890. Decided March 10, 1890.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment in favor of the Commonwealth for the amount of certain taxes and reversing a judgment of the Court of Common Pleas of Dauphin County in said State.

On motion to dismiss or affirm. *Affirmed.* Messrs. John F. Sanderson, Deputy Atty.-Gen., and William S. Kirkpatrick, Atty.-Gen., for motion.

Mr. James W. M. Newlin in opposition.

Mr. Justice Bradley delivered the opinion of the court:

This case, so far as any federal question is concerned, is similar, in all substantial respects, to that of *The Bell's Gap Railroad Company v.*

The Commonwealth of Pennsylvania, just decided [ante, p. 302], and must be governed by the decision in that case.

The motion to dismiss the writ of error is denied, and the judgment of the Supreme Court of Pennsylvania is affirmed.

JOSIAH H. DEWITT ET AL., *Piffs. in Err.*,

JOSEPH H. BERRY ET AL.

(See S. C. Reporter's ed. 306-316.)

Written contract of sale of goods—parol evidence of warranty, not admissible—proof of custom—varying contract by parol evidence—implied warranty, when does not exist—meaning of words—special warranty—oral testimony of precious conversation.

1. Where the contract of sale of goods is in writing and contains no warranty, parol evidence is not admissible to add a warranty; nor where the written contract contains a warranty.
2. A written and express contract cannot be controlled or varied or contradicted by a usage or custom.
3. While parol evidence is sometimes admissible to explain such terms in the contract as are doubtful, it is not admissible to contradict what is plain, or to add new terms.
4. An express warranty of quality excludes any implied warranty that the articles sold were merchantable or fit for their intended use.
5. Where there is, on the sale of goods, an express warranty of quality in terms and a sample delivered and accepted showing the quality, no implied warranty exists.
6. If a party seeks to make out that certain words used in a contract have a different acceptation from their ordinary sense he must prove it by clear, distinct and irresistible evidence.
7. Where the terms of the contract were: "These goods to be exactly the same quality as we make for the De Witt Wire Cloth Company and as per sample bbls. delivered," the goods that were in fact made for the last-named company, not what were agreed to be made, were the standard.
8. When parties have put their engagement into writing, in such terms as import a legal obligation, without any uncertainty, it is conclusively presumed that the whole engagement was re-

NOTE.—Oral evidence as applicable to written contracts. See note to *Bradley v. Wash. etc. Steam Packet Co.* 10: 72.

As to parol evidence of previous negotiations, when admissible to affect a written contract, see note to *Union Mut. L. Ins. Co. v. Mowry*, 24: 674.

As to construction of written contracts, how far a question for the court, see note to *Ward v. U. S.* 20: 792.

As to contracts, their interpretation and validity, see note to *Bell v. Bruen*, 11: 89.

Contracts for future delivery of goods; grain options; wager contracts. See note to *Irwin v. Williar*, 28: 225.

As to damages for breach of contract of sale, see note to *Shepherd v. Hampton*, 4: 369.

As to implied warranty against latent defects, and that manufactured article is fit for its purpose, see note to *Bulkley v. Honold*, 15: 663.

As to warranty of quality; breach; rescission; absence of fraud; vendee's remedy,—see note to *Pope v. Allis*, 29: 363.

duced to writing; and all oral testimony of a previous conversation between the parties is inadmissible.

[No. 173.]

Argued Jun. 7, 8, 1890. Decided Mar. 17, 1890.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of plaintiffs for the amount due for a quantity of varnish sold and delivered to defendant. *Affirmed.*

Statement by *Mr. Justice Lamar*:

This action was commenced in the Marine Court of the City of New York, to recover \$1,687.51, alleged to be due plaintiffs, for a quantity of varnish, etc., sold and delivered to defendants between November 9, 1881, and May 15, 1882. It was duly removed into the Circuit Court of the United States for the Southern District of New York, on the petition of the defendants, the plaintiffs being citizens of Michigan, the defendants citizens of New York, and the amount sought to be recovered, exclusive of costs, exceeding \$500.

The record appears to contain substantially all the evidence. It shows the material facts to be as follows:

On the 24th of June, 1881, a contract was made between the parties in these terms:

"Brooklyn, N. Y., June 24th, 1881.

"We hereby agree to deliver to Messrs. J. H. De Witt & Son, at their factory in Brooklyn, in N. Y., eighty (80) barrels of japan and twenty (20) barrels of varnish within one year from date, these goods to be exactly the same quality as we make for the De Witt Wire Cloth Company of New York, and as per sample bbls. delivered.

"Turpentine copal varnish, at 65c. per gallon.

"Turpentine japan dryer, at 55c. per gallon.

"Each shipment to consist of eight (8) barrels japan and two (2) barrels varnish, to be made once a month, commencing September next.

"Terms on each shipment, six months, without interest.

"Berry Brothers,

"per A. Hooper, Manager.

"We hereby accept the above proposition.

"J. H. De Witt & Son.

"Brooklyn, June 24th, '81."

At the time stipulated, the defendants in error, Berry Bros., delivered the proper number of barrels of varnish and of dryer, but the plaintiffs in error claim that the dryer did not conform to the contract, in quality. They not only resist the payment of a balance due of the purchase money, but also present a cross-demand for \$17,500 for alleged breach of contract. The precise point of controversy is as to the relative quantities of turpentine and of benzine in the dryer. It appears that plaintiffs in error were manufacturers of wire gauze for screens, etc., and bought the dryer to use in their factory, and that the plaintiffs in error knew of these facts. The japan dryer and the copal varnish were used to mix with the paint that was put on wire goods. The process was

that the wire cloth ran through a trough filled with the paint so mixed, and passed between the felt rollers into a drying chamber heated by steam to 140 degrees. At the farther end of such chamber the cloth passed into the cold air. The rolls then stood four or five days, after which they were rolled into tight rolls, wrapped, and put into the storehouse. The plaintiffs in error allege that the paint and varnish, in this case, were adulterated by the excessive use of benzine in their manufacture; and that for that reason the paint did not adhere to the wire cloth, but scaled off.

Plaintiffs in error commenced using the dryer and varnish in question about their business in August, 1881; but the goods prepared with them did not, in the ordinary course of business, reach the consumers until May, 1882. It was then that plaintiffs in error first discovered the defect—the composition of the goods being unknown to them, and only discoverable either by a chemical analysis or by the results of use. In the fall of 1882 large quantities of the wire cloth were returned because the paint came off; and the balance that plaintiffs in error had on hand unsold proved to be unsalable for the same reason, and had to be cleaned off and repainted; there being some 3,500,000 square feet damaged one-half cent per square foot, or \$17,500.

Plaintiffs in error further claim that, under the contract, the defendants in error were obliged to furnish articles of a grade that commercially answered to the description of "turpentine copal varnish," and "turpentine japan dryer;" and that such grades were commercially known. That the articles so known contain either very little or no benzine, and are made of turpentine; whereas, if made of benzine, without turpentine, they are called in trade a "benzine copal varnish," and a "benzine japan dryer;" and if they contain half benzine and half turpentine, they are called a "turpentine and benzine japan dryer," or a "turpentine and copal varnish." They claim further that the defendants in error had fraudulently substituted inferior goods for those sold; that whereas, by the description in the bill of sale, they were to have received goods with little or no benzine, they were furnished with goods which, on analysis, were shown to have 38 parts of benzine to 64 of turpentine, and were known to the trade as "benzine goods." The defendants in error, on the other hand, maintain that the contract did not call for goods known to the trade as "commercial turpentine" goods, for two reasons: (1) by the very terms of the contract the quality was agreed to be tested by a different standard, which was, that the goods sold were to be "exactly the same quality as we make for the De Witt Wire Cloth Company of New York, and as per sample bbls. delivered;" and (2) because there was no such standard of uniform manufacture and terminology in the trade, as to these goods, as was claimed by the plaintiffs in error, they themselves having discovered that their process was bad, and afterwards changed it.

It appears further from the record that in a previous contract between the defendants in error and the De Witt Wire Cloth Company—not the plaintiffs in error—a stipulation had been inserted that the goods should be "the

best of their kind, and equal to those formerly furnished." Plaintiffs in error maintained that this contract of quality is, by reference, a part of the contract. This view the court rejected.

In the course of the trial there were several exceptions taken to the introduction, or the refusal to permit the introduction, of evidence. The plaintiffs in error also made several exceptions to the charges as given, and to the refusals to charge as requested.

The trial resulted in a verdict and judgment for the defendants in error for the sum of \$2,177.57, being the full amount of the demand and costs; to review which judgment this writ of error was sued out. The plaintiffs in error claim by their assignments that the court in the trial below committed sixteen different errors.

Messrs. Henry Edwin Tremain and Mason W. Tyler, for plaintiff in error:

Under the contract in this case, defendants in error were bound to deliver articles that answered to the commercial description, "turpentine copal varnish" and "turpentine japan dryer."

Nichol v. Godts, 10 Exch. 191; *Joeling v. Kingsford*, 18 C. B. N. S. 447; *White v. Miller*, 71 N. Y. 118; *Hawkins v. Pemberton*, 51 N. Y. 200; *Henshaw v. Robins*, 9 Met. 83.

When there is no dispute concerning the facts it is not error for the court to instruct the jury that the evidence does not warrant a verdict for the plaintiff if such be the law upon those facts.

Parks v. Ross, 52 U. S. 11 How. 362 (13: 780); *Toland v. Sprague*, 37 U. S. 12 Pet. 300 (9:1093); *Schuchardt v. Allens*, 68 U. S. 1 Wall. 369 (17: 646); *Merchants Bank v. State Bank*, 77 U. S. 10 Wall. 665 (19: 1025); *Marion County v. Clark*, 94 U. S. 278 (24: 59); *Ryder v. Wombwell*, L. R. 4 Exch. 39.

The court erred in refusing to allow plaintiffs in error to introduce evidence to show that the article was not merchantable and also in refusing to charge, as requested, that defendants in error must have delivered to plaintiffs in error a merchantable article.

Jones v. Just, L. R. 3 Q. B. 197; *Mody v. Gregson*, L. R. 4 Exch. 49; *Hoe v. Sanborn*, 21 N. Y. 552; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 116 (28: 89); *Macfarlane v. Taylor*, L. R. 1 H. L. Sc. 245.

The court erred in refusing to allow plaintiffs in error to prove the difference in value between their cloth as painted with the Berry Brothers' material, and the same cloth painted with a fair article of turpentine japan and turpentine varnish.

Dushane v. Benedict, 120 U. S. 636 (30: 810); *French v. Vining*, 102 Mass. 132; *Dart v. Laimbeer*, 9 Cent. Rep. 915, 107 N. Y. 664; *White v. Miller*, 71 N. Y. 132; *Passenger v. Thorburn*, 84 N. Y. 634; *Randall v. Raper*, El. Bl. & El. 84; *Milburn v. Belloni*, 39 N. Y. 53; *Wolcott v. Mount*, 86 N. J. L. 262; *Flick v. Wetherbee*, 20 Wis. 293.

Gains prevented, as well as losses sustained, may be recovered as damages for a breach of contract.

Masterlon v. Mayor, 7 Hill, 61; *Griffin v. Colver*, 16 N. Y. 489; *Messmore v. N. Y. Shot & Lead Co.* 40 N. Y. 422; *Wakeman v. Wheeler &*

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Wilson Mfg. Co. 2 Cent. Rep. 180, 101 N. Y. 205.

The court erred in refusing to charge if the sample was not in fact an article answering to the commercial description contracted for, then it is not material whether the articles delivered corresponded with the sample.

Heilbutt v. Hickson, L. R. 7 C. P. 438; *Benj. Sales* (ed. 1889) 853.

Mr. Jno. E. Parsons, for defendants in error:

It was not error for the court to decline to phrase its charge in language furnished.

Northwestern L. Ins. Co. v. Muskegon Bank, 122 U. S. 501 (31: 1100).

Where goods are sold by sample, and where the contract requires that they shall be of the same quality as other specified goods, the obligation of the seller is discharged if the goods are of the agreed quality and correspond with the sample.

Sands v. Taylor, 5 Johns. 395, 410.

In the case of the sale of an article of an agreed quality, there is no warranty that it shall answer the particular purpose intended by the buyer.

Beck v. Sheldon, 48 N. Y. 365.

Where goods are sold by sample and the contract specifies the quality it is immaterial whether the goods delivered are or are not merchantable or salable.

Parkinson v. Lee, 2 East, 314; *Jones v. Just*, L. R. 3 Q. B. 197; *Benj. Sales*, § 987.

Where a buyer purchases by sample he must take goods which correspond with the sample.

Chanter v. Hopkins, 4 Mees. & W. 398.

Parol evidence is inadmissible to vary a written contract or to add a warranty not contained in it.

Mumford v. McPherson, 1 Johns. 414.

If the affidavits of De Witt & Son, that on the second and third days of the trial they learned of matters which protected them against having their case tried before the jury, were true, the law will not tolerate that a party may go on for ten days with the trial, take his chance of the result and, when beaten, for the first time complain.

Fox v. Hazelton, 10 Pick. 275; *Gale v. N. Y. C. & H. R. R. Co.* 13 Hun, 1; *Valiente v. Bryan*, 66 How. 302.

Mr. Justice Lamar delivered the opinion of the court:

It is not necessary to examine the sixteen assignments of error in detail. When analyzed they are resolved into one or other of these three propositions:

(1) That under a contract for the future delivery of goods, such as was made in this case, and by the terms of this agreement, it was still necessary that the goods delivered should conform to a common commercial standard, and should be adapted to the known uses of the vendee, notwithstanding the express terms of the written contract.

(2) That the court erred in refusing to treat the previous contract between Berry Brothers and the De Witt Wire Cloth Company as a part of the contract in controversy, by reference.

(3) That the court erred in excluding the antecedent parol colloquium offered as a part of the

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contract, or as competent to explain and interpret it.

We will consider these general propositions in the order stated. *First*. The contract between the parties was in writing and contained an express warranty as to the quality. It says: "These goods [are] to be exactly the same quality as we make for the De Witt Wire Cloth Company of New York, and as per sample bbls. delivered." Now there is good authority for the proposition that if the contract of sale is in writing and contains no warranty, parol evidence is not admissible to add a warranty. *Van Ostrand v. Reed*, 1 Wend. 424; *Lamb v. Crafts*, 12 Met. 353; *Dean v. Mason*, 4 Conn. 432; *Reed v. Wood*, 9 Vt. 285; 1 Parsons on Cont. (6th ed.) 589.

If it be true that the failure of a vendee to exact a warranty when he takes a written contract precludes him from showing a warranty by parol, *a multo fortiori* when his written contract contains a warranty on the identical question, and one in its terms inconsistent with the one claimed.

In the case of *The Reeside*, 2 Sumn. 567, *Mr. Justice Story* said: "I apprehend that it never can be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and *a fortiori* not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary or contradict the most formal and deliberate written declarations of the parties." The principle is, that while parol evidence is sometimes admissible to explain such terms in the contract as are doubtful, it is not admissible to contradict what is plain, or to add new terms. Thus, where a certain written contract was for "prime singed bacon," evidence offered to prove that by the usage of the trade a certain latitude of deterioration called "average taint" was allowed to subsist before the bacon ceased to answer that description, was held to be inadmissible. 1 Greenleaf on Evidence, sec. 292, note 3; *Yates v. Pyn*, 6 Taunt. 446; *Barnard v. Kellogg*, 77 U. S. 10 Wall. 883 [19: 987]; *Bloven v. New England Screw Co.* 64 U. S. 28 How. 420 [16: 510]; *Oelricks v. Ford*, 64 U. S. 28 How. 49 [16: 534].

There are numerous well considered cases that an express warranty of quality excludes any implied warranty that the articles sold were merchantable or fit for their intended use. *International Pavement Co. v. Smith*, 17 Mo. App. 264; *Johnson v. Latimer*, 71 Ga. 470; *Cosgrove v. Bennett*, 32 Minn. 371; *Shepherd v. Gilroy*, 46 Iowa, 193; *McGraw v. Fletcher*, 35 Mich. 104.

Nor is there any conflict between these authorities and others like them on the one hand, and those on the other, which hold that goods sold by a manufacturer, in the absence of an express contract, are impliedly warranted as

merchantable, or as suited to the known purpose of the buyer. *Dushane v. Benedict*, 120 U. S. 630, 636 [30: 810], and cases there cited. It is the existence of the express warranty, or its absence, which determines the question. In the case at bar there was such an express warranty of quality in terms. Not only that, but there was a sample delivered and accepted, as such. The law is well settled that, under such circumstances, implied warranties do not exist. *Mumford v. McPherson*, 1 Johns. 414; *Sands v. Taylor*, 5 Johns. 395; *Beck v. Sheldon*, 48 N. Y. 365; *Parkinson v. Lee*, 2 East, 314. In *Jones v. Just*, L. R. 3 Q. B. 197, quoted by Mr. Benjamin in his work on Sales, § 657, Mellor, J., delivering the opinion of the court, laid down, among others, the following rule: "Where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known defined and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer." *Chanter v. Hopkins*, 4 Mees. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288.

Examining now the express terms of the contract, in order to see what they are, and whether they fairly import the warranty claimed by the plaintiffs in error, we find them to be as follows:

"These goods to be exactly the same quality as we make for the De Witt Wire Cloth Company of New York, and as per sample bbls. delivered. Turpentine copal varnish, at 65 cts. per gallon. Turpentine japan dryer, at 55 cts. per gallon."

There are here three items of description claimed by the plaintiffs in error: (1) That they should be the same as those made for the De Witt Wire Cloth Company; and there is no evidence whatever that they were not the same, nor is a difference in this respect any part of their claim. (2) That they should conform to a sample delivered; and here again is an entire absence of testimony to show any difference, and a want of any such claim by the plaintiffs in error. The whole question, therefore, as to this branch of the case turns upon the effect of the use of the expressions "Turpentine copal varnish, at 65 cts. per gallon. Turpentine japan dryer, at 55 cts. per gallon." The plaintiffs in error maintain that the defendants in error thereby engaged to deliver articles known to the trade by those names, and of a certain standard of quality. We do not so construe the writing. All the terms descriptive of the quality are found in the sentence preceding. These sentences are nothing but stipulations in respect to the prices to be paid, and were not intended to fix quality.

There is this further to be said. We have carefully examined the record in this case, and are impressed with a conviction that, whatever the fact may be, the evidence adduced fails to show any such general usage of trade in respect to the standard of these preparations, or in respect to their designations, as is claimed by the plaintiffs in error. Their position is, that the words "turpentine copal varnish," etc., if con-

sidered at all as a stipulation as to quality, would mean a varnish in which the liquid elements were to be so composed that at least 50 per cent of them should be turpentine. In *Carter v. Crick*, 4 Hurlst. & N. 417, Pollock, C. B., observed that "if a party seeks to make out that certain words used in a contract have a different acceptation from their ordinary sense, either for the purposes of trade, or within a certain market, or in a particular country, he must prove it; not by calling witnesses, some of whom will say it is one way and some the other, and then leaving it to the jury to say which they believe; but by clear, distinct and irresistible evidence."

We pass now to the second proposition of the plaintiffs in error, that the court erred in refusing to charge the jury that if the goods delivered to them as turpentine were not the best of their kind, as guaranteed by reference to the contract with the De Witt Wire Cloth Company, they should find for them. The answer to the proposition seems obvious; it is but an effort, in a different shape, to vary the written contract made. The terms of that contract were not "These goods to be exactly the same quality as we have heretofore contracted to make for the De Witt Wire Cloth Company and as per sample bbls. delivered;" but were, "These goods to be exactly the same quality as we make for the De Witt Wire Cloth Company," etc. There is here no reference whatever, either express or implied, to the contract with the De Witt Wire Cloth Company; what goods *were in fact made*, not what were agreed to be made, was the standard. To fix that standard of goods produced, and not goods contracted for, yet more firmly as the measure of quality, a subsequent clause was written—"and as per sample bbls. delivered." It is clear that, under the contract, if the goods produced for the De Witt Wire Cloth Company varied from the samples delivered, the plaintiffs in error had the right to insist on the test by the sample. It is manifest that the terms of the other contract were not present to the minds of the parties to this contract. The plaintiffs in error fixed the terms of their warranty, and we cannot import other terms into the writing.

The third proposition, that the court erred in excluding evidence of an antecedent conversation between the salesman and one of the plaintiffs in error, is disposed of by the well-settled rule, that "when parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties, . . . as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected." 1 Greenleaf, Ev. sec. 275, and authorities cited; *White v. National Bank*, 103 U. S. 658 [26: 250]; *Metcalf v. Williams*, 104 U. S. 98 [23: 665]; *Martin v. Cole*, 104 U. S. 90 [23: 647].

On the whole case we find no material error, and the judgment of the court below is affirmed.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, *Appt.*,

v.

THE THIRD NATIONAL BANK OF CHICAGO.

(See S. C. Reporter's ed. 276-280.)

Railroad company, when liable for debts of another company whose property has been leased to it—property of corporation, liable for its debts—trust fund—cross-bill—equitable remedies—amendments at hearing.

1. Where one railroad company leased and surrendered all its property to another railroad company for the purpose of procuring money to pay liens thereon, and the lessee covenanted in effect to pay and discharge all judgment liens founded on existing claims and to return the demised property to the lessor, at the end of the lease, and the lessee also received proceeds of the bonds secured by a trust deed on the property, the owner of judgments against the lessor is entitled to a decree requiring the lessee to pay the amount of such judgments.
2. A corporation in debt cannot transfer its entire property by lease, so as to prevent the application of the property to the satisfaction of its debts.
3. The properties of a corporation constitute a trust fund for the payment of its debts; and, when there is a misappropriation of the funds of a corporation, equity, on behalf of the creditors of such corporation, will follow the funds so diverted.
4. Where, in a court of equity, an apparent legal burden on property is challenged, the court has jurisdiction of a cross-bill to enforce, by its own procedure, such burden.
5. A court of equity which denies legal remedies may enforce equitable remedies for the same debt; and an application for the latter is not foreign to a bill for the former.
6. Amendment to a cross-bill may be allowed at the hearing simply to enable the cross-complainant to avail itself of what has been alleged and proved by the original complainants, although thereby is presented a new and independent basis of relief.

[No. 174.]

Argued Jan. 8, 1890. Decided March 17, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois that the Chicago, Milwaukee and St. Paul Railway Company pay in to the clerk of this court a sum sufficient to satisfy the judgment in favor of the Third National Bank of Chicago against the Chicago and Pacific Railroad Company, including also the amount with interest paid by said Bank to re-

NOTE.—As to individual liability of stockholders for corporate debts, see note to *Hatch v. Dana*, 26: 885.

As to dissolution of corporations, and effect on debts owned by them, and on their property, see note to *Mumma v. The Potomac Co.* 8: 945.

As to fiduciary position of directors; their contracts and dealings with corporations,—see note to *Koehler v. Black River Falls Iron Co.* 17: 340.

One who acquires a trust estate, with knowledge of the trust, is subject to the same duties, as to the trust, as the original trustee; cestui que trust may follow property. See note to *Wormley v. Wormley*, 5: 651.

deem; and in case of failure to pay said money that a receiver be appointed of the property to pay said moneys out of the earnings of the road. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 26 Fed. Rep. 820.

Mr. E. Walker, for appellant:

A cross-bill is a matter of defense, and is confined to the matters in litigation in the original suit.

Story, Eq. Pl. §§ 889, 898, 681; *Young v. Colt*, 2 Blatchf. 378; *Gallatian v. Cunningham*, 8 Cow. 361; *Walden v. Bodley*, 39 U. S. 14 Pet. 156 (10: 398); *Slason v. Wright*, 14 Vt. 208; *Cross v. DeValle*, 68 U. S. 1 Wall. 5 (17: 516).

It can be sustained only on matters growing out of the original bill.

Thompson v. Shoemaker, 68 Ill. 256; *Lund v. Skanes Bank*, 96 Ill. 181; *Gage v. Mayer*, 5 West. Rep. 496, 117 Ill. 682; *Daniel v. Morrison*, 6 Dana, 186; *Crabtree v. Banks*, 1 Met. (Ky.) 482; *Rutland v. Paige*, 24 Vt. 181; *Ayres v. Carver*, 58 U. S. 17 How. 591 (15: 179); *Pindall v. Treco*, 30 Ark. 249; *Eoe v. Louis*, 91 Ind. 470; *Hall Lumber Co. v. Gustin*, 54 Mich. 624; *Cartwright v. Clark*, 4 Met. 104; *Kemp v. Mackrell*, 8 Atk. 812; *Rubber Co. v. Goodyear*, 76 U. S. 9 Wall. 807 (19: 587); *Mayflower v. The Dove*, 91 U. S. 381, 385 (28: 354, 355).

No decree can be founded upon new and distinct matters introduced by a cross-bill which were not embraced in the original suit.

1 Daniell, Ch. Pr. 549, note 2; *May v. Armstrong*, 8 J. J. Marsh. 262; *Daniel v. Morrison*, 6 Dana, 186; *Field v. Schieffelin*, 7 Johns. Ch. 252; *Josey v. Rogers*, 13 Ga. 478; *Andrews v. Hobson*, 23 Ala. 219; *Gouverneur v. Elmendorf*, 4 Johns. Ch. 357; *Griffith v. Merritt*, 19 N. Y. 529.

An amendment will not be allowed at hearing which will prejudice or surprise defendant, or will change the issues.

Moshier v. Knox College, 82 Ill. 155; *Farwell v. Meyer*, 35 Ill. 40; *Hewitt v. Dement*, 57 Ill. 500, 502; *Lewis v. Lanphere*, 79 Ill. 187, 189; *Booth v. Wiley*, 102 Ill. 84, 100; *Am. Bible Society v. Price*, 8 West. Rep. 66, 115 Ill. 623-666; *The Tremolo Patent (Tremaine v. Hitchcock)*, 90 U. S. 28 Wall. 518, 527 (28: 97, 98); *Hardin v. Boyd*, 118 U. S. 756 (28: 1141); *Shields v. Barrow*, 58 U. S. 17 How. 180 (15: 158); *Snead v. McCoull*, 54 U. S. 12 How. 407, 421, 422 (18: 1043, 1050); *Oglesby v. Attrill*, 14 Fed. Rep. 214; *Land Co. v. Elkins*, 20 Fed. Rep. 545.

If the courts below abuse their discretion in permitting amendments at hearing, their action will be reviewed.

Jefferson County v. Ferguson, 13 Ill. 33, 35; *Mason v. Bair*, 38 Ill. 194; *Booth v. Wiley*, 102 Ill. 84, 100; *Gordan v. Reynolds*, 114 Ill. 118, 128.

Messrs. Huntington W. Jackson and John H. Thompson, for appellees:

Whenever a creditor has a trust in his favor or a lien upon property for the debt due him, he may go into equity.

Case v. Beauregard, 101 U. S. 688 (25: 1004); *Weyauvega v. Ayling*, 99 U. S. 119 (24: 470); *Tappan v. Evans*, 11 N. H. 811; *Holt v. Bancroft*, 30 Ala. 193; *Hopkins v. Granger*, 52 Ill. 504; *Henry County v. Winnebago Swamp Drainage Co.* 52 Ill. 454; *Constant v. Matteson*, 22 Ill. 557.

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When a debtor conveys property to a trustee for the payment of his debt, if the trustee fails or refuses to so apply it, a court will compel him to appropriate it to the purpose designed.

Renfro v. Pearce, 68 Ill. 125; *Phillips v. Stone*, 25 Ill. 77; *Norton v. Hixon*, 25 Ill. 439, 456; Story, Eq. Jur. § 695.

As long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust.

Cook v. Tullis, 85 U. S. 18 Wall. 332 (21: 933); *Rutten v. Union Pac. Co.* 17 Fed. Rep. 480; *Walser v. Seligman*, 13 Fed. Rep. 416; *Mechanics Bank of Alexandria v. Seton*, 26 U. S. 1 Pet. 309 (7: 155); *Baltimore C. Nat. Bank v. Conn. Mut. L. Ins. Co.* 104 U. S. 54 (26: 693); Story, Eq. Jur. § 465, and note, §§ 468, 623; 2 Lewin, Trusts, 892; 2 Perry, Trusts, 835, 836; *Pennock v. Coe*, 64 U. S. 23 How. 129 (18: 439).

The agreement gave the Bank a right of judicial process against the Milwaukee Company in case of nonpayment.

Hervey v. Illinois Midland R. Co. 28 Fed. Rep. 170.

By the judgment in favor of the Bank, the property of the Pacific Company was charged with its payment, and the Milwaukee Company accepted the property thus charged and agreed to pay the same.

Grigg v. Banks, 59 Ala. 317; *Gordon v. McCulloch*, 66 Md. 248; *Downer v. Brackett*, 21 Vt. 602; *Ketchum v. St. Louis*, 101 U. S. 306-309 (25: 999); *Re Strand Music Hall Co.* 3 De G. J. & S. 147; *Pinch v. Anthony*, 8 Allen, 536; 1 Jones, Mortgages, § 162; Willard, Eq. Jur. 462; *Watson v. Duke of Wellington*, 1 Russ. & M. 602; *Yeates v. Groves*, 1 Ves. Jr. 280; *Lett v. Morris*, 4 Sim. 607; *Ex parte Alderson*, 1 Madd. 58.

The Chicago and Pacific and the Chicago, Milwaukee and St. Paul Roads are estopped from contesting the validity of the sale under the Tabor judgment.

Carroll v. Moconkey, 5 Pa. 168; *Holmes v. Steele*, 28 N. J. Eq. 173; *Lucas v. Hart*, 5 Iowa, 415; *Austin v. Loring*, 63 Mo. 19; *Turner v. Watkins*, 31 Ark. 429-449; *Maquoketa v. Willey*, 85 Iowa, 323; *Morgan v. Chicago & A. R. Co.* 96 U. S. 720 (24: 744); *Bank of U. S. v. Lee*, 38 U. S. 13 Pet. 107 (10: 81); *Merchants Bank v. State Bank*, 77 U. S. 10 Wall. 604 (19: 1008); *Baker v. Pratt*, 15 Ill. 568; *Mills v. Graves*, 38 Ill. 455; *People v. Brown*, 67 Ill. 435; *Knoebel v. Kircher*, 33 Ill. 308; *Smith v. Newton*, 38 Ill. 230; *International Bank v. Bowen*, 80 Ill. 541; *Higgins v. Ferguson*, 14 Ill. 269; *Close v. Glenwood Cemetery*, 107 U. S. 466 (27: 408); *Thompson v. Hammond*, 1 Edw. Ch. 497-506.

The property seized was the entire property of the Chicago and Pacific Road. It cannot be said therefore that if the sale had taken place, the result would have been to destroy utterly the value of the property,

Philadelphia & B. C. R. Co's App. 70 Pa. 355; *Coe v. Johnson*, 18 Ind. 218; *Talbott v. Hale*, 72 Ind. 1; *Eells v. Johann*, 27 Fed. Rep. 327; *Ludlow v. Clinton Line R. Co.* 1 Flipp. 25; *Milwaukee & M. R. Co. v. Chamberlain*, 73 U. S. 6 Wall. 748 (18: 859); *Milwaukee & M. R. Co. v. James*, 78 U. S. 6 Wall. 750, 752 (18: 854).

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Mr. Justice Brewer delivered the opinion of the court:

In 1865, by a special Act of the Legislature of Illinois, the Chicago and Pacific Railroad Company was organized as a body corporate, with authority to construct and operate a railroad from the City of Chicago to the Mississippi River, at a point near Savanna, both points being within the State of Illinois. In 1872 it executed a trust deed upon its property to secure \$3,000,000 of bonds. On March 9, 1876, judgment was rendered against it in the United States Circuit Court for the Northern District of Illinois for the sum of \$3,499.73, in favor of Horace Tabor. Execution was first issued upon this judgment September 9, 1876. On May 27, 1876, suit was brought to foreclose the deed of trust. After a decree in such foreclosure, and on May 1, 1879, the property was sold on an order of sale, for \$916,100, to John I. Blair and others. Subsequent to April 2, 1880, but within the year prescribed by statute, the Chicago and Pacific Railroad Company redeemed the property from the sale under the foreclosure decree, the Chicago, Milwaukee and St. Paul Railway Company having advanced the money therefor. On the 19th of February, 1880, which was after the foreclosure sale but before the redemption, the Third National Bank of Chicago brought suit in the same court against the Chicago and Pacific Railroad Company, upon notes given by the company to the Bank for money loaned. On the 3d of April, 1882, judgment was rendered in that suit, in favor of the Bank, for \$36,165.36; and on the 15th of July, of the same year, execution was issued thereon. On the 25th day of June, 1881, which was after the redemption from the foreclosure sale, the property of the Chicago and Pacific Railroad Company was sold, under an execution issued upon the Tabor judgment, to Albert Keep, to whom the certificate of sale was executed. The property so sold was described as follows:

"All and singular the railroad of the Chicago and Pacific Railroad Company, as the same is now surveyed, laid out, constructed and located in the Counties of Cook, DuPage, Kane, DeKalb, Ogle and Carroll, in the State of Illinois, including the road-bed, stations or station-houses, depot grounds, rails, ties, fences, bridges, viaducts and culverts, and all other buildings and structures, as well as engine-houses, machine and other shops used in connection with said railroad."

On June 4, 1882, Albert Keep, the purchaser, assigned the certificate of sale to Alexander Mitchell, the president of the Chicago, Milwaukee and St. Paul Railway Company. The judgment debtor, not redeeming within the year, the Bank, as judgment creditor, on September 25, 1882, redeemed from the execution sale by the payment to the marshal of the necessary sum, \$5,304.20, and this redemption money was paid to and received by Alexander Mitchell. The Statute of Illinois, with reference to such redemptions, provides as follows:

"Sec. 20. If such redemption is not made, any decree or judgment creditor, his executors, administrators or assigns, may, after the expiration of twelve months and within fifteen months after the sale, redeem the premises in

the following manner: Such creditor, his executors, administrators or assigns, may sue out an execution upon his judgment or decree, and place it in the hands of the sheriff or other proper officer to execute the same, who shall indorse upon the back thereof a levy of the premises desired to be redeemed; and the person desiring to make such redemption shall pay to such officer the amount for which the premises to be redeemed were sold, with interest thereon at the rate of eight per centum per annum from the date of the sale, for the use of the purchaser of such premises, his executors, administrators or assigns; whereupon such officer shall make and file in the office of the recorder of the county in which the premises are situated a certificate of such redemption, and shall advertise and offer the premises for sale under said execution as in other cases of sale on execution." *Starr & Curtiss, Ill. Statutes, chap. 77.*

The proceedings had were in conformity with this section, and the marshal advertised the sale accordingly, on October 24, 1882. As heretofore stated, the redemption by the Chicago and Pacific Railroad Company was with money advanced by the Chicago, Milwaukee and St. Paul Railway Company. This advancement was made in pursuance of these proceedings. On April 1, 1880, which was subsequent to the commencement of the suit by the Bank, resolutions were passed by the stockholders of the Chicago and Pacific Railroad Company, authorizing the leasing of its property and franchises to the Chicago, Milwaukee and St. Paul Railway Company, and also the execution of a new mortgage; and on the next day, the first-named company executed its lease to the last-named Company, and the two companies executed a joint trust deed upon the same property to secure the payment of \$3,000,000 of bonds, payable in thirty years. By the lease, which was for 999 years, the lessor (which will for convenience be called the Pacific Company) not only disabled itself from performing the functions and discharging the duties of its incorporation, but also transferred all its property and franchises to the lessee (hereafter called the Milwaukee Company). The consideration of the lease was \$1, and the performance of the covenants of the lease by the lessee. The Pacific Company was largely indebted outside of the amount secured by the trust deed; it therefore surrendered to the Milwaukee Company all the means it had of discharging its indebtedness. Among the recitals in the lease are these:

"Whereas certain other parties to whom the said party of the second part was so as aforesaid indebted have prosecuted their several demands in the Superior and Circuit Courts of Cook County, and other courts of the State of Illinois, and have procured divers judgments thereon, which now remain unpaid and unsatisfied of record, and are a lien upon the property of the said party of the first part, and other of said demands still remain unliquidated; and whereas the said party of the second part, at the request of the said party of the first part, now proposes to aid the party of the first part in procuring a sufficient sum of money to redeem said property from the afore-

said sale, and to protect said property from all the aforesaid valid judgment liens, and also to extend and construct the road of said party of the first part to the Mississippi River; . . . and also to pay all taxes, charges or assessments imposed or assessed, or which may be hereafter imposed or assessed, upon the property or premises of the party of the first part."

And among the covenants of the lessee are these:

"The said party of the second part, in consideration of the said demise and lease so as aforesaid made by the said party of the first part, hereby covenants and agrees that it will take up, pay, cancel, satisfy and discharge the said three thousand bonds of one thousand dollars each at maturity thereof, and will pay, cancel and discharge each and every of the coupons or interest warrants attached to the said bonds, and each of them, as the same shall become due and payable, so as aforesaid to be made and issued to the parties of the first and second parts, and will, during the continuance of this lease, at all times save the said party of the first part free and harmless therefrom, and from the mortgage so as aforesaid to be executed by the said parties of the first and second parts to the Farmers' Loan and Trust Company, on the second day of April, 1880, . . . and the said party of the second part shall and will, at its own proper cost and expense, preserve and keep the railway and premises hereby demised, and every part of the same, in thorough repair, working order and condition, and supplied with rolling-stock and equipment, so that the business of the said demised railway shall be preserved, encouraged and developed. . . . The said party of the second part hereby covenants, promises and agrees to and with said party of the first part that at the end of said term, or other sooner determination of this said lease, the said party of the second part shall redeliver and surrender up to the party of the first part, its successors or assigns, the said demised railway and premises in as good order and condition as the same shall be delivered to the said party of the second part under this lease, and with such additions, betterments and improvements as shall have been made thereto."

The bonds were sold at ninety-seven cents, and the amount necessary to redeem from the foreclosure sale was about \$1,100,000. Out of the proceeds of these bonds the Milwaukee Company not only completed the construction of the entire road authorized by the charter of the Pacific Company, from Chicago to the Mississippi River, but also constructed a bridge over the Mississippi River, so as to connect this road with its own line in Iowa. Upon these facts can the validity of the decree requiring the Milwaukee Company to pay to the Bank, within a specified time, the amounts of the two judgments held by it, be successfully questioned? We think not. It would perhaps be difficult to point out any separate clause in the lease by which the Milwaukee Company obligated itself to pay the judgment in favor of the Bank, and yet there is force in the contention that, taken as a whole, the instrument casts this burden upon the Company. A part of the subject matter of the contract

was claims against the Pacific Company. One recital is of the foreclosure debt; immediately following is one of the existence of claims, some of which had been sued on and passed into judgment and become liens, others still unliquidated; followed by the recital that the purpose of this arrangement is the redemption from said foreclosure sale, and the protection of the property from all the aforesaid valid judgment liens. Narrowly, the valid judgment liens referred to may include only those already existing, mentioned in the preceding recital; or, broadly, all valid judgment liens perfected on the claims named in that recital, whether already in judgment or not. If these were all the provisions, the narrow construction might be preferred; but the further and express covenants of the Milwaukee Company were to pay and discharge fully the proposed indebtedness of \$3,000,000, and to return at the end of the lease, to the lessor, the demised property. Does not this indicate that the understanding and intent were that the Milwaukee Company should discharge all judgment liens founded upon existing claims, whether such liens had already been perfected, or should be created in subsequent suit? A judgment after a lease does not of its own right defeat the lease, or deprive the lessee of his interest and possession; but it operates against the lessor, and whatever interest, great or small, is retained in the leased premises. The purpose of this stipulation was not the protection of the lessee, but of the lessor. It was not that the lessee should be able to retain and enjoy the possession during the terms of the lease; but that the property should be freed from all burdens, so that at the termination of the lease the lessor might retake and enjoy it. The scope of the contract was not the payment of the debts of the lessor, for a mere debt, never passing into judgment, casts no burden upon the interest of lessor or lessee in the property, and the removal of all burdens was apparently the intent of the contracting parties. But again, the express lien on the lessor's property amounted only to about \$1,100,000; yet, by the arrangement, a new lien was created from which nearly \$3,000,000 was received, all of which sum passed into the hands of the lessee. Will not equity, for the payment of the debts of the lessor, follow this surplus into the hands of the lessee? Can a corporation in debt transfer its entire property by lease, so as to prevent the application of the property, at its full value, to the satisfaction of its debts? *Central R. & Bkg. Co. v. Pettus*, 113 U. S. 116, 124 [28: 915, 918]; *Mellen v. Moline M. Iron Works*, 131 U. S. 352, 366 [33: 178, 182]. We do not care to pursue an inquiry into this question at length, or consider what limitations would surround this doctrine as applied generally, preferring to notice a single matter, which is significant and decisive. The contracting parties arranged, not merely for the discharge of the foreclosure lien, but for the completion of the road for which the lessor's franchise was granted. The lessee not only performed these stipulations, but with moneys arising from the sale of these bonds built, for its own benefit, a bridge across the Mississippi River, connecting this road with its line in Iowa, and thus making a continuous line of road to Omaha.

Neglecting to pay the debts of the lessor, it appropriated a large amount of the proceeds of the trust deed upon the lessor's property to its own benefit, and the improvement of its own property. Here clearly was a diversion of funds, which the creditors of the lessor might follow in equity. This is only the application of familiar doctrine. The properties of a corporation constitute a trust fund for the payment of its debts; and, when there is a misappropriation of the funds of a corporation, equity, on behalf of the creditors of such corporation, will follow the funds so diverted. The Milwaukee Company, from securities on the property of the Pacific Company, received nearly three millions of dollars; part it used for the benefit of the lessor company, and part it appropriated to its own benefit. Can it do this, and let the lessor company's debt go unpaid? Equity answers this question in the negative, and such was the ruling of the circuit judge. 26 Fed. Rep. 820.

Entertaining no doubt upon these matters, we pass to the consideration of certain questions of equity pleadings and procedure and evidence upon which the counsel for appellant largely relies. It will be remembered that after its redemption from sale under the Tabor judgment, the Bank, following the provisions of the Statute, advertised the property for sale on the execution issued upon its own judgment. The Railroad Companies filed their bill in equity in the circuit court to restrain such sale. The Bank, besides its answer, filed a cross-bill, which, after setting out the facts, prayed that its judgment might be decreed a valid equitable lien and incumbrance upon the property of the Pacific Company; that a receiver might be appointed, with power to apply the revenues to the judgment; and that the property be sold in satisfaction thereof, and for general relief. It is objected that such cross-bill was not germane to the original bill, and was therefore improperly filed. The case of *Milwaukee & M. R. Co. v. Chamberlain*, 78 U. S. 6 Wall. 748 [18: 859], fully answers this objection. In that case a bill was filed to set aside the judgment. One of the defendants, owner of the judgment, filed a cross-bill, praying that the judgment might be decreed a valid lien, and the property sold to satisfy it. The court dismissed both bills, the latter on the ground that the former having been dismissed on its merits, the latter could not be maintained, because the parties litigating were both citizens of the same State. This last ruling was reversed by this court, *Mr. Justice Nelson*, delivering the opinion, saying: "We think that the court erred in dismissing the cross-bill. It was filed for the purpose of enforcing the judgment, which was in the circuit court, and could be filed in no other court, and was but ancillary to and dependent upon the original suit—an appropriate proceeding for the purpose of obtaining satisfaction." In that case the original bill was to set aside a judgment—here, to restrain an execution sale under a judgment; but this difference does not affect the principle. Where in a court of equity an apparent legal burden on property is challenged, the court has jurisdiction of a cross-bill to enforce by its own procedure such burden. The court which denies legal remedies may enforce

equitable remedies for the same debt; and an application for the latter is not foreign to a bill for the former.

Again, it is objected that an amendment to the cross-bill was allowed at the hearing, which changed the nature of the issues, and was therefore improper. This is the most serious question in the case. The amendment conformed the cross-bill to the proofs, and was in accord with the view of the law applicable to the facts, as indicated by the circuit judge, and as already approved by us in the fore part of this opinion; but it did work a change in the ground upon which relief was sought. The cross-bill, as originally framed, relied upon the fact that by redemption from the foreclosure sale by the mortgagor the lien of the foreclosure decree was wholly removed, leaving the Tabor judgment as a first lien upon the property; that, by the redemption from the sale under the Tabor judgment, the Bank became possessed of that lien; and that, holding that lien and its own judgment lien, it was entitled to enforce those liens in equity if not by execution at law. The misappropriation of a part of the proceeds of the \$3,000,000 of bonds by the Milwaukee Company was not distinctively or separately alleged or counted on as the basis of relief. The amendment introduced this matter into the cross-bill; but the fact was distinctly stated in the original bill filed by the railroad companies, for it alleged "that said lessee, with the means provided by the execution of said last-named trust deed and bonds, and the proceeds of the sale thereof, by and with the consent of your orator, the Chicago and Pacific Railroad Company, has completed the construction of the entire road authorized by its charter, from the City of Chicago to the Mississippi River, and has also constructed a bridge across the Mississippi River at or near Savanna." And proof of this was given by the railroad companies in their evidence. The fact was thus developed by the railroad companies, both by their bill and their proofs, and the amendment to the cross-bill was simply to enable the cross-complainant to avail itself of what had been alleged and proved by the original complainants. So, although thereby was presented a new and independent basis of relief, we think it must be held that there was no error in permitting the cross-complainant to avail itself of the fact thus furnished by its adversaries.

It is also objected that after this amendment, thus introducing new issues, the defendants to the cross-bill asked leave to file an answer thereto, which was denied; but the answer which was tendered contained no defense to the matter thus presented. It averred in substance that the Milwaukee Company had expended upon the road of the Pacific Company more than the entire proceeds of the \$3,000,000 of bonds, to wit, about \$4,000,000; but it contained no denial of the fact that it had used, as alleged, a part of the proceeds of the bonds in the construction of the bridge across the Mississippi River; in other words, it sought to excuse its misappropriation of a part of the proceeds of those securities by the fact that it had afterwards spent a large amount of its own money in improving the property of the Pacific Company. But that did not excuse

the misappropriation, or release it from liability therefor. The misappropriation gave to the Bank, at the time at which it was made, the right to pursue the misappropriated proceeds into the hands of the Milwaukee Company. That right the Milwaukee Company could not thereafter defeat by spending money on the property of the Pacific Company; and it was unnecessary to enter into any inquiry as to the reasons for this subsequent expenditure, or as to how far the necessities of its own business on the through line from Chicago to Omaha compelled further improvements on that portion of the line east of the Mississippi River.

Still again, it is objected that there was no testimony showing how much of the proceeds of these bonds was expended in the construction of the bridge across the Mississippi River. The original bill alleged that the bridge was constructed out of the proceeds of these bonds; and it might almost be assumed that the construction of a bridge across such a great river would cost far more than the amount of the Bank's claims. But further in the hearing, the president of the Pacific Company (who is also the counsel in this case) was examined as a witness, and testified as to the construction of the bridge out of the proceeds of these bonds; that the Pacific Company had parted with all its property and had no earnings or income; that it was impossible for him to give any detailed statement of the manner in which the proceeds of the \$3,000,000 of bonds was expended; and that he did not know whether any of the employés of either company could furnish such statement. Inasmuch, therefore, as the original bill alleged the construction of this bridge out of the proceeds of these bonds; as the answer to the amendment to the cross-bill did not deny the fact of such misappropriation, or aver that it was less than the amount of complainant's claims, and as the principal officer of the Pacific Company was unable to tell how much was thus expended, and did not know of anyone who could furnish the information, we do not think the court erred in assuming that the amount of such misappropriation was in excess of the Bank's claims, and rendering a decree accordingly.

We see no error in the record and the decree is therefore affirmed.

THE TOLEDO, DELPHOS & BURLINGTON RAILROAD COMPANY

ET AL., Appts.,

v.

THOMAS H. HAMILTON.

(See S. C. Reporter's ed. 296-306.)

Mechanic's lien—existing mortgage has priority—mechanic's lien subordinate—equitable lien—repairs—equitable title.

1. Where a railroad company executed a mortgage on its present and after-acquired property, to se-

NOTE.—As to lien of mortgage on after-acquired property, see note to Pennock v. Coe, 10: 496.

As to priority between mortgage and mechanic's lien, see note to Brooks v. Burlington & S. W. R. Co. 25: 1067.

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cure its bonds, and thereafter a contractor with the company erected a dock for the company on a part of the property covered by the mortgage, and filed a mechanic's lien for his pay, he is not entitled to priority of payment over the mortgage.

2. A recorded mortgage, given by a railroad company on its road-bed and other property, creates a lien whose priority cannot be displaced thereafter, directly by a mortgage given by the company, nor indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction.
3. The mechanic's lien was subordinate to the lien of the prior mortgage; the mortgagee took a vested priority, beyond the power of the mortgagor or the Legislature thereafter to disturb.
4. The fact of the construction of the dock, and the consequent improvement of the mortgaged property, did not give to its constructor an equitable lien prior in right to the lien of the mortgage, nor furnish equitable reasons why the legal priority belonging to the mortgage should be displaced.
5. The equitable principles upon which the decisions rest, applying to the payment, out of the proceeds of the sale of railroad property, of debts for operating expenses and repairs, are not applicable to claims such as the present, for the original construction of a railroad while there was a subsisting mortgage upon it.
6. That the railroad company had only the equitable title to the land does not change the case. The mortgage, being one with words of general description, conveyed land held by a full equitable, as well as that held by a legal, title.

[No. 184.]

Argued Jan. 10, 1890. Decided March 17, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Ohio sustaining the claim of the appellee, Thomas H. Hamilton, for a mechanic's lien on railroad property, and decreeing prior payment of the lien out of the proceeds of the sale of the railroad property. *Reversed.*

The facts are stated in the opinion.

Messrs. Clarence Brown, John M. Butler and R. G. Ingersoll, for appellants:

The Mechanic's Lien Law of Ohio does not apply to railroads and their construction.

Rutherford v. Cincinnati & P. R. Co. 35 Ohio St. 559.

Decisions in other States, on like Mechanic's Lien Laws, seem to be in line with this decision.

Graham v. Mt. Sterling Coal Road Co. 14 Bush (Ky.) 425; *Dunn v. North Mo. R. Co.* 24 Mo. 498; *Abercrombie v. Ely*, 60 Mo. 28; *Leonard v. Brooklyn*, 71 N. Y. 498; *La Crosse & M. R. Co. v. Vanderpool*, 11 Wis. 124; *Truesdell v. Gay*, 13 Gray, 811.

The first mortgage is prior, superior and paramount in lien to the lien of Hamilton's mechanic's lien.

Choteau v. Thompson, 2 Ohio St. 114; *West v. Klotz*, 87 Ohio St. 420; *Coe v. N. J. Midland R. Co.* 81 N. J. Eq. 127, 128; 2 Wood, Ry. Law, 292.

It is the law of Ohio that a mortgage takes effect from the date it is duly filed for record.

Bercaw v. Cockerill, 20 Ohio St. 163; *Bloom v. Noggle*, 4 Ohio St. 52; *Kling v. Ballentine*, 40 Ohio St. 391.

In Ohio, railroad corporations have the right

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and power to mortgage all of their present and future-to-be-acquired property.

Coe v. Columbus, P. & I. R. Co. 10 Ohio St. 378; *Coe v. Peacock*, 14 Ohio St. 187; *Coopers v. Wolf*, 15 Ohio St. 528; *Lane v. Baughman*, 17 Ohio St. 648; *Walsh v. Barton*, 24 Ohio St. 48, 44.

Hamilton could not have, or acquire, any lien superior to the lien of the first mortgage.

Galveston, H. & H. R. Co. v. Cowdrey, 78 U. S. 11 Wall. 480-482 (20: 206); *Dunham v. Cincinnati, P. & C. R. Co.* 68 U. S. 1 Wall. 266-268 (17: 588); *Dillon v. Barnard*, 88 U. S. 21 Wall. 440 (22: 678); *Wright v. Kentucky & G. E. R. Co.* 117 U. S. 73 (29: 821); *Porter v. Pittsburg Bessemer Steel Co.* 120 U. S. 649 (30: 880); *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 U. S. 678, 674 (31: 837).

A consolidation of two railroad corporations merges all of the rights, franchises, privileges, duties, obligations and liabilities of each of the old corporations into the new corporation, so that they continue to exist the same as though no consolidation had been effected.

Green County v. Conness, 109 U. S. 104 (27: 872); *Shields v. Ohio*, 95 U. S. 319 (24: 357); *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164 (24: 97); *Branch v. Charleston*, 92 U. S. 677 (28: 750); *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665 (28: 757).

Messrs. John H. Doyle and A. W. Scott, for appellee:

The mechanic's lien of Hamilton should have precedence, by reason of priority, over the lien of the first-mortgage bondholders.

Williamson v. N. J. Southern R. Co. 28 N. J. Eq. 277, 29 N. J. Eq. 311.

Where after-acquired property comes into the hands of the mortgagor, subject to incumbrances or liable to liens, the mortgage attaches to the property in the condition in which it comes under the mortgage, and subject to such liens and incumbrances as are then on it.

Dunham v. Cincinnati, P. & C. R. Co. 68 U. S. 1 Wall. 254 (17: 584); *Galveston, H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 459 (20: 199); *U. S. v. New Orleans R. Co.* 79 U. S. 12 Wall. 362 (20: 484).

The lien of Hamilton, when perfected, attached to the entire road, and was not confined to the particular piece of road where the work was done.

Meyer v. Hornby, 101 U. S. 728 (25: 1078); *Brooks v. Burlington & S. R. Co.* 101 U. S. 448, 451 (25: 1057, 1060); *Jones, Liens*, § 1619; *Dayton etc. R. Co. v. Lewton*, 20 Ohio St. 401; *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37; *Choteau v. Thompson*, 2 Ohio St. 114; *Dutro v. Wilson*, 4 Ohio St. 101; *Pomeroy*, Eq. Jur. § 678; *Pittsimeons v. Ogden*, 11 U. S. 7 Cranch, 2 (3: 249).

Between the legal and equitable title to the same subject matter, the legal title in general prevails.

Boone v. Ohiles, 85 U. S. 10 Pet. 177 (9: 388); *Pain v. Inman*, 6 Helsk. (Tenn.) 5; *Botzford v. New Haven, M. & W. R. Co.* 41 Conn. 454; *Anketel v. Converse*, 17 Ohio St. 11; *Bayley v. Greenleaf*, 20 U. S. 7 Wheat. 46 (5: 393).

The premises in dispute were never acquired by the Railroad Company that executed the mortgage.

After the consolidations, it took the legal title thereto in the name of George W. Ballou.

Shields v. Ohio, 95 U. S. 319 (24: 357); *Ferguson v. Meredith*, 68 U. S. 1 Wall. 25 (17: 604); *State v. Sherman*, 23 Ohio St. 411; *McMahan v. Morrison*, 16 Ind. 172; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359 (25: 185); *Lauman v. Lebanon Valley R. Co.* 80 Pa. 42.

The mortgage trustees represent the bondholders secured by the mortgages.

Corcoran v. Chesapeake & O. Canal Co. 94 U. S. 741 (24: 190); *Kerrison v. Stewart*, 93 U. S. 160 (23: 845); *Wallace v. Loomis*, 97 U. S. 163 (24: 901).

The peculiar circumstances of this case clearly bring it within the class of materialmen and it would be an arbitrary hardship to exclude this laborer.

Fordick v. Schall, 99 U. S. 235 (25: 339).

Mr. Justice Brewer delivered the opinion of the court:

The question in this case arises between a mortgagee and a party claiming a mechanic's lien upon the mortgaged premises, as to priority of payment. The facts are these: On January 17, 1880, the Toledo, Delphos and Burlington Railroad Company executed and delivered its first mortgage to the Central Trust Company of New York, to secure the payment of \$1,350,000 six per cent bonds. The description of the property conveyed by this mortgage is as follows: "Unto the Central Trust Company of New York, and to its successor or successors in trust, and for the uses and trusts hereby created, all and singular the line of railroad of the said party of the first part, as the same now is or hereafter may be constructed, between Toledo, Lucas County, Ohio, through the Counties of Lucas, Wood, Henry, Putnam, Allen and Van Wert, in the State of Ohio; and the Counties of Adams, Wells, Huntington, Wabash, Miami, Grant and Howard, in the State of Indiana, to the City of Kokomo, Indiana, being about one hundred and eighty miles in length; together with all and singular the right of way; road-bed, made and to be made; its track, laid or to be laid, between the terminal points aforesaid; together with all supplies, depot grounds, rails, fences, bridges, sidings, engine-houses, machinery, shops, buildings, erections, in any way now, or hereafter, appurtenant unto said described line of railroad; together with all the engines, machinery, supplies, tools and fixtures, now, or at any time hereafter, owned or acquired by said party of the first part, for use in connection with its line of railroad aforesaid; and all depot grounds, yards, sidings, turn-outs, sheds, machine shops, leasehold rights and other terminal facilities now, or hereafter, owned by the said party of the first part, together with all and singular the powers and franchises thereto belonging, and the tolls, and income, and revenue to be levied and derived therefrom."

The trust company accepted the trust created by this mortgage, and the bonds were issued by the Railroad Company, certified by the trustee and sold on the market. The mortgage was, within a few days after its execution, duly recorded in the proper counties. In October, 1883, default having occurred in the payment of interest, the trust company brought suit to

foreclose. There being a conflict of interest between the bondholders under this and those under a terminal trust mortgage subsequently executed by the Railroad Company, a committee of bondholders under the first mortgage, consisting of James M. Quigley, Charles T. Harbeck and John McNab, was appointed to represent the interest of such bondholders, and by order of the court duly made co-complainants. Thomas H. Hamilton, appellee, intervened, and filed his petition claiming a mechanic's lien. On March 20th, May 9th and June 2d, 1888, respectively, he had entered into three several contracts with the Railroad Company for the erection of a dock on the Maumee River, in the City of Toledo. Under these contracts he had built the dock, and, receiving only partial payment, had filed a claim for a mechanic's lien for the balance. The lot on which the dock was built was a part of the railroad property covered by the first mortgage above referred to. The circuit court sustained his claim of lien, and decreed prior payment of the amount due him out of the proceeds of the sale of the railroad property as an entirety. No question is made as to the amount due him by the Railroad Company for the work he did; but the contention of the appellants is that he is not entitled to priority of payment. His claim of priority depends upon either a legal right given by his mechanic's lien, or an equitable right arising from the construction of the dock and consequent improvement of the railroad property. The master, who reported upon the intervening petition, based his award of priority upon the latter ground, holding that the fact of construction, and consequent improvement of the railroad property, gave an equitable right to priority of payment, while the court, giving the same priority, rested it upon the fact of a mechanic's lien. We think that the views of neither the master nor the court can be sustained, and that it was error to give appellee priority over the mortgagee. It will be noticed, and it is a fact which lies at the foundation of this case, that the contracts for the construction of the dock were not made till more than three years after the execution and record of the mortgage. The record imparted notice to Hamilton, and to all others, of the fact and terms of the mortgage; and the question is thus presented, whether a railroad company, mortgagor, can, three years after creating by recorded mortgage an express lien upon its property, by contract with a third party displace the priority of the mortgage lien. It would seem that the question admits of but a single answer. Certainly as to ordinary real estate, no one would have the hardihood to contend that it could be done; and there is in this respect no difference between ordinary real estate and railroad property. A recorded mortgage, given by a railroad company on its road-bed and other property, creates a lien whose priority cannot be displaced thereafter, directly by a mortgage given by the company, nor indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction.

It is enough to refer to the decisions of this court. In the case of *Dunham v. Cincinnati, P. & O. R. Co.*, 68 U. S. 1 Wall. 354 [17:594], there was presented a question of priority be-

tween a mortgagee and a contractor who had expended money and labor in building a railroad, under a subsequent agreement with the company that he should have possession of the road until he was fully paid, and who had never surrendered the possession, and the priority of the mortgage was sustained. Upon this point the court observed: "Counsel of respondents concede that the mortgage to the complainant was executed in due form of law, and the case also shows that it was duly recorded on the ninth day of March, 1855, more than eight months before the contract set up by the respondent was made. All of the bonds, except those subsequently delivered to the contractor, had long before that time been issued, and were in the hands of innocent holders. Contractor, under the circumstances, could acquire no greater interest in the road than was held by the company. He did not exact any formal conveyance, but, if he had, and one had been executed and delivered, the rule would be the same. Registry of the first mortgage was notice to all the world of the lien of the complainant, and in that point of view the case does not even show a hardship upon the contractor, as he must have known when he accepted the agreement that he took the road subject to the rights of the bondholders. Acting as he did with a full knowledge of all the circumstances, he has no right to complain if his agreement is less remunerative than it would have been if the bondholders had joined with the company in making the contract. No effort appears to have been made to induce them to become a party to the agreement, and it is now too late to remedy the oversight. Conceding the general rules of law to be as here laid down, still an attempt is made by the respondents to maintain that railroad mortgages made to secure the payment of bonds issued for the purpose of realizing means with which to construct the road, stand upon a different footing from the ordinary mortgages to which such general rules of law are usually applied. Authorities are cited which seem to favor the supposed distinction, and the argument in support of it was enforced at the bar with great power of illustration, but suffice it to say, that in the view of this court the argument is not sound, and we think that the weight of judicial determination is greatly the other way. *Pierce v. Emery*, 32 N. H. 484; *Pennock v. Coe*, 64 U. S. 23 How. 180 [16:441]; *Field v. Mayor*, 6 N. Y. 179; *Seymour v. Canandaigua and N. F. R. Co.* 25 Barb. 286; *Redf. Railways*, 578; *Langton v. Horton*, 1 Hare, 549; *Re Howe*, 1 Paige, 129; *Mitchell v. Winslow*, 2 Story, C. C. 644; *Domat*, 649, art. 5; 1 Pow. Mort. 190; *Noel v. Bewley*, 8 Sim. 108."

See also, on this general proposition, the cases of *Galveston, H. & H. R. Co. v. Coudrey*, 78 U. S. 11 Wall. 459 [20:199]; *Dillon v. Barnard*, 88 U. S. 21 Wall. 480, 440 [22:673, 678]; *Porter v. Pittsburg Bessemer Steel Co.* 120 U. S. 649 [30:830]; and 122 U. S. 267 [30:1210]; *Thompson v. Whitewater Valley R. Co.* 132 U. S. 68 [33:256]. Reference may be had to a decision of the Supreme Court of Ohio, the State in which this lien was attempted to be created and enforced (*Choteau v. Thompson*, 2 Ohio St. 114), in which the court, speaking of a mechanic's lien, says: "The lien does not

override or interfere with prior bona fide liens. The idea that the builder, or materialman, may have a lien upon the house to the exclusion of a mortgagee, or judgment creditor, whose lien attached before the house was erected, altered or repaired, is inadmissible, and could not, in practice, be carried out." And again: "We do not suppose that the law relating to mortgages, or to judgments and executions, was in any way affected by the enactment of the Lien Law. And we are of opinion, as before stated, that liens under this law do not, in any case or in any manner, interfere with prior bona fide liens." So that if a mechanic's lien could have been placed upon the railroad, or any part thereof, under the Ohio Statute, and by the proceedings taken was in fact perfected, it would not operate to displace the priority of the earlier mortgage.

To what extent, if at all, a mechanic's lien could, under the statutes of Ohio in force at the time Hamilton attempted to file his lien, be placed upon a railroad, or any part of it, may be a matter of doubt. *Rutherford v. Cincinnati & P. R. Co.* 85 Ohio St. 559; *Smith Bridge Co. v. Bowman*, 41 Ohio St. 87; Revised Statutes of Ohio, 1880, sections 3184 and 3185 and sections 3207 to 3211, inclusive; also Laws of 1883, amended sections 3207 to 3211, inclusive, and Laws of 1884, page 126. It is unnecessary in this case to express any opinion about the matter, for if a mechanic's lien was effected, it was subordinate to the lien of the prior mortgage. There was no statute in force at the time the mortgage was executed, giving any priority to subsequent mechanic's liens; and by the mortgage the mortgagee took its vested priority beyond the power of the mortgagor or the Legislature thereafter to disturb.

Neither did the fact of the construction of the dock, and the consequent improvement of the mortgaged property, give, as reported by the master, to Hamilton an equitable lien prior in right to the lien of the mortgage, or furnish equitable reasons why the legal priority belonging to the mortgage should be displaced. It is true cases have arisen in which, upon equitable reasons, the priority of a mortgage debt has been displaced in favor of even unsecured subsequent creditors. See *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.*, 125 U. S. 658, 673 [81: 832, 837], in which many of these cases are collected and the equitable principles underlying them stated. But those principals have no application here. The work which Hamilton did was in original construction, and not in keeping up, as a going concern, a railroad already built. The amount due him was no part of the current expenses of operating the road. There was, as to him, no diversion of current earnings to the payment of current expenses.

The distinction is so well expressed by Mr. Justice Blatchford, in given the opinion of the court in the case of *Porter v. Pittsburgh Bessemer Steel Co.*, 120 U. S. 649, 671 [30: 830, 838], that it is sufficient to quote his language: "The claims of the appellees are for the original construction of the railroad. This is not a case where the proceeds of the sale of the property of the railroad, as a completed structure, open for travel and transportation, are to be applied to restore earnings which, instead of having

been applied to pay operating expenses and necessary repairs, have been diverted to pay interest on mortgage bonds and the improvement of the mortgaged property, the debts due for the operating expenses and repairs having remained unpaid when a receiver was appointed. The equitable principles upon which the decisions rest, applying to the payment, out of the proceeds of the sale of railroad property, of such debts for operating expenses and necessary repairs, are not applicable to claims such as the present, accrued for the original construction of a railroad while there was a subsisting mortgage upon it. These five appellees gave credit to the company for their work. It was construction work, and none of it was for operating expenses or repairs, and none of it went towards keeping a completed road in operation, either in the way of labor or material. When these claims accrued, the road of the company had not been opened for use. The claims accrued after the mortgage had been executed and recorded, and after \$1,000,000 of the bonds secured by it had been issued and pledged to innocent bona fide holders for value. We are not aware of any well-considered adjudged case, which, in the absence of a statutory provision, holds that unsecured floating debts for construction are a lien on a railroad superior to the lien of a valid mortgage duly recorded, and of bonds secured thereby, and held by bona fide purchasers for value. The authorities are all the other way."

It is urged by the appellee, in objection to the force of these propositions, as applied to the facts in this case, that at the time this mechanic's lien was created the legal title was not in the Railroad Company, but in one George W. Ballou; that as the mortgagor had no legal title, the mortgage created no legal lien; that while by the decree of foreclosure the legal title was transferred to the mortgagor, it was transferred subject to the burden of the mechanic's lien; and the cases of *Williamson v. N. J. Southern R. Co.*, 28 N. J. Eq. 277, also 29 N. J. Eq. 811, and *Botsford v. New Haven, M. & W. R. Co.*, 41 Conn. 454, are especially relied upon. But the facts in those cases are very different from those in this. In the New Jersey case, the defendant railroad company had executed a mortgage with the "after-acquired property" clause in it, duly recorded. It was also the owner of a large majority of the stock in the Long Branch and Sea Shore Company, and was in possession of and operating the latter company's road. No consolidation in fact of the two companies had taken place; but being in possession of the latter company's road, it had contracted for the building of certain docks, walls and piers, at the terminus of such road. Having failed to make payment for such work, a mechanic's lien was perfected upon the latter company's road. Upon a suit to foreclose the mortgage given by the defendant railroad company, the chancellor, laying hold of the fact that the defendant railroad company was the owner of this large majority of the stock—was in possession of and operating the latter company's road—decreed that such road, with its property and franchises, belonged to the defendant railroad company, and as after-acquired property was subject to complainant's mortgage, but subordinate to the

mechanic's lien. On review in the court of errors and appeals, as reported in 29 N. J. Eq., *supra*, the decision of the chancellor was sustained, the court saying: "Until that decree was signed, the right of the complainant in the lands of the Sea Shore Company under his mortgage was a mere unexecuted equity, to have the benefit of such equities as his mortgagor had in the premises, without any legal title in himself or in his mortgagor upon which his mortgage as a conveyance could operate.

When the decree of the chancellor was signed, which established the lien of complainant's mortgage on the property of the Long Branch and Sea Shore Company, Berthoud & Co. had, by force of the provisions of the Mechanic's Lien Act, acquired a lien on the premises which related back to the commencement of the building, and was entitled to priority over all conveyances, mortgages or incumbrances subsequent thereto. This lien was not displaced by the chancellor's decree, which, in the absence of fraud, could be effective only to bring under the complainant's mortgage the lands of the Sea Shore Company, subject to such liens as were lawfully acquired while the legal estate was in that company. The chancellor's decree adjudging the validity and priority of the claim of Berthoud & Co. should be affirmed." Unquestionably such ruling was correct. The owner of a majority of the stock in a railroad corporation has no title to the road. The title is in the corporation, and he is not the corporation. A mortgage by the owner of such stock is no lien upon the road, and does not prevent the casting of any legal lien upon it. So that while, for the many equitable reasons stated in the opinion, the decree vested the property in the latter road in the defendant railroad company, yet it perfected and transferred that title subject to all legal liens then existing upon it. As the court of errors and appeals well said, until that decree was signed the right of the complainant, the mortgagee, was a mere unexecuted equity, to have the benefit of such equities as his mortgagor had in the premises.

In the Connecticut case the facts were these: After giving the mortgage the railroad company desired to erect a depot on land adjoining its track. The owner agreed to give the company the land provided it would build a depot. Upon the building a mechanic's lien was filed. The owner had never made a conveyance. Upon a foreclosure of the mortgage the mechanic's lien upon the building and the ground upon which it was constructed was held prior to the mortgage. The decision was based upon the ground that the full equitable title never passed to the railroad company until the completion of the building, and then it passed subject to the burden of the mechanic's lien. Hence, though after-acquired property, and subject to the lien of the mortgage, it was when acquired already burdened with a lien.

But in the case at bar, as appears from the testimony and the decree, only the naked legal title remained in Ballou; the full equitable title was in the Railroad Company—and in that Company before the contracts were entered into. The Railroad Company had the same title when it made the contracts that it had when the work was done and the decree rendered. Hamilton's contracts were with the Railroad

Company, and of course gave a lien upon the lands only to the extent of the title that the railroad company had. The mortgage being one with words of general description, conveyed land held by a full equitable, as well as that held by a legal, title. Jones, Mortgages, section 138; *Massey v. Papin*, 65 U. S. 24 How. 362 [16: 784]; *Farmers L. & T. Co. v. Fisher*, 17 Wis. 114; *Lincoln Bldg. & Sav. Assn. v. Hass*, 10 Neb. 581; *Laughlin v. Braley*, 25 Kan. 147. We conclude, therefore, that there is nothing in this fact to justify an award of priority to appellee.

It is further objected by the appellee that the ground upon which this dock was built was never acquired by the Company which executed the mortgage, but by a new Company into which the mortgagor Company passed by consolidation. In view of the condition of the record we are compelled to accept the statement of the court in its decree, which is, that the property was covered by the mortgage in suit. Again, it is urged that a part of the work was done after the receiver was appointed, and by his authority. The report of the master does not sustain this claim; neither does the account filed by the intervenor for the purpose of securing his mechanic's lien. And while there is testimony tending to show that he did some work after the appointment of a receiver, there is also contradictory testimony. And even in that part of the testimony which tends to show that work was done after the appointment of a receiver, there is nothing to indicate how much was done, or whether it was done by the authority and direction of the receiver, or simply in completion of a contract theretofore entered into with the Company.

These are all the facts we deem it necessary to mention. *The decree of the Circuit Court will be reversed, with instructions for further proceedings in accordance with the views herein expressed.*

MICHAEL GORMLEY, Appt.,

v.

ALFRED CORNING CLARK.

(See S. C. Reporter's ed. 388-350.)

Illinois Burnt Records Act—state decisions, when followed as rules of property, etc.—state statutes—remedies in U. S. courts—statute remedy, extent of—equity jurisdiction—legal remedy—restoration of record—bill in equity, relief under—homestead rights.

1. The Illinois "Burnt Records Act" was in effect a Statute of Limitations, and was not unreasonable, nor unconstitutional because not providing for trial by jury or otherwise.
2. Upon the construction of the Constitution and laws of a State, this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some provision of the Federal Constitution, or of a federal statute, or a rule of general commercial law.
3. And this is so where a course of those decisions, whether founded on statutes or not, have become rules of property within the State; also in regard to rules of evidence in actions at law; and also in reference to the common law of the State, and its laws and customs of a local character.

4. Substantially conclusive effect is given to such decisions upon the construction of state statutes, as affecting title to real estate within the State.
5. Remedies in the courts of the United States are, at common law or in equity, according to the essential character of the case, uncontrolled in that particular by the practice of the state courts.
6. An enlargement of equitable rights by state statute may be administered by the circuit courts of the United States as well as by the courts of the State.
7. Where the deed of land in Chicago, and its record, has been destroyed, the petitioner is entitled to the establishment of the record by the proceeding authorized under the said Statute, and, when the court has once acquired jurisdiction, it can adjudicate upon all claims to the property in controversy, as therein provided.
8. As this case comes within the provisions of the Statute, and equity can alone afford the entire relief sought, the fact that legal questions are also involved cannot oust the court of jurisdiction.
9. The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances.
10. Under this Statute, the restoration of the record title is matter essentially of equitable cognizance, while the declaration of the invalidity of the ordinance of January 3, 1882, the removal of the cloud caused by recording a copy thereof, and the abatement of the obstruction to the streets, were matters in respect to which the petitioner could properly resort to a court of equity.
11. A bill in equity may be retained for the purpose of granting full relief when jurisdiction exists.
12. There was no error in the direction for the removal of the buildings from the portion of the street in disregard of the homestead rights of appellant and his wife: the proofs establish such a dedication as created an easement in the petitioner which the court was justified in protecting.

[No. 192.]

Submitted Jan. 27, 1890. Decided Mar. 17, 1890.

A PPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois in favor of Clark, plaintiff, that he was vested with title to the premises in dispute and had an easement in the use of Adams Street, and that defendant, Gormley, and his wife had no homestead rights in the premises or in said street, and that possession of said premises be surrendered to plaintiff. *Affirmed.*

Statement by Mr. Chief Justice Fuller:

Michael Gormley, the appellant, on the 5th day of March, 1874, made a subdivision, into blocks and lots, of certain property within the limits of the Village of Glencoe, Cook County, Illinois, entitled "Gormley's Addition to Glencoe;" acknowledged the plat before a justice of the peace; and had it certified to by the county surveyor, and duly recorded in the recorder's office of said county. He derived title to so much of the property as is involved in this case under a warranty deed from his father, Marcus Gormley, the patentee, dated May 4, 1861, and recorded in the office of said recorder June 5th of that year. On the 15th of May, 1877, Gormley and his wife executed a trust deed, which was duly recorded, to one Loeb as trustee, conveying certain blocks and lots in Gormley's

Addition to Glencoe, to secure a promissory note described therein, which trust deed was duly acknowledged, and released in due form of law all homestead rights of the grantors in the property conveyed. The premises were subsequently sold under the powers of sale in the trust deed for default in payment, and conveyed by deeds dated September 10, 1878, some of the blocks to Edward Clark, a block and some of the lots to Sarah J. Condon, and some to others. Edward Clark died October 14, 1882, and Alfred Corning Clark acquired title to the portion conveyed to him, as his sole heir-at-law. On the 29th day of March, 1884, Sarah J. Condon conveyed the premises deeded to her to Alfred Corning Clark, who by that conveyance, and as heir to Edward, became the owner of blocks 3, 4, 5, 8 to 24 inclusive, and lots 8, 4, 5, 6, 11 and 12 in block 6, in Gormley's Addition to Glencoe, in the County of Cook and the State of Illinois.

By the charter of the Village of Glencoe, it was provided that printed or written copies of all ordinances passed by the council of the village should be posted up in at least three of the most public places therein, within thirty days after their passage, and should take effect at the expiration of ten days after such posting. On the 4th day of October, 1881, on a petition signed by Michael Gormley, the council of Glencoe vacated Adams Street, between Grove Street and Bluff Street, in Gormley's Addition, which ran between blocks 8 and 9 of that addition, and upon which Gormley's house, barn and outbuildings then stood. This portion of the street formed the means of ingress and egress to some twenty-four lots in these two blocks. The ordinance was posted and a certified copy filed in the recorder's office by Gormley on October 17, 1881. On the 8d of January, 1882, the council of Glencoe passed an ordinance, which was in Gormley's own handwriting, vacating some ten streets and parts of streets in Gormley's Addition, which surrounded the property in controversy, and the evidence tended to show that this was done upon representations made by Gormley that he owned the property through which the streets passed, and that, at all events, such was the belief of the members of the council in taking the action in question. On the 12th day of January, 1882, the vote on the passage of the ordinance was reconsidered and again reconsidered on January 24, 1882; and on the 7th of February, 1882, the council passed an ordinance providing "that any and all ordinances heretofore passed by this council, vacating any streets or parts of streets in Gormley's Addition to Glencoe, or purporting so to do, are hereby repealed, and all the streets and parts of streets shown in the first and originally recorded plat of said addition are hereby declared to be public streets." The ordinance of January 8, 1882, was never posted by the clerk, and although the charter required ordinances to be entered at length in an ordinance book, neither the ordinance of October 4, 1881, nor that of January 3, 1882, nor any of the repealing or rescinding resolutions or ordinances, were entered at length in such book. Shortly after the passage of the ordinance of January 3, 1882, Gormley applied to the clerk of the village to post the ordinance, and the clerk replied that he should take the

full time allowed him by law to do so, namely, thirty days. He also applied for a certified copy of the ordinance, but the clerk did not give it to him. He then copied the minutes of the meeting of January 3, 1882, and posted such copy and made oath thereto, January 24, 1882, and filed the same on that day in the recorder's office of Cook County. On the 17th of January, 1882, Gormley filed in the Superior Court of Cook County, Illinois, a petition for a mandamus upon the clerk of the village to immediately post certified copies of the ordinance passed on January 3, 1882, as required by law, and to file for record, in the recorder's office of Cook County, a duly certified copy of the ordinance, or to furnish to him (Gormley) a duly certified copy upon tender of his legal fees. This petition was answered by the clerk, and a replication filed, and the cause tried, a jury being waived, by Gary, J., who rendered judgment dismissing the petition at Gormley's costs. The case was taken to the Appellate Court for the First District of Illinois, by which court the judgment of the superior court was affirmed. After the commencement of this action, Gormley sued out from the Supreme Court of Illinois a writ of error to review the judgment of the appellate court, and the judgment of that court was thereupon affirmed. *Gormley v. Day*, 114 Ill. 185.

Gormley sold several lots and blocks of his subdivision to different parties; put down sidewalks, and threw up various streets with a plow; street and sidewalk work in the addition was done by the village; and portions of various streets were graded and ditched. After the foreclosure the taxes upon the premises in dispute were paid by Alfred Corning Clark.

On the 31st of March, 1884, Clark filed his petition under the "Burnt Records Act" so called, being chapter 116 of the Revised Statutes of Illinois, setting up his title to the property in controversy; alleging the destruction of the records of Cook County and of his record title on October 8 and 9, 1871, by fire; the proceedings of the council of the Village of Glencoe, of the clerk and of Michael Gormley; and the suits in the superior and appellate courts; and charging fraud on Gormley's part and threatened irreparable injury; averring that Gormley was in possession of petitioner's land and about to destroy its market value by procuring a vacation of the streets around it; and asking that council and clerk be enjoined. Petitioner made the Village of Glencoe, its council and clerk, Michael Gormley and wife and others, who had claimed some interest in the property, parties, "and all whom it may concern," and prayed that the ordinances of October 4, 1881, and January 3, 1882, be declared null and void and of no effect whatsoever, and for a decree confirming and establishing his title in fee simple to the lots and blocks mentioned as aforesaid, and that he be put in possession; and that the village, its council and clerk, be restrained from passing or posting any ordinance or ordinances vacating streets or parts of streets adjoining petitioner's lots and blocks. Many of the defendants defaulted, and some answered, including Gormley and wife, upon whose answer the only questions in issue here arise. Upon hearing, the court en-

tered a final decree in favor of Clark, adjudging that he was, at the date of filing the petition, vested with title in fee simple absolute to the premises in dispute, and confirming and establishing the same; that Gormley was estopped from claiming any informality or defect in the plat of his addition to Glencoe; that he and his wife had no homestead rights in any of the lots and blocks decreed to Clark, or in any streets or parts thereof on which any of the said lots or blocks abutted, as against said Clark, his representatives, heirs and assigns; that the ordinance of January 3, 1882, was null and void; that title to that portion of Adams Street between Grove Street and Bluff Street was vested in Gormley, but subject to an easement in the use of it by said Clark, his heirs, legal representatives and assigns, as the owner of lots or parts of lots abutting thereon; that said Gormley and wife remove from that portion of Adams Avenue on or before a date named, and in default of such removal the marshal remove the buildings thereon located; and that possession of the property in dispute be surrendered to petitioner. The decree dissolved a preliminary injunction which had been granted against the village and its authorities, and awarded no relief in respect to them.

From this decree Gormley appealed to this court, and assigns as errors (1) that the court erred in not dismissing the bill for want of equity; (2) that petitioner had a complete and adequate remedy at law, and a court of chancery had no jurisdiction; (3) that the court erred in decreeing void the ordinance vacating said streets in said Gormley's Addition to Glencoe; (4) that the court erred in decreeing that said Michael and Eliza Gormley remove their house, barn and shop from said portion of Adams Avenue, between Grove and Bluff Streets; (5) that the court erred in decreeing to the petitioner an easement in the right of use of Adams Avenue, between Grove and Bluff Streets, as a street, by said petitioner; (6) that the court erred in decreeing the petitioner entitled to the possession of said lots and blocks in said petition described; (7) that the court erred in decreeing that the appellant surrender up possession of said streets, lots and blocks to the petitioner.

Mr. Millard F. Riggle, for appellant:

Whenever a court of law affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law.

Killian v. Ebbinghaus, 110 U. S. 568 (28: 246); *Fussell v. Gregg*, 113 U. S. 550 (28: 998); *Holland v. Challen*, 110 U. S. 15 (28: 52); *Hutchings v. Higgins*, 59 Ill. 29.

A law that would take the property of one and transfer it to another without compensation would be unconstitutional.

Gebhardt v. Reeves, 75 Ill. 301; *St. John v. Quitzow*, 72 Ill. 334; *Cooper v. Detroit*, 42 Mich. 584.

For an injury which an individual or a corporation suffers in common with the public, equity will not relieve.

Detroit v. Detroit & M. R. Co. 25 Mich. 173; *Denver & S. R. Co. v. Denver City R. Co.* 2 Colo. 678.

Messrs. Charles E. Pope, Alexander McCoy and Charles B. McCoy, for appellee:

If one desires a jury trial in a suit under the Burnt Records Act, he must demand it in the court below.

Heacock v. Hosmer, 109 Ill. 245-251; *Heacock v. Lubuke*, 107 Ill. 896-904.

This court will not allow a question to be raised in this court not raised in the court below.

Bell v. Bruen, 42 U. S. 1 How. 169 (11: 89); *Doe v. Watson*, 49 U. S. 8 How. 263 (12: 1072); *Belk v. Meagher*, 104 U. S. 279 (26: 785); *Clark v. Fredericks*, 105 U. S. 4 (26: 938); *Springer v. U. S.* 102 U. S. 586-598 (26: 256).

Where a party goes to trial before the court without objection he has waived his right to a jury.

Kearney v. Case, 79 U. S. 12 Wall. 275, 284 (20: 895, 897); *Bond v. Dustin*, 112 U. S. 604 (28: 835); *Dundee Mortgage & T. Invest. Co. v. Hughes*, 124 U. S. 157 (81: 357).

A federal tribunal can enforce statutory rights upon the chancery side of the court when the citizenship of the parties is such as to give the court jurisdiction.

Clark v. Smith, 88 U. S. 13 Pet. 195, 208, 204 (10: 123, 127).

In decreeing on titles, this court must accommodate the mode of proceeding to the nature of the case and the character of the equities involved in the controversy so as to give effect to state legislation and state policy.

Ex parte McNeil, 80 U. S. 13 Wall. 236 (20: 624); *Broderick's Will*, 88 U. S. 21 Wall. 503 (22: 599); *Fitch v. Creighton*, 65 U. S. 24 How. 159 (16: 596); *Holland v. Challen*, 110 U. S. 15 (28: 52); *Reynolds v. Crawfordville First Nat. Bank*, 112 U. S. 405 (28: 738); *Gage v. Caraher*, 125 Ill. 447; *Smith v. Hutchinson*, 108 Ill. 662.

The Burnt Records Act is broad and comprehensive in its character, and it is intended thereby that when a court has once acquired jurisdiction that it shall go on and adjudicate upon any and all claims and titles to the property in dispute.

Smith v. Gage, 11 Biss. 217; *Mulvey v. Gibbons*, 87 Ill. 367; *Robinson v. Ferguson*, 78 Ill. 538; *Smith v. Hutchinson*, 108 Ill. 662; *Moore v. Wayman*, 107 Ill. 195; *Farwell v. Harding*, 96 Ill. 32; *Barnett v. Cline*, 60 Ill. 205; *Bradish v. Grant*, 6 West. Rep. 525, 119 Ill. 606.

The Illinois Act is not unconstitutional as depriving one of the right of trial by jury.

Heacock v. Hosmer, 109 Ill. 245, 250, 251; *Bertrand v. Taylor*, 87 Ill. 235.

Whether or not the State Constitution authorized the passage of a statute, what is the interpretation of such statute, and what acts are justified under such statute, are to be decided exclusively by the highest court of the State.

Green v. Neal, 31 U. S. 6 Pet. 291 (8: 402); *Elmendorf v. Taylor*, 23 U. S. 10 Wheat. 152 (6: 289); *Watson v. Mercer*, 33 U. S. 8 Pet. 88 (8: 879); *Jackson v. Lamphire*, 28 U. S. 3 Pet. 280 (7: 679); *Withers v. Buckley*, 61 U. S. 20 How. 84 (15: 816); *Porter v. Foley*, 65 U. S. 24 How. 415 (15: 740); *Medberry v. Ohio*, 65 U. S. 24 How. 413 (15: 739); *Salomons v. Graham*, 82 U. S. 15 Wall. 208 (21: 37); *Aicardi v. State*, 86 U. S. 19 Wall. 635 (22: 215); *Norton v. Shelby*

County, 118 U. S. 425 (30: 178); *Harpending v. Dutch Church*, 41 U. S. 16 Pet. 455 (10: 1029); *McCluny v. Silliman*, 28 U. S. 3 Pet. 270 (7: 676); *Murray v. Gibson*, 56 U. S. 15 How. 421 (14: 755); *Amy v. Watertown*, 130 U. S. 801 (32: 946); *Hanrick v. Patrick*, 119 U. S. 156, 170 (30: 396, 404); *Sanger v. Nightingale*, 122 U. S. 176 (31: 1105).

The Fourteenth Amendment does not take away from the States the power of giving a court of equity jurisdiction in cases requiring equitable relief.

Church v. Kelsey, 121 U. S. 288, 284 (30: 961); *Basey v. Gallagher*, 87 U. S. 20 Wall. 670 (22: 452); *Walker v. Sauvinet*, 92 U. S. 90 (23: 678).

The right of way passed as an appurtenance to the blocks, and therefore clear of homestead rights.

Smyth, Homesteads and Exemptions, § 308, p. 243; *Kittle v. Pfeiffer*, 22 Cal. 484; *Hamilton v. Chicago, B. & Q. R. Co.* 124 Ill. 235; *Mathiessen Zinc Co. v. La Salle*, 5 West. Rep. 178, 117 Ill. 411; *Trickey v. Schlader*, 52 Ill. 78; *Lake View v. LeBahn*, 6 West. Rep. 786, 120 Ill. 92; *Littler v. Lincoln*, 106 Ill. 358; *Maywood County v. Maywood*, 5 West. Rep. 529, 118 Ill. 61; *Lee v. Mound Station*, 6 West. Rep. 329, 118 Ill. 304; *Zearing v. Rober*, 74 Ill. 411.

Equity would protect abutting property owners by injunction upon any invasion of their rights.

Jacksonville v. Jacksonville R. Co. 67 Ill. 540.

The court was justified in ordering a writ of assistance to issue.

Terrell v. Allison, 88 U. S. 21 Wall. 291 (22: 635); *Kern v. Zink*, 55 Ill. 449.

Mr. Chief Justice Fuller delivered the opinion of the court:

Upon the 8th and 9th of October, 1871, a memorable conflagration destroyed a large part of the City of Chicago, including the courthouse and the entire records of the County of Cook in the State of Illinois, in which the City of Chicago was situated. An Act was thereupon passed by the General Assembly of that State, approved April 9, 1872, to remedy the evils consequent upon the destruction of public records (Laws Ill. 1871, 1872, p. 652), which Act is now chapter 116 of the Revised Statutes of Illinois. (2 Starr and Curtis, 1993.) That Act provided that in case of such destruction, the courts of the county wherein it occurred, having chancery jurisdiction, should have power to inquire into the condition of any title to or interest in any land in such county, and to make all such orders, judgments and decrees as might be necessary to determine and establish said title or interest, legal or equitable, against all persons known or unknown, and all liens existing on such lands, whether by statute, mortgage, deed of trust or otherwise; that it should be lawful for any person claiming title to any lands in the county at the time of the destruction of its records, and for all claiming under such person, to file a petition in any court in the county having chancery jurisdiction, praying for a decree establishing and confirming his said title, which petition should set out the character and extent of the estate in the land in question claimed by the complainant or petitioner, and from whom and when and by what mode he derived his title thereto;

the names of all persons owning or claiming any estate in fee in, or who should be in possession of, said lands or any part thereof, and also all persons to whom any such lands had been conveyed, and the deed or deeds of such conveyance recorded in the office of recorder of deeds since the time of destruction of the records and prior to the filing of the petition; and their residences, so far as the same were known; that all persons so named in the petition should be made defendants and notified of the suit by summons or publication in the same manner as required in chancery proceedings in the State, unknown owners or claimants to be brought in under the designation of "to whom it may concern;" that any person interested might oppose the petition, demur to or answer it, or file a cross-petition if he desired to do so; and that the decree entered in the proceeding should be, as to the title found, forever binding and conclusive, except against minors and insane persons, and persons in possession or to whom the lands had been conveyed and the deeds recorded since the destruction of the records and prior to the filing of the petition, and not made parties defendant by name. The Act also contained various provisions in protection of married women, insane persons and minors, and all defendants not served with summons were given one year after entry of decree to ask its vacation on petition; and the rules and regulations governing courts of chancery in Illinois were declared to apply to proceedings under the Act so far as not inconsistent therewith.

By numerous decisions of the Supreme Court of the State of Illinois it has been determined that a petition to establish title, under what is known as the "Burnt Records Act," need not show that the petitioner was in possession of the land or that it was vacant and unoccupied, as required in a bill to quiet title, the Act authorizing the petitioner to make all parties in possession or claiming an interest in the land parties defendant to the petition, creating a clear and marked distinction between a case of this character and such a bill; that the court is authorized and required to investigate the interest of all the parties in the premises in question, and to decree in favor of the better title; that all that is required in respect to adverse claimants or their titles is, that such claimant shall be named in the petition and made defendant; that nothing more is required to give the court jurisdiction under the Statute to investigate the claims of title to the premises, and by its decree establish and confirm the title in the person in whom it is found to be vested, and to make all such orders, judgments and decrees as shall be necessary to that end; that decrees so entered are, as to the title so found, forever binding and conclusive between the parties; that the Statute was in effect a Statute of Limitations, and under the circumstances was not unreasonable, but demanded as a matter of safety in a great emergency; that it was not open to the objection of unconstitutionality, because not providing for trial by jury or otherwise; and that the question whether a jury should be allowed could not arise unless a jury was demanded. *Gage v. Caraher*, 125 Ill. 447; *Heacock v. Hosmer*, 109 Ill. 245; *Heacock v. Lubuke*, 107 Ill. 396; *Robinson v. Ferguson*, 78 Ill. 588; *Bradish v. Grant*, 119 Ill. 606, 6 West. Rep. 525; *Bertrand v. Taylor*, 87 Ill. 285.

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The subject received much consideration from Judge Blodgett, holding the Circuit Court for the Northern District of Illinois, in *Smith v. Gage*, 11 Biss. 217, in which he announced substantially the same conclusions. And he remarks "that the court, on the final hearing of such a case, may, in its discretion as a court of equity, where two conflicting titles are presented, the validity of which can be determined in a court of law, by the express terms of its decree, remit the parties holding such titles to a court of law for the trial of their rights; but this would be purely a matter of equitable discretion, and does not limit the power of the court in this proceeding to settle the entire title by its decree." In *Gage v. Caraher*, *ubi supra*, the Supreme Court of Illinois says: "Whatever may be the power of the court of chancery, where there are controverted titles, to restore, by its decree, the evidences of title in the respective parties as they were before the destruction of the record, and then, in its discretion, remit the parties to a court of law to there try their titles, it is manifest no such course was contemplated by the Statute, or necessary in cases under it." In *Ward v. Farrell*, 97 Ill. 613, in passing upon the right to demand a trial by jury in the particular instance there in hand, it is justly observed: "Where a new class of cases are, by legislative action, directed to be tried as chancery causes, it must appear that, when tested by the general principles of equity, they are of an equitable character, and can be more appropriately tried in a court of equity than in a court of law. And if of this character, when brought in a court of equity they stand upon the same footing with other causes, and the court will have the right, as in other cases, to determine all questions of fact without submitting them to a jury."

Upon the construction of the Constitution and laws of a State, this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some provision of the Federal Constitution, or of a federal statute, or a rule of general commercial law. *Norton v. Shelby County*, 118 U. S. 425, 439 [30: 178, 185]. And this is so where a course of those decisions, whether founded on statutes or not, have become rules of property within the State; also in regard to rules of evidence in actions at law; and also in reference to the common law of the State, and its laws and customs of a local character when established by repeated decisions. *Burgess v. Seligman*, 107 U. S. 20 [27: 359]; *Bucher v. Cheshire R. Co.* 125 U. S. 555 [31: 795]. Substantially conclusive effect is given to such decisions upon the construction of state statutes, as affecting title to real estate within the State. *Ridings v. Johnson*, 128 U. S. 212 [32: 401]; *Bacon v. Northwestern M. L. Ins. Co.* 131 U. S. 253 [33: 128]; *Hanrick v. Patrick*, 119 U. S. 156, 169 [30: 396, 404].

And while the rule is thoroughly settled that remedies in the courts of the United States are at common law or in equity, according to the essential character of the case, uncontrolled in that particular by the practice of the state courts (*New Orleans v. Louisiana Construction*

Company, 129 U. S. 45, 46 [32: 607]), yet an enlargement of equitable rights by state statute may be administered by the circuit courts of the United States as well as by the courts of the State; and when the case is one of a remedial proceeding, essentially of an equitable character, there can be no objection to the exercise of the jurisdiction. *Broderick Will Case*, 88 U. S. 21 Wall. 508, 520 [22:599, 605]; *Holland v. Challen*, 110 U. S. 15, 25 [28: 52, 56]; *Frost v. Spitley*, 121 U. S. 552, 557 [30: 1010, 1012].

Tested by the conclusions of the Supreme Court of Illinois, the principal contention on appellant's behalf cannot be sustained. The record of the patent and the deed from the patentee to Michael Gormley had been destroyed, and the deed, which it turned out on this hearing was in Gormley's possession, had never been re-recorded. The petitioner was entitled to the establishment of the record by the proceeding authorized under the Statute, and, when the court had once acquired jurisdiction, it could go on and adjudicate upon all claims to the property in controversy, as therein provided. The character of the litigation sufficiently indicates that the petitioner legitimately invoked the aid of the Statute.

It is strenuously insisted that the remedy at law was adequate, and that as the right of possession was purely a legal question and for a jury, the court of chancery should have declined jurisdiction; but, inasmuch as the case came within the provisions of the Statute, and equity could alone afford the entire relief sought, the fact that legal questions were also involved could not oust the court of jurisdiction. The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances (*Kilbourn v. Sunderland*, 130 U. S. 505, 514 [32:1005, 1008]); and it is quite clear that under this Statute the restoration of the record title is a matter essentially of equitable cognizance, while the declaration of the invalidity of the ordinance of January 8, 1852, the removal of the cloud caused by recording a copy thereof, and the abatement of the obstruction to the streets, were matters in respect to which, under the averments of the petition and the evidence adduced at the hearing, the petitioner could properly resort to a court of equity. Undoubtedly the rule that a bill may be retained for the purpose of granting full relief when jurisdiction exists, should not be abused by being employed as a mere pretext for bringing into chancery causes proper for a court of law; but under the local law, this could not be predicated of a petition which the petitioner was entitled to file under the "Burnt Records Act," and, as already stated, we administer, where adverse citizenship gives us jurisdiction of a case, the equitable relief which state legislation accords.

It is objected that there was error in the direction for the removal of the buildings from the portion of Adams Street between blocks eight and nine, in disregard of the homestead rights of appellant and his wife; but we do not think so. Whether the plat was a statutory plat or not, as to which some issue is made by the answer, the proofs establish such a dedication as

created an easement in the petitioner, the existence of which Gormley was estopped to deny, and which the court was justified in protecting. *Maywood Co. v. Maywood*, 118 Ill. 61 [5 West. Rep. 529]; *Matthiessen & H. Zinc Co. v. La Salle*, 117 Ill. 411 [5 West. Rep. 178]; *Little v. Lincoln*, 106 Ill. 858; *Hamilton v. Chicago, B. & Q. R. Co.* 124 Ill. 285.

The right of way, as appurtenant to these blocks and lots, passed to the purchasers under the sale upon the trust deed, which was executed by Gormley and his wife, and by which both had released the homestead claim, and the decree recognized the fee as still in Gormley subject to the burden thus imposed. *Trickey v. Schlader*, 52 Ill. 78; *Kittle v. Pfeiffer*, 22 Cal. 484.

As to the remaining errors assigned, we are of opinion that the court correctly held the second ordinance duly annulled, and the easement as existing in the petitioner, so far as respected the property described in the first of the two ordinances referred to, and properly granted the writ of assistance to put the petitioner into possession of his blocks and lots as prayed; and while the bill did not specifically pray for similar relief in respect to the streets in question, such relief was agreeable to the case made by the bill, and could be awarded as within the prayer for general relief. The writ of assistance was simply in effectuation of the decree, and was in accordance with the recognized practice in equity and the Ninth Equity Rule. We are satisfied upon the whole case that the circuit court committed no error, and the decree will therefore be affirmed.

THE COUNTY COURT OF MACON COUNTY ET AL., *Plffs. in Err.*,

v.

UNITED STATES, *ex rel.* ALFRED HULDEKOPER.

(See *S. C. Macon County v. Huldekoper*, Reporter's ed. 832-837.)

Tax to pay county bonds—mandamus to compel levy—extent of tax.

1. Under the Missouri law authorizing a county to subscribe to stock of the Mo. & Miss. R. Co., and issue bonds therefor and levy a tax of one twentieth of one per cent to pay same, after applying said tax to the payment of a judgment on interest coupons of said bonds, the balance due on such judgment is a liability of the county to be paid out of its general funds.
2. The statutes of the State having authorized the county to levy another tax of one half of one per cent for county purposes, the owner of the judgment may by mandamus compel the county to levy the full amount of said last-named tax and apply it to the payment of the said balance due on

NOTE.—As to mandamus to compel city, town or county to levy tax to pay bonds or interest on bonds, see note to *Davenport v. U. S.* 19: 704.

As to suits on coupons detached from bonds, see note to *Kenosha v. Lamson*, 19: 725.

As to sale of lands for taxes; strict compliance with statute necessary,—see note to *Williams v. Peyton*, 4: 518.

When an injunction to restrain the collection of a tax will be granted. See note to *Williams v. Peyton*, 4: 518.

said judgment *pro rata* with other demands against the county.

3. The county having levied a tax of one half of one per cent, including as part thereof twenty cents on one hundred dollars levied by the township boards for township and bridge purposes, the county can be compelled to levy an additional tax of twenty cents on one hundred dollars to pay the balance of said judgment and other county debts *pro rata*.

[No. 615.]

Argued Jan. 17, 20, 1890. Decided Mar. 17, 1890.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri to review a judgment for a peremptory mandamus compelling an increase of the county tax levy from thirty cents to fifty cents by a further levy of twenty cents on every hundred dollars of valuation of taxable property in the county, and application of such levy to the payment of the warrant for relator's judgment and other registered warrants against the county. *Affirmed.*

Statement by Mr. Justice Field:

On the 19th of November, 1879, the relator, Alfred Huidekoper, recovered in the Circuit Court of the United States for the Eastern Division of the Western District of Missouri, a judgment against Macon County, in that State, for \$28,088, and costs, upon interest coupons detached from certain bonds issued May 2, 1870, by that county to the Missouri and Mississippi Railroad Company under the authority of the 18th section of the Act incorporating the company, approved February 20, 1865. The judgment not having been paid, and pursuant to a mandate of the court, a warrant was issued, dated April 29, 1884, upon the treasurer of the county, directing him to pay to the relator \$35,677.47 out of the general funds of the county in payment of that judgment. This warrant represented the judgment with interest and costs. It was on the same day presented for payment to the treasurer of the county, and its payment was refused for alleged want of funds.

The 18th section of the Act incorporating the Missouri and Mississippi Railroad Company provided that "it shall be lawful for the corporate authorities of any city or town, or the county court of any county, desiring to do so, to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay the same not to exceed one twentieth of one per cent upon the assessed value of taxable property for each year." It was under the authority thus conferred that the County Court of Macon County subscribed for stock in that company and issued the bonds in payment of its subscription, upon coupons of which the judgment of the relator was recovered.

The laws of the State of Missouri existing at the time of the issue of the bonds and coupons, namely, May 2, 1870, authorized the County Court of Macon County to levy and collect annually a tax of one half of one per cent upon all the taxable wealth of the county for county revenue, in addition to the one twentieth of one per cent tax authorized by the charter of the railroad company.

In *United States v. Clark County*, 96 U. S. 211 [24: 628], it was held that bonds similar to those upon which the coupons were issued for 184 U. S.

which the judgment here was recovered, were debts of the county as fully as any other of its liabilities, and that if any balance remained due on them for principal or interest, after application of the proceeds of the specific tax of one twentieth of one per cent, the holders were entitled to its payment out of the general funds of the county. And in the decision of five cases arising upon similar bonds before the court at the October Term of 1888 (109 U. S. 229), it was held that the payment of any such balance was demandable out of funds raised by taxation for ordinary county uses.

It appears that for the year 1885 the County Court of Macon County ordered that the levy upon every one hundred dollars of valuation of taxable property in that county for county revenue should be thirty cents, instead of fifty cents authorized by law, and that the revenue should be apportioned as follows: to the salary fund, one third; to the contingent fund, one fifth; to the poor-house fund, one fifth; to the road and bridge fund, one sixth; and to the jury and election fund the balance,—and that its clerk certify that order to the treasurer. The relator thereupon made a demand upon the county to annul and rescind this order of apportionment, and to increase the tax levy for the current year of 1885 from thirty cents to the fifty cents authorized by law upon every one hundred dollars valuation of taxable property in the county, and to apply the proceeds of such tax to the payment of the relator's judgment and warrant. This demand being refused, he prayed for a further writ of mandamus directing the County Court and the justices thereof to make the order and take the proceedings demanded.

Subsequently, on motion of the relator, the court entered an order requiring the County Court of Macon County and its treasurer to make and file in court on the first Monday in March, 1886, full returns and statements under oath relative to the administration of the county revenue after the first of January, 1884, to the date of filing their returns, stating the value of the property assessed for the years 1884 and 1885, what taxes were levied thereon for county revenue and when, what amounts were collected on said levies, what dispositions were made of the amounts so collected, what subdivisions into special funds had been made of the county revenue, what payments had been made to each fund, and what balance remained on hand to the credit of each of the funds, and to the credit of the general fund, and what warrants had been theretofore issued and registered drawn on the general fund, and what, if any, payments had been made thereon.

In November, 1885, the County Court filed an amended return to the mandamus issued, its original return having been lost, admitting that the county is a municipal corporation whose financial affairs are administered by a county court, that the relator recovered the judgment stated, and procured the warrant on its treasurer in the manner alleged, that the warrant was unpaid, and that by the law of Missouri, at the time of the issue of the bonds, the County Court was authorized to levy and collect a tax of one half of one per cent upon all the taxable wealth of the county for county revenue, in addition to the one twentieth of one

per cent authorized by the charter of the company. But it set up that the county had levied for the year 1885 upon all the taxable wealth of the county of every kind and description the full sum of fifty cents on the one hundred dollars valuation thereof as would appear by the exhibits which it presented, and made a part of its return, and stated that it had apportioned the revenue as above mentioned. It appeared also that the township boards for the several townships in that county had levied for township and road purposes for the year 1885 twenty cents on the one hundred dollars valuation of taxable property, and that the County Court had directed the clerk of the county to extend on the several tax books of the respective townships the rates which had been thus levied for township purposes. It was only in this way that the County Court had levied fifty cents on the hundred dollars of valuation of taxable property, that is, by treating as a part of such sum the amount which the township boards had levied for township and road purposes, namely, twenty cents on the one hundred dollars of valuation of taxable property.

It also appeared from that return that the amount of money remaining in the treasury of Macon County was \$14,894.44, and that there were outstanding and unpaid warrants largely in excess of that sum, issued on the general fund of the county for the years 1884 and 1885, and that before the issue of the relator's warrant and its registration, a school-fund warrant for the sum of \$7,848.90 had been issued by the county and registered.

The relator demurred to the return, and the circuit court sustained the demurrer, and ordered a peremptory mandamus to issue, compelling the County Court to annul the order apportioning the revenue for 1885 into separate and distinct funds, to increase the tax levy for that year from thirty cents to fifty cents by a further levy of twenty cents on every one hundred dollars of valuation of taxable property in the county, such levy to be made and collected with the regular annual levies required by law, and to apply the proceeds of such levy *pro rata* towards the payment of all registered warrants of even date and registration with relator's warrant, and to divide the surplus in the treasury of \$14,894.44, after deducting therefrom the amount of the warrant in favor of the school fund, between the relator's warrant and other warrants of even date of registration with that warrant issued under and by virtue of mandamus proceedings in said circuit court.

A motion for a rehearing was denied. To review this judgment the case is brought to this court on writ of error.

Messrs. James Carr and Robert G. Mitchell, for plaintiffs in error:

The facts cited in the return are not denied, consequently they stand admitted.

Harshman v. Knox County, 122 U. S. 306 (30: 1152).

The facts stated in said return show good legal reasons why the relator is not entitled to a peremptory writ of mandamus as prayed for in said information.

U. S. v. Clark County, 95 U. S. 769 (24: 545).

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The relator is not entitled to the levy of any other tax.

U. S. v. Macon County, 99 U. S. 582 (25: 331); *U. S. v. Clark County*, 95 U. S. 769 (24: 545); *State v. Macon County*, 68 Mo. 29; *State v. Shorridge*, 56 Mo. 126.

It would be gross breach of trust to take this fund or any part thereof and apply it to the payment of the relator's judgment.

Missouri v. Winterbottom, 123 U. S. 215 (31: 124); *Clay County v. McAleer*, 115 U. S. 616 (29: 482); *East St. Louis v. U. S.* 110 U. S. 321 (28: 162); *Grant v. Davenport*, 36 Iowa, 401; *Coffin v. Davenport*, 23 Iowa, 515; *French v. Burlington*, 42 Iowa, 618; *Com. v. Lancaster County*, 6 Binn. 5; *Com. v. Philadelphia County*, 1 Whart. 1; *Edgerton v. Municipality*, 1 La. Ann. 485; *Dobbins v. Erie County*, 41 U. S. 16 Pet. 435 (10: 1022).

The relator has got all he is entitled to under the contract.

State v. Shorridge, 56 Mo. 126; *State v. Macon County Ct.* 68 Mo. 29.

Mr. Joseph Shippen, for defendant in error:

The court below was correct in ordering the annulling of the apportionment of the county revenue for the year 1885 into separate and distinct funds.

State v. Macon County Ct. 41 Mo. 453; *Curren v. Arkansas*, 56 U. S. 15 How. 820 (14: 712); *U. S. v. Clark County*, 96 U. S. 211 (24: 628).

Mr. Justice Field delivered the opinion of the court:

According to the law of Missouri under which the bonds of Macon County were issued to the Missouri and Mississippi Railroad Company, in payment of its subscription of stock to that company, as stated above, the balance due upon the judgment of the relator, after application of the moneys raised by the special tax of one twentieth of one per cent upon the assessed value of taxable property, stood on the same footing as any other liability of the county to be paid out of its general funds. To raise revenue to meet its expenses, which included that liability, the county was authorized to levy a tax of fifty cents on every one hundred dollars of valuation of taxable property in the county. *United States v. Clark County*, 96 U. S. 211 [26: 628]; *Knox County Ct. v. United States*, 109 U. S. 229 [27: 915].

In this case it appears that for the year 1885 the county had levied only thirty cents on every one hundred dollars of property, but it set up in its answer that it had levied fifty cents, treating the twenty cents which had been levied by the boards of townships for township and bridge purposes as part of the fifty cents. The township is a separate organization from that of the county, with authority to purchase and hold real estate and make contracts and control its corporate property, and its taxes levied for those purposes over which it has control can in no just sense be termed taxes for county purposes. There can be, therefore, no valid objection to the county's levy of an additional twenty cents on the one hundred dollars to make up the fifty cents which it is authorized to levy to meet its expenses and liabilities.

The apportioning of the funds collected to

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distinct and separate purposes does not affect the question presented. The proceeding is to obtain a further levy and the appropriation of its proceeds upon the judgment of the relator among other debts of the county.

That the surplus remaining in the treasury over the payment of the warrant for the school fund, which is of prior registration, should be appropriated, *pro rata*, upon all the warrants of even date and registration, is a simple measure of justice. All the warrants were issued and registered on the same day, and if they could only be paid in the order of their registration, and a payment could not be made on any one without its surrender, as contended, the treasurer would be obliged to retain the funds in his possession until he had a sufficient amount to pay them all before applying any portion thereof. As the circuit court said, this is an absurd position, and it held that whenever any reasonable amount has accumulated it should be distributed, and added that the order of the court would be a full protection to the officer. In that respect, as well as in other particulars, concurring with the court, *we affirm its judgment.*

MARIE P. EVANS ET AL., *Appts.*,

THE STATE NATIONAL BANK OF
NEW ORLEANS.

(See S. C. Reporter's ed. 380-382.)

Practice—second appeal, when taken—failure to file record, effect of—dismissal—time of filing record.

1. Where an appeal is taken to this court and the record is not filed at the term at which it is returnable, the appeal is of no avail, and a second appeal may be taken.
2. Where a second appeal is taken by its allowance by the circuit court within the two years it is operative if the second is filed during the succeeding term.
3. Neither the signing of the citation nor the approval of the bond is necessary to the jurisdiction of this court, but it is essential that the record be filed during the term at which the appeal is returnable.
4. It is appellant's duty to docket his case and file the record with the clerk of this court within the first six days of the term, where the decree was rendered thirty days before the commencement of the term.
5. If this is not done the appellee may have the case docketed and dismissed, but the court may, even then, permit appellant to docket the case and file the record after such dismissal.
6. If the case is not so docketed and dismissed by appellee, the appellant is in time if the record be filed during the return term.
7. The filing of the record in this case under the second appeal, during the term succeeding its allowance, though on one of the last days of that term and more than two years from the rendition of the decree, the appeal having been allowed within the two years, gave this court jurisdiction, which was not defeated by the failure to obtain a citation or give the bond within the two years.

[No. 655.]

Submitted Mar. 3, 1890. Decided Mar. 17, 1890.
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APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana in favor of defendant, dismissing the bill with costs.

On motion to dismiss. *Denied.*

The facts are stated in the opinion.

Messrs. James McConnell and W. Hallet Phillips for motion.

Messrs. J. J. Johnson, A. H. Garland and H. J. May in opposition.

Mr. Chief Justice Fuller delivered the opinion of the court:

The decree in this case was rendered on the 19th of June and a rehearing refused on the 6th of July, 1885. On the 8th of July of that year an order was entered allowing Mrs. Evans and her husband, who were complainants below, an appeal to this court upon giving bond with security as directed; and upon the same day the bond was filed and approved. Nothing further was done, and the record not having been filed in this court during the succeeding term the appeal became of no avail, because not duly prosecuted. *Credit Co. v. Arkansas Cent. R. Co.* 128 U. S. 258 [82:448]. On the 21st of May, 1887, Mr. and Mrs. Evans petitioned the circuit court to allow an appeal from said decree, which was on that day allowed and entered of record, on the petitioners furnishing bond conditioned according to law. This bond was accordingly given and approved on the 3d of October, 1887, and citation issued and served, returnable at October Term, 1887. The record was filed here on the 31st of March, 1888, one of the days of that term.

A motion is now made to dismiss the appeal, upon the grounds that it could not be granted, because the court had exhausted its power by the allowance of the first appeal, and because, if this were not so, the second appeal was not taken within two years from the entry of the decree. As to the first of these grounds it may be remarked, that when the term elapsed at which the first appeal was returnable, without the filing of the record, that appeal had spent its force, and the matter was open to the taking of a second appeal, as it would have been if the appellee had docketed the cause and had it dismissed. As to the second appeal, this was taken within the two years, by its allowance by the circuit court, and not lost, as appellants did not fail to file the record during the succeeding term. Neither the signing of the citation nor the approval of the bond was necessary to our jurisdiction, but it was essential that the record should be filed during the term at which the appeal was returnable.

Under the Ninth Rule, it is the duty of an appellant to docket his case and file the record with the clerk of this court within the first six days of the term, where the decree was rendered thirty days before the commencement of the term, and if this is not done, the appellee may have the case docketed and dismissed as therein provided, though even then the court may by order permit the appellant to docket the case and file the record after such dismissal. And it has always been held that if the case is not so docketed and dismissed by the appellee, the appellant is in time if the record be filed during the return term.

The filing of the transcript of record in this

case under the second appeal, during the term succeeding its allowance, sufficed for the purposes of jurisdiction, which was not defeated by the failure to obtain a citation or give the bond within two years from the rendition of the decree. *Edmonson v. Bloomshire*, 74 U. S. 7 Wall. 306 [19: 91]; *Richardson v. Green*, 180 U. S. 104 [32: 872], and cases cited.

The motion to dismiss is therefore denied.

AUGUST F. ARNDT ET AL., *Plffs. in Err.*,
v.

NATHAN K. GRIGGS.

(See S. C. Reporter's ed. 316-329.)

Service of summons by publication, in suit as to lands—state law—jurisdiction—constructive service.

1. A State has power by statute to provide for the adjudication of titles to real estate within its limits as against nonresidents who are brought into court only by publication.

2. The procedure established by the State, in this respect, is binding upon the federal courts.

3. The disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated.

4. The court can acquire jurisdiction to quiet title by constructive service against nonresident defendants by publication where the statutes of the State provide for and allow such mode of service in such cases.

[No. 1150.]

Submitted Jan. 10, 1890. Decided Mar. 17, 1890.

IN ERROR to the Circuit Court of the United States for the District of Nebraska to review a judgment in favor of plaintiff in a suit in ejectment on a decree quieting the title.

Upon a certificate of division of opinion between the trial judges. *Reversed.*

The facts are stated in the opinion.

Messrs. Walter J. Lamb, Arnott C. Ricketts and Henry H. Wilson, for plaintiffs in error:

The mode of transferring real estate is subject to the control of the Legislature of the State.

8 Pom. Eq. Jur. § 1517; *Bonwell v. Otis*, 50 U. S. 9 How. 336 (13: 164); *Parker v. Overman*, 59 U. S. 18 How. 187 (15: 318); *Clark v. Smith*, 88 U. S. 18 Pet. 203 (10: 127); *Huling v. Kaw Valley R. & Imp. Co.* 180 U. S. 559 (32: 1045); *Mellen v. Moline M. Iron Works*, 131 U. S. 352 (33: 178).

The court acquires jurisdiction to quiet title by constructive service against nonresident defendants.

Scudder v. Sargent, 15 Neb. 102; *Keene v. Sallenbach*, 15 Neb. 200; *Watson v. Ulbrich*, 18 Neb. 189; *Huling v. Kaw Valley R. & Imp. Co.* 180 U. S. 563 (32: 1048); *Salisbury v. Sands*, 2 Dill. 270; *Blair v. West Point Mfg. Co.* 7 Neb. 152; *Penn v. Hayward*, 14 Ohio St. 304; *Williams v. Welton*, 28 Ohio St. 468; *Fisher v. Fredericks*, 33 Mo. 612; *Weil v. Lowenthal*, 10 Iowa, 575; *Brooklyn Trust Co. v. Bulmer*, 49 N. Y. 84; *Dillon v. Heller*, 39 Kan. 599; *Amabaugh v. Exchange Bank*, 33 Kan. 100; *Beebe v. Doster*, 36 Kan. 666; *Gillespie v. Thomas*, 23 Kan. 138;

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Walkenhorst v. Lewis, 24 Kan. 420; *Rowe v. Palmer*, 29 Kan. 337; *Venable v. Dutch*, 37 Kan. 515, 519; *Entreken v. Howard*, 16 Kan. 551; *Howard v. Entreken*, 24 Kan. 428; *Essig v. Lower*, 120 Ind. 239; *Cloyd v. Trotter*, 118 Ill. 391; *Adams v. Cowles*, 95 Mo. 501; *Wunstel v. Landry*, 39 La. Ann. 312; *Preston v. Bowmar*, 19 U. S. 6 Wheat. 580 (5: 336); *U. S. v. Fox*, 94 U. S. 320 (24: 192); *McCormick v. Sulivant*, 23 U. S. 10 Wheat. 202 (6: 303); *Beauregard v. New Orleans*, 59 U. S. 18 How. 497 (15: 469); *Suydam v. Williamson*, 65 U. S. 24 How. 484 (16: 745).

Messrs. Nathan K. Griggs, Samuel Rinker and Julius A. Smith, for defendant in error:

Statutes authorizing personal judgments upon constructive service as well as judgments rendered upon such service are void.

Hart v. Sansom, 110 U. S. 151 (28: 101); *Langdell*, Eq. Pl. (2d ed.) §§ 43, 184; *Orton v. Smith*, 59 U. S. 18 How. 263 (15: 393); *Vandever v. Freeman*, 20 Tex. 334; *Hollingsworth v. Barbours*, 29 U. S. 4 Pet. 466, 475 (7: 922, 926); *Boswell v. Otis*, 50 U. S. 9 How. 336 (13: 164); *Bischoff v. Wethered*, 76 U. S. 9 Wall. 812 (19: 329); *Knowles v. Logansport Gaslight & C. Co.* 86 U. S. 19 Wall. 58 (22: 70); *Pennoyer v. Neff*, 95 U. S. 714 (24: 565); *Schibsy v. Westenhole*, L. R. 6 Q. B. 155; *The City of Mecca*, L. R. 6 Prob. Div. 106; *Clark v. Hammett*, 27 Fed. Rep. 389; *Pitts v. Clay*, 27 Fed. Rep. 637.

The mere fact that the real estate is within the territorial limits of the court's jurisdiction does not give the court jurisdiction of the property.

Eaton v. Badger, 33 N. H. 228.

Mr. Justice Brewer delivered the opinion of the court:

The statutes of Nebraska contain these sections: Sec. 57, chap. 73, Compiled Statutes 1885, p. 493: "An action may be brought and prosecuted to final decree, judgment or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate." Sec. 58: "All such pleadings and proofs and subsequent proceedings shall be had in such action now pending or hereafter brought, as may be necessary to fully settle and determine the question of title between the parties to said real estate, and to decree the title to the same, or any part thereof, to the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment or order into effect." Sec. 77, Code of Civil Procedure, Compiled Statutes 1885, p. 637: "Service may be made by publication in either of the following cases: Fourth. In actions which relate to, or the subject of which is, real or personal property in this State, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a nonresident of the State or a foreign corporation." Sec. 78 of the Code: "Before service can be made by publication, an affidavit must be filed that service of a summons cannot be made within this State,

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on the defendant or defendants, to be served by publication, and that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication." Sec. 82 of the Code: "A party against whom a judgment or decree has been rendered without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened and be let in to defend; . . . but the title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title to any property sold before judgment under an attachment." Sec. 429 of the Code: "When any judgment or decree shall be rendered for a conveyance, release or acquittance, in any court of this State, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available, as if the conveyance, release or acquittance had been executed conformable to such judgment or decree."

Under these sections, in March, 1882, Charles L. Flint filed his petition in the proper court against Michael Hurley and another, alleging that he was the owner and in possession of the tracts of land in controversy in this suit; that he held title thereto by virtue of certain tax deeds, which were described; that the defendants claimed to have some title, estate, interest in or claim upon the lands by patent from the United States, or deed from the patentee, but that whatever title, estate or claim they had, or pretended to have, was divested by the said tax deeds, and was unjust, inequitable and a cloud upon plaintiff's title; and that this suit was brought for the purpose of quieting his title. The defendants were brought in by publication, a decree was entered in favor of Flint quieting his title, and it is conceded that all the proceedings were in full conformity with the statutory provisions above quoted.

The present suit is one in ejectment, between grantees of the respective parties to the foregoing proceedings to quiet title; and the question before us, arising upon a certificate of division of opinion between the trial judges, is whether the decree in such proceedings to quiet title, rendered in accordance with the provisions of the Nebraska statute, upon service duly authorized by them, was valid and operated to quiet the title in the plaintiff therein. In other words, has a State the power to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a nonresident, is brought into court only by publication? The Supreme Court of Nebraska has answered this question in the affirmative—*Watson v. Ulbrich*, 18 Neb. 186, in which the court says: "The principal question to be determined is whether or not the decree in favor of Gray, rendered upon constructive service, is valid until set aside. No objection is made to the service, or any proceedings connected with it. The real estate in controversy was within the jurisdiction

of the district court, and that court had authority, in a proper case, to render the decree confirming the title of Gray. In *Castrique v. Imrie*, L. R. 4 H. L. 414-429, Mr. Justice Blackburn says: 'We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the state under the authority of which the court sits; and, secondly, whether the sovereign authority of that state has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world.' The court, therefore, in this case, having authority to render the decree, and jurisdiction of the subject matter, its decree is conclusive upon the property until vacated under the statutes or set aside."

Sec. 57, enlarging as it does the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property, has been sustained by this court, and held applicable to suits in the federal court. *Holland v. Challen*, 110 U. S. 15 [28:52]. But it is earnestly contended that no decree in such a case, rendered on service by publication only, is valid or can be recognized in the federal courts; and *Hart v. Sansom*, 110 U. S. 151 [28:101], is relied on as authority for this proposition. The propositions are, that an action to quiet title is a suit in equity; that equity acts upon the person; and that the person is not brought into court by service by publication alone.

While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, What jurisdiction has a State over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of nonresidents to such real estate? If a State has no power to bring a nonresident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a nonresident will remain for all time a cloud, unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the State. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is

local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the State, in this respect, is binding upon the federal courts. In *United States v. Fox*, 94 U. S. 815, 820 [24: 192], it was said: "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." See also *McCormick v. Sullivan*, 23 U. S. 10 Wheat. 202 [6: 308]; *Beauregard v. New Orleans*, 59 U. S. 18 How. 497 [15: 469]; *Snyder v. Williamson*, 65 U. S. 24 How. 427 [16: 742]; *Christian Union v. Yount*, 101 U. S. 352 [25: 888]; *Lathrop v. Commercial Bank*, 8 Dana (Ky.) 114.

Passing to an examination of the decisions on the precise question, it may safely be affirmed that the general, if not the uniform, ruling of state courts has been in favor of the power of the State to thus quiet the title to real estate within its limits. In addition to the case from Nebraska, heretofore cited, and which only followed prior rulings in that State—*Scudder v. Sargent*, 15 Neb. 102; *Keene v. Sallenbach*, 15 Neb. 200—reference may be had to a few cases. In *Cloyd v. Trotter*, 118 Ill. 391, the Supreme Court of Illinois held that under the statutes of that State the court could acquire jurisdiction to quiet title by constructive service against nonresident defendants. A similar ruling as to jurisdiction acquired in a suit to set aside a conveyance as fraudulent as to creditors was affirmed in *Adams v. Coules*, 95 Mo. 501. In *Wunzel v. Landry*, 39 La. Ann. 812, it was held that a nonresident party could be brought into an action of partition by constructive service. In *Ewing v. Lower*, 120 Ind. 289, the Supreme Court of Indiana thus expressed its views on the question: "It is also argued that the decree in the action to quiet title, set forth in the special finding, is *in personam* and not *in rem*, and that the court had no power to render such decree on publication. While it may be true that such decree is not *in rem*, strictly speaking, yet it must be conceded that it fixed and settled the title to the land then in controversy, and to that extent partakes of the nature of a judgment *in rem*. But we do not deem it necessary to a decision of this case to determine whether the decree is *in personam* or *in rem*. The action was to quiet the title to the land then involved, and to remove therefrom certain apparent liens. Section 318, Rev. Stat. 1881, expressly authorizes the rendition of such a decree on publication." This was since the decision in *Hart v. Sansom*, as was also the case of *Dillon v. Heller*, 89 Kan. 599, in

which *Mr. Justice Valentine*, for the court, says: "For the present we shall assume that the statutes authorizing service of summons by publication were strictly complied with in the present case, and then the only question to be considered is whether the statutes themselves are valid. Or, in other words, we think the question is this: Has the State any power, through the Legislature and the courts, or by any other means or instrumentalities, to dispose of or control property in the State belonging to nonresident owners out of the State, where such nonresident owners will not voluntarily surrender jurisdiction of their persons to the State or to the courts of the State, and where the most urgent public policy and justice require that the State and its courts should assume jurisdiction over such property? Power of this kind has already been exercised, not only in Kansas, but in all the other States. Lands of nonresident owners, as well as of resident owners, are taxed and sold for taxes; and the owners thereby may totally be deprived of such lands, although no notice is ever given to such owners, except a notice by publication, or some other notice of no greater value, force or efficacy. *Beebe v. Doster*, 36 Kan. 666, 675, 677. Mortgage liens, mechanics' liens, materialmen's liens and other liens are foreclosed against nonresident defendants upon service by publication only. Lands of nonresident defendants are attached and sold to pay their debts; and, indeed, almost any kind of action may be instituted and maintained against nonresidents to the extent of any interest in property they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication. *Gillespie v. Thomas*, 28 Kan. 138; *Walkenhorst v. Lewis*, 24 Kan. 420; *Rowe v. Palmer*, 29 Kan. 337; *Venable v. Dutch*, 37 Kan. 515, 519. All the States by proper statutes authorize actions against nonresidents, and service of summons therein by publication only, or service in some other form no better; and, in the nature of things, such must be done in every jurisdiction, in order that full and complete justice may be done where some of the parties are nonresidents. We think a sovereign State has the power to do just such a thing. All things within the territorial boundaries of a sovereignty are within its jurisdiction; and, generally, within its own boundaries a sovereignty is supreme. Kansas is supreme, except so far as its power and authority are limited by the Constitution and laws of the United States; and within the Constitution and laws of the United States the courts of Kansas may have all the jurisdiction over all persons and things within the State which the Constitution and laws of Kansas may give to them; and the mode of obtaining this jurisdiction may be prescribed wholly, entirely and exclusively by the statutes of Kansas. To obtain jurisdiction of everything within the State of Kansas, the statutes of Kansas may make service by publication as good as any other kind of service."

Turning now to the decisions of this court: In *Bonwell v. Otis*, 50 U. S. 9 How. 336 [13: 164], was presented a case of a bill for a specific performance and an accounting, and in which was a decree for specific performance and accounting; and an adjudication that the amount

due on such accounting should operate as a judgment at law. Service was had by publication, the defendants being nonresidents. The validity of a sale under such judgment was in question; the court held that portion of the decree, and the sale made under it, void; but with reference to jurisdiction in a case for specific performance alone, made these observations: "Jurisdiction is acquired in one of two modes: first, as against the person of the defendant, by the service of process; or, second, by a proceeding against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem*, in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service or process, it is substantially of that character."

In the case of *Parker v. Overman*, 59 U. S. 18 How. 187 [15: 318], the question was presented under an Arkansas statute, a statute authorizing service by publication. While the decision on the merits was adverse, the court thus states the statute, the case and the law applicable to the proceedings under it: "It had its origin in the state court of Dallas County, Arkansas, sitting in chancery. It is a proceeding under a statute of Arkansas, prescribing a special remedy for the confirmation of sales of land by a sheriff or other public officer. Its object is to quiet the title. The purchaser at such sales is authorized to institute proceedings by a public notice in some newspaper, describing the land, stating the authority under which it was sold, and 'calling on all persons who can set up any right to the lands so purchased, in consequence of any informality, or any irregularity or illegality connected with the sale, to show cause why the sale so made should not be confirmed.' In case no one appears to contest the regularity of the sale, the court is required to confirm it, on finding certain facts to exist. But if opposition be made, and it should appear that the sale was made 'contrary to law,' it became the duty of the court to annul it. The judgment or decree, in favor of the grantee in the deed, operates 'as a complete bar against any and all persons who may thereafter claim such land, in consequence of any informality or illegality in the proceedings.' It is a very great evil in any community to have titles to land insecure and uncertain; and especially in new States, where its result is to retard the settlement and improvement of their vacant lands. Where such lands have been sold for taxes there is a cloud on the title of both claimants, which deters the settler from purchasing from either. A prudent man will not purchase a law suit, or risk the loss of his money and labor upon a litigious title. The Act now under consideration was intended to remedy this evil. It is in substance a bill of peace. The jurisdiction of the court over the controversy is founded on the presence of the property; and, like a proceeding *in rem*, it becomes conclusive against the absent claimant, as well as the present con-

testant. As was said by the court in *Clark v. Smith*, 88 U. S. 13 Pet. 203 [10: 127], with regard to a similar law of Kentucky: 'A State has an undoubted power to regulate and protect individual rights to her soil, and declare what shall form a cloud over titles; and, having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the Legislature, having its origin in the peculiar condition of the country. The State Legislatures have no authority to prescribe forms and modes of proceeding to the courts of the United States; yet, having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed be substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state court.' In the case before us the proceeding, though special in its form, is in its nature but the application of a well-known chancery remedy; it acts upon the land, and may be conclusive as to the title of a citizen of another State."

In the case of *Pennoyer v. Neff*, 95 U. S. 714, 727, 784 [24: 565, 570, 573], in which the question of jurisdiction in cases of service by publication was considered at length, the court, by *Mr. Justice Field*, thus stated the law: "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. . . . It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants, but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned." These cases were all before the decision of *Hurt v. Sansom*.

Passing to a case later than that (*Huling v. Kaw Valley R. & Imp. Co.* 130 U. S. 539 [32: 1045]), it was held that, in proceedings commenced under a statute for the condemnation of lands for railroad purposes, publication was sufficient notice to a nonresident. In the opinion, *Mr. Justice Miller*, speaking for the court, says: "Of course, the statute goes upon the presumption that, since all the parties cannot be served personally with such notice, the publication, which is designed to meet the eyes of everybody, is to stand for such notice. The publication itself is sufficient if it had been in the form of a personal service upon the party himself within the county. Nor have we any doubt that this form of warning owners of property to appear and defend their interests,

where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action of the tribunals appointed by proper authority to determine those matters. The owner of real estate, who is a nonresident of the State within which the property lies, cannot evade the duties and obligations which the law imposes upon him in regard to such property, by his absence from the State. Because he cannot be reached by some process of the courts of the State, which, of course, have no efficacy beyond their own borders, he cannot therefore hold his property exempt from the liabilities, duties and obligations which the State has a right to impose upon such property; and, in such cases, some substituted form of notice has always been held to be a sufficient warning to the owner, of the proceedings which are being taken under the authority of the State to subject his property to those demands and obligations. Otherwise the burdens of taxation, and the liability of such property to be taken under the power of eminent domain, would be useless in regard to a very large amount of property in every State of the Union." In this connection, it is well to bear in mind that, by the statutes of the United States, in proceedings to enforce any legal or equitable lien, or to remove a cloud upon the title of real estate, nonresident holders of real estate may be brought in by publication (18 Stat. 472); and the validity of this Statute, and the jurisdiction conferred by publication, has been sustained by this court. *Mellen v. Moline M. Iron Works*, 131 U. S. 352 [33: 178].

These various decisions of this court establish that, in its judgment, a State has power by statute to provide for the adjudication of titles to real estate within its limits as against nonresidents who are brought into court only by publication; and that is all that is necessary to sustain the validity of the decree in question in this case.

Nothing inconsistent with this doctrine was decided in *Hart v. Sansom*, *supra*. The question there was as to the effect of a judgment. That judgment was rendered upon a petition in ejectment against one Wilkerson. Besides the allegations in the petition to sustain the ejectment against Wilkerson, were allegations that other defendants named had executed deeds, which were described, which were clouds upon plaintiffs' title; and in addition an allegation that the defendant Hart set up some pretended claim of title to the land. This was the only averment connecting him with the controversy. Publication was made against some of the defendants, Hart being among the number. There was no appearance, but judgment upon default. That judgment was, that the plaintiffs recover of the defendants the premises described; "that the several deeds in plaintiffs' petition mentioned be, and the same are hereby, annulled and canceled, and for naught held, and that the cloud be thereby removed;" and for costs, and that execution issue therefor. This was the whole extent of the judgment and decree. Obviously in all this there was no adjudication affecting Hart. As there was no allegation that he was in possession, the judgment for

possession did not disturb him; and the decree for cancellation of the deeds referred specifically to the deeds mentioned in the petition, and there was no allegation in the petition that Hart had anything to do with those deeds. There was no general language in the decree quieting the title as against all the defendants; so there was nothing which could be construed as working any adjudication against Hart as to his claim and title to the land. He might apparently be affected by the judgment for costs, but they had no effect upon the title. So the court held, for it said: "It is difficult to see how any part of that judgment (except for costs) is applicable to Hart; for that part which is for recovery of possession certainly cannot apply to Hart, who was not in possession; and that part which removes the cloud upon the plaintiffs' title appears to be limited to the cloud created by the deeds mentioned in the petition, and the petition does not allege, and the verdict negatives, that Hart held any deed."

An additional ground assigned for the decision was that if there was any judgment (except for costs) against Hart, it was, upon the most liberal construction, only a decree removing the cloud created by his pretended claim of title, and therefore, according to the ordinary and undisputed rule in equity, was not a judgment *in rem*, establishing against him a title in the land. But the power of the State, by appropriate legislation, to give a greater effect to such a decree was distinctly recognized, both by the insertion of the words "unless otherwise expressly provided by statute," and by adding: "It would doubtless be within the power of the State in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose." And of course, it follows that if a State has power to bring in a nonresident by publication for the purpose of appointing a trustee, it can in like manner bring him in and subject him to a direct decree. There was presented no statute of the State of Texas providing directly for quieting the title of lands within the State, as against nonresidents, brought in only by service by publication, such as we have in the case at bar, and the only statute cited by counsel or referred to in the opinion was a mere general provision for bringing in nonresident defendants in any case by publication; and it was not the intention of the court to overthrow that series of earlier authorities heretofore referred to, which affirm the power of the State, by suitable statutory proceedings, to determine the titles to real estate within its limits, as against a nonresident defendant, notified only by publication.

It follows, from these considerations, that the first question presented in the certificate of division, the one heretofore stated, and which is decisive of this case, must be answered in the affirmative.

The judgment of the Circuit Court is reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

JOHN C. DEPUTRON, *Plff. in Err.*,
v.

ROWENA YOUNG.

(See S. C. Reporter's ed. 241-260.)

Nebraska practice—jurisdiction as to parties—collusive suit—dismissal of suit—review of findings—title by patent—tax deed, when void—color of title—possession of land—constructive and mixed possession—power to convey—proof—estoppel—title of purchaser at execution sale—vacating order of confirmation—rights of purchaser.

1. Where the averment of diverse citizenship was not controverted by the answer, the averment must be taken as true under the practice in Nebraska.
2. Where the jurisdictional allegation is not traversed, no question involving the capacity of the parties in the cause to litigate in the circuit court can be raised before the jury. The court may proceed to judgment, although the special verdict contains no finding upon this point.
3. The objection that the title had been placed in plaintiff collusively, to enable the suit to be brought in the United States court, should be raised at the first opportunity; a delay to raise it, such as a delay for a year and a half after a second trial until motions for new trial by both parties on special verdict, will be considered on motion to dismiss on that ground, although defendant avers ignorance of the facts before the trial.
4. A suit cannot properly be dismissed by a circuit court of the United States, as not involving a controversy within the jurisdiction of the court, unless the facts when made to appear on the record create a legal certainty of that conclusion.
5. This court cannot review the action of the circuit court in reference to findings of the jury objected to, and, no exceptions having been saved, is restricted to the question whether there was error in giving judgment for the plaintiff upon the facts as found.
6. The finding that plaintiff obtained title to the land by patent from the United States to his grantor, who conveyed to plaintiff, makes out his title, and to prevent his recovery defendant must prove some affirmative defense alleged.
7. In Nebraska, a tax deed not executed by the treasurer under his seal of office is void.
8. A tax deed, though void upon its face, is sufficient color of title in Nebraska to support an adverse possession to the property; the possession, however, which bars a recovery must be continuous, uninterrupted, open, notorious, actual, exclusive and adverse.
9. Where the rightful owner is in the actual occupancy of a part of his tract, he is in the constructive and legal possession and seisin of the whole, unless he is dispossessed by actual occupation and dispossession.
10. Where the possession is mixed, the legal seisin is according to the legal title, and there can be no constructive possession in defendant, even if that might exist if he had actual possession of a part and no one had possession of the remainder.
11. In the case of a naked power to convey, not coupled with an interest, the law requires that every prerequisite to the exercise of that power should precede it.
12. If the validity of a deed depends on an act *in pais*, the party claiming under it is bound to prove the performance of the act.
13. If the power to convey is general and the con-

veyance is a fraud upon the power, no estoppel arises in favor of the grantee unless he paid value without notice.

14. In Nebraska, the title of a purchaser at an execution sale depends not alone upon his bid or payment of the purchase money, but upon the confirmation of the sale, and the sale, though temporarily confirmed, may be set aside, where no rights of a third party accrue in the mean time.
15. Where the order of confirmation was vacated before there was any change in the relation of the parties, the sheriff's deed fell with it.
16. The purchaser can move for confirmation or to set the sale aside, and can appeal from the order thereon, and may be compelled to perform his bid, and is concluded by the result of the proceedings to confirm or annul the same.

[No. 1151.]

Submitted Jan. 6, 1890. Decided Mar. 10, 1890.

IN ERROR to the Circuit Court of the United States for the District of Nebraska to review a judgment in favor of plaintiff in an action of ejectment. *Affirmed.*

Opinion below, 37 Fed. Rep. 46.

Statement by *Mr. Chief Justice Fuller*:

This was an action of ejectment brought in the Circuit Court of the United States for the District of Nebraska, June 14, 1884, by Rowena Young, a citizen of Ohio, against John C. Deputron, a citizen of Nebraska, to recover certain premises in the petition named. The defendant answered, denying plaintiff's ownership and right to possession; and setting up title under a tax deed and purchase in good faith and without notice for \$10,000 paid, being the full value, and ten years' adverse possession. To this answer a reply, specifically denying its averments, was filed by the plaintiff. At the November Term, 1885, of said court, a trial was had, which resulted in a verdict for the defendant and judgment thereon, which was set aside on motion of plaintiff, and a new trial awarded. In March, 1883, the cause was tried a second time, and a special verdict of forty-one findings rendered by the jury as set forth in the margin.*

*1st. That Jane Y. Irwin obtained title to said lands by patent from the United States December 15, 1862, and on the 9th of August, 1867, conveyed the same to William P. Young, who on the 5th of February, 1874, reconveyed the same to Jane Y. Irwin, who, on the 11th day of June, 1884, conveyed said lands to the plaintiff, Rowena Young.

2d. On the 31st of March, 1874, Jane Y. Irwin and husband entered into a contract with N. S. Scott, Samuel Boyd and Milton La Master for the selling and subdivision of said lands.

3d. And said Scott, Boyd and La Master soon after entered upon said lands under said contract, and staked out the block corners and street intersections, being engaged in the survey on the lands in controversy and other lands for a period of about two months, finishing their survey about the last of May, 1874.

4th. On the 12th of August, 1875, Jane Y. Irwin and her husband executed a power of attorney to William T. Donovan to enable him to make conveyances to purchasers when sales were made by Scott, Boyd and La Master, and to facilitate their operations under their contract of March 31st, 1874.

5th. We find that there was no assessment of the land in controversy for taxes in the year 1867, nor was the same borne upon the tax-list of that year.

6th. We find the tax deed of June 12, 1871, executed by John Cadman, county treasurer, was not sealed by the county treasurer with his official seal, nor did the county treasurer then have an official seal.

7th. We find that the county treasurer's deed exe-

'The defendant excepted to the tenth, seventeenth and nineteenth findings, and moved to set aside each of the same, and for a judgment for the defendant and against the plaintiff upon the verdict as thus amended; and the plaintiff filed his motion for judgment on the verdict according to the prayer of the petition. On the 10th day of May, 1886, these motions, coming on to be heard, were submitted to the court on briefs to be filed within sixty days, and on the 24th day of June, 1886, the court entered an order by agreement of the parties, that the time to settle and sign a bill of exceptions be, and the same was thereby, extended to the second Monday in November following. The record contains no such bill of exceptions. On the 9th day of November, 1887, Deputron filed his petition, alleging that Rowena Young was not the real party in interest, and that the title of the property in controversy was collusively and fraudulently transferred to her for the sole purpose of vesting apparent jurisdiction in the federal court; that the case did not really and substantially involve a dispute or controversy properly within its jurisdiction; and that Rowena Young had been improperly and collusively made a plaintiff for the purpose of creating a case cognizable under the laws of the United States; and praying that the cause be dismissed; to which the plaintiff answered, denying any fraud and collusion, and averring that she was the real party interested. On the 16th day of November, 1888, the following order was entered:

"This cause, coming on for hearing on the petition and application of the defendant to

dismiss for want of jurisdiction, was tried by the court, Messrs. Hall and Webster appearing for the plaintiff and Messrs. Lamb, Ricketts and Wilson and Harwood, Ames and Kelly for the defendant; whereupon, after hearing the evidence and argument of counsel, and being fully advised in the premises, it is now, on this day, ordered and adjudged by the court that said petition and application be and the same are hereby denied; to which ruling and order of the court said defendant, by his attorneys, then and there duly excepted."

An opinion on the merits was given by the circuit judge December 17, 1888 (37 Fed. Rep. 46), and thereupon the motion of the defendant for judgment was overruled, the motion of the plaintiff for judgment sustained, and judgment entered that the plaintiff recover from the defendant the real property described in the petition and the costs of the action. A bill of exceptions containing the petitions, answers and proceedings, and evidence adduced upon the question of jurisdiction, was signed and filed in due time. The pending writ of error was then sued out from this court.

Messrs. Walter J. Lamb, Arnott C. Ricketts and Henry H. Wilson, for plaintiff in error:

Where the subject matter of the controversy has been transferred to a nominal plaintiff who has no real interest in it, and the litigation is carried on and controlled by the grantor or assignor for his own use and benefit, such

cuted by R. A. Bain, dated September 15, 1871, was not sealed by the county treasurer, nor did the county treasurer then have an official seal.

8th. We find the forty acres of land sold by the sheriff to E. J. Curson and conveyed by deed October 10, 1877, was at that time of the value of \$20,000.

9th. That the confirmation of sale was set aside by the District Court of Lancaster County, in which it had been made November 3, 1877, before E. J. Curson had made any conveyance to anyone, and was never afterwards confirmed.

10th. The jury find that Nelson C. Brock and his grantees had mixed possession of the west half of the southwest quarter of section 24, township 10, range 6, in Lancaster County, Nebraska, for ten years prior to the commencement of this suit, but the jury find that parties claiming under defendants' grantors held portions of said property and parties holding under plaintiff's grantors held portions of said property, so that said possession was in controversy and disputed and mixed down to the year 1877.

11th. That up to the year 1876, the said defendants and their grantors had mixed possession of the land in dispute, to wit, the northeast quarter of the southwest quarter of section 24, township 10, range 6, but said land was open, vacant and unoccupied, except by the city pest-house, and was used as a common.

12th. The jury also find that parties held mixed possession of portions of the west half of the southwest quarter of section 24, township 10, range 6, during the years 1874 and 1875, who did not attorn to or acknowledge possession in either the plaintiff or the defendants or anyone under or by whom they claim.

13th. The jury find that the conveyance from Jane Y. Irwin and John Irwin by William T. Donovan, attorney-in-fact, to J. P. Lantz was a fraud upon the power held by said Donovan, and was given by Donovan and taken by Lantz with the intention of defrauding Jane Y. Irwin, and that Samuel W. Little had full knowledge of such facts, and procured such conveyance to be made with such knowledge and design.

14th. That the said deed by Donovan to Lantz and the deed of same by Lantz to Little were ex-

cuted at the same time and were parts of one transaction, and that the northeast quarter of the southwest quarter of section 24, township 10, range 6, was on the 25th day of October, 1879, worth \$30,000, and that the balance of the land then by Donovan conveyed would exceed \$70,000 in value at that time.

15th. That during the years 1874, 1875 and 1876 parties holding under the grantors of plaintiff held portions of the west half of the southwest quarter of section 24, township 10, range 6.

16th. We find that all the defendants had full knowledge of the revocation of the power of attorney aforesaid upon the record by Jane Y. Irwin, and of the facts therein stated prior to any purchase made by them or either of them.

17th. That one N. C. Brock, through whom the defendant traces one chain of his title, on the 12th day of June, 1871, received from the county treasurer of Lancaster County, Nebraska, a tax deed of that date of the north half of and 20 acres off the west side of the southwest quarter of the southwest quarter of section 24, township 10, range 6 east, in Lancaster County, Nebraska, the premises in controversy being in the northeast quarter of the southwest quarter aforesaid, which tax deed purported to be issued for the taxes assessed against the above-described parcels of land, respectively, for the year 1867, which tax deed was on the 18th day of June, 1871, recorded in the county clerk's office of Lancaster County, Nebraska.

18th. That on the 15th day of December, 1871, the county treasurer of Lancaster County, Nebraska, delivered to said Nelson C. Brock a second tax deed of that date covering the northeast quarter of the southwest quarter of section 24, township 10, range 6 east, in Lancaster County, Nebraska, including the property in dispute, which deed was issued for the tax of the year 1868, and which tax deed was on the 18th day of December, 1871, recorded in the county clerk's office of Lancaster County, Nebraska.

19th. That on the 18th day of December, 1871, said Nelson C. Brock made, executed and delivered to one Charles T. Boggs a lease in writing of that date of the north half of and the southwest quarter of the southwest quarter of section 24, township 10,

transfer will be held colorable only and vests no jurisdiction in the federal courts.

Williams v. Nottawa, 104 U. S. 211 (26: 720); *Haves v. Oakland*, 104 U. S. 459 (26: 831); *Detroit v. Dean*, 106 U. S. 541 (27: 301); *Hayden v. Manning*, 106 U. S. 586 (27: 306); *Farmington v. Pillsbury*, 114 U. S. 188 (29: 114); *Little v. Giles*, 118 U. S. 602 (30: 271); *Bernards Twp. v. Stebbins*, 109 U. S. 335 (27: 962); *Greenwalt v. Tucker*, 10 Fed. Rep. 884; *Coffin v. Haggin*, 11 Fed. Rep. 219; *Fountain v. Angelica*, 12 Fed. Rep. 8; *De Laveaga v. Williams*, 5 Sawy. 574; *M'Lean v. Clark*, 81 Fed. Rep. 501.

This want of jurisdiction will not be varied or cured by going to trial without objection, and this court when satisfied that the apparent jurisdiction of the circuit court was fraudulently obtained will reverse the judgment and dismiss the case.

Cashman v. Amador & S. Canal Co. 118 U. S. 58 (30: 72).

Objections to the jurisdiction never come too late and will be raised by the court on its own motion.

Hilton v. Dickinson, 108 U. S. 165 (27: 688); *Grace v. American Cent. Ins. Co.* 109 U. S. 278 (27: 932); *Cameron v. Hodges*, 127 U. S. 825 (32: 183); *Chapman v. Barney*, 129 U. S. 681 (32: 801).

After verdict and before judgment the jurisdiction may be called in question by motion or by pleading tendering an issue on facts dehors the record.

Hartog v. Memory, 116 U. S. 588 (29: 725); *Greenwalt v. Tucker*, 10 Fed. Rep. 884.

Badges of a colorable transfer for the pur-

pose of vesting the federal courts with apparent jurisdiction are: (1) want of knowledge on the part of the plaintiff of the property; (2) indifference of the grantee and activity of the grantor in the suit; (3) want or inadequacy of consideration; (4) grantor's control of the property after the alleged transfer; (5) the family relationship of the grantee and grantor; (6) the non-production of the correspondence by which the transfer was effected; (7) the grantor furnishing means to conduct the litigation; (8) the fact that the petition was neither signed nor sworn to by the nominal plaintiff, and even the answer to the petition of the defendant below to dismiss was filed without any verification whatever.

Hayden v. Manning, 106 U. S. 587 (27: 306); *Coffin v. Haggin*, 11 Fed. Rep. 220; *M'Lean v. Clark*, 81 Fed. Rep. 504; *Little v. Giles*, 118 U. S. 606 (30: 272); *Haves v. Oakland*, 104 U. S. 461 (26: 832); *Chandler v. Attica*, 22 Fed. Rep. 625-627; *Cashman v. Amador & S. Canal Co.* 118 U. S. 61 (30: 72).

A finding as to the citizenship of the parties was necessary to enable the court to render judgment.

Halsted v. Buster, 119 U. S. 841 (30: 463); *Menard v. Goggan*, 121 U. S. 253 (30: 914); *Eberhart v. Huntsville*, 120 U. S. 223 (30: 628); *Chapman v. Barney*, 129 U. S. 681 (32: 801).

All the facts necessary to a recovery must be found in the special verdict, or the judgment will be reversed.

Chesapeake Ins. Co. v. Stark, 10 U. S. 6 Cranch, 273 (3: 321); *Barnes v. Williams*, 24 U. S. 11 Wheat. 415 (6: 508); *Prentice v. Zane*, 49

range 6 east, in Lancaster County, Nebraska, for the term of two years from that date, which lease contained a leave or license to the lessee to remove all buildings placed upon said premises by him on or before the termination of said lease, which said lease was recorded in the county clerk's office of Lancaster County, Nebraska, on the 2d day of January, 1872.

20th. That on the 18th day of December, 1873, the said Nelson C. Brock made, executed and delivered to said Charles T. Boggs a second lease in writing of that date of the north half and the southwest quarter of the southwest quarter of section 24, township 10, range 6 east, in Lancaster County, Nebraska, for the term of two years from that date, which said lease contained a similar provision permitting the lessee to remove all buildings and improvements by him erected or permitted to be erected on said premises off from the same at any time before the expiration of the said term therein granted, which lease was on the 5th day of January, 1874, recorded in the county clerk's office of Lancaster County, Nebraska.

21st. That in the month of December, 1871, the said Charles T. Boggs, claiming title under the said lease first aforesaid, entered into the mixed possession of the said premises by assuming control and ownership over the same, and by collecting rents from squatters and persons then located upon said premises, and subleased other portions of said premises, and continued to exercise mixed possession of said premises, down to the time he yielded his mixed possession of the same to Samuel W. Little, and that he paid the rent to N. C. Brock for the said premises during the terms of the two leases above mentioned.

22d. That at the expiration of his term under said leases he yielded his mixed possession of the said premises to Samuel W. Little.

23d. That on the 18th day of May, 1874, said Nelson C. Brock and his wife, by their deed of quit-claim, conveyed all the said premises, the north half of the southwest quarter and the southwest quarter of the southwest quarter of section 24, township 10, range 6 east, to Samuel W. Little, which deed was duly recorded in the county clerk's office of Lan-

caster County, Nebraska, on the 26th day of May, 1874.

24th. That in or about the month of May, 1873, Charles T. Boggs subleased the north half of the southwest quarter of section 24, township 10, range 6 east, to one D. A. Gilbert, who, on or about that date, entered upon the mixed possession of the same and erected a ranch for cows, or milk ranch, on the northwest quarter of said quarter section, all the said north half of said southwest quarter being at the time he entered therein wholly vacant and unoccupied lands, and that he continued under said lease in the mixed possession and occupation of the same until in or about the year 1878, when he moved off his cattle ranch and surrendered his mixed possession of the same at the instance of S. W. Little, having during that period attorned and paid rent to Charles T. Boggs.

25th. That in the year 1876 Samuel W. Little began breaking up and actually improving the northeast quarter of said quarter-section and erected windmills and placed other valuable improvements thereon, planted trees and shrubbery and set out hedges and other fences, and thence, until he delivered his mixed possession of the said property to his several grantees, had the mixed possession of the said premises, said northeast quarter of the southwest quarter of section 24, township 10, range 6 east.

26th. That on the 19th day of May, 1877, in the District Court of Lancaster County, in the State of Nebraska, at the April Term of the said court, in a certain action therein pending, wherein Milo H. Sessions was plaintiff and John Irwin and Jane Y. Irwin were defendants, a judgment was obtained in the said action in favor of the said H. M. Sessions and against said John Irwin and Jane Y. Irwin by the consideration of said court, wherein it was considered by said court that the said plaintiff therein should recover from and against the said defendants, John Irwin and Jane Y. Irwin, the principal sum of \$350, besides costs therein, taxed at the sum of \$41.23, and for which said sums execution was awarded out of the said court; that thereafter execution was issued upon said judgment against the said John Irwin and Jane Y. Irwin, and the same

U. S. 8 How. 484 (12:1164); *Suydam v. Williamson*, 61 U. S. 20 How. 483 (15:980); *Mumford v. Wardell*, 73 U. S. 6 Wall. 482 (18:760); *Hodges v. Easton*, 106 U. S. 408 (27:169); *Witham v. Earl of Derby*, 1 Wilson, 55; *Wallingford v. Dunlap*, 14 Pa. 82.

In the federal courts, in an action of ejectment, a recovery can be had only upon the strictly legal title, not upon an equitable title.

Watts v. Lindsey, 20 U. S. 7 Wheat. 158 (5:428); *Bagnell v. Broderick*, 88 U. S. 13 Pet. 436-450 (10:235, 239); *Fenn v. Holmes*, 62 U. S. 21 How. 481-483 (16:198); *Hooper v. Scheimer*, 24 U. S. 23 How. 235 (16:452); *Sheirburn v. De Cordova*, 65 U. S. 24 How. 423 (16:741); *Foster v. Mora*, 98 U. S. 425 (25:191); *Langdon v. Sherwood*, 124 U. S. 83 (31:846); *Johnson v. Christian*, 128 U. S. 383 (32:414).

Any person having the equitable title to land cannot recover in an action at law on the ground that the legal or paper title is based upon fraud. The legal title must first be attacked and declared void by an action in chancery.

Walker v. Kynett, 82 Iowa, 524; *Johnson v. Christian*, 128 U. S. 381 (32:414); *Bagnell v. Broderick*, 88 U. S. 13 Pet. 450 (10:239); *St. Louis Smelting Co. v. Green*, 13 Fed. Rep. 208.

Even though vacating the confirmatory order rendered Curson's title defective, yet as no provision was made for the return of the purchase money, he would hold the legal title as security for the purchase money paid.

Brobst v. Brock, 77 U. S. 10 Wall. 519 (19:

1002); *Oldham v. Pfleger*, 84 Ill. 102; *Hunt v. Loucks*, 38 Cal. 372; *Doe v. Snyder*, 8 How. (Mass.) 67; *Cox v. Nelson*, 1 T. B. Mon. 95.

Whatever is done under a judgment while in full force is valid and binding upon the parties litigant, notwithstanding a reversal of the judgment.

U. S. v. Bank, 31 U. S. 6 Pet. 8 (8:299); *Voorhees v. U. S. Bank*, 85 U. S. 10 Pet. 449 (9:490); *Gray v. Brignardello*, 68 U. S. 1 Wall. 627 (17:693); *Grignon v. Astor*, 48 U. S. 2 How. 819 (11:283); *Scudder v. Sargent*, 15 Neb. 103; *Fahinger v. Fahinger*, 14 Phila. (Pa.) 622; *Shakepear v. Fisher*, 11 Phila. (Pa.) 251.

The vacating order having been made without notice was void.

Osborn v. Cloud, 28 Iowa, 104; *Wright v. Leclair*, 3 Iowa, 241; *Lyster v. Brewer*, 13 Iowa, 461; *Toler v. Ayres*, 1 Tex. 398; *Williams v. Cummins*, 4 J. J. Marsh. 637.

Nor can notice be presumed.

Thatcher v. Powell, 19 U. S. 6 Wheat. 119 (5:221); *Galpin v. Page*, 85 U. S. 18 Wall. 850 (21:959); *State Bank v. Marsh*, 10 Ark. 129; *McKinney v. Williams*, 7 Tex. 598.

The conveyance by Donovan cannot be attacked for fraud in an action at law.

Walker v. Kynett, 82 Iowa, 524; *Bagnell v. Broderick*, 88 U. S. 13 Pet. 450 (10:239); *Johnson v. Christian*, 128 U. S. 381 (32:414); *St. Louis Smelting Co. v. Green*, 13 Fed. Rep. 208; *President v. Cornen*, 87 N. Y. 820; *Fenn v. Holme*, 62 U. S. 21 How. 481 (16:198); *Montejo v. Owen*, 14 Blatchf. 824.

coming to the hands of the sheriff of the said county, for want of goods and chattels whereon to levy the said writ, he seized and caused to be appraised, advertised and sold as the property of the said Jane Y. Irwin the northeast quarter of the southwest quarter of section 24, township 10, range 6, to one E. J. Curson, for the sum of \$30; that thereafter he made due return of his said sale unto the said district court; and afterwards on the 2d day of October, 1877, the following proceedings were had in the said court, to wit: "H. M. Sessions against John Irwin and Jane Y. Irwin. This case comes on upon motion of plaintiff for confirmation of sale heretofore had in this case, and it is hereby ordered by the court that cause be shown by Tuesday next, October 9th, why sale should not be confirmed."

That afterwards, on the 10th day of October, 1877, that being the 9th day of the October, 1877, Term of said court, the following proceedings were had in said action therein: "H. M. Sessions v. John Irwin and Jane Y. Irwin. This case comes on upon the motion of plaintiff for confirmation of sale heretofore had under former order of this court, and the court, upon a careful examination of the proceedings thereof, finds that the same have been had in all respects in conformity to law and the orders of this court. It is ordered that the said proceedings and sale be, and they are hereby, approved and confirmed; and it is further ordered by the court that the said sheriff convey to the purchaser by deed in fee simple the lands and tenements so sold." That afterwards and on the 10th day of October, 1877, pursuant to the foregoing proceedings, Sam. McClay, sheriff of said county, made, executed and delivered to said E. J. Curson, purchaser, a sheriff's deed of conveyance of the said premises, the northeast quarter of the southwest quarter of section 24, township 10, range 6 east, in Lancaster County, Nebraska; which deed was by the said E. J. Curson filed and recorded in the county clerk's office of Lancaster County, Nebraska, on the 10th day of October, 1877, at 5 o'clock P. M.

27th. That on the 9th day of November, 1877, said Elijah J. Curson and Anna M. Curson, his wife, by deed of general warranty and for the consideration of the sum of \$30, expressed to be in hand paid, granted, bargained, sold and conveyed the said premises, the northeast quarter of the south-

west quarter of section 24, in township 10, range 6 east, to Samuel W. Little; which deed of conveyance was, on the 26th day of November, 1877, filed and recorded in the county clerk's office of Lancaster County, Nebraska.

28th. On the 12th of August, 1875, Jane Y. Irwin and her husband executed a power of attorney to William T. Donovan to enable him to make conveyances to purchasers when sales were made by Scott, Boyd and La Master, and to facilitate their operations under their contract of March 31st, 1874.

29th. That on the 25th day of October, 1879, the said Jane Y. Irwin and John Irwin, by W. T. Donovan, their attorney-in-fact, for the purported consideration, as expressed upon the face of said deed, of \$1,000, made, executed and delivered to one John P. Lantz their warranty deed conveying the northeast quarter of the southwest quarter of section 24, township 10, range 6 east, and all that portion of the west half of the said southwest quarter of section 24, township 10, range 6 east, lying north of the centre line of R Street, in the City of Lincoln, extended east through said lands; and also the following-described parcels of land, situated in the southwest quarter of said southwest quarter of section 24, township 10, range 6 aforesaid: Commencing at the southwest corner of said section 24, thence running east 520 feet; thence north 460 feet; thence west 520 feet; thence south 460 feet to the place of beginning, and also commencing at a point 460 feet east of the southeast corner of block No. 38, in the City of Lincoln; and 470 feet north of the south line of O Street, in said City of Lincoln; thence running east 780 feet; thence north 400 feet; thence west, 780 feet; thence south 400 feet to the place of beginning; which said deed was recorded in the county clerk's office in Lancaster County, Nebraska, on the 25th day of October, 1879, at 4 o'clock and twenty-five minutes P. M.

30th. That on the 25th day of October, 1879, said John P. Lantz and Hannah Lantz, his wife, by their deed of general warranty and for the consideration of \$1,000, as expressed in said deed, paid by Samuel W. Little to said John P. Lantz, conveyed the property in the last finding above described to the said Samuel W. Little; which deed was, on the 25th day of October, 1879, at 4 o'clock and thirty minutes P. M., recorded in the county clerk's office of Lancaster County, Nebraska.

31st. That neither Jane Y. Irwin nor John Irwin,

The findings of fact and judgment must conform to the pleadings.

Lipp v. Horbach, 12 Neb. 371; *Graham v. Chamberlain R. Co.* 70 U. S. 8 Wall. 704 (18: 247); *Insurance Companies v. Boykin*, 79 U. S. 12 Wall. 433 (20: 442).

Messrs. John F. Dillon, Samuel Shellabarger, R. S. Hall and Joseph R. Webster, for defendant in error:

After a special verdict on the merits covering all the issues and after motions by both parties for judgment, it was not competent for the defendant to raise the question of jurisdiction based on the alleged collusive nature of the conveyance to the plaintiff.

Hartog v. Memory, 116 U. S. 588, 590 (29: 725, 726); *Hewitt v. Story*, 39 Fed. Rep. 158.

This court has no jurisdiction to review the decision of the circuit court on the defendant's petition to dismiss on the ground that the jurisdiction of that court was collusively obtained.

Flanders v. Troed, 76 U. S. 9 Wall. 425 (19: 878); *Kearney v. Case*, 79 U. S. 12 Wall. 275 (20: 395); *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 614 (23: 409); *Madison County v. Warren*, 106 U. S. 622 (27: 811); *Alexander County v. Kimball*, 106 U. S. 628 (27: 811), *note*; *Bond v. Dustin*, 112 U. S. 607 (28: 836); *Boogher v. Ins. Co.* 108 U. S. 90, 96 (26: 810, 811); *Guild v. Frontin*, 59 U. S. 18 How. 185 (15: 290); *Kelsey v. Forsyth*, 62 U. S. 21 How. 85 (16: 32); *Campbell v. Boyreau*, 62 U. S. 21 How. 223 (16: 96).

nor anyone for them, ever paid any taxes on any portion of the north half and the southwest quarter of the southwest quarter of section 24, township 10, range 6 east.

32d. That Nelson C. Brock and Samuel W. Little and their respective grantees of any property in dispute herein have paid all taxes assessed against the said property since the entry thereof to the year 1884, under claim of title to said premises.

33d. That on the 9th day of August, 1887, John Irwin and Jane Y. Irwin, by their deed of general warranty, conveyed to one William P. Young the north half of the southwest quarter and the southwest quarter of the southwest quarter of section 24, township 10, range 6 east, for the purported consideration expressed on the face of the said deed of \$400, which said deed was filed and recorded in the county clerk's office of Lancaster County, Nebraska, on the 10th day of August, 1887.

34th. That on the 9th day of January, 1875, said Samuel W. Little, by a deed of quit-claim, pursuant to an arrangement made between Jane Y. Irwin and one George Smith and said Samuel W. Little, made, executed and delivered, for the consideration of \$100, a part of the southwest quarter of the southwest quarter of section 24, township 10, range 6 east; that said S. W. Little had consented to the entry of said George Smith upon the said parcel of land under the contract for the purchase of the same from Messrs. Scott, Boyd and La Master.

35th. That in the year 1873 one Hickman entered upon the northeast quarter of the southwest quarter of section 24, township 10, range 6 east, under a lease from Charles T. Boggs, and erected thereon stables for a milk ranch and paid rent thereon for said premises at the rate of \$12 per annum, and continued to occupy the said premises for such purposes and for feeding and herding his stock thereon for a period of about two years.

36th. That from May 31, 1874, continuously down to the time of the commencement of this suit, June 14, 1884, Charles T. Boggs and Samuel W. Little and his and their lessees and grantees, under claim of title thereto, held mixed possession of all of the north half of the southwest quarter of section 24, township 10, range 6 east, and that no other person occupied the same or entered thereon under claim of title to any part thereof.

37th. That on the 25th day of September, 1883, Samuel W. Little and Mary D. Little, by their deed of general warranty and for the consideration of the sum of \$10,500, sold and conveyed to the defendant, John C. Deputron, all that part of the north-

Upon this record no question arises upon the order of the circuit court refusing to dismiss the case which is open to review by this court.

Norris v. Jackson, 76 U. S. 9 Wall. 125 (19: 608); *Martinton v. Fairbanks*, 112 U. S. 670 (28: 862).

The charge of fraud in the assignment must be made out by that degree of proof which is requisite to overthrow any other like deed or assignment.

Maxwell Land Grant Case, 121 U. S. 835 (30: 949); *Atlantic Delaine Co. v. James*, 94 U. S. 207 (24: 112); *Colorado Coal Co. v. U. S.* 123 U. S. 816-817 (31: 185); *Barry v. Edmunds*, 116 U. S. 550 (29: 729).

It is only where it appears to a legal certainty that there is retained in the assignor, or grantor, an interest in the subject matter of the litigation, that the courts hold the assignment to be fraudulent or collusive.

McDonald v. Smalley, 26 U. S. 1 Pet. 620 (7: 287); *Barney v. Baltimore*, 73 U. S. 6 Wall. 288 (18: 827); *Smith v. Kernochen*, 48 U. S. 7 How. 216 (12: 670); *De Laveaga v. Williams*, 5 Sawy. 573; *Collinson v. Jackson*, 8 Sawy. 357; *Hoyt v. Wright*, 4 Fed. Rep. 169; *Neal v. Foster*, 36 Fed. Rep. 41; *Marion v. Ellis*, 10 Fed. Rep. 411, 412; *Warner v. Pennsylvania R. Co.* 13 Blatchf. 232.

The party who sets up a title must furnish the evidence necessary to support it.

Williams v. Peyton, 17 U. S. 4 Wheat. 79 (4: 518).

east quarter of the southwest quarter of section 24, township 10, range 6 east, described as follows, and being the premises in dispute: "Beginning at a point in the center of R Street in said city, 150 feet east of the east line of 17th Street; thence east along the center of R Street 800 feet to the center of 19th Street; thence north, at right angles with R Street, 1,400 feet; thence west, parallel with R Street, 750 feet, to the east line of 17th Street extended north through R Street; thence south along said east line of 17th Street 790 feet; thence east, parallel with R Street, 94 feet; thence south, parallel with 17th Street, 247 feet; thence east, parallel with R Street, 38 feet; thence south, parallel with 17th Street, 163 feet; thence east along Leighton's north line, 18 feet; thence south along Leighton's line, 200 feet to the place of beginning, containing 22.15 acres of land; also part of the said northeast quarter of the southwest quarter of section 24, township 10, range 6 east, described as follows: For a starting point begin at a point 400 feet east of Grand Avenue and 200 feet north of R Street, at C. M. Leighton's northwest corner, running thence north 410 feet; thence east 94 feet; thence south 247 feet; thence east 38 feet; thence south 163 feet; thence west along Leighton's north line to the place of beginning, the north and south limits to be parallel with Grand Avenue and the east and west limits to be parallel with R Street; which said deed was recorded on the 6th day of September, 1883, in the county clerk's office of Lancaster County, Nebraska.

38th. That said Samuel W. Little delivered to the said John C. Deputron the mixed possession of the said premises at the date of the execution of the said deed, and that the said John C. Deputron thence and hitherto has held the mixed possession of the same.

39th. That the value of the said premises at the present time is the sum of forty thousand dollars.

40th. We find that John C. Deputron, defendant, is a brother-in-law of S. W. Little, his grantor, and that there is no proof of any consideration paid by Deputron to Little for such conveyance.

41st. That the value of the land claimed by John C. Deputron, defendant, being 22.15 acres, was worth (40,000) forty thousand dollars.

January 29, 1875, S. W. Little was holding said premises as purchaser at tax sale under certificate of purchase May 23, 1874, for tax of 1872.

If the court is of the opinion that on these facts the plaintiff is entitled to possession of the property in dispute, then we find for the plaintiff.

In Nebraska, the court may review and annul its own orders.

Smith v. Pinney, 2 Neb. 145; *Wise v. Frey*, 9 Neb. 220; *Hansen v. Bergquist*, 9 Neb. 277; *Volland v. Wilcox*, 17 Neb. 50.

In Nebraska, the purchaser can move for the order of confirmation, or to set aside the sale.

Phillips v. Dawley, 1 Neb. 821; *Gregory v. Tingley*, 18 Neb. 322; *Paulett v. Peabody*, 3 Neb. 197.

The order vacating the confirmation was regular.

Reynolds v. Stansbury, 20 Ohio, 354; *Gilbert v. Brown*, 9 Neb. 94; *Hansen v. Bergquist*, 9 Neb. 276; *Vindquest v. Perky*, 16 Neb. 286; *Dodge v. People*, 4 Neb. 228.

In the case of a naked power not coupled with an interest the law requires that every prerequisite to the exercise of the power should precede it.

Williams v. Peyton, 17 U. S. 4 Wheat. 77 (4: 518); *Taylor v. Benham*, 46 U. S. 5 How. 233, 272 (12: 130, 148); *Ventress v. Smith*, 35 U. S. 10 Pet. 161 (9: 332); *Ransom v. Williams*, 69 U. S. 2 Wall. 813, 319 (17: 808, 806); *Speigle v. Meredith*, 4 Biss. 120; *Morrill v. Cone*, 68 U. S. 23 How. 82 (16: 255); *Clarke v. Courtney*, 30 U. S. 5 Pet. 347 (8: 149).

A fraudulent conveyance by an attorney in fact is void as to the fraudulent grantee.

Graffam v. Burgess, 117 U. S. 180 (29: 839); *Dupont v. Wertheman*, 10 Cal. 354; *Fay v. Winchester*, 4 Met. 513; *Easton v. Clark*, 35 N. Y. 225; *Clarke v. Courtney*, 30 U. S. 5 Pet. 319 (8: 140); *Stainer v. Tyne*, 3 Hill, 279; *Meade v. Brothers*, 28 Wis. 692; *Wiltshire v. Sims*, 1 Campb. 258; *Attwood v. Munnings*, 7 Barn. & C. 278; *Reese v. Medlock*, 27 Tex. 124; *Morrill v. Cone*, 68 U. S. 23 How. 82 (16: 255).

In order that an estoppel as to title may exist in favor of a person, he must show that he paid value without notice.

Philadelphia, W. & B. R. Co. v. Dubois, 79 U. S. 12 Wall. 47, 64 (20: 265, 269); *Doe v. Oliver and Duchess of Kingston's Case*, 2 Smith, Lead. Cas. (7th Am. ed.) 715, notes; *Stewart v. Lansing*, 104 U. S. 505 (26: 866); *Pana v. Bowler*, 107 U. S. 529 (27: 424); *Smith v. Sac County*, 78 U. S. 11 Wall. 139 (20: 102).

A tax deed not executed by the treasurer under his seal of office is void.

Gue v. Jones, 25 Neb. 637; *Sutton v. Stone*, 4 Neb. 323; *Reed v. Merriam*, 15 Neb. 325; *Hendrix v. Boggs*, 15 Neb. 472; *Sullivan v. Merriam*, 16 Neb. 180; *Shelley v. Towle*, 16 Neb. 195; *Baldwin v. Merriam*, 16 Neb. 200; *Seaman v. Thompson*, 16 Neb. 548.

Every essential step must be proven by the one who claims under the deed.

Ronkendorff v. Taylor, 29 U. S. 4 Pet. 358 (7: 885); *Williams v. Peyton*, 17 U. S. 4 Wheat. 79 (4: 518); *McKeighan v. Hopkins*, 14 Neb. 364.

To establish a title by adverse possession, the possession must be actual, hostile and exclusive.

Bradstreet v. Huntington, 30 U. S. 5 Pet. 439 (8: 183).

The possession must be continuous. It must be begun and continued in the same right.

Armstrong v. Morrill, 81 U. S. 14 Wall. 120, 146 (20: 765, 772); *Olwine v. Holman*, 23 Pa. 284; *San Francisco v. Fulde*, 37 Cal. 353; *Lovell v. Frost*, 44 Cal. 475; *Beaupland v. McKeen*, 928

28 Pa. 124, 184; *Donnell v. De la Lanza*, 61 U. S. 20 How. 32 (15: 525).

If the possession is conflicting or mixed, constructive possession follows the title.

Hunnicutt v. Peyton, 102 U. S. 369 (26: 121); *Hunt v. Wickliff*, 37 U. S. 3 Pet. 212 (7: 400); *Barr v. Gratz*, 17 U. S. 4 Wheat. 223 (4: 556).

Mr. Chief Justice Fuller delivered the opinion of the court:

It is contended that the circuit court erred in entering judgment on the special verdict because the citizenship of the parties was not found by the jury. But that fact stood admitted on the record. The plaintiff averred in her petition that she was "a citizen and resident of the State of Ohio," and that the defendant was "a citizen and resident of the State of Nebraska." The answer set up three defenses: (1) An affirmative claim of title under a tax deed. (2) Ten years' adverse possession. (3) "And this defendant, further answering, denies that the said plaintiff is the owner of the the premises described in her petition; and this defendant also denies that the plaintiff is entitled to the possession of the said premises, and prays to be hence dismissed with his costs to be taxed." The averment of diverse citizenship was not controverted by the answer, and, as the petition would have been insufficient without that allegation, the averment must be taken as true under the practice in the courts of record in Nebraska. (Neb. Code Civ. Proc. §§ 184, 185; Comp. Stat. 1885, p. 645.)

Clearly, where the jurisdictional allegation is not traversed, no question involving the capacity of the parties in the cause to litigate in the circuit court can be raised before the jury (*Philadelphia, W. & B. R. Co. v. Quigley*, 62 U. S. 21 How. 203, 214 [16: 73, 77]), or treated as within the issues they might be empaneled to determine. The circuit court properly proceeded to judgment, although the special verdict contained no finding upon this point.

After the case had been twice tried on its merits, and stood on the special verdict upon motions by the parties for judgment in their favor respectively, the defendant assailed the jurisdiction of the court by petition, upon the ground that the title had been placed in the plaintiff collusively and with the view of enabling suit to be brought in the United States court, when in fact the plaintiff did not own the property and had accepted the title only for the collusive purpose aforesaid. Prior to the passage of the Act of 1875, such a question could only be raised by a plea in abatement in the nature of a plea to the jurisdiction; but the fifth section of that Act provided that if "it shall appear to the satisfaction of said circuit court at any time after such suit has been brought that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable under this Act, the said circuit court shall proceed no further therein, but shall dismiss the suit; but its order dismissing the cause shall be reviewable by the supreme court on writ of error or appeal, as the case may be." 18 Stat. 472. The application here was made

more than a year and a half after the second trial, and although the petitioner avers that he "did not have knowledge of the above facts before the trial of this cause," we remark in passing that such an objection ought to be raised at the first opportunity, and delay in its presentation should be considered in examining into the grounds upon which it is alleged to rest.

The issue of fact raised upon this petition was tried by the circuit court without a jury, and the application denied. No question of law was reserved by the defendant during the hearing, but he entered an exception to the final order, and now asks us to hold that it was the duty of the circuit court to dismiss the case because collusively brought. We do not care to enter upon a discussion as to how far in an action at law, where there are no special findings upon an issue of fact such as this, a party has the right to demand a review of the final order of the circuit court on the merits, as, upon the evidence in this record, we are content with the conclusion arrived at. In *Barry v. Edmunds*, 116 U. S. 550 [29: 729], it was held that a suit cannot properly be dismissed by a circuit court of the United States, as not involving a controversy within the jurisdiction of the court, unless the facts when made to appear on the record create a legal certainty of that conclusion. "Nothing less than this," said Mr. Justice Matthews, "is meant by the Statute when it provides that the failure of its jurisdiction, on this account, 'shall appear to the satisfaction of said circuit court.'"

The question was whether the conveyance by Jane Y. Irwin to Rowena Young was colorable merely. The plaintiff testified positively that she was the real owner of the land, and that it was conveyed to her by her sister, Mrs. Irwin, partly in consideration of what Mrs. Irwin owed her, and partly because she herself had a share in it; that "the land was entered with money coming out of my father's estate belonging in part to me, being the joint fund of Jane and myself." And her testimony is corroborated by that of her brother, William P. Young.

We have carefully examined the evidence, and especially the matters urged as constituting badges of colorable transfer, but do not find any substantial ground for overthrowing the deed, or questioning the passing of the title. Such conflict as exists has been determined by the circuit court, and it would subserve no useful purpose to restate the circumstances in detail, as we think the facts fell far short of establishing petitioner's contention.

Upon the rendition of the special verdict the defendant moved to set aside the 10th, 17th and 19th findings as not supported by the evidence, and for judgment upon the verdict as so amended, but the court overruled the motion, and entered judgment for the plaintiff upon the special verdict as returned. We cannot review the action of the court in reference to the findings objected to, and, no exceptions having been saved, are restricted to the question whether there was error in giving judgment for the plaintiff upon the facts as found.

From the first finding it appears that Jane Y. Irwin "obtained title to said lands by patent from the United States December 15, 1862, and on the 9th of August, 1867, conveyed the same

to William P. Young, who, on the 5th of February, 1874, reconveyed the same to Jane Y. Irwin, who, on the 11th day of June, 1884, conveyed said lands to the plaintiff, Rowena Young." This made out the title of defendant in error, and to prevent her recovery the plaintiff in error was obliged to sustain one or more of his affirmative defenses, in respect to which he had the burden of proof.

These defenses were: claim under two tax deeds, coupled with ten years' adverse possession; conveyance by Jane Y. Irwin, by William T. Donovan as her attorney-in-fact; sheriff's deed on execution sale to Curson, deed of Curson to Little, and of Little to plaintiff in error.

As to the tax deeds, it was found that one was issued upon a sale made for the taxes of a year when the land was not assessed for taxes, and that neither of them was "sealed by the county treasurer with his official seal, nor did the county treasurer then have an official seal." The circuit court held that, under the decisions of the Supreme Court of Nebraska, these tax deeds were void for want of the seal, and cited many decisions of that court to that effect. In *Gue v. Jones*, 25 Neb. 634, 637, January Term, 1889, the court say: "At the trial the defendant produced a tax deed covering the premises in question, issued to Smith by the treasurer of Douglas County, August 4, 1865, for the taxes of 1862. This deed was objected to by the plaintiff on several grounds, among others, that it was not executed under the official seal of the treasurer. The Act of 1861, under which the deed was executed, provides, at section 60, 'that such conveyance shall be executed by the county treasurer, under his hand and seal;' then follows the statutory form of such deed, concluding with the words of attestation, 'In testimony whereof the said . . . treasurer of said county has hereunto set his hand and seal, on the date and year aforesaid. [Seal.]' The Statute has been substantially carried forward throughout all the changes of the Revenue Laws to the present day. Under its provisions it has been held by this court in cases too numerous for citation, of which several are cited by counsel for defendant in error, that a tax deed not executed by the treasurer under his seal of office is void. It will not be expected that this line of decision can be departed from now. The deed introduced in the case at bar, if legal and proper in all other respects, as to which we pass no opinion, is open to the fatal objection that it does not purport to have been executed by the county treasurer under his seal of office."

No title, therefore, was transmitted by these deeds; but a tax deed, though void upon its face, is sufficient color of title in Nebraska to support an adverse possession to the property therein described (*Gatling v. Lane*, 17 Neb. 77); while a tax certificate is not. *McKeighan v. Hopkins*, 14 Neb. 384. The possession, however, which bars a recovery must be continuous, uninterrupted, open, notorious, actual, exclusive and adverse. *Armstrong v. Morrill*, 81 U. S. 14 Wall. 120, 145 [20: 765, 773]. From the findings it appears that Little was holding in January, 1875, which was within ten years prior to the commencement of this suit, under a tax certificate; that up to the year 1876 the

possession of the land in dispute was "mixed," but it "was open, vacant and unoccupied except by the city pest house, and was used as a common;" that some portions of the whole tract were in possession of squatters, some portions in possession of parties holding under Mrs. Irwin, and a part in the possession of the grantee in the tax deeds or under him; and the jury find the possession of the premises delivered to the defendant and held by him to have been only a mixed possession. Where the rightful owner is in the actual occupancy of a part of his tract, he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession; and where the possession is mixed, the legal seisin is according to the legal title, so that in the case at bar there could be no constructive possession on the part of the defendant or his grantors, even if that might exist if he had had actual possession of a part and no one had been in possession of the remainder. *Huntteutt v. Peyton*, 102 U. S. 333, 368 [26: 118, 120]; *Barr v. Gratz*, 17 U. S. 4 Wheat. 213, 223 [4: 553, 556]. Nothing is clearer upon the face of this record than that the jury refused to find the possession relied on by defendant to have been actual, undisputed, exclusive, open, notorious and adverse, but found, on the contrary, that the possession was mixed. The judgment cannot be reversed on the ground of error in this regard.

The plaintiff in error also asserted title under a conveyance by Donovan as her attorney in fact. The 2d, 3d, 4th, 13th, 14th, 16th, 23th, 29th, 30th, 37th and 40th findings present the facts on this branch of the case, and establish that on the 31st day of March, 1874, Jane Y. Irwin entered into a contract with Scott, Boyd and La Master for the subdivision and sale of this and other land, and that they entered upon, platted and surveyed it by the last of May, 1875; that (4th and 28th), "on the 12th of August, 1875, Jane Y. Irwin and her husband executed a power of attorney to William T. Donovan to enable him to make conveyances to purchasers when sales were made by Scott, Boyd and La Master, and to facilitate their operations under their contract of March 31, 1874;" that on the 25th day of October, 1879, a deed was executed by Donovan, as attorney in fact, for tracts which included that in dispute, to one Lantz, for "the purported consideration, as expressed upon the face of said deed, of \$1,000," and on the same day Lantz, "for the consideration of \$1,000, as expressed in said deed, paid by Samuel W. Little to said John P. Lantz," conveyed the same to Little; that these deeds were parts of one transaction, and the entire property conveyed was worth over \$100,000; that the conveyance by Donovan to Lantz "was a fraud upon the power held by said Donovan, and was given by Donovan and taken by Lantz with the intention of defrauding Jane Y. Irwin, and that Samuel W. Little had full knowledge of such fact, and procured such conveyance to be made with such knowledge and design;" that the defendant had full knowledge of the revocation of the power of attorney aforesaid upon the record by Jane Y. Irwin and of the facts therein stated prior to any purchase by him that Little and wife, for the recited consideration of \$10,500, sold and

conveyed to Deputron, who was a brother-in-law of Little, "and that there is no proof of any consideration paid by Deputron to Little for such conveyance." It is not pretended that the deed to Lantz was made to carry out or effectuate any sale of the property which had been made by Scott, Boyd and La Master, and the findings show that it was made in fraud of the power of attorney and with the intention of defrauding Jane Y. Irwin. We cannot agree with the counsel for plaintiff in error that it is to be inferred that the power to Donovan was a power to convey generally and at discretion. We do not understand the language of the fourth and twenty-eighth findings, which are identical, as merely indicating the purpose for which the power of attorney was given, but regard it as expressing the limitations of the power. It was the scope of the power that the jury must have had in mind in stating that it was executed to enable Donovan to make conveyances to purchasers "when sales were made by Scott, Boyd and La Master, and to facilitate their operations under their contract of March 31, 1874." We think it sufficiently clear that it was only a naked power to convey when a sale had been made. The deed by Donovan was a fraud upon the power, because it was in violation of the authority thereby vested. The rule is well settled that "in the case of a naked power, not coupled with an interest, the law requires that every prerequisite to the exercise of that power should precede it. The party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the party claiming under it is as much bound to prove the performance of the act as he would be bound to prove any matter of record on which the validity of the deed might depend." *Williams v. Peyton*, 17 U. S. 4 Wheat. 77 [4: 518]; *Ransom v. Williams*, 60 U. S. 2 Wall. 318, 319 [17: 303, 305]. It behooved the plaintiff in error to have the power made part of the findings, if the conclusion we have reached as to its contents was open to dispute, and not to have accepted the fourth and twenty-eighth findings without objection. In the language used in *Williams v. Peyton*, the power was a link in his chain which was essential to its continuity, and which it was incumbent on him to preserve. The findings in reference to this power not only do not justify the contention of plaintiff in error, but are inconsistent with it, for the Donovan deed was not simply found fraudulent in fact, but "a fraud upon the power." This, coupled with the finding that the power was to enable Donovan to convey when sales were made by Scott, Boyd and La Master shows that Donovan's act, when compared with the words of the power, was not warranted by the terms used. Nor under those findings is there any ground for the assumption that Deputron believed that Scott, Boyd and La Master had made sale of the property to Lantz or Little.

Even if the power had been general the conveyance was found fraudulent, and no estoppel arises in favor of plaintiff in error in the absence of findings that he paid value without notice.

It is impossible to conclude that the circuit

court erred in putting aside this attempt to bolster up the title by the deed of Donovan.

In addition to the Donovan deed and the tax deeds, it is urged on behalf of the plaintiff in error that he made out title under a sale on execution. One Sessions, on May 19, 1877, recovered a judgment in the District Court of Lancaster County, Nebraska, against Jane Y. Irwin, upon which execution was issued and levied on forty acres, of which the premises in controversy were a part, and sale made to one Curson for \$80, which sale was confirmed October 10, 1877, and a deed of the forty acres made by the sheriff and recorded on the same day, the land being worth at that time \$20,000. The order confirming the sale was set aside by the court November 3, 1877, before Curson "had made any conveyance to anyone, and was never afterwards confirmed." On the 9th of November, 1877, Curson conveyed this land for \$80 to S. W. Little, which deed was recorded on the 26th day of November.

The opinion of the circuit court upon this point is as follows: "It is the settled law of Nebraska that the title of a purchaser at an execution sale depends, not alone upon his bid or payment of the purchase money, but upon the confirmation of the sale; also that one purchasing at an execution sale submits himself to the jurisdiction of the court as to matters affecting that sale, and that a court has power during the term to vacate or modify its own orders or to rescind decrees. *Phillips v. Dawley*, 1 Neb. 320; *Bank v. Green*, 10 Neb. 184; *Volland v. Wilcox*, 17 Neb. 50; *Gregory v. Tingley*, 18 Neb. 322. It follows from these facts and decisions that the sale, though temporarily confirmed, was finally set aside, and that no rights of a third party accrued during the time that the sale was apparently confirmed. Hence this chain of title presented by defendants must fail." We are entirely satisfied that this expresses the law on the subject in the State of Nebraska. In *State Bank v. Green*, 10 Neb. 180, the Supreme Court of Nebraska says: "Under our law governing sales of property on execution the title of the purchaser depends entirely upon the sale being finally confirmed, and until this is done the rights of the execution debtor are not certainly divested." The final order confirming is subject to review as the confirmation of a sale in equity is (*Parrat v. Neligh*, 7 Neb. 459); and the purchaser submits to the jurisdiction of the court as to all matters connected with such sale or relating to him in the character of purchaser. This order of confirmation was vacated before there was any change in the relation of the parties, and the sheriff's deed fell with it. Counsel for plaintiff in error refers to section 508 of the Civil Code, which reads as follows: "If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers, but in such case restitution shall be made by

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the judgment creditor, of the moneys for which such lands or tenements were sold, with lawful interest from the day of sale." Comp. Stat. 1885, p. 695. This section relates to the judgment, as to which the purchaser is not affected by irregularity or error, and to which he is not a party; but we are considering the order of confirmation, which may be reviewed on appeal (7 Neb. 459); though the merits of the original case are not open to re-examination. *State Nat. Bank v. Scofield*, 9 Neb. 499.

The cases cited by the circuit judge show that the purchaser can move for confirmation, or to set the sale aside, and can appeal from the order thereon; that he may be compelled to perform his bid, and that he is concluded by the result of the proceedings to confirm or annul the same. And see *Paulett v. Peabody*, 8 Neb. 197; *Shann v. Jones*, 19 N. J. Eq. 251; *Requa v. Rea*, 2 Paige, 839; *Barker v. Richardson*, 41 N. J. Eq. 656. That such is the rule in Nebraska is quite convincingly shown by the case of *Sessions v. Irwin*, 8 Neb. 5, which was an appeal by Curson from the order setting aside the confirmation and the sale under consideration here, which order was, however, affirmed. If Sessions, the judgment creditor, received \$80 from Curson, respecting which there is no finding, he became Curson's debtor to that amount, and, as argued for defendant in error, Curson might have a right to be compensated out of the moneys collected upon the judgment, but the operation of the order setting aside the confirmation was to defeat any claim of title on the part of Curson or his grantee. This accords with the decisions and settled practice of the state courts in reference to sales under process issuing out of them.

Finally, it is said that the judgment embraces property not described in the petition. The description was "the west half of the northeast quarter of the southwest quarter of section twenty-four."

The jury found title thereto in defendant in error, and also by the 37th finding described what was stated to be "the premises in dispute" by metes and bounds, as conveyed to Deputron. The judgment, though using somewhat different language, conforms to the finding. There was no motion to set aside the verdict and for a new trial, nor can we discover that any suggestion of mistake in its terms was made below.

The governmental subdivision would be, if accurate, eighty rods long by forty rods wide, and the finding and judgment describe a tract fourteen hundred feet in length by seven hundred and fifty feet in width, less a parcel in the southwest corner, but excess in acreage frequently occurs in government surveys, and as the finding is that the description there given and followed in the judgment is the description of the premises in dispute, we perceive no ground for interference.

There being no error, the judgment is affirmed.

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JOSEPH BANIGAN, *Plff. in Err.*,
v.

CHARLES BARD, Receiver of the HAY-
WARD RUBBER COMPANY.

(See S. C. Reporter's ed. 291-296.)

*Preferred stock—when money paid for same can-
not be recovered back from receiver of insolvent
corporation.*

As against the receiver of an insolvent corpora-
tion, the owner of preferred stock, who, as direc-
tor and general agent of the corporation, was
active in passing the resolution authorizing the
issue of the stock and inducing others to take it,
and who has voluntarily subscribed and paid for
it and received his certificate therefor, cannot,
after holding it over two years, and voting on it,
recover back the money paid by him for it from
the effects of the insolvent corporation, on the
ground that the corporation had no power to
issue preferred stock.

[No. 1854.]

Submitted Jan. 8, 1890. Decided March 17, 1890.

IN ERROR to the Circuit Court of the United
States for the District of Connecticut to re-
view a judgment for the plaintiff in an action
by the receiver of the Hayward Rubber Com-
pany for moneys had and received, and upon
an account. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 39 Fed. Rep. 13.

Mr. Tilton E. Doolittle, for plaintiff in
error:

The Hayward Rubber Company had no
power to issue preferred stock, and its action
in attempting to issue said stock was illegal and
of no effect.

Oregon R. & Nat. Co. v. Oregonian R. Co.
180 U. S. 1 (32: 887); *New London v. Brainard*,
22 Conn. 555; *New York Firemen Ins. Co. v.*
Ely, 5 Conn. 568; *Occum Co. v. Sprague Mfg.*
Co. 84 Conn. 541; *Hope Mut. L. Ins. Co. v.*
Weed, 28 Conn. 63; *Cotlin v. Eagle Bank*, 6
Conn. 240; *Berlin v. School Society*, 9 Conn.
180; *Mechanics Sav. Bank v. Meriden Agency*
Co. 24 Conn. 164; *Kent v. Quicksilver Mining*
Co. 78 N. Y. 179; *Hutton v. Scarborough Cliff*
Hotel Co. 2 Drew. & Sm. 514, 521; *Re Bangor &*
P. Slate & S. Co. L. R. 20 Eq. 59; *Moss v.*
Syers, 82 L. J. N. S. Ch. 711; *Harrison v. Mex-*
ican R. Co. L. R. 19 Eq. 858; *Melhado v. Ham-*
ilton, 28 L. T. N. S. 578.

A corporation has no power to increase its
capital stock without express authority from
the Legislature.

Chicago City R. Co. v. Allerton, 85 U. S. 18
Wall. 285 (21: 903); *Sutherland v. Olcott*, 95 N.
Y. 98; *Scovill v. Thayer*, 105 U. S. 143 (26: 968);
New York & N. H. R. Co. v. Schuyler, 34 N.
Y. 30; *Salem Mill Dam Corp. v. Ropes*, 6 Pick.
23; *Knollton v. Congress & E. Spring Co.* 14
Blatchf. 364; *Smith v. Goldsworthy*, 4 Q. B.
480; *Re Financial Corporation (Holmes' Case)*,
L. R. 2 Ch. 720; *Droitchich Pat. Salt Co. v.*
Curzon, L. R. 8 Exch. 42.

No assent by the stockholders, even if the
assent be unanimous, can make valid any such
assumption of power.

NOTE.—As to preferred stock; its issue; rights of
holders of,—see note to *Warren v. King*, 27: 769.

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Thomas v. West Jersey R. Co. 101 U. S. 71
(25: 950).

The rights of the stockholders to dividends
and to the property are not to be altered except
by consent of all.

Ashbury v. Watson, L. R. 28 Ch. Div. 56, L.
R. 80 Ch. Div. 376; *Warren v. King*, 108 U. S.
889 (27: 769); *St. John v. Erie R. Co.* 89 U. S.
22 Wall. 186 (23: 743); *Williston v. Michigan*
Southern & N. I. R. Co. 18 Allen, 400; *Taft v.*
Hartford P. & F. R. Co. 8 R. I. 810.

The plaintiff in error is not estopped from
denying the validity of the stock.

Scovill v. Thayer, 105 U. S. 143 (26: 968);
Stace and Worth's Case, L. R. 4 Ch. 683; *Veeder*
v. Mudgett, 95 N. Y. 295; *Am. Tube Works*
v. Boston Machine Co. 189 Mass. 5; *Reed v. Bos-*
ton Machine Co. 141 Mass. 454; *Allen v. Her-*
rick, 15 Gray, 274, 284; *Turnbull v. Payson*, 95
U. S. 418 (24: 437); *Bank of Hindustan v. Ali-*
son, L. R. 6 C. P. 222; *Winters v. Armstrong*,
37 Fed. Rep. 508; *Schierenberg v. Stephens*, 33
Mo. App. 814; *Eaton v. Pacific Nat. Bank*, 4
New Eng. Rep. 63, 144 Mass. 260.

The preferred stock being invalid, the con-
sideration of the contract failed, and the plain-
tiff in error can recover the amount paid.

Winters v. Armstrong, 37 Fed. Rep. 512;
Bank of Hindustan v. Alison, L. R. 6 C. P. 54;
Am. Tube Works v. Boston Machine Co. 189
Mass. 5; *Reed v. Boston Machine Co.* 141 Mass.
454; *Congress Spring Co. v. Knollton*, 108 U.
S. 49 (26: 847); *Anthony v. Household Sewing*
Machine Co. 16 R. I. —, 5 L. R. A. 575; *Schier-*
enberg v. Stephens, 33 Mo. App. 814; *Eaton v.*
Pacific Nat. Bank, 4 New Eng. Rep. 63, 144
Mass. 260; *Northrop v. Graves*, 19 Conn.
548.

The plaintiff in error has not, through any
laches, lost his right to the recovery of the
money paid.

Allen v. Hammond, 86 U. S. 11 Pet. 63, 71
(9: 633, 636); *Walker v. Tucker*, 70 Ill. 527;
Couturier v. Hastie, 5 H. L. Cas. 673; *Ham-*
mond v. Allen, 3 Sumn. 896; *Brewster v. Bur-*
nett, 125 Mass. 68; *Kent v. Bornstein*, 12 Allen,
842; *Pence v. Langdon*, 99 U. S. 578 (25: 420);
Charter v. Trevelyan, 11 Clark & F. 714; *Pal-*
mer v. Thayer, 28 Conn. 237; *Harding v. Mill*
River Woolen Mfg. Co. 34 Conn. 453; *Winters*
v. Armstrong, 37 Fed. Rep. 521.

Mr. Jeremiah Halsey, for defendant in
error:

Unless there be something in the laws of the
State under which the corporation is organized
or created forbidding it, a company may issue
preferred stock, when the articles of associa-
tion provide therefor, or if the existing share-
holders unanimously give their consent.

1 Morawetz, *Priv. Corp.* 464; *Kent v. Quick-*
silver Mining Co. 78 N. Y. 178; *Harrison v.*
Mexican R. Co. L. R. 19 Eq. 858; *Re Bridge-*
water Nav. Co. L. R. 89 Ch. Div. 8; *Re South*
Durham Brewery Co. L. R. 81 Ch. Div. 273;
Beach, Joint-Stock Act of Conn. 25.

Such assent is binding when evidenced by
the continued acquiescence in the corporate
act.

Sheldon H. B. Co. v. Eickmeyer H. B. M. Co.
90 N. Y. 613; *Westchester & Phila. R. Co. v.*
Jackson, 77 Pa. 321; *Scovill v. Thayer*, 105 U.
S. 143 (26: 971).

The stockholder is estopped by his conduct

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and by acquiescence in and failure to rescind his contract.

Veeder v. Mudgett, 95 N. Y. 295; *Upton v. Jackson*, 1 Flipp. 418; *Chubb v. Upton*, 95 U. S. 665 (24: 528).

An increase of the capital stock of an existing corporation need not be fully subscribed to be valid and binding upon the subscribers.

1 *Morawetz, Priv. Corp.* 142; *Clarke v. Thomas*, 84 Ohio St. 46; *Nutter v. Lexington & W. C. R. Co.* 6 Gray, 85; *Eaton v. Pacific Nat. Bank*, 4 New Eng. Rep. 68, 144 Mass. 275; *Veeder v. Mudgett*, 95 N. Y. 811; *Merrick v. Reynolds Engine & G. Co.* 101 Mass. 381.

It was a voluntary payment for the benefit of the company.

Scovill v. Thayer, 105 U. S. 158 (26: 978); *Delano v. Butler*, 118 U. S. 634 (30: 260).

Mr. Justice Miller delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Connecticut. The suit was brought by Charles Bard, receiver of the Hayward Rubber Company, which was a corporation organized under the laws of the State of Connecticut, and located in the Town of Colchester in the County of New London. Being in an insolvent condition its affairs were placed in the hands of said Bard as receiver for the purpose of winding it up. Bard brought this suit in his character of receiver, in the Superior Court of New London County, and, on the application of Banigan, it was removed into the Circuit Court of the United States for the District of Connecticut. The case was heard there by the court without the intervention of a jury, upon a stipulation by the parties that this should be done.

There is filed in the record what purports to be a finding of facts and opinion of the court (39 Fed. Rep. 13), in which the opinion and the statement of the evidence are mingled together in a way which it is difficult to separate, and which, if there were any objection to it, might not be found in accordance with sections 649 and 700 of the Revised Statutes of the United States. But as there does not seem to be any controversy about the special finding of facts, and as there is a bill of exceptions in the case which very fairly presents the only question at issue, we proceed to examine into it.

It appears that the Hayward Rubber Company prior to the year 1879 had been a profitable concern and paid large dividends, its last being made in 1881. Thereafter its business deteriorated and became unprofitable. Its capital stock was \$400,000, and the par value of its shares was \$25 each. In January, 1888, the stockholders, in endeavoring to secure some competent person to oversee and direct the management of its business, entered into negotiation with defendant, Banigan, who was president and general agent of the Woonsocket Rubber Company, and who was a well-known and successful manufacturer, the result of which was that they sold him four hundred shares of the stock at \$12.50 per share. Mr. Banigan was appointed general agent of the company by the directors, and had full control of the manufactory, subject to their approval. He entered upon the oversight of the business, laid out and arranged for new buildings, bought

new machinery, ordered new lasts, tools, rolls and cutting machinery, and had automatic sprinklers put in the mill, all at an expense of some \$120,000.

In March, 1885, a committee of the directors, of which Mr. Banigan was a member, sent out a circular recommending an increase of the capital by the issue of preferred stock to the amount of \$100,000, saying that it was advisable to have a unanimous vote in favor of the proposition, asking for proxies, and inclosing resolutions which were to be submitted to a stockholders' meeting, April 2, 1885. This meeting authorized the issue of preferred stock to the amount of \$100,000, entitled to cumulative dividends at 8 per cent per annum, which issue took precedence of all dividends on the common stock and any future additions thereto. The order in regard to the issue of preferred stock was passed by a unanimous vote of the shares present or represented at the meeting, being 13,400 shares. The whole number of shares was 16,000. Each stockholder had the privilege of subscribing to said stock in proportion to the number of shares of existing stock owned by him. Mr. Banigan subscribed for 702 shares of the preferred stock, and on April 2 paid the company for it \$17,550, and received a certificate for said shares, which contained in substance the provisions of the resolution voted. Shares to the amount of \$25,000 in all were subscribed for. Banigan voted upon this stock at one or two annual meetings, and on June 26 thereafter he wrote to Potter, Lovell & Co., note brokers, of Boston, inclosing a statement of the company's affairs, and saying that it had arranged to issue \$100,000 preferred stock, but "only one quarter of it has yet been issued, which I have taken principally." No claim for repayment of this \$17,550 was made until 1888. Meantime Mr. Banigan continued to be the general agent of the company until it went into the hands of a receiver on August 9, 1887.

A considerable part of the evidence recited in the statement of facts by the court, and in its opinion, had relation to the question of the claim for salary or compensation for services which Mr. Banigan set up as a set-off to his admitted indebtedness to the corporation, which latter amounted to \$26,051.98; being the balance due on account of sales made by Banigan for the Hayward Rubber Company, as its agent. But as the allowance made by the court to the defendant for his salary, of \$10,000, which with the interest amounted to \$12,085.83, is not in controversy, because the plaintiff has taken no writ of error to that judgment, and as the sum of \$26,051.98 is not in controversy by Banigan, no further consideration of those matters which relate to the salary is necessary, and the only question raised before us is that growing out of the refusal of the court to allow Banigan the sum of \$17,550, which he had paid for the preferred stock of the company, as a set-off to his indebtedness, which is not otherwise disputed.

The court below upon that subject says: "The claim for \$17,550 rests upon a question of law. The contention of defendant is that, inasmuch as the statutes of Connecticut simply allow a joint-stock company to increase its capital stock, and the articles of association gave no authority to make preferred stock, it was

beyond the power of the Hayward Rubber Company to create such a class of stock, and there was a total failure of consideration for the contract; that no estoppel can exist against the assertion of the invalidity of the stock; and that the defendant is entitled to recover the amount paid by him from the corporation."

The court then concedes the proposition that under the laws of Connecticut there was no authority to issue this preferred stock, but the judge further says: "I am not favorably impressed with the doctrine that, as against the assignee or receiver of an insolvent corporation, the owner of preferred stock, who has voluntarily subscribed and paid for it, for the purpose of promoting the scheme, and has received his certificate therefor, and the terms and conditions upon which the subscription was made have been fully complied with by the corporation, can recover the amount paid. In *Winters v. Armstrong*, 87 Fed. Rep. 508, Judge Jackson guards against such a broad principle, and it is not in accordance with the teaching of *Seovill v. Thayer*, 105 U. S. 143 [26: 968]."

He also says that if defendant can recover an amount from the insolvent estate in a case where there is no claim of an unfulfilled condition, it must be upon a theory of the rescission of the contract, because the stockholder received nothing of value. He then adds: "This rescission must be made within a reasonable time. In this case Mr. Banigan paid for his stock April 2, 1885, and was still a stockholder when the receiver was appointed, August 9, 1887. I do not think that the preferred stockholder who voluntarily creates stock of this kind—for this Mr. Banigan virtually did—can hold it for twenty-eight months in the hope of dividends, and then, upon finding the company insolvent, come in as a creditor and receive back his money." He accordingly refused to allow the claim of Banigan for the money paid for this stock.

Perhaps but little can be added to what was said by the judge of the circuit court. It may be well to call attention a little more pointedly to the fact that when Mr. Banigan attempted, a year after the insolvency of the corporation, to return his stock and demand the money which he had paid for it, and at the time he filed this claim as a set-off in the circuit court, the corporation with which he dealt, and of which he was in effect the dominant spirit, had ceased to have existence for any other purpose than winding up its affairs, and all this matter had passed into the hands of the receiver, who represented especially the interests of creditors. It is in the face of the claim of these creditors, who must largely lose at any rate, that Mr. Banigan's claim is to be considered, and we are of opinion that, having received certificates for this stock on which he voted in control of the company, and which increased his power in regard to that control, and having been the chief agent in causing the issue of this stock and giving it credit and currency by his actions, he cannot now be permitted to withdraw the money which he had paid, from the fund out of which these creditors are to be paid.

The force of this proposition is increased by the length of time elapsing between the payment of the money and the twenty-eight months in which Mr. Banigan held this stock, and

voted upon it, and took the chances of its finally being a valuable investment. As its validity was a question of law, he must be presumed to have known it as well as anybody else. The cases of *Seovill v. Thayer*, 105 U. S. 143 [26: 968], and the very recent case of *Aspinwall v. Butler, Receiver of the Pacific National Bank of Boston*, 183 U. S. 595 [33: 779], while they are not so precisely analogous to the present case as to be considered conclusive of it, do yet enforce the general principle, that a person subscribing for stock under circumstances almost similar to the present is bound for the obligations which the law imposes upon the holders of such stock for the benefit of the creditors of the insolvent corporation. We base our decision in the present case upon the view that Mr. Banigan, who was a controlling spirit in the Hayward Rubber Company, was active in passing the resolution which authorized the issue of the stock and inducing other persons to take it, and in giving credit to the corporation on the ground that such stock had been taken and that he had actually paid his money into the company, which its creditors had a right to consider as so much of its paid-up capital; that he held this stock for over two years, when the corporation was in struggling circumstances; that he voted upon it at two elections; and that he cannot now be permitted to recover back the money paid by him, from the effects of the insolvent corporation, which by law are devoted to the bona fide creditors of the institution.

Judgment affirmed.

THE HENDERSON BRIDGE COMPANY. *Ptff. in Err.,*

WALLACE McGRATH ET AL.

(See S. C. Reporter's ed. 260-276.)

Alteration of contract—construction of ditch—authority of engineer to make contract—question for jury—making of contract—implied promise—error in charge.

1. Upon the facts, the court holds that the construction of the continuous drainage ditch parallel to the embankment of a section of the railroad was not covered by the original contract of plaintiffs to do the grading, masonry and trestle work of such section.
2. To dig the earth on a surface rolling and broken for the sole purpose of constructing a level embankment is a different problem from the digging with the double view of constructing the embankment and the making of a continuous ditch with prescribed directions and uniform bottom level.
3. The resident engineer of defendant, a corporation, who superintended the construction of the work and was directed by the chief engineer to have the plan of drainage carried out, had power to make the contract with plaintiffs who had contracted to make the embankment, for the making of the ditch.
4. It was for the jury to say whether such contract did in fact exist. It was not for the court to assume and instruct the jury as matter of law that it did not exist.
5. It was for the jury to say whether a conversation between the resident engineer and one of the

plaintiffs in respect to the piling, in which the former said (in answer to the question by the latter whether plaintiffs would be paid for it) that the chief engineer "would do what was right," was with a contractual intent and was a contract or not.

6. If the resident engineer as the representative of the Company made no express promise to pay, the law would imply one, he having power to direct the work, and there being no claim that he exceeded his authority in doing so.
7. Where, in the charge to the jury, there was no material error to the injury of the party excepting, the court will not consider whether the language used in the charge was technically accurate.

[No. 63.]

Argued Nov. 4, 1889. Decided March 17, 1890.

IN ERROR to the Circuit Court of the United States for the District of Indiana to review a judgment in favor of plaintiffs to recover a balance due them for the construction of a section of a railroad. *Affirmed.*

Statement by Mr. Justice Lamar:

This was an action at law brought by the defendants in error against the plaintiff in error in the Circuit Court of Vanderburgh County, Indiana, and removed into the Circuit Court of the United States for the District of Indiana.

The Henderson Bridge Company is a corporation of the State of Kentucky, organized for the purpose of building a bridge over the Ohio River from the City of Henderson, Kentucky, to the Indiana bank of the river, and a railroad thence to the City of Evansville, Indiana, a distance of about nine miles.

On the 8th of July, 1884, a contract was made between the Company and the defendants in error for the grading, masonry and trestling of the railroad for a distance of something over six miles, measuring from Evansville to the bridge, designated as sections 1 to 6 inclusive, and a part of section 7, each section being one mile long. No formal written contract was executed between the parties; but the agreement arrived at consisted of, (1) specifications and profile of the work to be done, on the part of the Company; (2) proposals on the part of the contractor; and (3) acceptance of the proposals by the Company.

The specifications prepared by the chief engineer of the defendant classified the work as "Clearing and Grubbing," "Excavations," "Embankments," "Masonry" and "Pile Trestle."

Defendant in error completed the work about the 1st of March, 1885, and the Company accepted it. On the final settlement a controversy arose as to the amount of the balance due the defendants in error after crediting the partial payments made as the work progressed; and this suit was brought to recover the amount of \$23,667, claimed by them to be due, which the Company had refused to pay.

The bills of exception taken below, however, and the errors assigned, narrow the controversy in this court to two items—one being in respect to a drainage ditch, which was ordered to be made; the other in regard to the value of certain extra pile work. Our statement of the case will be confined to an examination of those points.

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(1) The work contracted for lay, all except the two sections nearest to Evansville, through the bottoms of the Ohio River, which were subject to overflow. On that portion in the bottoms the profiles showed several stretches of trestling which aggregated 1,486 feet. The specifications, however, provided that "the quantities marked on profile are approximate, and not binding. The relative amounts of trestle and earthwork may be changed at option of the engineer without prejudice."

While the work was in progress the Company determined to modify the plan so as to omit the trestle and make a continuous embankment with underlying drain-pipes. This modification necessitated a different system of surface drainage; and it was determined that the borrow-pits (that is to say, the excavations along the line of the railroad from which the earth was taken to form the embankment) should form a drainage ditch on the eastern side for about two thirds of the way. Mr. Hurlburt, who was the Company's third engineer in rank, and had immediate supervision of the work in the field, was directed to have these modifications carried out.

In consequence of this change in the plan, Mr. Vaughan, the Company's chief engineer, on the 16th of August, 1884, telegraphed O. F. Nichols, the resident engineer at Henderson, directing him to notify the defendants in error that "all trestle on portion of line embraced in their contract will be dispensed with." And on the 26th of August following Nichols wrote them as follows: "As directed by the chief engineer, Mr. F. W. Vaughan, I hereby notify you that the trestle shown north of station three hundred and thirty-three (333) on profile of the Henderson Bridge Railroad will be omitted. The corresponding space will be filled by solid embankment. Arrangements have been completed for additional borrow-pits necessary to complete these embankments." No objection was made to that change by the defendants in error.

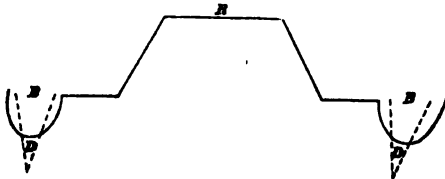
In regard to the ditch, however, it was different. Defendants in error maintain that no such ditch was called for either by the specifications or by the profile, and that therefore they were under no contract to make it. They claim further, and there is testimony in the record to the point, that on the day after the receipt of Mr. Nichols' letter, Hurlburt, the local engineer in charge, came to see them, and notified them that they would be required to make said ditch on the eastern side of the embankment from section three to section seven, inclusive, for the purposes of draining the borrow-pits, such ditch to be two feet wide on bottom in section three, three feet at bottom in section four, four feet wide on bottom in section seven, and to run through the borrow-pits, and have a slope of one and a half feet, horizontal measurement, to one foot perpendicular. Defendants claim further that they objected, on the ground that they could not make the ditch without compensation, and that thereupon Hurlburt replied that they would be paid for it at the same price they had bid for excavation, and that it would be estimated from the top of the ground down.

The Company, on the other hand, denies both the fact of the making of such alleged

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supplementary contract, and the authority of the engineer, Hurlburt, to make it. It maintains that the evidence shows only an expression of opinion made by Hurlburt.

The annexed rude diagram of a cross-section of the work will illustrate the situation:



Defendants in error do not deny the fact of the coincidence, as stated, between the ditch and the borrow-pits, but they justify by saying that the basis of measurement adopted in their contracts, while it is to a certain extent arbitrary, yet is not a cheating or improper basis, for the reason that it is a commutation, and was necessitated by the introduction of the continuous parallel ditch. The digging of such a ditch introduced, they claim, an entirely new element into the work; it peremptorily demanded the careful maintenance of the ditch level throughout its whole extent, and required long hauls of dirt; and whereas, before the ditch was ordered, the excavation was made entirely with reference to the convenience of depositing the dirt in the embankment, afterwards it had to be made with reference to the ditch.

(2) The defendants in error were required to make certain trestle approaches on one side of the road for some of the road crossings, and farm crossings, into which were put 2,800 lineal feet of piling. The profile did not indicate that these approaches were to be made of piling; and defendants in error claim that they were not, therefore, included in the bid, but were made under a new agreement that they should be paid for "as was right." The contract price for trestles was 80 cents per lineal foot, but the evidence of defendants in error tended to show that the construction of these trestles was worth from 60 cents to \$1.50 per lineal foot.

The engineer's estimate for February, 1885, contained this item: "Secs. 3, 4, 5, 6, 7. Piles driven, 2,108 lineal feet, 30 cents per lineal foot, \$680.90." This was part of the piling in controversy; and on this estimate the defendants in error settled with the Company for February and receipted it. The Company now claims that said settlement and receipt, and the original agreement as to value in the bid accepted, conclusively fixes the price at 30 cents per lineal foot for the whole 2,800 feet; while the defendants in error, on the other hand, claim that the receipt in February was merely for a payment for 2,108 lineal feet, and that they can, as to the other 700 feet, still prove value on a *quantum meruit*.

Under these forms of the controversy, not necessary to be further adverted to here, the case was tried below. On the trial the court instructed the jury as follows: "The taking out of the trestles and the requirement of earthwork in their place created no basis for a claim for extra compensation; so that, for the purpose of the question we are now coming to,

the case is the same as though the specifications and profile in the first instance had shown continuous embankment. The Bridge Company, having come to the conclusion to make this embankment, deemed it proper to make a change in the requirements in respect to ditches, but there is no reservation in the contract in regard to that. Of course, the general terms of the contract in respect to the right of the engineer to oversee the work may embrace the power to direct reasonable changes in regard to ditches, but there is nothing authorizing the Bridge Company to substitute a continuous ditch for the ditches defined upon the original profile; so when they determined to require this continuous ditch to be made, it necessarily put the parties into a position for negotiation on the subject, and Mr. Hurlburt, the engineer in charge, being authorized to have this ditch constructed, had incidental authority to agree upon the price or mode of measurement."

The defendant at the time excepted to so much of that instruction as is contained in the following words, viz.: "But there is nothing authorizing the Bridge Company to substitute a continuous ditch for the ditches defined upon the original profile; so when they determined to require this continuous ditch to be made, it necessarily put the parties into a position for negotiation on the subject, and Mr. Hurlburt, the engineer in charge, being authorized to have this ditch constructed, had incidental authority to agree upon the price or mode of measurement."

The court also gave the jury the following instructions, viz.: "But when it was proposed to make a continuous ditch on the east side of the track at the same time the embankment was being made, that introduced a new element into the problem. If the parties were to make an embankment and ditch also, it became desirable to take the dirt for the embankment from such localities as would be most effective in producing the ditch, and it necessarily resulted from this state of things that a party making embankment would, or might at least, make embankment and ditch at the same time. He might be taking earth out for the purpose of making embankment which he could have taken from another place more economically if he was not intending to make this ditch. It follows that earth taken from the same place may represent embankment, and also ditch. The excavation made might be borrow-pit, and it might be ditch, and consequently it became proper for the parties concerned to adopt some system by which they would compute the respective amounts to be credited to each phase of the work. The same work being effective, both towards making the embankment and making the ditch, to treat it as all embankment or as all ditch would be unjust. So it was for the parties, the Bridge Company and plaintiffs, to agree upon some plan upon which they could make a computation; and so I instruct you upon the facts as they appear without dispute that it was within the power of Mr. Hurlburt, the resident engineer, who was superintending the construction of the work, to make a contract with the plaintiffs, who were under contract to make the embankment, for the making of this ditch, to agree that they should do this work, and how much of the excavation should be

deemed to be for the purpose of embankment and how much for the ditch."

The defendant also excepted at the time to so much of that instruction as is in the words following, viz.: "And so I instruct you upon the facts as they appear without dispute that it was within the power of Mr. Hurlburt, the resident engineer, who was superintending the construction of the work, to make a contract with the plaintiffs, who were under contract to make the embankment, for the making of this ditch, to agree that they should do this work, and how much of the excavation should be deemed to be for the purpose of embankment and how much for the ditch."

The court also gave to the jury the following instructions, viz.: "From the duty imposed upon him as resident engineer of the defendant arose Mr. Hurlburt's power to make an adjustment of the question. Plaintiffs claim he did make arrangements with them by which it was agreed that the portion of excavation to be regarded as such should be considered as starting from the lower level of the ditch along its whole length and be measured at a certain slope to the surface of the earth as it was before work was commenced, and upon that they claim 37,256 cubic yards of excavation as ditch. Defendant claims that Hurlburt did not make any such agreement, and this is an issue of fact which the jury must determine upon the evidence. I will say, however, that under the circumstances Mr. Hurlburt did have power to make the agreement if he saw fit so to do. If you find that he did so, and that the measurements he returned are correct, then the plaintiffs are entitled to compensation accordingly for 37,256 cubic yards at 18 cents per cubic yard." And to the giving of that instruction the defendant at the time excepted.

The court also gave to the jury the following instruction: "If Mr. Hurlburt did not make such agreement with these parties, but simply told them what mode of measurement he thought would be adopted, but that it would have to be left to the chief engineer in the end, it would follow that the work was done without any special agreement, and you will be compelled to estimate it upon its fair and reasonable worth. You will then consider from the proof how much excavation was made for the ditch, and how much more to make the embankment than if the continuous ditch had not been required, and for the number of yards of earth excavated in consequence allow 18 cents per cubic yard. In this view the figures of Mr. Hurlburt, though relevant, would not be conclusive as evidence. If he made the agreement, as the plaintiffs claim he did, and his estimates were correct, that is an end of the question. If he did not make the agreement and the question was left open, then you must determine the number of yards excavated for the ditch upon the proof and allow accordingly the contract price of 18 cents a yard."

The defendant at the time excepted to so much of that instruction as is in the following words, viz.: "If he made the agreement, as the plaintiffs claim he did, then that is an end of the question."

The defendant requested the court, in writing, to give to the jury the following instruction, viz.: "As to the ditch claimed by plain-

tiffs to have been made by them on the easterly side of the railroad of defendant, the plaintiffs are entitled to recover only for so much excavation as was actually done for the purpose of making such ditch, excluding any portion of the borrow-pits dug exclusively for the purpose of making the embankments, and that the jury can find for plaintiffs only the contract price of eighteen cents per cubic yard for the excavation, which they may find from the evidence was so made for the purpose of making such ditch." But the court refused to give that instruction; whereupon the defendant at the time excepted.

As to the claim of the defendants in error for a price extra to the original contract for the trestles built by them the court gave to the jury the following instructions: "The next item is the piles in the bridges. The contract price for piles is thirty cents per lineal foot. The profile and specifications, as originally drawn, or as they now stand, show considerable trestle work, and show generally highway crossings across the track at different places, but there is no statement in the specifications or in the profile with respect to what kind of crossing it shall be, whether of earth or of timber. There is a dispute between the parties arising out of this fact upon the question whether these bridges, made for the purpose of carrying highways over the embankment, are within the contract. The contract in that respect is ambiguous. The court, looking at the contract, cannot say what kind of crossing was intended. There is no proof of custom in this case sufficient to settle this point. We are therefore left to the construction which the contractors themselves have adopted, as shown by their conduct under the contract. When parties have made an ambiguous contract and have acted under it, and their joint actions show their understanding of it, courts and juries will follow the construction thus indicated. In this case the evidence shows that in respect to 2,100 feet, in round numbers, the plaintiffs themselves treated the piles as coming within the terms of the contract in respect to price by receipting for that price upon the estimates. There has been evidence before the jury—I cannot rehearse it—as to what was said between the engineer of defendant and plaintiffs at the time this work was done. Perhaps the plaintiffs made some protest against doing this work at the price stated, but, nevertheless, they went on and did the work under that price and receipted for it, and I think the jury should accept that as conclusive upon that point. A subordinate engineer, working in behalf of a corporation, as Mr. Hurlburt was, has no right to waive the effect of receiving pay upon monthly estimates under a contract like this. Such a contract would have but little force or value if a subordinate agent has the power to waive the terms, and this contract declares the estimates made by the engineer and furnished to the parties to be final, except for fraud or mistake. If the defendant had been an individual instead of a corporation he could have been there in person and waived the contract by saying 'We will leave that open; we will not make that conclusive;' but I instruct you that this subordinate agent, Mr. Hurlburt, working for the Bridge Com-

pany, a corporation whose affairs must have been conducted by agents appointed to act for it—Mr. Hurlburt acting in this capacity—could not waive this stipulation in the contract, that the monthly and final estimates should be conclusive. Therefore, in respect to the piling included in the estimate, about 2,100 lineal feet, plaintiffs have precluded themselves from claiming extra pay. In respect to the work on the embankment, the act of accepting pay at the contract price raises the presumption that that was the proper price for the whole amount, and, in the absence of proof to the contrary, the contract price should govern; but the presumption is not conclusive as to the 700 feet of piling not in the estimates, and if you find upon the proof that there was an agreement between plaintiffs and Mr. Hurlburt that these piles should be paid for at what they were reasonably worth, and not by the contract price, you may allow the reasonable value as shown by the proof on the subject."

The defendant at the time excepted to so much of that instruction as is contained in the following words, viz.: "But the presumption is not conclusive as to the 700 feet of piling not in the estimates, and if you find upon the proof that there was an agreement between plaintiffs and Mr. Hurlburt that these piles should be paid for at what they were reasonably worth, and not by the contract price, you may allow the reasonable value as shown by the proof on the subject."

The defendant in writing requested the court to give the jury the following instruction, viz.: "Where any of the work done by plaintiffs and sued for in their complaint has been included in any of the monthly estimates of such work read to them, and such work is therein valued at the contract price, such fact is conclusive evidence that such work was done under the contract and the prices fixed there final and conclusive."

But the court refused to give that instruction; to which ruling of the court the defendant at the time excepted.

It is claimed that, by reason of those instructions, the jury were authorized to find, and did find, for the defendants in error, for the alleged ditch, five thousand six hundred and thirty-six dollars and fifty-five cents, and for the piling eight hundred and fifty dollars, in excess of any rightful claim they had; and to that extent the plaintiff in error, which was the defendant below, avers the verdict to be erroneous.

The verdict of the jury upon which the judgment was rendered was for \$13,470 in favor of the defendants in error.

The assignments of error are: (1) that the court erred in refusing to charge the jury in behalf of the defendant below, as stated; and (2) that the court erred in those parts of the charge given, which were objected to by the defendant below, as stated.

Messrs. James M. Shackelford and S. B. Vance, for plaintiff in error:

If the work was done without a new contract, the compensation would be only for the excavation actually done at the rate fixed by the original contract.

2 Sutherland, Damages, 499-503.

Hurlburt, a subordinate engineer, had no authority by virtue of his office to make such contract.

2 Wood, Ry. Law, 446; *Powrie v. Kansas Pac. R. Co.* 1 Colo. 529.

Messrs. Alexander Gilchrist, Curran A. DeBruler and D. B. Kumler, for defendants in error:

The authority given to an agent, whether general or special, express or implied, embraces the appropriate means to accomplish the desired end.

Story, Agency, §§ 58 *et seq.* 79; *Merchants Bank v. Central Bank*, 1 Ga. 418; *Hatch v. Coddington*, 95 U. S. 48 (24: 339); *Bentley v. Doggett*, 51 Wis. 224; *Huntley v. Mathias*, 90 N. C. 101; *Labrie v. Manchester*, 59 N. H. 120; *Harrison v. Missouri Pac. R. Co.* 74 Mo. 864; *Kane v. Cortes*, 100 N. Y. 132; *Damon v. Inhabitants of Granby*, 2 Pick. 345.

An instruction to a jury must be read in connection with the body of the instructions.

Evanston v. Gunn, 99 U. S. 660 (25: 306).

Mr. Justice Lamar delivered the opinion of the court:

The main questions to be determined in the first branch of this case are these:

(1) Did the modification of the original specifications and profile, made in August, 1884, fall within the original contract, or did it create a feature in the work to be done so different from that originally contracted for as to put the defendants in error in a position to make as to that feature a new contract?

(2) Did the engineer, Hurlburt, have authority to make such new contract?

(3) Did the court err in refusing to charge, as prayed, "that the plaintiffs [below] are entitled to recover only for so much excavation as was actually done for the purpose of making such ditch, excluding any portion of the borrow-pits dug exclusively for the purpose of making the embankments?"

We shall briefly consider those questions *seriatim*.

First. A careful examination of the specifications and profile, and of the testimony in the case, all set forth in the bills of exceptions, satisfies us that the requirement to construct a continuous drainage ditch parallel to the embankment, four and one third miles long, and of the dimensions ordered, did create a new problem in the work not covered by the original contract. The ditch was required to have a fall of nearly two feet to the mile; to be two feet wide at the bottom at one end, and to increase in size to six feet bottom width at the other end; and throughout, the sides were required to be scaled one and one-half foot horizontal measure to one foot perpendicular. The testimony shows that in one portion, at least, it was nine feet deep. It was made to drain off the water from the prescribed area, and to take the place of the county ditches. On this point McGrath, one of the defendants in error, testified that "to make the borrow-pits serve for a ditch it was necessary to haul the earth from the high ground, where the embankment was low, to the low grounds, where the embankment was high, whereas but for the ditch the earth from the embankment would have been

taken directly from the sides; that this in many places necessitated a longer haul of earth, and increased the cost of the embankment."

Wasson, who was a sub-contractor, testified that before the change was made he "had taken earth from borrow-pits about twenty inches deep, and afterwards had to dig to the depth of nine feet to make the ditch, and was required to haul this extra excavation, some of it six hundred feet."

Robinson testified that "if the work was changed so as to require a continuous ditch, it could not be done as cheaply as it could if done as provided for in the specifications, because where the embankment would be low you would have to make a shallow borrow-pit, and in making a continuous ditch you would have to deepen that borrow-pit to bring it to the ditch level and would have to carry the dirt forward, necessitating a haul. There was no continuous ditch contemplated in the profile of the work."

Fisher, a witness for defendants in error, testified that he was "a civil engineer of thirty-five years' experience, and largely as railroad engineer. If the specifications provided that the earth for embankment should be borrowed equally from both sides, and then a continuous ditch should be required to be made on one side of the embankment, it would necessitate a greater haul and would be more expensive. In consequence of the ditch a greater amount of earth would have to be taken from the side on which the ditch is made. One cannot work to such an advantage in a narrow ditch as in a board borrow-pit. The deeper you go, the harder the earth is to work."

Outside of the testimony of the witnesses, it is manifest that to dig earth on a surface rolling and broken, as the profile shows the surface to have been in this instance, for the sole purpose of constructing a level embankment, and without regard to the depth or extent or level of the pits thereby made, is a very different problem from the digging with the double view of the construction of such an embankment, and the making of a continuous ditch with prescribed directions and uniform bottom level for a length of more than four miles.

It is true that, as the plaintiff in error says, the profile shows ditching in these same sections, covered by the original contract, to the amount of 4,660 cubic yards; but it also is true that those ditches were of a very different character, and imposed no such burden on the contractor as did the one in question. Indeed, the plaintiff in error itself treated the modification as a serious change, and especially so considered the ditch, before the controversy arose. In the correspondence between the two engineers of the Company, which determined on it, it is spoken of as a new system.

Second. We also think the engineer, Hurlburt, had authority to make a new contract for the ditching. The plaintiff in error insists that a subordinate engineer has no such authority by virtue of his employment. That may be conceded; but it is not the ground assumed by the defendants in error. They contend that Hurlburt was especially authorized to make the contract; and support that position by quoting the second engineer Nichols, who says, "that the plan of drainage suggested in my let-

ter to Mr. Vaughan was accepted by him, and Mr. Hurlburt was directed to have it carried out." This view is fortified by the fact that in Vaughan's letter to Nichols whereby the proposed changes were sanctioned (16th of August, 1884), and numerous items of adjustment and arrangement made necessary by such changes suggested, Vaughan himself clearly recognized the situation as one admitting of new terms with the contractors. He wrote, *inter alia*, of the change, "this solid bank business" he called it, "we might get a low rate for extra earth in consideration of the same."

In *Damon v. Granby*, 2 Pick. 345, the inhabitants of the Town of Granby had voted that certain persons (thirteen in number) should be a committee to procure a master builder, and superintend the building of a meeting-house for the town. On the trial of the case (which was an action of debt by the builder of the meeting-house on the contract made with the committee) the defendants objected that the superintending committee had no authority to contract for the building of the house. The court held that the vote of the inhabitants gave to this committee the authority to enter into the contract. "To superintend the building of the house," says the court, "includes the power to make the necessary contracts," etc. See also *Story on Agency*, sec. 79.

Third. Nor do we think the court below erred in refusing to charge the jury that the defendants in error were only entitled to recover for such excavation as was actually done for the purpose of making such ditch, as distinguished from such portion of the ideal ditch as coincided in space with the borrow-pits, as portions thereof. In some cases, nay, in most cases, that would be a proper charge, perhaps, but not in this case. Here the plaintiffs below claimed before the jury, as a matter of fact, that they held a valid contract with the defendant below, by the terms of which they were entitled to pay for the whole volume of the ditch (calling it "imaginary" in part makes no difference), from the bottom up to the original ground surface through its whole length; and that whether said volume coincided with the spaces of borrow-pits or not. It was for the jury to say whether such contract did in fact exist. It was not for the court to assume and instruct the jury as a matter of law that it did not exist. Such a contract was not legally impossible. It was not claimed that the contractors defrauded the Company, or in any way took advantage of it; and the basis of measurement, even if artificial and to an extent "imaginary," is not legally unreasonable, in view of the testimony of the witnesses as to the onerous and complicated labors of such a ditch. As a substitute and equivalent for all the items of demand—in increased volume of excavation, increased hauls, increased hardness of earth to be worked, etc.—it may have been a very proper system. We cannot say that it was not.

As to the second branch of the case, viz., that in respect to the piling, it is objected by the plaintiff in error that the instruction of the court was erroneous for the following reasons: First. Because in speaking of the 700 feet still not paid for, the court said: "If you find upon the proof that there was an agreement between plaintiffs and Mr. Hurlburt that these piles

should be paid for at what they were reasonably worth," etc.; while there was no evidence tending to show that Hurlburt made the agreement therein supposed. But there was such evidence. Ryan, one of the plaintiffs below, had testified that "we had no contract for this work, and before we began it I had a conversation with Mr. Hurlburt about it. I wanted to know what we would be paid for it, and he said that Mr. Vaughan would do what was right." This was claimed to be a contract for reasonable compensation. It was for the jury to say whether the conversation was with a contractual intent or not. The court had no right to assume as a matter of law that it was not, and refuse a charge on that aspect of the case. Second. Because Hurlburt had no authority to make a contract in reference to this matter. But the contract spoken of, being for a compensation on a *quantum meruit*, and not for a specified price, it is immaterial whether Hurlburt had such an authority or not. If, as the representative of the Company, he had made no express promise to pay, the law would imply one. There is no question as to his power to direct the work, and no claim that he exceeded his authority in directing the crossings to be made of trestle and pile work. Such being the case, we do not consider it necessary to discuss the abstract question of whether the language used by the court was technically accurate as applied to the case; if it was not there was yet no material error—none that could have injured the defense.

We do not think that the acceptance of thirty cents for some of the trestles precluded the plaintiffs as to the value of others.

The judgment of the court below is affirmed.

EDWARD P. PENFIELD, *Plff. in Err.*,

THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY.

(See S. C. Reporter's ed. 351-361.)

New York Statute of Limitations—suit against nonresident—laws of his residence—resident of State, who is—domicil.

1. By New York Code of Civil Procedure, sec. 380, an action which does not involve title or possession of real property in the State cannot be brought in the State against a nonresident of the State, after the time limited by the laws of his residence for bringing a like action, except by a resident of the State or one who becomes so before the expiration of the time so limited.
2. One having a cause of action against a Tennessee corporation, for personal injury in that State, and being a resident of Missouri when the injury occurred, is barred by said section 380 from bringing his action in New York unless he became a resident of that State before the expiration of the one year limited by the laws of Tennessee for the commencement of such an action, although in New York the period of limitation is three years.
3. A traveling salesman, residing in St. Louis, Missouri, who sent his wife and children to Brooklyn, New York, where they took up their residence and commenced to keep house and have since resided, did not become a resident of

New York when he sent his family into that State nor until he joined them there.

4. By retaining his residence for purposes of business in St. Louis, he did not become a resident of New York, within the meaning of its Statutes of Limitation, until he changed his actual residence to that State, although his domicil might be there.

[No. 187.]

Argued Jan. 30, 1890. Decided March 17, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of New York to review a judgment in favor of defendant, The Chesapeake, Ohio and Southwestern Railroad Company, in an action to recover damages for a personal injury. *Affirmed.*

The facts are stated in the opinion.

Mr. Rufus M. Williams, for plaintiff in error:

Residence has, wherever the question has arisen, been uniformly construed to mean legal residence or domicil.

Jacobs, Law of Dom. § 53, chap. 2, p. 89; *Putnam v. Johnson*, 10 Mass. 488; *Blanchard v. Stearns*, 5 Met. 298; *Holmes v. Greene*, 7 Gray, 299; *Crawford v. Wilson*, 4 Barb. 504; *Fry's Election Case*, 71 Pa. 302; *State v. Hallett*, 8 Ala. 159; *Dale v. Irwin*, 78 Ill. 170; *Vanderpool v. O'Hanton*, 53 Iowa, 246; *Cooley*, Const. Lim. 600.

By domicil is meant the permanent home.

Moorhouse v. Lord, 10 H. L. Cas. 272, 284; Jacobs, Law of Dom. §§ 57, 59, 60, 62, 69, 71, 73, pp. 97, 101, 103, 106, 113, 115, 120; Story, Conf. Laws, §§ 41, 43, 47; Phillimore, Law of Dom. No. 11, p. 11; *Putnam v. Johnson*, 10 Mass. 488, 501; *Tanner v. King*, 11 La. 175; Whart. Conf. Laws, §§ 21, 69, 74; *Lord v. Colvin*, 4 Drew. 866.

The words "domicil" and "home" are substantially equivalent.

Whicker v. Hume, 7 H. L. Cas. 124; *Mitchell v. U. S.* 88 U. S. 21 Wall. 350 (22: 584); *Ezzer v. Brighton*, 15 Me. 58; *Shaw v. Shaw*, 98 Mass. 158; *State v. Aldrich*, 14 R. I. 171; *Chasne v. Wilson*, 1 Bosw. 673; Jacobs, Law of Dom. chap. 3, p. 113, § 70.

Residence commonly imports something less fixed and stable than, and to that extent different from, domicil; and a distinction is taken between the actual and legal residence, the latter being generally deemed equivalent to domicil.

Shattuck v. Maynard, 3 N. H. 123; *Long v. Ryan*, 30 Gratt. 718; *Cohen v. Daniels*, 25 Iowa, 88; *Crawford v. Wilson*, 4 Barb. 504; *Fitzgerald v. Arel*, 63 Iowa, 104.

Residence, when used in statutes, is generally construed to mean domicil.

Jacobs, Law of Dom. § 75, p. 123; *Boucicault v. Wood*, 2 Biss. 34; *Doyle v. Clark*, 1 Flipp. 586; *Abington v. North Bridgewater*, 23 Pick. 170; *Thorncliffe v. Boston*, 1 Met. 242; *Blanchard v. Stearns*, 5 Met. 298; *Collesier v. Hailey*, 6 Gray, 517; *Langdon v. Doud*, 6 Allen, 423; *Hallett v. Bassett*, 100 Mass. 167; *State v. Aldrich*, 14 R. I. 171; *Kennedy v. Ryall*, 67 N. Y. 879; *Isham v. Gibbons*, 1 Bradf. (N. Y.) 69; *Re Hawley*, 1 Daly (N. Y.) 531-534; *Reed's App.* 71 Pa. 878; *Tyler v. Murray*, 57 Md. 418; *Talmadge v. Talmadge*, 66 Ala. 199; *Dale v. Irwin*, 78 Ill. 170; *Campbell v. White*, 23 Mich.

178; *Chariton County v. Moberly*, 59 Mo. 288; *McDaniel v. King*, 5 Cush. 469; *Harvard College v. Gore*, 5 Pick. 870; *People v. Platt*, 50 Hun, 454.

Every person must have a domicile somewhere.

Jacobs, Law of Dom. § 81; *Desmare v. U. S.* 93 U. S. 605 (23: 959); *White v. Brown*, 1 Wall. Jr. C. C. 217; *Church v. Rowell*, 49 Me. 867; *Gilman v. Gilman*, 52 Me. 165; *Thorndike v. Boston*, 1 Met. 242; *Report of the Judges*, 5 Met. 587; *McDaniel v. King*, 5 Cush. 469; *Otis v. Boston*, 12 Cush. 44; *Briggs v. Rochester*, 16 Gray, 387; *Wilson v. Terry*, 11 Allen, 206; *Shaw v. Shaw*, 98 Mass. 158; *Borland v. Boston*, 132 Mass. 89; *First Nat. Bank v. Balcorn*, 85 Conn. 351; *Crawford v. Wilson*, 4 Barb. 504; *Brown v. Ashbough*, 40 How. Pr. 260; *Ryall v. Kennedy*, 8 Jones & S. 347; *Re Bye*, 2 Daly, 525; *State v. Grizzard*, 69 N. C. 115; *Kellogg v. Oshkosh*, 14 Wis. 628; *Morgan v. Nunes*, 54 Miss. 308; *Kellogg v. Winnebago County*, 42 Wis. 97; *Hall v. Hall*, 25 Wis. 600; *Shepherd v. Cassidy*, 20 Tex. 24; *Cross v. Everts*, 28 Tex. 523.

For purposes of succession, see *Dupuy v. Wurtz*, 58 N. Y. 556; *Van Hoffman v. Ward*, 4 Redf. 244.

No person can at the same time have more than one domicile.

Jacobs, Law of Dom. § 91; *Bulkley v. Williamstown*, 3 Gray, 493; *Borland v. Boston*, 132 Mass. 89; *Lee v. Stanley*, 9 How. Pr. 272; *Bartlett v. New York*, 5 Sandf. 44; *Douglass v. New York*, 2 Duer, 110; *Brent v. Armfield*, 4 Cranch, C. C. 579; *Long v. Ryan*, 80 Gratt. 718; *Love v. Cherry*, 24 Iowa, 204.

Every person who is *sui juris* and capable of controlling his personal movements may change his domicile at pleasure.

Jacobs, Law of Dom. §§ 99, 100; *Harral v. Harral*, 89 N. J. Eq. 279; *Lestapies v. Ingraham*, 5 Pa. 71; *Tanner v. King*, 11 La. 175; *Hennen v. Hennen*, 12 La. 190; *Russell v. Randolph*, 11 Tex. 460.

Change of domicile is a question of act and intention, and cannot be accomplished without the concurrence of both.

Jacobs, Law of Dom. §§ 125, 127; *Aikman v. Aikman*, 3 Macq. H. L. Cas. 854; *Catlin v. Gladding*, 4 Mason, 308; *Wayne v. Greene*, 21 Me. 357; *Brewer v. Linnaeus*, 36 Me. 428; *Warren v. Thomaston*, 48 Me. 406; *Leach v. Pillsbury*, 15 N. H. 187; *Harvard College v. Gore*, 5 Pick. 870; *Lyman v. Fiske*, 17 Pick. 231; *Shaw v. Shaw*, 98 Mass. 158; *Ross v. Ross*, 103 Mass. 575; *Bangs v. Brewster*, 111 Mass. 382; *Carey's App.* 75 Pa. 201; *Pilson v. Bushong*, 29 Gratt. 229; *Hayes v. Hayes*, 74 Ill. 312; *McConnell v. Kelley*, 138 Mass. 372; *Whart. Confl. Laws*, § 40.

Domicil and the right to vote are not to be confounded.

Whart. Confl. Laws, § 48; *Putnam v. Johnson*, 10 Mass. 492.

The intent of plaintiff in error at the time of removing his family in August, 1883, from St. Louis to Brooklyn, must control.

Harris v. Firth, 4 Cranch, C. C. 710; *Bell v. Kennedy*, L. R. 1 H. L. Sc. 307; *Church v. Rowell*, 49 Me. 867; *Littlefield v. Brooks*, 50 Me. 475; *Wilson v. Terry*, 11 Allen, 206; *Mills v. Alexander*, 21 Tex. 154; *Whart. Confl. Laws*, § 40.

U. S., Book 33.

Laws, §§ 55, 56; *Jennison v. Hapgood*, 10 Pick. 77.

Domicil can only be devested by an actual departure, with intent to remain.

Johnson v. Merchandise, 2 Paine, 602; *Van Ness, Prize Cas.* 1; *Beardstown v. Virginia*, 81 Ill. 541.

The change must be a bona fide change.

Jones v. League, 59 U. S. 18 How. 76 (15: 263); *Case v. Clarke*, 5 Mason, 70; *Evans v. Davenport*, 4 McL. 574; *Catlett v. Pac. Ins. Co.* 1 Paine, 594; *Fisk v. Chicago, R. I. & P. R. Co.* 58 Barb. 472; *Munroe v. Douglas*, 5 Madd. 405.

A constructive residence is sufficient to give domicile, though an actual residence may not have begun.

Williams v. Roxbury, 12 Gray, 21; *Whart. Confl. Laws*, § 58.

In the absence of legislation it is therefore a question of usage and local understanding more than of principle.

Harbaugh v. People, 88 Mich. 242; *Warren v. Bd. Registration* (Mich.) 2 L. R. A. 203.

A change of residence is satisfactorily shown by proof of an intent to change, an actual removal and a new abode taken.

Bassett v. Wheeler, 84 N. Y. 468; *Crawford v. Wilson*, 4 Barb. 504; *Frost v. Briabin*, 19 Wend. 11; *Re Hale*, 2 N. Y. Leg. Obs. 139; *Hegeman v. Fox*, 1 Redf. 297, 14 Barb. 475; *Boardman v. House*, 18 Wend. 512; *Burrows v. Miller*, 4 How. Pr. 849; *Isham v. Gibbons*, 1 Bradf. 69; *Re Thompson*, 1 Wend. 48; *Re Wrigley*, 8 Wend. 134; *Vischer v. Vischer*, 12 Barb. 640; *Re Fitzgerald*, 2 Cain, 318.

Residence is a question of fact for the jury, to be determined from all the circumstances of the case.

Cochrane v. Boston, 4 Allen, 178, 28 Am. Dec. 295; *Pearce v. State*, 1 Sneed, 63, 60 Am. Dec. 185; *Lyman v. Fisk*, 17 Pick. 281, 28 Am. Dec. 298; *Blanchard v. Stearns*, 5 Met. 804; *Kennedy v. Ryall*, 67 N. Y. 380; *Colleston v. Hailey*, 6 Gray, 518.

The former place of abode must be abandoned only as a place of abode. Therefore, occasional returns, or an intention to return, for temporary purposes of business, or pleasure, or the like, will not prevent a change of domicile.

Jacobs, Law of Dom. § 160; *Anderson v. Laneville*, 9 Moore, P. C. 325; *Burnham v. Rangeley*, 1 Woodb. & M. 7; *Kemna v. Brockhaus*, 10 Biss. 128; *Williamson v. Parisien*, 1 Johns. Ch. 389; *Hood's Estate*, 21 Pa. 106; *State v. Frest*, 4 Harr. (Del.) 558; *Swaney v. Hutchins*, 13 Neb. 266; *Russell v. Randolph*, 11 Tex. 460.

Residence of wife and family as evidence of domicile.

Jacobs, Law of Dom. § 401; *Prieto v. Duncan*, 22 Ill. 26.

A married man is generally to be deemed domiciled at the place where his wife and family dwell.

Ommanney v. Bingham, Robertson, Pers. Suc. Appendix, 468; *Platt v. Atty. Gen.* L. R. 8 App. Cas. 336; *Forbes v. Forbes*, Kay, 341; *Burnham v. Rangeley*, 1 Woodb. & M. 7; *Hylton v. Brown*, 1 Wash. C. C. 298; *Cooper v. Galbraith*, 8 Wash. C. C. 546; *Greene v. Windham*, 18 Me. 225; *Brewer v. Linnaeus*, 36 Me. 428;

Topham v. Lewiston, 74 Me. 236; *Shattuck v. Maynard*, 3 N. H. 123; *Rumney v. Campton*, 10 N. H. 567; *Anderson v. Anderson*, 42 Vt. 850; *Williams v. Whiting*, 11 Mass. 424; *Jennison v. Hapgood*, 10 Pick. 77; *Greene v. Greene*, 11 Pick. 410; *Bangs v. Brewster*, 111 Mass. 382; *Grant v. Daliber*, 11 Conn. 234; *Fisk v. Chicago, R. I. & P. R. Co.* 53 Barb. 472; *Ames v. Duryea*, 6 Lans. 155; *Lee v. Stanley*, 9 How. Pr. 272; *Chaine v. Wilson*, 1 Bosw. 673; *Sherwood v. Judd*, 3 Bradf. 267; *Roberti v. Methodist Book Concern*, 1 Daly, 3; *Re Scott*, 1 Daly, 584; *Cadwalader v. Howell*, 18 N. J. L. 138; *Brun-dred v. Del Hoyo*, 20 N. J. L. 323.

The residence of a man who has a family which he maintains, and which has an established home, is prima facie with that family.

Keith v. Stetter, 35 Kan. 100; Whart. Conf. Laws, § 67; *Re Hawley*, 1 Daly, 581; *Re Crawford*, 3 N. Y. Leg. Obs. 76; *Chaine v. Wilson*, 8 Abb. Pr. 78; *Houghton v. Ault*, 16 How. Pr. 77; *Bache v. Lawrence*, 17 How. Pr. 554; *Petersen v. Chemical Bank*, 32 N. Y. 21.

When a man's wife and family reside in one place, and he does business in another, returning to them at intervals, he is domiciled where they dwell, and not where he does business.

Jacobs, Law of Dom. § 402; *Cooper v. Galbraith*, 3 Wash. C. C. 546; *U. S. v. Thorpe*, 2 Bond, 340; *Williams v. Whiting*, 11 Mass. 424; *Greene v. Greene*, 11 Pick. 410; *Fisk v. Chicago, R. I. & P. R. Co.* 53 Barb. 472; *Chaine v. Wilson*, 1 Bosw. 673; *Anderson v. Anderson*, 42 Vt. 850. *Messrs. B. F. Tracy and W. W. McFarland*, for defendant in error:

The cause of action accrued against a person who was not then a resident of the State.

Code, § 890; *St. Clair v. Cox*, 106 U. S. 850 (27: 222); *Morawetz, Priv. Corp.* §§ 958, 959, and notes; *Burnham v. Rangeley*, 1 Woodb. & M. 11; *Frost v. Brisbin*, 19 Wend. 11.

"Residence" is used in none but the popular sense, and not as "domicil."

Re Thompson, 1 Wend. 45; *Haggart v. Morgan*, 5 N. Y. 14; *Bell v. Pierce*, 51 N. Y. 12; *Union Hotel Co. v. Hersee*, 79 N. Y. 454; *Reg. v. University of Oxford*, L. R. 7 Q. B. 471; *Atty-Gen. v. McLean*, 1 Hurlst. & C. 750; *Blackwell v. England*, 8 El. & Bl. 541; *Hewer v. Cox*, 3 El. & El. 428; *Tazewell County v. Davenport*, 40 Ill. 197; *Storm v. Smith*, 43 Miss. 499.

Mr. Justice Harlan delivered the opinion of the court:

This action was brought in March, 1884, in the Supreme Court of New York, Kings County, by the plaintiff in error against the Chesapeake, Ohio and Southwestern Railroad Company, a corporation created under the laws of Kentucky and Tennessee. Its object was to recover damages alleged to have been sustained by the plaintiff on the 30th of November, 1882, in the State of Tennessee, in consequence of the careless, negligent and wrongful conduct of the defendant and its servants, while he was a passenger upon one of its trains. Upon the petition of the Company the action was removed into the Circuit Court of the United States for the Eastern District of New York, where, after the evidence was concluded, the jury, under the direction of the court, returned a verdict for the defendant. This direction was given because, in the opinion of that court,

the plaintiff's cause of action was barred by the Statutes of Limitation of New York.

The Statutes here referred to are in these words:

"The following actions must be commenced within the following periods, after the cause of action has accrued. . . . Within three years: . . . An action to recover damages for a personal injury, resulting from negligence." N. Y. Code of Civil Procedure, §§ 380, 388.

"Where a cause of action, which does not involve the title to, or possession of, real property within the State, accrues against a person who is not then a resident of the State, an action cannot be brought thereon in a court of the State, against him or his personal representative, after the expiration of the time limited by the laws of his residence for bringing a like action, except by a resident of the State, and in one of the following cases:

"1. Where the cause of action originally accrued in favor of a resident of the State.

"2. Where, before the expiration of the time so limited, the person in whose favor it originally accrued was, or became, a resident of the State, or the cause of action was assigned to, and thereafter continuously owned by, a resident of the State." Id. § 890.

A motion for a new trial having been overruled, a judgment was rendered for the Company. That judgment is here for review, the only error assigned being the court's instruction to find for the defendant.

It was agreed that at the trial the plaintiff gave testimony tending to show the following facts: He lived in Harlem, New York, when a boy of fourteen years of age, married in Brooklyn, removed from that city to Michigan, from the latter State to Illinois, and from Illinois to St. Louis, Missouri, where he had resided for about one year prior to the accident. At the time of the accident he was a traveling salesman for an agent of the Michigan Salt Association located in St. Louis, and when the trial took place was engaged in that capacity. When injured, he resided in St. Louis, with his wife and children. In August, 1883, he "sent his wife and children to Brooklyn, New York, where they took up their residence and commenced to keep house, and where they have resided ever since August, 1883, and do now reside." The plaintiff himself did not go to Brooklyn with his family in August, 1883, nor did he join them there until December 31, 1883, or January 1, 1884. "He remained with his family in Brooklyn for about three months, when he again went to St. Louis, and from there went traveling for said agency as said salesman." He "again joined his wife and children the next December, 1884, and remained with them some three months, when he again went out on the road." He joined his family in October, 1885, and was with them at the time of the trial. He lived with them when at home, and always lived with his wife since their marriage, except when absent on business. The attorney for the defendant addressed the plaintiff at his place of business in St. Louis, up to December 28, 1883, on which day the latter notified him by letter of his change of address to Brooklyn, for which place he was in the act of starting to join his family.

Upon the issue as to the residence of her husband, Mrs. Penfield's evidence was, that they had lived together constantly for about twenty-two years, and she was always with him except when he was traveling. Having stated that at the time of the accident, and during the sickness of her husband, resulting from the injuries received by him, they resided at St. Louis, her examination continued: "Q. How long did you continue to live there yourself after this sickness? A. Until the next August. Q. What year was that? A. 1883. Q. In August, 1883, what did you do? A. Came here to Brooklyn; hired a house and went to housekeeping; moved all my things I wished to retain, and have lived here ever since with my children. Q. What about your furniture? A. Part I sold in St. Louis and part I brought here. Q. And have you been residing here ever since? A. Yes, sir. Q. Your husband's place of abode is here with you in your house? A. Yes, sir. Q. At the time you removed from St. Louis to Brooklyn,—will you state, if you know, the reason why your husband did not come on with you at that time?" This question was objected to as immaterial and irrelevant, and was not answered.

As the Railroad Company is a corporation of Tennessee, where the injury occurred, and as the plaintiff was not a resident of New York when the cause of action originally accrued to him, the suit was barred by section 890 unless he became a resident of the latter State before the expiration of the period limited by the laws of Tennessee for the commencement of actions like this, that is, before the expiration of one year from November 30, 1882. The contention of the plaintiff is that, although he was not in the State of New York for some years prior to December, 1883, he became, within the meaning of the Statute, a resident of that State, when, in August, 1883, he sent his family to the City of Brooklyn. We are not aware of any determination of this precise question by the highest court of New York. But there are decisions of that court construing statutes, other than Statutes of Limitation, which contain the words "resident" and "residence." Those decisions may throw some light upon the present case.

The earliest of those cases, to which our attention has been called, is *Re Thompson*, 1 Wend. 48. It arose under a Statute (1 Rev. Laws, 157), the 23d section of which provided "that the estate, real and personal, of every debtor who resides out of this State, and is indebted within it, shall be liable to be attached and sold for the payment of his debts, in like manner, in all respects, as nearly as may be, as the estates of debtors residing within this State." Chief Justice Savage, delivering the opinion of the court, said that the object of the Statute was to authorize creditors to prosecute for their debts when their debtors were abroad; and whether their absence from the State was permanent or temporary, whether voluntary or involuntary, the reason for giving this remedy to the creditor was the same. He said the question was "Where was his actual residence, not his domicile?" . . . The Act is intended to give a remedy to creditors, whose debtors cannot be served with process. If the debtor absconds or secretes himself, then an attachment issues. If he notoriously resides abroad, then the at-

tachment issues. But if he goes openly to another State or country, and remains there doing business, but intending to return when his convenience will permit, he is not, as his counsel contends, an absent debtor, and his property cannot be attached. He may become a bankrupt abroad, as has Alexander Thompson; his property may be taken by his partners, and used by them, or transferred to his foreign creditors, as is attempted in this case; and the creditor may stand by and acknowledge and regret the insufficiency of our laws, but the property cannot be touched. Surely the Legislature never intended such a state of things. . . . The reason why this remedy is given against the property of debtors resident abroad is equally applicable whether the debtor is absent permanently or temporarily. No length of residence, without the intention of remaining, constitutes domicile. A debtor, therefore, by residing abroad, without declaring an intention to remain, might prevent his creditors from ever collecting their debts. In my judgment, the present case comes not only within the spirit of the Act, but also within its terms."

In *Frost v. Brisbin*, 19 Wend. 11, the court was required to determine the meaning of the word "resident," in the Act of 1831 (Statutes 1831, p. 896), providing that no person should be arrested on civil process in suits brought upon contracts, express or implied, except in cases where the defendant "shall not have been a resident of this State for at least one month previous to the commencement of a suit against him."

In that case it appeared that Brisbin, a citizen and resident of New York, purchased a stock of goods, took them to Milwaukee, and established himself in business in the latter city, leaving his wife and child to board at his former residence in New York. There was evidence tending to show that he went to Milwaukee with intent to make it his permanent residence. But there was also evidence tending to show that he had no fixed purpose, when he went to that city, of making it his permanent abode, unless he was successful in business, and that when arrested he had the purpose—not having been thus successful—to close up his business and return to his former residence, though without any certain plans as to his future course.

The court, speaking by Chief Justice Nelson, said that if the case turned upon the defendant's formed intention and purpose of mind, and not upon the fact of actual residence, the law was for him. But upon a review of former decisions, construing statutes regulating the rights and remedies of creditor and debtor, he said: "The cases cited above establish that the transient visit of a person for a time at a place does not make him a resident while there; that something more is necessary to entitle him to that character. There must be a settled, fixed abode, an intention to remain permanently at least for a time, for business or other purposes, to constitute a residence within the legal meaning of that term. . . . One of these cases expressly, and all of them virtually, decide that actual residence, without regard to the domicile of the defendant, was within the contemplation of the statutes. Whether, therefore, the defendant had so established

himself at Milwaukee as to work a change of his domicile or not, is immaterial; for if we concede he has not, he may still be a *resident* there. The domicile of the citizen may be in one State or Territory, and his actual residence in another." After observing that upon the facts it must be assumed that the defendant commenced an actual and permanent residence in Milwaukee in the spring of 1886, but that since that date he had resolved to close his business there as soon as it could be conveniently done, and return to his former residence, the court said: "Has this change of intention worked a change of residence? For this is the most that can be pretended. If our exposition of the meaning of the term in the Statute is correct, it clearly did not. His actual residence is still at Milwaukee. He is still carrying on his business there, and may continue it for such time as he pleases. Change of mind may lead to change of residence, but cannot with any propriety be deemed such of itself."

In *Haggart v. Morgan*, 5 N. Y. 422, 428—which was the case of an attachment against the defendant as a nonresident debtor,—it was held that, although the defendant was domiciled in New York, he was, by reason of a continuous, though temporary, absence in New Orleans, for about three years, to be deemed a nonresident within the meaning of the Statute regulating attachments.

In *Weitkamp v. Loehr*, 53 N. Y. Sup. Ct. Rep. [21 Jones & S.] 82, the court said: "Residence, in Attachment Laws, generally implies an established abode, fixed permanently for a time, for business or other purposes, although there may be an intent existing all the while to return to the true domicile."

These cases show that, within the meaning of the Statutes regulating attachments against the property of debtors, as well as those regulating arrests on civil process for debts, it was the actual residence of the defendant, and not his domicile, that determined the rights of the parties.

A like construction appears to have been given, or assumed, by the courts of New York in regard to similar words in that clause of its Statute of Limitations which provides that if, after the cause of action shall have accrued, the defendant shall "depart from and reside out of the State, the time of his absence" shall not be included in the period of limitation. The Supreme Court of the State, discussing that provision, said: "The expressions 'and reside out of the State' and 'the time of his absence' have the same meaning; they are correlative expressions. So that while the defendant in this case resided out of, he was absent from, the State, and accordingly, until he again became a resident of the State, the suspension of the operation of the Statute continued." *Burroughs v. Bloomer*, 5 Denio, 582, 585. It was held in that case, as well as in two later and well considered opinions, the one of the Superior Court of the City of New York, delivered by Mr. Justice Duer, and the other of the court of appeals, delivered by Judge Selden, that where a defendant, after the cause of action accrued against him, departed from and resided out of the State several times, returning to the State in the intervening periods,

all the times of absence or nonresidence were to be added together and deducted from the term of limitation. *Ford v. Babcock*, 2 Sandf. 518, 527, 531; *Cole v. Jessup*, 10 N. Y. 96, 104, 107. In each of those three cases it was not alleged or contended, and could not be inferred from any language in the pleadings, or in the opinion, that the defendant changed his domicile upon each departure and return. To the same effect is *Satterthwaite v. Abercrombie*, 23 Blatchf. 308. And, in a very recent case, the court of appeals said: "The law gives a creditor six years' continued presence of his debtor within the State after the cause of action has accrued." *Engel v. Fischer*, 102 N. Y. 400, 404, 3 Cent. Rep. 808.

To give a different meaning to the word "residence," or "resident," or "reside" in that clause of the New York Statute of Limitations which relates to plaintiffs, from that which the courts of the State have given it in that clause of the same Statute which relates to defendants, as well as in various statutes of the State on other subjects, would produce much confusion.

Assuming, without deciding, that the testimony introduced for the plaintiff in the present case would warrant the impression that he had obtained a domicile in the State of New York by virtue of his wife and family, with his consent, having made their home in that State, there is nothing in the evidence which had the slightest tendency to show that his own actual residence was in the State of New York for many years prior to his going there from St. Louis in December, 1883.

To illustrate by referring to other statutes, let us suppose that the plaintiff, while engaged in business in St. Louis, had brought this action in the Supreme Court of New York, immediately after his family took up their residence in Brooklyn. Could he not have been compelled to give security for costs, under section 3268 of the Code of Civil Procedure, which declares that "the defendant, in an action brought in a court of record, may require security for costs to be given, . . . where the plaintiff was, when the action was commenced, . . . a person residing without the State." Or, if the defendant in this action had, within the same period, brought, in one of the courts of New York, a suit against the present plaintiff, upon a cause of action, for an "injury to personal property, in consequence of negligence," it could not be doubted, in view of the decisions heretofore cited, that an attachment could have been sued out, and sustained, under sections 685 and 686 of the Code, which provide that a warrant of attachment against the property of one or more defendants in such an action may be granted upon the application of the plaintiff, where it appears by affidavit "that the defendant is . . . not a resident of the State." Could Penfield, in the last case supposed, have been deemed a nonresident of New York, when sued for "an injury to personal property in consequence of negligence," and under the same facts be regarded as a resident of New York if he sued the same party "for a personal injury resulting from negligence?" Could he be deemed a resident of the State for the purpose of bringing this action, immediately after his family

reached Brooklyn, and a nonresident if the Railroad Company had, at the same time, sued him in New York, and taken out an attachment against his property? The answer to these questions suggests that, in view of the course of decisions in New York, the plaintiff by retaining his residence for purposes of business in St. Louis, did not become a resident of New York, within the meaning of section 390, until he changed his actual residence to that State. If he had, before the expiration of the period limited by the law of Tennessee, quit- ted his residence in Missouri and joined his family in New York for the purpose of mak- ing the latter State his residence in fact, he would have been entitled to bring his action within the period fixed by the laws of New York for the commencement of actions like this by one who is a resident of that State when the cause of action accrues.

As under the evidence the jury could not, by any reasonable inference from the proof, have found that the plaintiff became himself a resident of New York within a year after the cause of action accrued, the instruction to find for the defendant was right.

Judgment affirmed.

J. P. CLOUGH, President of the COUNCIL OF THE FIFTEENTH SESSION OF THE LEGISLATURE OF IDAHO TERRITORY, *Appt.*,

v.

E. J. CURTIS, Secretary of IDAHO TERRITORY.

H. Z. BURKHART, Speaker of the HOUSE OF REPRESENTATIVES OF THE FIFTEENTH SESSION OF THE LEGISLATURE OF IDAHO TERRITORY, *Appt.*,

v.

C. H. REED, Chief Clerk of the HOUSE OF REPRESENTATIVES, ET AL.

(See S. C. Reporter's ed. 361-372.)

Idaho Supreme Court, jurisdiction of—Legisla- ture of Idaho—federal question—authority exercised under United States—mandamus to correct records of Legislature—power of court to determine whether Legislature is lawfully constituted.

1. The Supreme Court of Idaho Territory has original jurisdiction to issue writs of mandate, review, prohibition, habeas corpus, and all writs necessary to the exercise of its appellate juris- diction.
2. The Legislature of Idaho has power to confer such jurisdiction on that court. Sec. 1910, U. S. Rev. Stat., does not forbid the conferring of such jurisdiction.
3. A mandamus issued upon the ground that bodies of persons claimed, but without right, to be, respectively, the lawful Council and House of Representatives of such Territory, usurped the legislative power conferred by Congress upon the Legislative Assembly of the Territory and

passed enactments purporting to be laws of such Territory, draws in question the lawful existence of those bodies as such Council and House of Representatives, and the validity of the author- ity which they have assumed to exercise under the United States.

4. A court, by means of writs of mandamus oper- ating upon the officers of legislative bodies, can- not make up the records of the proceedings of those bodies, or cause alterations to be made in such records as prepared by the officer whose duty it was to prepare them.
5. The court, in a case that does not involve the private rights of litigants, cannot be required to determine whether or not particular bodies of persons constituted a lawful Legislative Assem- bly.

[Nos. 1183, 1184.]

Argued Jan. 27, 28, 1890. Decided March 17, 1890.

A PPEALS from judgments of the Supreme Court of the Territory of Idaho sustaining demurrers to writs of mandamus. *Affirmed.*

The facts are stated in the opinion.

Messrs. Arthur Brown and Lyttleton Price, for appellants:

The judiciary has the power to pass upon the legality of each of the other branches of the government.

Kilbourn v. Thompson, 103 U. S. 199 (26: 889); *Burnham v. Morrissey*, 14 Gray, 226.

A court will, by mandamus, correct the most solemn records, and require the ministe- rial officers charged with them to certify to the truth in making them, and, if improperly made, to correct them.

Hill v. Goodwin, 56 N. H. 441; *Wise v. Bigger*, 79 Va. 269; *Smith v. Moore*, 38 Conn. 106; *Farrell v. King*, 41 Conn. 448; *Douglas County Road Co. v. Douglas County*, 5 Or. 873; *State v. Whittet*, 61 Wis. 352; *Pom. Eq. 871, note*; 2 Whart. Ev. 983; *Gwyer v. Figgins*, 37 Iowa, 518; *Chapman v. Hurd*, 67 Ill. 284; *Bell v. Pike*, 53 N. H. 473; *Hall v. Summers- worth*, 39 N. H. 511.

Where there are two Houses, each claiming to be the rightful one, if it is necessary, for the proper determination of the validity of the laws, to say which House was rightfully elected, the court may do it.

Justice's Answer, 70 Me. 608; *Prince v. Skillin*, 71 Me. 361; *Lamb v. Lynd*, 44 Pa. 336.

The presiding officer has the right, and it is his duty, when the time arises, to adjourn the legislative body, without motion from that body.

Rules of Prac. House of Rep. 274; Journal 49th Cong. 887; Jefferson's Manual, 183; Cushing's Manual, § 527; Cushing, Law Leg. Assem. §§ 290, 318; *Hill v. Goodwin*, 56 N. H. 441.

The recording officer must be governed and controlled by the presiding officer.

Bell v. Pike, 53 N. H. 482.

In matters of public importance, and con- cerning the public alike, any citizens may initiate proceedings in mandamus, and be plaintiff or applicant in the suit.

High, Ex. Leg. Rem. §§ 431-433; *Union Pac. R. Co. v. Hall*, 91 U. S. 854 (23: 432); *Hall v. Union Pac. R. Co.* 3 Dill. 521.

Mandamus will lie against cabinet officers.

Kendall v. U. S. 37 U. S. 12 Pet. 608 (9: 1214).

NOTE.—When mandamus will issue. See note to *McCluny v. Silliman*, 4: 263.

As to mandamus to control inferior courts; discre- tion,—see note to *Ex parte Morgan*, 26: 135.

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The court had authority to issue the mandamus.

U. S. v. Schurz, 102 U. S. 892 (26: 170); *Ellis v. Bristol County*, 2 Gray, 371, 375; *New Orleans, M. & T. R. Co. v. Miss.* 112 U. S. 17 (28: 620); *People v. Schiellain*, 95 N. Y. 124; *U. S. v. Percheman*, 32 U. S. 7 Pet. 74 (8: 613); *Harrington v. Holter*, 111 U. S. 796 (28: 602); *U. S. v. Gomez*, 70 U. S. 3 Wall. 766 (18: 216).

Mr. G. A. Jenks, for appellees:

The existence and terms of a public law are not issuable. The courts may determine whether a law exists.

Gardner v. Collector, 73 U. S. 6 Wall. 499 (18: 890); *Watkins v. Holman*, 41 U. S. 16 Pet. 25 (10: 878); 1 Phillips, Ev. 425, note; *People v. Highway Comrs.* 54 N. Y. 276, 279; *People v. Develin*, 33 N. Y. 279, 280, 281; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 131 (3: 176); *Sherman v. Story*, 30 Cal. 253.

The legislative journal imports absolute verity. *Ryan v. Lynch*, 68 Ill. 160; *Spongler v. Jacoby*, 14 Ill. 297; *Division of Howard County*, 15 Kan. 211, 214; *South Ottawa v. Perkins*, 94 U. S. 260, 277 (24: 154, 161); *Gardner v. Barney*, 73 U. S. 6 Wall. 511 (18: 893); *Post v. Kendall County*, 105 U. S. 667 (26: 1204).

A mandamus does not confer power upon those to whom it is directed.

U. S. v. Clark, 95 U. S. 773 (24: 546); *Carroll County v. U. S.* 85 U. S. 18 Wall. 77 (21: 778); *U. S. v. Macon County*, 99 U. S. 591 (25: 383); *Ex parte Rowland*, 104 U. S. 612 (26: 864); High, Ex. Leg. Rem. § 32; *Secretary v. McGarrahan*, 76 U. S. 9 Wall. 298, 313 (19: 579, 588); *U. S. v. Boutwell*, 84 U. S. 17 Wall. 604 (21: 721); *Com. v. Colley Twp.* 29 Pa. 121.

It will not be granted to undo an act already done.

Ex parte Burtis, 108 U. S. 338 (26: 351); *Maxwell v. Burton*, 2 Utah, 599; Short, Information, 250; *People v. Reardon*, 49 Hun, 425.

Want of legal remedy does not give the right. High, Ex. Leg. Rem. § 19, note, § 154, note.

The writ will not be allowed in cases involving distinctly questions of law and fact, nor wherein the action invoked involves judgment and discretion.

U. S. v. Comrs. 72 U. S. 5 Wall. 563, 566 (18: 692, 693); *Attala County v. Grant*, 9 Smedes & M. 77, 47 Am. Dec. 104.

The writ must be issued upon affidavit on application of party beneficially interested.

People v. Olds, 8 Cal. 137; *People v. Thompson*, 25 Barb. 73; *People v. Greene County*, 12 Barb. 217; High, Ex. Leg. Rem. § 38.

The Supreme Court of Idaho had no original jurisdiction.

Curtis, Jurisdiction of U. S. Courts, 92; *Riggs v. Johnson County*, 73 U. S. 6 Wall. 166 (18: 768).

The granting or refusal of a mandamus is discretionary.

Union P. R. Co. v. Hall, 91 U. S. 354 (23: 432); *Ball v. Lappius*, 3 Or. 56; *State v. Gracey*, 11 Nev. 233; *McClung v. Silliman*, 19 U. S. 6 Wheat. 598 (5: 340); *Nebraska v. Lockwood*, 70 U. S. 3 Wall. 239 (18: 48).

The Supreme Court of Idaho had no jurisdiction to amend or purge the journal of the House of Representatives.

State v. Smith, 4 West. Rep. 101, 44 Ohio St. 348; *State v. Moffitt*, 5 Ohio, 363, 364;

Koehler v. Hill, 60 Iowa, 545; *Re Roberts*, 5 Colo. 525, 528; Cooley, Const. Lim. (5th ed.) 163, note 27; *Territory v. Clayton* (Utah) 18 Pac. Rep. 628, 629; *Turley v. Logan County*, 17 Ill. 151; *South Ottawa v. Perkins*, 94 U. S. 264 (24: 156).

The court will take judicial notice of all facts that bear upon the existence of the statute, and decide whether such a law exists.

Dwarris, Stat. 467; 1 Kent, Com. 400; Sedg. Stat. and Const. Law, 84; 4 Coke, Inst. 26; 8 Coke, Inst. 28; *Gardner v. Barney*, 73 U. S. 6 Wall. 499, 511 (18: 890, 893); *Sherman v. Story*, 30 Cal. 253.

Mr. Justice Harlan delivered the opinion of the court:

These cases depend upon the same principles of law, and will be considered together.

It appears from the record of the first one (No. 1138) that upon the petition of the appellant to the Supreme Court of the Territory of Idaho, an alternative writ of mandamus was issued, stating substantially the following facts: The appellant was and is the president of the Council of the 15th session of the Legislature of Idaho, and the appellee is the secretary of that Territory. On the 60th day of that session, February 7, 1889, the Council continued in session until midnight, and thereafter until about one o'clock of the succeeding morning. About the latter hour in the morning of the 8th day of February, 1889, a communication was received from the chief clerk of the House of Representatives, announcing that that body had elected one George P. Wheeler as speaker *pro tem*. The petitioner declined to receive that message as a message from the House, for the reason that the latter body had no authority to elect a speaker after the expiration of the sixty days prescribed for the session by the Act of Congress; and the petitioner, as president of the Council, announced to that body and declared "that, because the hour of 12 o'clock and after had arrived, and the time had elapsed in which the said Legislature was permitted to transact business, therefore the said Council was adjourned without day." He then inquired of the chief clerk if the adjournment was recorded in the minutes of the proceedings of the session, and received from him the reply that it was. The Council then dispersed, and the petitioner and some of the members left the room, after which other members pretended to reorganize the Council, and to elect one S. F. Taylor president *pro tem*. thereof, and to elect other officers of the Council, and also assumed to transact legislative business, passing enactments which the persons, so pretending to be a legislature, claimed were Acts of the Legislature of the 15th session of the Territory. Seventeen Acts were so passed after the time had expired for holding the session of the Legislature.

The writ also stated that in making up a record of the sixtieth day of the legislative session the clerk did not thereafter show him the same; and petitioner never saw, until after the clerk had filed with E. J. Curtis, the secretary of the Territory, certain papers which he claimed were the proceedings of the sixtieth day of the session of the Council, but which, in fact, were a false and fictitious account of those proceed-

ings, signed by S. F. Taylor, and not signed by petitioner, president of the Council, as required by its rules and practice. The petitioner found that a part of the minutes or records had been cut out, and that there were three stubs of leaves which had been a part of the former proceedings of the records or minutes of said session. The part of the minutes reciting that the president of the Council declared the session adjourned, and his reasons therefor, had been cut out and were omitted from the minutes as filed with the secretary of the Territory.

On the 14th of February, 1889, the petitioner, as the president of the Council, called the attention of the secretary of the Territory to said cut leaves, stating to him the proceedings that should have appeared therein, and handed to him a report thereof as they actually occurred, demanding that the same be incorporated with the proceedings of the Legislature, and recorded as a part of the proceedings of the Council. The defendant, Edward J. Curtis, declined to record the adjournment proceedings as a part of the proceedings of the Legislature. The petitioner then and there demanded that the report as furnished by him be certified to Congress as part of the proceedings of the Legislature of Idaho for the fifteenth session. But defendant refused to report the said adjournment as a part of the proceedings. The petitioner, after having stated and certified to him, as secretary of the Territory, that all of the alleged proceedings, wherein it was stated that S. F. Taylor was president *pro tem.*, were had after the hour of 12 o'clock, and after the adjournment of the Council by the president thereof, demanded that the subsequent proceedings and pretended legislation be not recorded as a part of the proceedings of the Legislature; and, if already recorded, that the same be expunged from the record of the proceedings of the 15th session of the Legislature; all of which the secretary declined to do, and he still declines to treat the proceedings and Acts signed by S. F. Taylor, president *pro tem.*, as null and void, and threatens to certify them to Congress as a part of the proceedings of the Council.

The record in the second case (No. 1134) shows that upon the petition of H. Z. Burkhardt, speaker of the House of Representatives of Idaho Territory, 15th session, an alternative writ of mandamus was issued against Charles H. Reed, chief clerk of that body, and Edward J. Curtis, secretary of the Territory, alleging the following facts:

The defendant Reed, as such chief clerk, has in his possession the minutes of the proceedings of the last day of the session of the House of Representatives, which minutes have been read and approved by that body, and so declared to it then and there by the speaker on the last day of such session. Thereafter the speaker asked the clerk if there was any further business before the house, and the latter replied there was none. After the hour of 12 o'clock midnight of the 7th day of February, 1889, being the 60th and last day of the session, the plaintiff, as speaker and acting as such, announced that the time had arrived when by the Act of Congress the session closed by limitation of time, and declared the House adjourned *sine die*. To that announcement there was no dissent by the House or by any member thereof, but all ac-

quiesced therein, and the speaker, acting as such, actually adjourned the House after the hour of 12 o'clock at night of the 60th day of the session. Upon such adjournment he and a portion of the representatives left the assembly room, and thereafter several members of the Legislature elected a speaker and assumed to pass Acts and to perform the duties of the House.

The writ in this case also states that it was and is the duty of the defendant Reed, as chief clerk, to make and keep correct and true minutes of the doings and proceedings of the House, and upon their approval by the speaker it is his custom and duty to sign the same as speaker. But Reed wrongfully and fraudulently falsified said record of the minutes of the House on its last day's session, and took from and kept out of the minutes the fact that the speaker had them read and approved, and declared the same duly approved, and that the speaker asked the clerk if there was any further business, to which the latter replied that there was none, and that the speaker declared the House adjourned without day, according to the laws of the United States, the time for the limit of the session having expired. He wrongly and falsely put into the minutes of the last day's session the statement that, pending the reading of the journal, the speaker left the chair and went out of the House, when, in fact, he did not leave the House until after its final adjournment. The defendant Reed also neglected and refused to allow the speaker to inspect, revise, approve or sign the minutes, and obtained the signature thereto of one George P. Wheeler, a member of the Legislature, who was neither the speaker nor the actual speaker *pro tem.* of the House. He filed with the defendant Curtis, secretary of the Territory, said falsified minutes as the true minutes of the last day's session, although the same, as the defendant Curtis knows, were not signed by the speaker as the law and custom require. On the 7th day of February, 1889, demand was made by Lyttleton Price, in behalf of the speaker, the plaintiff herein, that Curtis do not record or treat the proceedings after said adjournment as the proceedings of the House. Yet Curtis, as secretary, is wrongfully claiming and pretending that said false and incorrect minutes are the real, true and correct journals and minutes of the House, and is threatening to continue so to do, and to record and preserve those minutes as a record of the proceedings of the House on the last day of its 15th session.

These are the essential facts disclosed by the alternative writs of mandamus.

By the writ in the first case the defendant Curtis was commanded "to record the said report of the said proceedings of the said Council, as a part of the proceedings of the fifteenth session of the Legislature of Idaho Territory," and "to expunge from the records of the said sixtieth day of the session all the proceedings assumed to have been done while S. F. Taylor is alleged to be president of the Council, and to strike from the files and records of the laws of Idaho those pretended Acts of legislation signed by S. F. Taylor as president of the Council, or show cause," etc.

The writ in the other case commanded the

defendants "to bring such minutes and pretended minutes and journal of said House of Representatives into court, that the same may be corrected so as to state the facts, and that said Charles H. Reed correct the same in accordance with the facts, so that it may appear in the proper place in the minutes that said speaker asked the clerk if there was any further business before the House, and that the clerk said there was not, and that thereupon the minutes were read and approved, and that thereupon, it then being 12 o'clock midnight, the said speaker announced to the House that, the time having arrived when the session must close according to the law of Congress, he therefore now declared the House adjourned *sine die*, and that to the said announcement of the expiration of the time of the session there was no dissent, and that to the said order of final adjournment there was no objection; and that in every way and manner and particular said Reed make said minutes correspond with the facts, and be a full, true and complete record of said last day's session of said House of Representatives, and be nothing otherwise; and that, after being so corrected, the said speaker, H. Z. Burkhardt, may have an opportunity to sign said minutes as corrected; that the same be returned to the defendant Edward J. Curtis, as such secretary, or that, failing so to do," cause be shown, etc.

In each case there was a demurrer upon these grounds: (1) The court has no jurisdiction of the person of the defendant or of the subject of the proceeding. (2) The plaintiff has no legal capacity to sue. (3) The petition and writ do not state facts sufficient to constitute a cause of action or proceedings of this kind. (4) The writ is ambiguous and uncertain. In the second case an additional ground was assigned to the effect that several causes of action were improperly united. The demurrers were all sustained, and the applications for writs of mandamus denied.

Certain questions of jurisdiction raised by the appellees must be first examined. It is contended by them that the Supreme Court of Idaho has no original jurisdiction, and that, if it had, no appeal lies from its judgment in this case. Neither of these propositions are sound. The Revised Statutes of the United States expressly declare that the jurisdiction, both appellate and original, of the courts of Idaho "shall be limited by law." § 1866. And by section 8816 of the Revised Statutes of Idaho it is provided that the jurisdiction of the Supreme Court of that Territory shall be original and appellate, and that "its original jurisdiction extends to the issuance of writs of mandate, review, prohibition, habeas corpus and all writs necessary to the exercise of its appellate jurisdiction." Of the power of the Legislature of Idaho to confer original jurisdiction upon the Supreme Court of the Territory in such cases, there can be no doubt. Its power extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. Rev. Stat. U. S. § 1851. The jurisdiction of the several courts of the Territory is a rightful subject of legislation, and the above provision is not inconsistent with the Constitution or any Act of Congress.

It is contended, however, that the provision

that each of the district courts in certain Territories, including Idaho, "shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States" (Rev. Stat. U. S. § 1910), confers original jurisdiction, in cases of that character, only upon the territorial district courts. But that section is not to be so interpreted. It does not forbid the Legislature from giving original jurisdiction to the district courts of the Territory in cases other than those therein named. Accordingly, by the Revised Statutes of Idaho the jurisdiction of the district courts of the Territory is extended to all civil actions for relief formerly given in courts of equity; in which the subject of litigation is not capable of pecuniary estimation; in which the subject of litigation is capable of such estimation, and which involve the title or possession of real estate, or the legality of any tax, unjust assessment, toll or municipal fine; to all special proceedings; to the issuing of writs of mandate, review, prohibition, habeas corpus and all writs necessary to the exercise of its powers, and to the trial of indictments. Rev. Stat. Idaho, § 8880. Nor does section 1910 of the Revised Statutes of the United States forbid the Territorial Legislature from conferring original jurisdiction upon the Supreme Court of the Territory in cases named in section 8816 of the Revised Statutes of Idaho, although such cases may depend upon questions arising under the Constitution or laws of the United States. If Congress had intended to confer upon the district courts of the Territories named exclusive jurisdiction in the class of cases named in section 1910, it would have so declared in express terms.

This question has been adverted to because the jurisdiction of this court to review the judgment below depends upon the inquiry whether the present case is embraced by section 2 of the Act of March 8, 1885, authorizing this court, without regard to the sum or value in dispute, to review the judgment or decree of the supreme court of a Territory, in any case in which is drawn in question the validity of an authority exercised under the United States. 23 Stat. 443, chap. 855. Do the cases now before us raise any question as to the validity of an authority exercised under the United States? We are of opinion that they do. By the Revised Statutes of the United States, the legislative power in each Territory is vested in the governor and a Legislative Assembly, the latter to consist of a Council and House of Representatives. § 1846. The alternative writ of mandamus proceeds upon the ground that a body of persons claimed, but without right, to be, respectively, the lawful Council and House of Representatives of the Territory, usurped the legislative power conferred by Congress upon the Legislative Assembly of the Territory, and passed enactments purporting to be laws of such Territory. In each case is directly drawn in question the lawful existence of those bodies as the Council and House of Representatives of the Territory, and, consequently, the authority which they have assumed, as the Legislative Assembly of the Territory, to exercise under the United States. In this respect the present case differs from *Balti-*

more & P. R. Co. v. Hopkins, 180 U. S. 210, 225 [32: 908, 912], upon writ of error to the Supreme Court of the District of Columbia. In that case it was held that the words in the Act of March 3, 1885 (23 Stat. 448, chap. 355), the validity of a "statute of or an authority exercised under the United States," do not embrace a case which depends only on a judicial construction of an Act of Congress, there being no denial of the power of Congress to pass the Act, or of the right to enjoy whatever privileges are granted by it. The case now before us is within the very letter of the Act of 1885 because there is drawn in question the validity of an authority exercised under the United States. *Clayton v. Utah Territory*, 132 U. S. 632, 637 [33: 455, 456]. It is consequently our duty to inquire whether the court below erred in withholding the relief asked by the petitioners.

It is clear that such relief cannot be granted without deciding that the body over which George P. Wheeler presided was not the lawful House of Representatives; that the one over which S. F. Taylor presided was not the lawful Council; and that the minutes filed with the secretary of the Territory, purporting to be the record of the proceedings of the last day of the fifteenth session of the Legislature, were not true minutes of that day's session prior to its legal termination, but were, in part, minutes of the proceedings of persons who did not constitute the Council and House of Representatives of the Territory. Those facts being determined in favor of the petitioners the court is, in effect, asked to take these minutes into its own custody or under its control; to cause them to be corrected in accordance with the facts as alleged by the petitioners to exist; to order them, after being thus corrected, to be filed in the office of the secretary of the Territory, as the only true records of the legislative proceedings in question; and to require that officer to expunge from the files and records of the laws of the Territory the Acts passed while Taylor and Wheeler assumed to be the presiding officers, respectively, of the Council and House of Representatives of the Territory. And this relief, it is to be observed, is not asked by anyone claiming to have a beneficial interest in defeating or in sustaining the enactments passed by the two bodies alleged to have usurped the functions of a legislative assembly. Rev. Stat. Idaho, § 4978.

We are all of opinion that there was no error in denying these applications for writs of mandamus. We have not been referred to any adjudged case that would justify a court in giving the relief asked by the petitioners. And we do not suppose that such a case can be found in any State whose powers of government are distributed—as is the case in the Territory of Idaho—among separate, independent and co-ordinate departments, the legislative, the executive and the judicial. 12 Stat. 808, chap. 97; Rev. Stat. U. S. 1841, 1846, 1907. "One branch of the government," this court said in the *Sinking Fund Cases*, 99 U. S. 700, 718 [25: 496, 501], "cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

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It is not one of the functions of a court to make up the records of the proceedings of legislative bodies. Nor can it be required, in a case not involving the private interests of parties, to determine whether particular bodies, assuming to exercise legislative functions, constitute a lawful legislative assembly. Such a question might indeed arise in a suit depending upon an enactment passed by such an assembly. And it might be that, in a case of that character, and under some circumstances, the court would be compelled to decide whether such an enactment was passed by a legislature having legal authority to enact laws. How far in the decision of such a question the judiciary would be concluded by the record of the proceedings of those bodies, deposited by the person whose duty it was to keep it with the officer designated by law as its custodian, are questions we have no occasion at this time to consider. It is sufficient for the disposition of the present case to say that the court below properly refused to lay its hands upon what purported to be the record of the proceedings of the Legislative Assembly of Idaho, in the custody of the secretary of that Territory, and to cause changes or alterations to be therein made.

The cases cited by the appellants do not assert any different doctrines in respect to the power of the courts over the record of the proceedings of a co-ordinate department of government. They go no further than to assert the rule that a writ of mandamus, where there is no other adequate remedy, may be granted to compel inferior tribunals, corporations and public officers or agents to perform purely ministerial duties, in respect to which there is no discretion to be exercised. Rev. Stat. Idaho, § 4977. Such cases do not sustain the proposition that the judiciary, by means of writs of mandamus operating upon the officers of legislative bodies, may supervise the making up of the records of the proceedings of those bodies, or cause alterations to be made in such records as prepared by the officer whose duty it was to prepare them. Much less do they justify the court, in a case that does not involve the private rights of litigants, to determine whether particular bodies of persons constituted a lawful legislative assembly.

The judgment in each case is affirmed.

W. L. THOMAS, Police Sergeant of the CITY
OF RICHMOND, *Appt.*,
c.

WILSON LONEY.

(See S. C. *Re Loney*, Reporter's ed. 372-377.)

Notary public, depositions before, in contested election of member of Congress—officer of United States—witness—perjury in such dep-

NOTE.—The oath must be lawfully administered by competent authority, to convict of perjury. See note to U. S. v. Curtis, 27: 584.

When habeas corpus may issue, and when not; and from what courts, and by what judges; what way be inquired into by writ of. See note to U. S. v. Hamilton, 1: 490.

What questions may be considered on habeas corpus. See note to *Ex parte Carll*, 27: 288.

osition—offense against United States—cannot be punished by justice of the peace—habeas corpus.

1. A notary public, or other officer designated by Congress to take depositions in case of a contested election of a member of the House of Representatives of the United States, performs this function under the authority of Congress, and not under that of the State.
2. Testimony taken in such a case by deposition before a notary public stands on the same ground as if taken before a judge or officer of the United States.
3. A witness so giving his testimony in such a case is accountable for the truth of his testimony to the United States only.
4. Perjury committed in so testifying is an offense against the United States and within the exclusive jurisdiction of its courts, and cannot be punished in the courts of the State.
5. One who is in custody on a warrant from a justice of the peace for perjury in giving his deposition before a notary public, as a witness in a case of a contested election of a member of Congress, may be discharged on writ of habeas corpus by the United States circuit court.
6. The power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had.

[No. 1118.]

Submitted Jan. 21, 1890. Decided March 24, 1890.

APPPEAL from a judgment of the Circuit Court of the United States for the Eastern District of Virginia discharging upon habeas corpus Wilson Loney from imprisonment under a warrant of arrest from a justice of the peace of the City of Richmond, Virginia, upon a complaint charging him with perjury in giving his deposition as a witness before a notary public of the city in the case of a contested election of a member of the House of Representatives of the United States. *Affirmed.*

Opinion below, 38 Fed. Rep. 101.

Statement by *Mr. Justice Gray*:

This was a writ of habeas corpus, granted upon the petition of Wilson Loney, by the circuit court of the United States, to the police sergeant of the City of Richmond, in the State of Virginia, who justified his detention of the prisoner under a warrant of arrest from a justice of the peace for that city upon a complaint charging him with willful perjury committed on February 2, 1889, in giving his deposition as a witness before a notary public of the city in the case of a contested election of a member of the House of Representatives of the United States.

The circuit court discharged the prisoner, upon the ground that the offense charged against him was punishable only under § 5392 of the Revised Statutes, and was within the exclusive cognizance of the courts of the United States. 38 Fed. Rep. 101. The respondent appealed to this court.

Messrs. R. A. Ayers, Atty-Gen. of Virginia, and J. B. Tucker for appellant.
(No counsel for appellee.)

Mr. Justice Gray delivered the opinion of the court:

By the Constitution, the judicial power of

the United States is vested in the courts of the United States. Art. 3, sec. 1. By the statutes of the United States, those courts have jurisdiction, exclusive of the courts of the several States, of "all crimes and offenses cognizable under the authority of the United States" (Rev. Stat. § 711, cl. 1); and the circuit courts of the United States have exclusive cognizance of all such crimes and offenses, except where otherwise provided by law, the principal exception being where concurrent jurisdiction is given to the district courts of the United States (Rev. Stat. § 629, cl. 20; Act of August 19, 1888, chap. 866, § 1, 25 Stat. 434); and it is declared, by way of greater caution, that nothing contained in the Crimes Act of the United States "shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." Rev. Stat. § 5323.

The House of Representatives of the United States is made by the Constitution the judge of the elections, returns and qualifications of its own members. Art. 1, sec. 5.

Congress has regulated by law the form in which notice of a contested election may be given and answered, and the time and manner in which depositions on oath of witnesses in such cases may be taken and returned to the House of Representatives by a judge of any court of the United States, or of a court of record of any State, or by any mayor or recorder of a city, or by any register in bankruptcy or notary public, or, if the parties so agree, by any officer authorized to take depositions by the laws of the State or of the United States; and has provided for the punishment of such witnesses failing to attend and testify after being duly summoned. Rev. Stat. §§ 105-180; Act of March 2, 1887, chap. 318 (24 Stat. 445).

Congress has also enacted that every person, having taken an oath to testify truly, "before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered," who willfully and contrary to such oath states any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine and imprisonment. Rev. Stat. § 5392.

The laws of Virginia indeed provide that notaries public shall be appointed by the governor of the State; and may take "any oath or affidavit required by law, which is not of such nature that it must be made in court." Virginia Code of 1887, §§ 923, 173. But the oath of a witness in the case of a contested election of a member of the House of Representatives of the United States is not required by any law of Virginia, but is an oath authorized to be administered by the laws of the United States, and by those laws only; and the witness gives his testimony in obedience to those laws, and not in the performance of any duty which he owes to the State in which his testimony is taken.

Any one of the officers designated by Congress to take the depositions of such witnesses (whether he is appointed by the United States, such as a judge of a federal court or a register in bankruptcy, or by the State, such as a judge of one of its courts of record, a mayor or recorder of a city, or a notary public,

performs this function, not under any authority derived from the State, but solely under the authority conferred upon him by Congress, and in a matter concerning the government of the United States.

Testimony taken with the single object of being returned to and considered by the House of Representatives of the United States exercising the judicial power, vested in it by the Constitution, of judging of the elections of its members, and taken before an officer designated by Congress as competent for this purpose and deriving his authority to do this from no other source, stands upon the same ground as testimony taken before any judge or officer of the United States, and perjury in giving such testimony is punishable in the courts of the United States. *United States v. Bailey*, 84 U. S. 9 Pet. 288 [9: 118].

There are cases (the most familiar of which are those of making and uttering counterfeit money) in which the same act may be a violation of the laws of the State, as well as of the laws of the United States, and be punishable by the judiciary of either. *Fox v. Ohio*, 46 U. S. 5 How. 410 [12: 218]; *United States v. Marigold*, 50 U. S. 9 How. 560 [18: 257]; *Moore v. Illinois*, 55 U. S. 14 How. 18 [14: 306]; *Ex parte Siebold*, 100 U. S. 371, 890 [25: 717, 724]; *Cross v. North Carolina*, 182 U. S. 131 [38: 287].

But the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had. It is essential to the impartial and efficient administration of justice in the tribunals of the nation, that witnesses should be able to testify freely before them, unrestrained by legislation of the State, or by fear of punishment in the state courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded if a witness testifying before a court of the United States, or upon a contested election of a member of Congress, were liable to prosecution and punishment in the courts of the State upon a charge of perjury, preferred by a disappointed suitor or contestant, or instigated by local passion or prejudice.

A witness who gives his testimony, pursuant to the Constitution and laws of the United States, in a case pending in a court or other judicial tribunal of the United States, whether he testifies in the presence of that tribunal, or before any magistrate or officer (either of the nation or of the State) designated by Act of Congress for the purpose, is accountable for the truth of his testimony to the United States only; and perjury committed in so testifying is an offense against the public justice of the United States, and within the exclusive jurisdiction of the courts of the United States, and cannot therefore be punished in the courts of Virginia under the general provision of her statutes that "if any person, to whom an oath is lawfully administered on any occasion, willfully swear falsely on such occasion touching any material matter or thing," he shall be guilty of perjury. Virginia Code of 1887, § 3741.

It has accordingly been held by the Supreme Court of New Hampshire, in an able opinion of Chief Justice Parker, that the courts of a

State have no jurisdiction of the crime of perjury committed in an examination before a commissioner under the United States Bankrupt Act (*State v. Pike*, 15 N. H. 83); by *Mr. Justice Bradley*, affirming a decision of Judge Erskine, as well as by the Supreme Courts of Tennessee and of Georgia, that the state courts have no jurisdiction of perjury in testifying before a commissioner of the circuit court of the United States (*Ex parte Bridges*, 2 Woods, 428; *S. C. sub nom. Brown v. United States*, 14 Am. L. Reg. N. S. 566; *State v. Shelley*, 11 Lea (Tenn.) 594; *Ross v. State*, 55 Ga. 192); and by the courts of other States, that they have no jurisdiction of perjury in making an affidavit under the Acts of Congress relating to the sale of public lands. *State v. Adams*, 4 Blackf. 146; *People v. Kelly*, 88 Cal. 145; *State v. Kirkpatrick*, 32 Ark. 117.

The decisions in the Supreme Courts of Pennsylvania and of New Hampshire, cited for the appellant, holding that the judiciary of a State has jurisdiction of perjury committed in a proceeding for naturalization before a court of the State, under authority of Congress, tend rather to support than to oppose our conclusion; for they were put upon the ground that the proceeding for naturalization was a judicial proceeding in a court of the State, as it doubtless was. *Rump v. Commonwealth*, 30 Pa. 475; *State v. Whittemore*, 50 N. H. 245; *Spratt v. Spratt*, 29 U. S. 4 Pet. 593, 408 [7: 597, 902].

The courts of Virginia having no jurisdiction of the matter of the charge on which the prisoner was arrested, and he being in custody, in violation of the Constitution and laws of the United States, for an act done in pursuance of those laws by testifying in the case of a contested election of a member of Congress, law and justice required that he should be discharged from such custody, and he was rightly so discharged by the circuit court on writ of habeas corpus. Rev. Stat. §§ 751, 761; *Ex parte Royall*, 117 U. S. 241 [29: 868].

Judgment affirmed.

H. FITZGERALD, Sergeant of the CITY OF MANCHESTER, *Appt.*,

v.

CHARLES GREEN.

(See S. C. *Re Green*, Reporter's ed. 377-380.)

Illegal voting for presidential electors—power of State to punish—indictment containing two charges—secs. 5511, 5514, U. S. Rev. Stat.—illegal voting for member of Congress—habeas corpus.

1. The State has power to punish for illegal and fraudulent voting for presidential electors.
2. The including, in one indictment and sentence, of illegal voting both for a representative in Congress and for presidential electors, does not go to the jurisdiction of the state court, but is, at the worst, mere error, which cannot be inquired into by writ of habeas corpus.
3. Sections 5511 and 5514 of the Revised Statutes were made for the security and protection of elections held for representatives or delegates in Congress, and do not impair or restrict the power

of the State to punish fraudulent voting in the choice of its electors.

4. A person imprisoned under the judgment of a corporation court of a city of Virginia, sentencing him to imprisonment and fine on his conviction on an indictment for unlawfully voting at an election held in that city for a representative in Congress and for electors of President and Vice-President, cannot be discharged by a United States circuit court, on habeas corpus.

[No. 1117.]

Submitted Jan. 21, 1890. Decided Mar. 24, 1890.

A PPEAL from a judgment of the Circuit Court of the United States for the Eastern District of Virginia, discharging, upon habeas corpus, the prisoner, Charles Green, from his imprisonment under a judgment of the Hustings or Corporation Court of the City of Manchester, Virginia, sentencing him to imprisonment upon his conviction by a jury upon an indictment for unlawfully voting for a representative in Congress and for electors of President and Vice-President, he being disqualified so to vote. *Reversed.*

Statement by Mr. Justice Gray:

This was a writ of habeas corpus, granted upon the petition of Charles Green, by the circuit court of the United States, to the sergeant and jailer of the City of Manchester in the State of Virginia, who justified his detention of the prisoner under a judgment of the hustings or corporation court of the city, sentencing him to be imprisoned in the city jail for five weeks and to pay a fine of five dollars, upon his conviction by a jury on an indictment charging him with unlawfully, knowingly, corruptly and with unlawful intent voting at an election held in that city for a representative in Congress and for electors of President and Vice-President of the United States on November 6, 1888, being disqualified by a previous conviction for petty larceny.

By the Code of Virginia of 1887, general elections are held throughout the State on the fourth Tuesday in May, and on the first Tuesday after the first Monday in November, in each year, for all officers required by law to be chosen at such elections respectively (§ 109); persons convicted of bribery at an election, embezzlement of public funds, treason, felony or petit larceny, are disqualified to vote (§ 62); elections are by ballot containing the names of all persons intended to be voted for and designating the office of each (§ 122); members of the House of Representatives of the United States are chosen by the qualified voters of the respective congressional districts at the general election in November, 1888, and in every second year thereafter (§ 52); electors for President and Vice-President of the United States are chosen by the qualified voters of the State at the election held on the first Tuesday after the first Monday in November, 1888, and on the corresponding day in each fourth year thereafter, or at such other time as may be appointed by Congress (§§ 54, 55); and any person, who shall knowingly vote in any election district in which he does not reside and is registered, or vote more than once at the same election, "or, not being a qualified elector, vote at any election with an unlawful intent," shall be punished by imprisonment in jail not ex-

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ceeding one year, and by fine not exceeding \$1000. § 3851.

The circuit court was of opinion "that the United States courts for this district have sole and exclusive jurisdiction to hear and determine the matters and things alleged in the bill of indictment found in the said Hustings Court of Manchester, upon the ground that the Acts of Congress in such case made and provided (Rev. Stat. §§ 5511, 5514) have defined the offense charged in the said indictment and prescribed the penalty therefor, and that the United States courts have sole and exclusive jurisdiction thereof, and that the said Hustings or Corporation Court of Manchester had no jurisdiction of the matters and things charged in the said indictment against the said Charles Green;" and therefore adjudged that the prisoner be discharged. The respondent appealed to this court.

Messrs. R. A. Ayers, Atty-Gen. of Virginia, and J. R. Tucker for appellant.
(No counsel for appellee.)

Mr. Justice Gray delivered the opinion of the court:

In this case, as in *Loney's Case* [*ante*, p. 949], just decided, the question presented is whether the courts of the State of Virginia had jurisdiction of the charge against the prisoner. But that is the only respect in which the two cases have any resemblance.

By the Constitution of the United States, the electors for President and Vice-President in each State are appointed by the State in such manner as its Legislature may direct; their number is equal to the whole numbers of senators and representatives to which the State is entitled in Congress; no senator or representative or person holding an office of trust or profit under the United States, shall be appointed an elector; and the electors meet and vote within the State, and thence certify and transmit their votes to the seat of government of the United States. The only rights and duties, expressly vested by the Constitution in the national government, with regard to the appointment or the votes of presidential electors, are by those provisions which authorize Congress to determine the time of choosing the electors and the day on which they shall give their votes, and which direct that the certificates of their votes shall be opened by the president of the Senate in the presence of the two Houses of Congress, and the votes shall then be counted. Constitution, art. 2, sec. 1; Amendments, art. 12.

The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice-President of the nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the State Legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress. Constitution, art. 1, secs. 2, 3.

In accord with the provisions of the Constitution, Congress has determined the time as of which the number of electors shall be ascer-

tained, and the days on which they shall be appointed and shall meet and vote in the States, and on which their votes shall be counted in Congress; has provided for the filling by each State, in such manner as its Legislature may prescribe, of vacancies in its college of electors; and has regulated the manner of certifying and transmitting their votes to the seat of the national government, and the course of proceeding in there opening and counting them. Rev. Stat. §§ 181-148; Acts of February 8, 1887, chap. 90 (24 Stat. 373); October 19, 1888, chap. 1216 (25 Stat. 618).

Congress has never undertaken to interfere with the manner of appointing electors, or, where (according to the now general usage) the mode of appointment prescribed by the law of the State is election by the people, to regulate the conduct of such election, or to punish any fraud in voting for electors; but has left these matters to the control of the States.

Sections 5511 and 5514 of the Revised Statutes, referred to in the order of the circuit court, were, as observed by this court in *Coy's Case*, 127 U. S. 731, 751 [82: 274, 278], made for the security and protection of elections held for representatives or delegates in Congress, and do not impair or restrict the power of the State to punish fraudulent voting in the choice of its electors.

The question whether the State has concurrent power with the United States to punish fraudulent voting for representatives in Congress is not presented by the record before us. It may be that it has. *Ex parte Siebold*, 100 U. S. 371 [25: 717]. But even if the State has no such power in regard to votes for representatives in Congress, it clearly has such power in regard to votes for presidential electors, unaffected by anything in the Constitution and laws of the United States; and the including, in one indictment and sentence, of illegal voting both for a representative in Congress and for presidential electors, does not go to the jurisdiction of the state court, but is, at the worst, mere error, which cannot be inquired into by writ of habeas corpus. *Ex parte Crouch*, 112 U. S. 178 [28: 690]; *Re Coy*, 127 U. S. 756-759 [82: 280, 281].

Judgment reversed, and case remanded for further proceedings in conformity with this opinion.

CARL POHL ET AL., Appts.,
v.
THE ANCHOR BREWING COMPANY.

(See S. C. Reporter's ed. 381-387.)

United States patent—how limited in duration by foreign patent—expiration of term.

1. Under section 4887, U. S. Rev. Stat., a United States patent for an invention previously patented in a foreign country expires at the same time with the term limited by the foreign patent, or, if there be more than one foreign patent, at the same time with the one having the shortest time to run.
2. The duration of the United States patent is not to be limited by any lapse or forfeiture of any portion of the term of such foreign patent, by

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means of the failure to perform a condition subsequent, according to the foreign statute.

2. The words "expiration of term" in such section do not mean expiration of term through a forfeiture by breach of a condition, but mean expiration by lapse of time.

[No. 1269.]

Submitted Jan. 10, 1890. Decided Mar. 24, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York dismissing a suit in equity for the infringement of letters-patent No. 218,447, granted March 18, 1879, to Carl Pohl for an improvement in barrel and cask-scrubbing machines. *Reversed.*

The facts are stated in the opinion.

Opinion below, 89 Fed. Rep. 782.

Messrs. Grosvenor P. Lowrey, B. F. Thurston, Clarence A. Seward, J. M. Deuel and Noah Davis for appellants.

Mr. William J. Townsend for appellee.

Mr. Justice Blatchford delivered the opinion of the court:

This is a suit in equity, brought on the 16th of April, 1889, in the Circuit Court of the United States for the Southern District of New York, by Carl Pohl and Charles Zoller against The Anchor Brewing Company, a corporation, for the infringement of letters-patent No. 218,447, granted March 18, 1879, on an application filed January 3, 1879, to Carl Pohl, for an "improvement in barrel and cask-scrubbing machines."

The patent is granted on its face for the term of seventeen years from March 18, 1879, "subject to the limitation prescribed by sec. 4887, Rev. Stat., by reason of German patent dated September 6, 1877, and French patent dated September 8, 1877." It appears, by translations into English of the German and French patents, annexed to the bill, that the German patent began to run September 6, 1877, and its longest duration was until December 12, 1891, and that the French patent began to run from September 8, 1877, and ran for fifteen years.

The defendant put in a plea to the bill, setting forth that, at the time when Pohl applied for the United States patent, and at the time it was issued, he was a citizen of the Empire of Germany; that, on the 6th of September, 1877, a German patent was issued to him for the same invention, for the term of fifteen years; that, under the German Patent Law of May 25, 1877, he was required to pay certain annuities on the German patent, and to work the invention in the Empire of Germany in the manner and for the term specified by that law; that in default thereof, the term of the German patent would expire, and the rights and privileges of the patentee under it would become forfeited and cease; that Pohl neglected and failed to pay the annuities, and to work the invention in the Empire of Germany in the manner and time required by that law, whereby and under the provisions of that law the German patent became forfeited in 1880, and the term thereof expired; that, by reason thereof, and under the provisions of section 4887 of the Revised Statutes, the United States patent expired and the term thereof ended in 1880, and prior to the commencement of this suit, and, at the time it

was brought, the plaintiff had no title to the patent and no rights under it; that, on the 8d of September, 1877, a patent was issued to Pohl for the same invention by the proper authorities of the government of France, for the term of fifteen years, and subject to the provisions of the French Patent Law of July 5, 1844; that, under those provisions, a patentee who failed to pay his annuity as required by that law, before the beginning of each year of the duration of his patent, or who failed to put his invention in working order in France within two years from the signature of the patent, or who ceased such working during two consecutive years, would forfeit all right under the patent; that Pohl neglected and failed to pay his annuity as required by such law, and failed to put his alleged invention in working order in France within two years from the signature of the patent, and ceased such working during two consecutive years, whereby, under the provisions of the French Patent Law, the French patent was forfeited and the time and term thereof expired, and the rights of Pohl thereunder ceased; and that, under the provisions of section 4887 of the Revised Statutes, the United States patent expired and the term thereof ended prior to the commencement of this suit, and at that time the plaintiffs had no title to the patent and no exclusive rights thereunder.

The plea was set down for argument, and the circuit court, held by Judge Wallace, sustained the plea and dismissed the bill. To review that decree the plaintiffs have appealed.

Section 4887 of the Revised Statutes, on which the question involved in this case arises, reads as follows: "No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years." The particular question involved is as to the meaning of the language of the second paragraph of the section.

The United States patent in the present case, granted March 18, 1879, was granted for an invention which had been patented previously, in September, 1877, in Germany and in France. It must be, therefore, by the terms of section 4887, so limited as to expire at the same time with that of the two patents, German and French, "having the shortest term." The German patent on its face appears to have been granted for a term extending from September 6, 1877, to December 12, 1891; and the French patent for a term extending for fifteen years from September 3, 1877, that is, until September 3, 1892. If the United States patent does not expire until the end of the term expressed on the face of that one of the two patents, German and French, which has the shortest term so expressed on its face, it does not ex-

pire until the end of the term so expressed on the face of the German patent, namely, December 12, 1891; and so it had not expired when this suit was commenced, and has not yet expired. On the other hand, if it expired when the German patent became forfeited by reason of the facts alleged in the plea in regard to it, or when the French patent became forfeited by reason of the facts alleged in the plea in regard to it, the United States patent expired prior to the commencement of this suit.

The opinion of the circuit court in the present case (39 Fed. Rep. 782) proceeded upon the view that the "term" of the foreign patent, referred to in section 4887, was not the original term expressed in it, but its period of actual existence; and that the United States patent expired when the foreign patent having the shortest term was terminated by its lapsing or becoming forfeited in consequence of the failure of the patentee to comply with the requirements of the foreign patent law. The circuit court regarded the decision of this court in *Bate Refrigerating Co. v. Hammond*, 129 U. S. 151 [32: 645], made in January, 1889, as requiring such decision.

The question involved in the present case has been decided by several of the circuit courts.

In *Holmes Electrical Protective Co. v. Metropolitan Burglar Alarm Co.*, 21 Fed. Rep. 458, in the Circuit Court for the Southern District of New York, in August, 1884, it was held by Judge Wheeler that section 4887 meant that the term of the United States patent should be as long as the remainder of the term for which the foreign patent was granted, without reference to incidents occurring after the grant of the foreign patent; that that section referred to the fixing of the term of the foreign patent, and not to the keeping of it in force; and that the term of the United States patent was not affected by the fact that a prior English patent had been suffered to lapse by the nonpayment of a tax.

In *Paillard v. Bruno*, 29 Fed. Rep. 864, in the Circuit Court for the Southern District of New York, in December, 1886, it was held by Judge Wallace, that, under section 4887, a United States patent, for an invention which had been patented previously in England for the term of fourteen years, did not expire until fourteen years from the date of the English patent, notwithstanding the grant of the latter patent had terminated by the failure of the patentee to pay a stamp duty required to be paid as a condition of the continuance of the grant beyond the term of three years.

In *Bate Refrigerating Co. v. Gillett*, 31 Fed. Rep. 809, in the Circuit Court for the District of New Jersey, in August, 1887, before Mr. Justice Bradley, it was held that where an English patent was granted for a term certain, provided that, if the patentee should not pay a stamp duty within a certain time, the patent should cease and determine, a United States patent afterwards granted for the invention was not affected by a forfeiture of the foreign patent subsequently incurred by a failure to perform such condition; that the term of the English patent fixed the term of the United States patent; that the subsequent fate of the English patent had no effect upon the United States

patent; and that the life of each, after its inception, proceeded independently of the life of the other. As authority for this view, *Mr. Justice Bradley* cited the cases above referred to, of *Holmes Electrical Protective Co. v. Metropolitan Burglar Alarm Co.* and *Paillard v. Bruno*.

Prior to the decision of the circuit court in the present case, and in May, 1889, in *Huber v. N. O. Nelson Mfg. Co.*, 88 Fed. Rep. 880, in the Circuit Court for the Eastern District of Missouri, before *Judge Thayer*, it was held that a United States patent, granted after an English patent for the same invention had lapsed and become void by reason of the non-payment of a stamp duty, was granted without authority of law. This decision was made on the interpretation which the court gave to the case of *Bate Refrigerating Co. v. Hammond*.

But we think that the question involved in the present case is not the same as that decided in *Bate Refrigerating Co. v. Hammond*, and is not controlled by the decision in that case. There, a United States patent was granted in November, 1877, for seventeen years. A patent for the same invention had been granted in Canada to the same patentee for five years from January, 1877. The Canadian patent was, in December, 1881, extended for five years from January, 1882, and also for five years from January, 1887, under a Canadian Statute passed in 1872. The question involved was whether, under section 4887, the United States patent expired in January, 1882, or in January, 1892. This court, limiting itself to the precise question involved, said that it was "of opinion that, in the present case, where the Canadian Statute under which the extensions of the Canadian patent were granted, was in force when the United States patent was issued, and also when that patent was applied for, and where, by the Canadian Statute, the extension of the patent for Canada was a matter entirely of right, at the option of the patentee, on his payment of a required fee, and where the fifteen years' term of the Canadian patent has been continuous and without interruption, the United States patent does not expire before the end of the fifteen years' duration of the Canadian patent." This was said on the view, expressed elsewhere in the opinion, that the Canadian patent did not expire, and it never could have been said properly that it would expire, before January, 1892. The ground of this conclusion was, that the "term" of the Canadian patent granted in January, 1877, was by the Canadian Statute at all times a term of fifteen years' duration, made continuous and uninterrupted by the action of the patentee, as a matter entirely of right, at his own option.

By parity of reasoning, as applied to the present case, section 4887 requires that the United States patent shall be so limited as to expire at the same time with the term limited by the foreign patent issued prior to the issuing of the United States patent, having then the shortest time to run. There is nothing in the Statute which admits of the view that the duration of the United States patent is to be limited by anything but the duration of the legal term of the foreign patent in force at the time of the issuing of the United States

patent, or that it is to be limited by any lapsing or forfeiture of any portion of the term of such foreign patent, by means of the operation of a condition subsequent, according to the foreign statute. In saying that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent," the Statute manifestly assumes that the patent previously granted in a foreign country is one granted for a definite term; and its meaning is, that the United States patent shall be so limited as to expire at the same time with such term of the foreign patent. Such term was held, in *Bate Refrigerating Co. v. Hammond*, to be fifteen years and not five years.

This view is made conclusive by the requirement of section 4887, that if there be more than one prior foreign patent, the United States patent shall be so limited as to expire at the same time with that one of such foreign patents "having the shortest term." This means the foreign patent which, at the time the United States patent is granted, has then the shortest term to run, irrespective of the fact that the foreign patent may afterwards lapse or become forfeited by the non-observance of a condition subsequent prescribed by the foreign statute.

In the view that section 4887 is to be read as if it said that the United States patent is to be so limited as to expire at the same time with the expiration of the term of the foreign patent, or if there be more than one, at the same time with the expiration of the term of the one having the shortest term, the interpretation we have given to it is in harmony with the interpretation of the words "expiration of term" in analogous cases. *Oakley v. Schoonmaker*, 15 Wend. 226; *Beach v. Nixon*, 9 N. Y. 85; *Farnum v. Platt*, 8 Pick. 389. In those cases it was held that the words "expiration of term" do not mean expiration of term through a forfeiture by breach of a condition, but mean expiration by lapse of time.

The decree of the Circuit Court is reversed, and the case is remanded to that court with a direction to overrule, with costs, the plea of the defendant, to assign it to answer the bill, and to take such further proceedings as shall not be inconsistent with the opinion of this court.

JOHN SCHREYER, Individually and as
Executor and Trustee of the Last Will and
Testament of ANNA MARIA SCHREY-
ER, Deceased, Appt.,
v.

WILLIAM FORSE SCOTT, Assignee.

(See S. C. Reporter's ed. 405-417.)

*Transfer void as to subsequent creditor—settle-
ment by husband on wife, when not void—*

NOTE.—As to sale of goods on credit to insolvent vendee; when sale is void.—see note to *Donaldson v. Farwell*, 23: 993.

What are fraudulent conveyances; when void; when voluntary conveyances are valid; when void. See note to *Gaylord v. Kelshaw*, 17: 812.

Conveyances between husband and wife upheld in equity. See note to *Bank of U. S. v. Lee*, 10: 81.

knowledge by creditor—remotely subsequent creditor—business reverses—depreciation of property—property paid for by wife—presumption.

1. Very clear and direct testimony is essential to support an adjudication that a transfer of property is fraudulent and void as against a subsequent creditor.
2. In order to defeat for fraud a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do so supervene.
3. Even a voluntary conveyance from husband to wife is good as against subsequent creditors, unless executed as a cover for future schemes of fraud.
4. A person who had knowledge of such conveyance two years before he entered into the contract which is the basis of his claim, cannot say that he was defrauded thereby.
5. Where one who made such conveyance did not purpose to, and did not, enter upon any new business, and had at the time an abundance of money to pay all his debts and afterwards paid them, the conveyance will be free from the imputation of fraud, especially as against a remotely subsequent creditor.
6. Subsequent unexpected depreciation in the value of real estate or unexpected reverses in business do not show fraud in intent or fraud in result.
7. Where such conveyance was of property of which the wife was the equitable owner, or in which she had a large equitable interest, by reason of her moneys having paid for the same and for a large share of the improvements thereon, the conveyance was not voluntary but upon good consideration.
8. The court never presumes fraud; carelessness in the dealings between husband and wife does not tend to establish fraud.

[No. 197.]

Argued Jan. 31, 1890. Decided March 24, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York that certain transfers of property made by John Schreyer to his wife were fraudulent and void as against a creditor, and that he, as trustee, convey certain real estate and bonds and mortgages to the assignee in bankruptcy. *Reversed.*

The facts are stated in the opinion.

Opinion below, 25 Fed. Rep. 88.

Messrs. F. R. Coudert and **A. O. Salter**, for appellant:

The law does not presume fraud, but the reverse.

Phetipplace v. Sayles, 4 Mason, 312; *Shultz v. Hoagland*, 85 N. Y. 464; *Nicol v. Crittenden*, 55 Ga. 497; *Cummins v. Hurlbutt*, 92 Pa. 165; *Pratt v. Pratt*, 96 Ill. 184; *Grover v. Wakeman*, 11 Wend. 188; *Jaeger v. Kelley*, 52 N. Y. 274.

The fact of indebtedness at the time does not invalidate the conveyance.

Carr v. Breese, 81 N. Y. 584; *Phoenix Bank v. Stafford*, 89 N. Y. 405; *Cole v. Tyler*, 65 N. Y. 78; *Dunlap v. Hawkins*, 59 N. Y. 346; *Wickes v. Clarke*, 8 Paige, 166; *Van Wyck v. Seaward*, 1 Edw. Ch. 327; *Wallace v. Penfield*, 106 U. S. 260 (27: 147); *Hinde v. Longworth*, 24 U. S. 11 Wheat. 213 (6: 457); *Clark v. Killian*, 956

108 U. S. 766 (26: 607); *Smith v. Vodge*, 92 U. S. 188 (23: 431); *Graham v. R. Co.* 102 U. S. 148 (26: 106); *Horbach v. Hill*, 112 U. S. 144 (28: 670); *Pepper v. Carter*, 11 Mo. 543; *Payne v. Stanton*, 59 Mo. 159; *Lerow v. Wilmarth*, 9 Allen, 386; *Pratt v. Curtis*, 2 Low. 90.

As to subsequent creditors, neither the fact of indebtedness nor the absence of consideration will alone establish fraud. The fraudulent intent must be clearly and positively proven.

Herring v. Richards, 1 McCr. 574; *Ford v. Johnston*, 7 Hun, 568; *Dyggert v. Remerschnider*, 82 N. Y. 649.

The subsequent creditor must show intent to defraud subsequent creditors.

U. S. v. Grinwood, 5 Sawy. 81; *Barrows v. Barrows*, 6 West. Rep. 428, 108 Ind. 345; *Johnson v. Skaggs* (Ky.) 2 S. W. Rep. 493; *Matthai v. Heather*, 57 Md. 484; *Kimble v. Smith*, 95 Pa. 69; *Harlan v. Maglaughlin*, 90 Pa. 293; *Buckley v. Duff*, 6 Cent. Rep. 687, 114 Pa. 596; *Curtis v. Fox*, 47 N. Y. 801; *Phillips v. Wooster*, 86 N. Y. 412; *Smith v. Vodge*, 92 U. S. 188 (23: 481); *Walter v. Lane*, 1 MacArth. (D. C.) 282; *Fisher v. Lewis*, 69 Mo. 631.

That payment of the then existing debts repels any intent to defraud existing creditors.

Clafin v. Mess, 80 N. J. Eq. 218; *Todd v. Nelson*, 12 Cent. Rep. 220, 109 N. Y. 827.

These transfers appear to have been meritorious, both pecuniarily and otherwise.

Carr v. Breese, 81 N. Y. 584; *Iowa City Bank v. Weber*, 72 Iowa, 187; *Babcock v. Eckler*, 24 N. Y. 623; *Medsker v. Bonebrake*, 108 U. S. 66 (27: 654).

Vanderbilt had knowledge of Mrs. Schreyer's general ownership.

Baker v. Gilman, 52 Barb. 39; *Reed v. Woodman*, 4 Me. 400; *Lehmberg v. Biberstein*, 51 Tex. 457; *Monroe v. Smith*, 79 Pa. 459; *Herring v. Richards*, 3 Fed. Rep. 448; *Knight v. Forward*, 63 Barb. 811.

Cases where the creditors held security for their debt:

Pell v. Tredwell, 5 Wend. 661; *Stephens v. Olive*, 2 Bro. Ch. 90; *Manders v. Manders*, 4 Ir. Eq. 434; *Johnston v. Zane*, 11 Gratt. 552; *Hester v. Wilkinson*, 6 Humph. 215; *Williams v. Davis*, 69 Pa. 21; *Nippe's App.* 75 Pa. 472.

And as to adequacy of consideration:

Kempner v. Churchill, 75 U. S. 8 Wall. 369 (19: 462); *Fuller v. Brewster*, 53 Md. 361; *Washband v. Washband*, 27 Conn. 431; *Seaward v. Jackson*, 8 Cow. 490; *Dyggert v. Remerschnider*, 32 N. Y. 642.

Messrs. Bangs, Stetson, Tracy & McVeagh and **T. M. Tyng**, for appellee:

All property conveyed by the bankrupt in fraud of his creditors, existing or subsequent, passes to his assignee.

Re Wynne, 4 Nat. Bankr. Reg. 23; *Edmondson v. Hyde*, 7 Nat. Bankr. Reg. 1; *Bradshaw v. Klein*, 1 Nat. Bankr. Reg. 542; *Dudley v. Easton*, 104 U. S. 99 (26: 663); *Warren v. Moody*, 122 U. S. 132 (31: 1108); *Adams v. Collier*, 122 U. S. 382 (31: 1207).

The conveyances were fraudulent and void against subsequent creditors and the assignee in bankruptcy.

Shand v. Hanley, 71 N. Y. 319; *Young v. Hermans*, 66 N. Y. 374; *King v. Wilcox*, 11 Paige, 589; *Savage v. Murphy*, 84 N. Y. 508;

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Smith v. Vodges, 92 U. S. 188 (23: 481); *Carpenter v. Roe*, 10 N. Y. 227; *Case v. Phelps*, 39 N. Y. 184; *Dunn v. Hornbeck*, 72 N. Y. 80; *Wallace v. Penfield*, 106 U. S. 280 (27: 147); *Horbach v. Hill*, 112 U. S. 144 (28: 670); *Blennerhassett v. Sherman*, 105 U. S. 100 (26: 1008).

The facts show a secret trust, by means of which the naked paper title only passed to the wife, and the beneficial title remained in the bankrupt.

Schmidt v. Schmidt, 16 Jones & S. 520; *Lent v. Howard*, 89 N. Y. 169; *Adair v. Lott*, 8 Hill, 182.

Mr. Justice **Brewer** delivered the opinion of the court:

The question in this case is whether certain transfers of property made by John Schreyer to his wife, Anna Maria Schreyer, were fraudulent and void as against Peter J. Vanderbilt, a creditor of John Schreyer. The case is here on appeal from a decree of the Circuit Court for the Southern District of New York, brought by the assignee in bankruptcy of Schreyer against Schreyer individually, and as executor, etc., of his wife, now deceased. The circuit court (25 Fed. Rep. 83) found that the transfers were fraudulent, and decreed that the bankrupt, as executor and trustee, convey the real estate and bonds and mortgages hereafter described to the assignee in bankruptcy. From such decree this appeal has been taken. The facts are these: On January 21, 1871, Schreyer conveyed to his wife the following real estate situated in the City of New York: Nos. 348 and 350 West 39th Street and Nos. 351, 353 and 355 West 42d Street. The title was passed from Schreyer to his wife, by conveyance to Edward Sharkey, and from him to Mrs. Schreyer. On October 15, 1870, Schreyer and his wife conveyed No. 420 West 40th Street to George Gebhart and No. 422 West 40th Street to Matthew L. Ritchie, who each thereupon executed mortgages for \$5,000 to Mrs. Schreyer. These conveyances and mortgages were all recorded in 1871. Notice was thus given, by public record, of title in Mrs. Schreyer to both the real estate and the mortgages. Thereafter, and in 1874, buildings were erected on the two lots last mentioned, the mortgages for \$5,000 surrendered and two new mortgages taken—one from Gebhart to Mrs. Schreyer for \$7,750 on premises No. 420 West 40th Street, and one from Ritchie to Mrs. Schreyer for \$8,850 on premises No. 422 West 40th Street. The claim of Vanderbilt arose in this way: On February 2, 1874, a building contract was entered into between George Gebhart and Matthew L. Ritchie, as owners of premises Nos. 420 and 422 West 40th Street, with Vanderbilt, whereby he covenanted to erect two buildings on said premises for the sum of \$8,175, to be paid in the following manner: "When the said houses are topped out the payment of five thousand (\$5,000) dollars, by assignment of mortgage held by John Schreyer on the property of Anna Maria Schreyer, No. 350 West 42d Street, in the City of New York; three thousand one hundred and seventy-five (\$3,175) dollars when the houses are fully completed as above." On May 5, 1874, Vanderbilt had so far completed his contract that he was entitled to an assignment of the bond and

mortgage. He then demanded and received from Schreyer not only an assignment, but a guaranty of the bond and mortgage. There was no new consideration for this guaranty. In 1876 a prior mortgage on the premises covered by the bond and mortgage assigned as above set forth was foreclosed, and swept away the entire property, so that this bond and mortgage became worthless; whereupon Schreyer was sued on his guaranty and judgment recovered thereon. On September 17, 1878, John Schreyer was adjudged a bankrupt upon a creditor's petition, filed August 23, 1878. Several claims were proved against his estate in bankruptcy, but all have been satisfied except that of Vanderbilt; so that, while this action was brought by an assignee in bankruptcy, it was really for the sole benefit of Vanderbilt. On September 6, 1876, Mrs. Schreyer died, leaving a will by which her property was devised and bequeathed to her children; her husband was named as executor; and he, individually and as executor, was the defendant in this suit. And now the contention of the plaintiff below is, that the conveyances of January 21, 1871, and the two mortgages from Gebhart and Ritchie to Mrs. Schreyer in 1874, were fraudulent and void as against the claim of Vanderbilt. The conveyances were made and recorded more than three years prior to the building contract, out of which Vanderbilt's claim arose; and, while the mortgages to Mrs. Schreyer were executed and recorded during the same year with the building contract, yet the obligation assumed by Schreyer was a voluntary one, without consideration, and after a contract expressly providing for payment in another way, was conditional, and only became a fixed indebtedness two years thereafter, when by the foreclosure proceedings the worthlessness of the guaranteed bond and mortgage was developed. Obviously, very clear and direct testimony is essential to support an adjudication that these various transfers were fraudulent and void as against this subsequent creditor. In determining the rules applicable to such transactions reference should be had not only to the decisions of this court, but also to those of the courts of New York, where the parties lived and the transactions took place. *Allen v. Massey*, 84 U. S. 17 Wall. 351 [21: 542]; *Graham v. La Crosse & M. R. Co.* 102 U. S. 148 [26: 106]; *Wallace v. Penfield*, 106 U. S. 260, 263, 264 [27: 147, 148, 149].

In a recent case in the Court of Appeals of New York (*Todd v. Nelson*, 109 N. Y. 316, 327, 12 Cent. Rep. 217, 220), that court thus stated the law: "The theory upon which deeds conveying the property of an individual to some third party have been set aside as fraudulent in regard to subsequent creditors of the grantor has been that he has made a secret conveyance of his property while remaining in the possession and seeming ownership thereof, and has obtained credit thereby, while embarking in some hazardous business requiring such credit, or the debts which he has incurred were incurred soon after the conveyance, thus making the fraudulent intent a natural and almost a necessary inference, and in this way he has been enabled to obtain the property of others who were relying upon an appearance which was wholly delusive. Such are the cases cited by

the learned counsel for the appellants." See also *Phillips v. Wooster*, 36 N. Y. 412; *Curtis v. Fox*, 47 N. Y. 299; *Dunlap v. Hawkins*, 59 N. Y. 842; *Carr v. Breesee*, 81 N. Y. 584, and *Phenix Bank v. Stafford*, 89 N. Y. 405.

Turning now to the cases in this court: It was said in *Smith v. Vodge*, 92 U. S. 183 [28: 481]: "The law of this case is too well settled to admit of doubt. In order to defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do supervene, the settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable. *Sexton v. Wheaton*, 21 U. S. 8 Wheat. 229 [5: 608]; *Mullen v. Wilson*, 44 Pa. 418; *Stileman v. Ashdown*, 2 Atk. 481." In *Graham v. La Crosse & M. R. Co.*, 102 U. S. 148, 154 [26: 106, 108], it was said: "It seems clear that subsequent creditors have no better right than subsequent purchasers to question a previous transaction in which the debtor's property was obtained from him by fraud, which he has acquiesced in, and which he has manifested no desire to disturb. Yet, in such a case, subsequent purchasers have no such right." In *Wallace v. Penfield*, 106 U. S. 260, 262 [27: 147, 148], in which it appeared that the husband transferring property to his wife was indebted at the time of the transfer, though not to the party complaining of the transaction, the court observed: "His indebtedness existing at the time of the settlement upon the wife, as well as that which arose during the period of the improvements, was subsequently, and without unreasonable delay, fully discharged by him. Commenced in 1868, they were all, with trifling exceptions, completed and paid for before the close of the summer of 1869. So far as the record discloses, no creditor, who was such when the settlement was made or the improvements were going on, was materially hindered by the withdrawal by Williams, from his means or business, of the sums necessary to pay for the land and improvements. Those who seek, in this suit, to impeach the original settlement, or to reach the means he invested in improving his wife's land, became his creditors some time after the improvements (with slight exceptions not worth mentioning) had been made and paid for. If they trusted him in the belief that he owned the land, it was negligent in them so to do, for the conveyance of February 11, 1868, duly acknowledged, was filed for record within a few days after its execution." And in *Horbach v. Hill*, 112 U. S. 144, 149 [28: 670, 672], this language was used: "The complainant, not showing that he was at the time a creditor, cannot complain. Even a voluntary conveyance is good as against subsequent creditors, unless executed as a cover for future schemes of fraud." From these authorities, it is evident that the rule obtaining in New York, as well as recognized by this court, is that even a voluntary conveyance from husband to wife is good as against subsequent creditors; unless it was made with the intent to defraud such subsequent creditors; or there was secrecy in the transaction by which knowl-

edge of it was withheld from such creditors, who dealt with the grantor upon the faith of his owning the property transferred; or the transfer was made with a view of entering into some new and hazardous business, the risk of which the grantor intended should be cast upon the parties having dealings with him in the new business. Tested by these rules, it is impossible to sustain an adjudication, upon the testimony in this case, that the transfer of either the real estate or the bonds and mortgages was fraudulent as against the creditor Vanderbilt.

Assuming, in the first instance, that both transfers were purely voluntary, the deeds to Mrs. Schreyer were made and recorded three years before the building contract was signed, or the work done, out of which Vanderbilt's claim arose. There was thus that constructive notice referred to in *Wallace v. Penfield*, *supra*, as sufficient. Further, on May 21st, 1872, Vanderbilt entered into a written contract with Mrs. Schreyer to do the mason work in the construction of a building on the lots conveyed, the contract price being \$10,500. He thus had actual as well as constructive notice, more than two years before he entered into this last contract, that Mrs. Schreyer was the owner of these lots. With such knowledge he entered into the last contract, and thereafter accepted Schreyer's guaranty. How can he then say, with such knowledge, that he was defrauded by those conveyances? Is it possible to suppose that the Schreyers, when they made those conveyances, looked forward three years, and anticipated that Gebhart and Ritchie would seek to improve their real estate, and obtain pecuniary assistance from them, and, with that provision, planned to defraud anyone who might rely upon Mr. Schreyer's guaranty? Further than that, Schreyer did not at the time purpose to, and did not in fact, change his regular business, or enter upon any new business. From 1864 his business was that of a stair-builder, which business he prosecuted steadily until he sold out, in 1876, six years after the conveyances. Notwithstanding these conveyances, he retained all the property used in his stair-building business, was in debt only from five hundred to one thousand dollars, and had money in bank, accounts due him and personal property used in his business, aggregating from ten to twenty thousand dollars. It is true that some \$12,000 of mechanic's liens had been filed against buildings which he owned, and which had been recently constructed; but these liens were by sub-contractors, with possibly one or two minor exceptions. Money for their payment was deposited with certain trust companies; and, as the amounts due were adjudicated, they were paid out of moneys thus deposited. Could anything be clearer than that these conveyances were free from all imputation of fraud, as against anybody, and especially as against such a remotely subsequent creditor?

While the transaction as to the bonds and mortgages is nearer in point of time to the creation of the indebtedness to Vanderbilt, it is so remote in fact as also to be free from imputation of fraud. The circumstances surrounding the creation of this debt must be stated a little more in detail: Gebhart and Ritchie owned the

lots; they were each subject to two mortgages; one was a mortgage of \$3,750, given to Ellen E. Ward, from whom the Schreyers had originally purchased the lots; and one to Mrs. Schreyer, originally \$5,000, but reduced by payments to about \$2,200. Desiring to build, in the belief that the rents from new buildings on the front of the lots could be used to pay off their indebtedness, they arranged with the Schreyers for an advance of the amount that should be needed in addition to the sums they could borrow on mortgages from the Ward estate. The Ward estate agreed to loan \$10,000 on each lot and contemplated building. In pursuance of this arrangement, Mrs. Schreyer released her mortgages, new ones were executed to the Ward estate for \$10,000 on each lot, and the difference in money (\$6,000 and over) was paid to Gebhart and Ritchie, respectively, and by them handed to the Schreyers; and, when the buildings were completed, new mortgages were executed to Mrs. Schreyer for the \$2,200 of her original mortgage, and the excess of the cost above the amount furnished by the Ward estate. Schreyer, who was a practical builder, superintended the construction of the buildings. Vanderbilt made a contract with Gebhart and Ritchie for the mason work, as heretofore stated. He entered into this contract with knowledge that the \$5,000 bond and mortgage which Schreyer proposed to transfer in part payment was second and subordinate to a prior mortgage of \$16,000. He must have assumed, when he made the contract, that the property mortgaged was good for both mortgages; and, according to the testimony, it was then considered worth from thirty to thirty-five thousand dollars. When he had so far completed his contract as to be entitled to the assignment of his bond and mortgage, he demanded its guaranty from Schreyer; and he, in order that there might be no delay in the work, gave the required guaranty. Two years thereafter, owing to depreciation in value of real estate, the property covered by this \$5,000 bond and mortgage was sold under foreclosure of the \$16,000 mortgage, and realized only enough to pay that. Hence, Schreyer became liable on his guaranty. Is there anything in these facts to show fraud in intent or fraud in result? Obviously not. Vanderbilt entered into his contract with full knowledge of all the circumstances, unquestionably considering the \$5,000 bond and mortgage well secured, and willing to take his chances of its payment on foreclosure, if not otherwise. Schreyer, making no representations or concealments, doubtless acted in the same belief; and when, after partial completion of the contract, he, to prevent delay in the future work, guaranteed payment of the bond and mortgage, he did so in the belief that it was amply secured, and that he was assuming little or no risk in his guaranty. If fraud or wrong was intended on his part, obviously he would have refused to guarantee, and left Vanderbilt to take that which his contract entitled him to. The very fact of his voluntarily assuming a risk which he was under no obligations to assume, and which in no manner inured to his benefit, is satisfactory evidence that he had no thought of fraud. The subsequent depreciation of the value of real estate,

and the failure to realize on the sale thereafter more than the first \$16,000 mortgage, was something anticipated by neither party. It was one of those vicissitudes unexpected and unlooked for—not planned for—and doubtless an astonishment to all the parties. All the arrangements for the execution of these second mortgages to Mrs. Schreyer were made before any guarantee or personal liability on the part of Schreyer was demanded or thought of, and it does not appear that he was in debt to anyone at the time the arrangements were so made. Surely this unnecessary and voluntary assumption on his part in no manner indicates fraud in the arrangements already entered into and subsequently carried out, for the execution of these bonds and mortgages to Mrs. Schreyer. In the case of *Carr v. Breese*, 81 N. Y. 584, which was like this in presenting an unexpected depreciation in the value of property, the court justly observed: "Reverses came unexpectedly, while in the pursuit of his ordinary business, without any intention on his part to defraud his creditors, and it may be said that, without any fault on his part, except a want of human foresight, he became embarrassed and insolvent. It is not apparent that Breese had in view, at the time of the execution of the deed to his wife, any such result, or that he in any way contributed to produce the result which followed, for the purpose of defrauding his creditors and enjoying the advantages to be derived from the provisions made for his wife. Under such circumstances, the presumption of any fraudulent intent is rebutted, and it is manifest that he had done no more than any business man has a right to do, to provide against future misfortune when he is abundantly able to do so." Further, as negating any fraud in intent, a year after this guarantee, and when undoubtedly there must have been developing some probability of liability therefrom, Schreyer purchased other real estate and took the title in his own name. Still again, not only did he continue in his regular business of stair-building after these transactions, but it is evident from his bank books, produced in evidence, that his business was of considerable magnitude, for between August 26, 1869, and September 6, 1876, a period of about seven years, and including the time of these transactions, his deposits amounted to \$391,296.44.

We have thus far considered the case, as to these transfers from Schreyer to his wife, as if they were purely voluntary; but according to his testimony, and there is none contradicting it, they were far from voluntary, but rather the passing of the legal title to his wife, of property of which she was prior thereto the equitable owner, or in which she had at least a large equitable interest. She had between twenty-five hundred and three thousand dollars in money when they were married, in April, 1854. She purchased the leasehold interest in the lots on 39th Street, paying therefor, out of her own moneys, \$500 each. They lived on one of the lots, and the building on the other was rented. Unquestionably, therefore, the rents belonged to her. She also kept boarders for a number of years, two of them living with her for at least ten years, paying \$5 per week each. The balance of the money she had when

married she passed over to him from time to time for improvements on the property, or use in his business. It is true that afterwards buildings of considerable value were put upon these lots; and we do not wish to be understood as affirming that the entire cost of the property was the proceeds of her investment, or her earnings. All that the testimony fairly discloses is, that at the time of her marriage she was possessed of separate property, which was the foundation and largely the source of these subsequent accumulations. So that the conveyances in 1871 were not purely voluntary, but meritorious and upon good consideration. The same may be said as to the bonds and mortgages placed in her name in 1874.

It is objected by the appellees that Schreyer's testimony is not to be depended upon, because contradictory, confused and uncertain; that there is no definiteness in it as to amounts and dates; and that wrong in the transactions is evident, because the moneys received for rent after the conveyances were deposited by Schreyer in his own name in bank, and were obviously managed and handled by him as his own, as no accounts were kept between husband and wife of their separate moneys, but all were mingled in one fund, in his hands. But does all this indicate fraud? If his testimony is worthless and to be rejected, then there is practically no testimony interpreting those transactions, and the court never presumes fraud. The very confusion and carelessness in the dealings between husband and wife make against rather than in favor of the claim of fraud. There is no evidence that he was in debt at the time of these conveyances, at least beyond a trifling amount, which was subsequently paid; and if the parties had intended fraud and wrong, unquestionably their accounts would have been kept carefully and accurately, and books would now be presented showing such accounts. Husband and wife evidently saw no necessity of dealing with each other at arm's length; the title to the property was placed in her name when there was no legal or equitable reason why it should not be done; and the rents and other cash receipts were not unnaturally kept in one account and handled as one fund. The lack of substantial indebtedness and the record of the transfer being established, the carelessness of their dealings tends to prove honesty rather than to establish fraud.

Again, it is objected that the conduct of Schreyer, in respect to the bankrupt proceedings, is suspicious; that the bankrupt proceedings, though nominally at the instance of a creditor, were really at his instance; that the bankrupt and the creditor found their counsel in the same office; and that the other claims proved against him were in some suspicious way fixed up and adjusted, leaving only Vanderbilt's claim unpaid. Conceding all that is claimed by counsel in reference to these bankrupt proceedings in 1878, it is difficult to deduce therefrom any evidence of wrong in the transactions in 1871 and 1874. It may be that Schreyer did not want to pay Vanderbilt's claim; and it may be, as claimed by counsel, that he improperly sought the assistance of the bankrupt court to be relieved from liability therefrom; but it would be a very unjust conclusion from such facts, that in 1871, when he

made the conveyances to his wife, and in 1874, when he made the arrangement for the execution of the bonds and mortgages to his wife, anterior to any known or expected liability to Vanderbilt, he was acting with a view of subsequently going through bankruptcy, or defrauding Vanderbilt or any other creditor.

Recapitulating, the conveyances in 1871 were meritorious, upon good consideration, made by one in debt in only a trifling sum, and retaining an abundance of property for the discharge of those debts, and who in fact subsequently, and as they became due, paid them—made by one continuing and expecting to continue in the same profitable and not hazardous business in which he had been engaged for nearly a score of years, with no thought of entering upon any new or hazardous business, and more than three years before any liability to Vanderbilt was incurred or even thought of. And the placing of the notes, bonds and mortgages in 1874 in Mrs. Schreyer's name was in pursuance of an arrangement entered into when the husband was not in debt, and when no obligation, fixed or contingent, to Vanderbilt had been entered into or thought of.

Under these circumstances it is error to hold that the transactions were fraudulent and void as against Vanderbilt. *The decree of the Circuit Court must be reversed, and the case remanded, with instructions for further proceedings in accordance with the views herein expressed.*

GEORGE H. HAMMOND & COMPANY,
Plff. in Err.,

v.
THOMAS D. HASTINGS.

(See S. C. Reporter's ed. 401-405.)

Lien of corporation on its stock for debt of stockholder—law of Michigan—statutory notice of lien—certificate of stock not negotiable paper—ignorance of purchaser no waiver.

1. Where by general law a lien is given to a corporation upon its stock for the indebtedness of the stockholder, it is valid and enforceable against all the world.
2. The law of Michigan under which manufacturing corporations may be organized (§ 4143, 1 How. Stat.; § 17, Act 187, Laws 1875), that a corporation shall at all times have a lien upon all the stock or property of its members invested therein, for all debts due from them to such corporation, is a general law as decided by the Supreme Court of Michigan, which decision is conclusive in this court, and everywhere, as to its character.
3. Wherever paper of a nature similar to this is issued, under authority granted by general statute, whoever deals with that paper is charged with notice of all limitations and burdens attached to

NOTE.—*Charter or by-laws of corporations, as to transfer of stock; lien on stock for debt due by stockholders.* See note to Union Bank of Georgetown v. Laird, 4: 286.

As to right to pledge stock; rights of pledgee of same.—see note to Anderson v. Phila. Warehouse Co. 28: 478.

As to individual liability of stockholders for corporate debts, see note to Hatch v. Dana, 25: 885.

it by such statute, whether the party lives in or out of the State.

4. It is unnecessary to enter upon the certificate of stock any statement of the limitations and burdens which the law casts upon all such paper; and the omission to state such limitations upon the face of the paper is not a waiver by the corporation of the benefits thereof.
5. Such a certificate is not negotiable in either form or character; and like every non-negotiable paper, whoever takes it does so subject to its equities and burdens; and though ignorant of such equities and burdens, his ignorance does not relieve the paper therefrom, or enable him to hold it discharged therefrom.
6. This lien of a corporation may be waived, but mere ignorance on the part of the purchaser of the fact of the existence of the lien does not destroy it. It constitutes no waiver on the part of the corporation.

[No. 200.]

Argued March 7, 1890. Decided March 24, 1890.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment for the value of stock of a corporation in an action against it by reason of its refusal to transfer the same to a purchaser. *Reversed.*

The facts are stated in the opinion.

Messrs. A. H. Garland, Eliasha H. Flinn, William H. Swift and Don M. Dickinson, for plaintiff in error:

The common-law and statutory liability of stock must be determined by the law of the corporation's domicile. Any general liability attaching to all stockholders by virtue of their membership will be enforced in a foreign forum.

Erickson v. Nesmith, 15 Gray, 221, S. C. 4 Allen, 283; *Halsey v. McLean*, 12 Allen, 439.

The general laws under which such corporations are formed, with the articles of association adopted in pursuance thereof, constitute the charter of the corporation.

Atty-Gen. v. Perkins, 73 Mich. —; *Morawetz*, Priv. Corp. (2d ed.) § 874.

Everyone is conclusively presumed to know the provisions of the charter or articles of association of the corporation with whom he deals.

Canada S. R. Co. v. Gebhard, 109 U. S. 527 (27: 1020); *Angell & A. Corp.* § 299; *Green's Brice*, *Ultra Vires*, 397; *Bishop v. Globe Co.* 135 Mass. 132; *Payson v. Withers*, 5 Biss. 269-278.

Where a lien upon stock for the indebtedness of a stockholder is created by statute or by charter it is valid and enforceable against all the world.

Georgetown Union Bank v. Laird, 15 U. S. 2 Wheat. 390 (4: 269); *Brent v. Washington Bank*, 35 U. S. 10 Pet. 596 (9: 547); *Child v. Hudson's Bay Co.* 2 P. Wms. 207-209; *Meliorucci v. Royal Exch. Assur. Co.* 1 Eq. Cas. Abr. 9; *Sparks v. Liverpool Water Works Co.* 18 Ves. Jr. 423, 429; *Morgan v. Bank of North America*, 8 Serg. & R. 78-86; *Bank v. Lanier*, 78 U. S. 11 Wall. 369 (20: 172); *Bullard v. Bank*, 85 U. S. 18 Wall. 589-598 (21: 923); *Cecil Nat. Bank v. Watsonbank Bank*, 105 U. S. 217 (28: 1039); *Neale v. Janney*, 2 Cranch, C. C. 189; *Pierson v. Washington Bank*, 3 Cranch, C. C. 363; *McLean v. Lafayette Bank*, 8 McL. 604; *New Orleans Nat. Bank v. Wiltz*, 10 Fed. Rep. 332; *Bishop v. Globe Co.* 135 Mass. 132.

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Lien on stock created by statute or by charter is valid.

Presbyterian Congregation v. Carlisle Bank, 5 Pa. 345; *First Nat. Bank v. Hartford L. & A. Ins. Co.* 45 Conn. 22; *Bradford Bkg. Co. v. Briggs*, L. R. 81 Ch. Div. 19, reversing S. C. L. R. 29 Ch. Div. 149; *Stebbins v. Phoenix F. Ins. Co.* 8 Paige, 350; *Reese v. Commerce Bank*, 14 Md. 271; *German Bank v. Jefferson*, 10 Bush, 326; *Leggett v. Sing Sing Bank*, 24 N. Y. 283; *Utica Bank v. Smalley*, 2 Cow. 770; *Bohmer v. City Bank*, 77 Va. 445; *Sabin v. Bank of Woodstock*, 21 Vt. 358; *Cross v. Phoenix Co.* 1 R. I. 89; *Rogers v. Huntingdon Bank*, 12 Serg. & R. 77; *Everhart v. Westchester & P. R. Co.* 28 Pa. 339.

All persons dealing with a corporation must be charged with knowledge of the statute or charter conferring the lien.

Bishop v. Globe Co. 135 Mass. 132; *Georgetown Union Bank v. Laird*, 15 U. S. 2 Wheat. 390 (4: 269); *Downer v. Zanesville Bank*, Wright (Ohio) 477; *Grant v. Mechanics Bank*, 15 Serg. & R. 140; *St. Louis P. Ins. Co. v. Goodfellow*, 9 Mo. 149; *Sewall v. Lancaster Bank*, 17 Serg. & R. 285; *Kenton Ins. Co. v. Boneman*, 84 Ky. 480; *Morawetz*, Priv. Corp. (2d ed.) §§ 203, 591.

Refusal to allow a transfer of the stock until Sweet's debt was paid is a usual method, and is fully sustained by the authorities.

West Branch Bank v. Armstrong, 40 Pa. 278; *Grant v. Mechanics Bank*, 15 Serg. & R. 140; *Rogers v. Huntingdon Bank*, 12 Serg. & R. 77; *Tuttle v. Walton*, 1 Ga. 48; *McCredy v. Remsey*, 6 Duer, 574; *Farmers Bank v. Iglehart*, 6 Gill, (Md.) 50; *Vansandt v. Middlesex Bank*, 26 Conn. 144; *Hartford First Nat. Bank v. Hartford L. & A. Ins. Co.* 45 Conn. 22; *Reese v. Bank of Commerce*, 14 Md. 271; *Mechanics Bank v. N. Y. & N. H. R. Co.* 18 N. Y. 599; *Gilbert v. Manchester Iron Mfg. Co.* 11 Wend. 627.

Such a lien secures an indebtedness already existing when the debtor became a stockholder, and all indebtedness created while he remains a stockholder.

Smith v. Hennepin Co. 15 Am. & Eng. Corp. Cas. 576; 1 Jones, Liens, § 392 et seq.

It is immaterial, too, whether the debt be greater or less than the value of the stock; the whole stock may be held.

Sewall v. Lancaster Bank, 17 Serg. & R. 285.

And to compel a transfer the amount of the lien must be tendered.

Pierson v. Washington Bank, 3 Cranch, C. C. 363; *Bradford Bkg. Co. v. Briggs*, L. R. 81 Ch. Div. 19, overruling S. C. L. R. 29 Ch. Div. 149.

A corporation is not bound to ask for the surrender of the certificate when it credits a shareholder. It does not waive its lien by leaving the certificates outstanding.

Bohmer v. City Bank, 77 Va. 445; *Platt v. Birmingham Axle Co.* 41 Conn. 255.

And it is not necessary that the certificate issued should refer to the lien.

Hussey v. Mfg. & M. Bank, 10 Pick. 415; *Reese v. Bank*, 14 Md. 271; *Petersburg Sav. & Ins. Co. v. Lumsden*, 75 Va. 327-340.

Mr. Thos. McDougall, for defendant in error:

The courts do not favor anything that will in any way interfere with the free negotiation and transfer of stock.

Cushman v. Thayer Mfg. Co. 76 N. Y. 865;

N. Y. & N. H. R. Co. v. Schuyler, 84 N. Y. 30; *Bank v. Lanier*, 78 U. S. 11 Wall. 369 (20: 172); *Bullard v. Bank*, 85 U. S. 18 Wall. 589 (21: 928).

A purchaser in good faith has a right to claim the benefit of an estoppel in his favor as against the corporation.

Holbrook v. N. J. Zinc Co. 57 N. Y. 616; *Foreman v. Bigelow*, 4 Cliff. C. C. 508; *Steady v. Little Rock & Ft. S. R. Co.* 5 Dill. 848; *Brant v. Ehlen*, 59 Md. 1.

A holder for value, without notice of prior equities, obtains a perfect title thereto, as against such equities.

Walker v. Detroit Transit Co. 47 Mich. 338; *Mandelbaum v. North American Min. Co.* 4 Mich. 465; *Union Bank v. Laird*, 15 U. S. 2 Wheat. 390 (4: 269); *Brent v. Washington Bank*, 35 U. S. 10 Pet. 596 (9: 547); *Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 217 (26: 1039).

Mr. Justice Brewer delivered the opinion of the court:

On July 22, 1884, George O. Sweet was the owner of twelve hundred shares of the capital stock of a corporation organized under the Laws of the State of Michigan, known as George H. Hammond & Company, as evidenced by two certificates of stock (which were alike in everything, except numbers of shares and dates); and of one of which, with indorsements, the following is a copy:

"George H. Hammond & Company.

"Capital stock, \$1,500,000. Shares, \$25 each.
Number 5. Shares, 800.

"This is to certify that George O. Sweet is entitled to eight hundred shares of \$25 each of the capital stock of George H. Hammond & Company. Transferable only on the books of the Company, in person or by attorney, on the surrender of this certificate.

"Detroit, Mich., Jan'y 18, 1882.

"[Seal.] "George H. Hammond, Pres't.
James D. Standish, Sec'y.

"[Indorsed.]

"For value received, — hereby sell, assign and transfer unto — shares of the within stock, and do hereby constitute and appoint — attorney to transfer the same on the books of the Company.

"Witness my hand and seal this — day of —, A. D. 18—.

"———. [L. s.]"

These certificates had theretofore been pledged to the National Bank of Illinois, a bank located in the City of Chicago. On that day, in pursuance of the pledge, the stock was sold, and purchased by the defendant in error, Thomas D. Hastings. During all the time that Sweet owned the stock he was indebted to the corporation George H. Hammond & Company. After his purchase Mr. Hastings presented the certificates to the officers of the corporation, and demanded a transfer. This was refused, on the ground that the corporation had a lien upon the stock for the amount of Sweet's indebtedness to it. Thereupon this action was brought.

George H. Hammond & Company was a manufacturing corporation created in October, 1881, under the laws of the State of Michigan, with its principal office in the City of Detroit, 962

Michigan, and Sweet was, during the time of these transactions, a resident of and doing business in the City of Chicago, selling the property of the corporation on commission.

The Law of Michigan under which manufacturing companies may be organized, and under which George H. Hammond & Company was created and exists, has, since 1875, contained this provision (Section 4143, 1 Howell's Annotated Statutes; section 17 of Act 187, Laws 1875): "The stock of every such corporation shall be deemed personal property, and be transferred only on the books of such corporation, in such form and manner as their by-laws shall prescribe; and such corporation shall at all times have a lien upon all the stock or property of its members invested therein, for all debts due from them to such corporation." The general Act (1 Howell, sec. 4868) provides, as to all corporations, that a transfer of stock shall not be valid except as between the parties, unless entered on the books of the company, showing the names of the parties by and to whom transferred, the number and designation of shares, and the date of the transfer. The bank was ignorant of Sweet's indebtedness to the corporation when it lent its money on the security of the stock, and of course Hastings, though notified thereof at the time of the sale, succeeded to all the rights of the bank. On these facts the circuit judge, held that the purchaser took the stock discharged of any lien, and submitted to the jury only the question of the value of the stock; this having been found by its verdict, judgment was entered therefor, and the corporation now alleges error. The single question is, whether the corporation had a lien upon the stock for Sweet's indebtedness, as against the claims of the bank and the purchaser. This question must be answered in the affirmative; for the rule is clear and unquestioned, that where by general law a lien is given to a corporation upon its stock for the indebtedness of the stockholder, it is valid and enforceable against all the world. *Union Bank v. Laird*, 15 U. S. 2 Wheat. 390 [4: 269]; *Brent v. Washington Bank*, 35 U. S. 10 Pet. 596 [9: 547]; *Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 217, 221 [26: 1039, 1042]; *Rogers v. Huntingdon Bank*, 12 Serg. & R. 77; *Sevall v. Lancaster Bank*, 17 Serg. & R. 284; *Presbyterian Congregation v. Carlisle Bank*, 5 Pa. 345, 348; *Farmers Bank v. Iglehart*, 6 Gill, 50; *Reese v. Bank of Commerce*, 14 Md. 271; *Hartford First Nat. Bank v. Hartford L. & A. Ins. Co.* 45 Conn. 22; *Bishop v. Globe Co.* 185 Mass. 132; *Bohmer v. City Bank*, 77 Va. 445.

The law under which this corporation was organized was a general law. So it has been decided by the Supreme Court of Michigan (*Newberry v. Detroit & L. S. Iron Mfg. Co.* 17 Mich. 141, 151), where it is said: "The law in question is a public Act, and all are charged with knowledge of its provisions." This construction by the Supreme Court of the State which enacted the law is conclusive in this court, as well as everywhere, as to its character. The law in terms provides for a lien, and that being a public law all are charged with knowledge of its provisions. Generally, wherever paper of a nature similar to this is issued, under authority granted by general statute, whoever

deals with that paper is charged with notice of all limitations and burdens attached to it by such statute. And this is true whether the party lives in or out of the State by which the law was enacted. See authorities cited, *supra*. It was unnecessary to enter upon the certificate any statement of the limitations and burdens which the law casts upon all such paper; and the omission to state such limitations upon the face of the paper is not a waiver by the corporation of the benefits thereof.

In the case in 2 Wheaton, *supra*, where the Act of Incorporation gave a lien, this court, by Mr. Justice Story, said: "The certificate, issued to Patton for the fifty shares held by him (which is in the usual form), declares the shares to be 'transferable at the said bank, by the said Patton, or his attorney, on surrendering this certificate.' No person, therefore, can acquire a legal title to any shares, except under a regular transfer, according to the rules of the bank; and if any person takes an equitable assignment, it must be subject to the rights of the bank, under the Act of Incorporation, of which he is bound to take notice."

Repeated efforts have been made to have certificates of stock declared negotiable paper, but they have been unsuccessful. Such a certificate is not negotiable in either form or character; and like every non-negotiable paper, whoever takes it does so subject to its equities and burdens; and though ignorant of such equities and burdens his ignorance does not relieve the paper therefrom, or enable him to hold it discharged therefrom. It is objected that upon the face of this certificate it is nowhere stated that "George H. Hammond & Company" is a corporation. While this is not expressly stated, it clearly appears; and even if it were not so, the certificate is non-negotiable paper, and the party had no right to deal with it as though it were otherwise. He takes it subject to the burdens that in fact rested upon it.

Technical matters are suggested by counsel, but we deem it unnecessary to notice them. The circuit judge unquestionably, as appears from the record, ruled upon the substantial question considered by us. We think his ruling erroneous, and the case must therefore be reversed. That this lien of a corporation may be waived cannot be doubted. *Cecil Nat. Bank v. Watertown Bank*, 105 U. S. 217, 221 [26: 1089, 1041]. Perhaps when all the facts are developed, as they can be on the new trial, matters may be disclosed sufficient to establish a waiver; but mere ignorance on the part of the purchaser of the fact of the existence of the lien does not destroy it. It constitutes no waiver on the part of the corporation.

Judgment reversed, and the case remanded for a new trial.

THE HOWE MACHINE COMPANY and
GEORGE P. DESHON, Assignee, *Appts.*,

v.

THE NATIONAL NEEDLE COMPANY.

THE HOWE MACHINE COMPANY and
GEORGE P. DESHON, Assignee, *Appts.*,

v.

ALONZO H. WHITTEN ET AL.

(See S. C. Reporter's ed. 388-398.)

Patent right—claim—specification—construction of patent—disclaimer—application of old process—mechanism for turning from metal—want of invention.

1. A claim is to be construed in connection with the explanation contained in the specification, and it may be so drawn as in effect to make the specification an essential part of it; but the specification and drawings are usually looked at only for the purpose of better understanding the meaning of the claim, and not for the purpose of changing it.
2. The claim is a statutory requirement, prescribed for the purpose of making the patentee define precisely what his invention is, and should be construed in accordance with the plain import of its terms.
3. Where the patent is for a combination, it cannot be permitted to read into it any delicate adjusting apparatus not originally included in the claim.
4. The invention claimed in this case is not restricted to lathes for turning sewing-machine needles, nor did the patentee by disclaimer place any such limit upon the construction of the patent.
5. The application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated.
6. The application to the turning of machine awls and needles from metal, of mechanism old and familiar in the art of wood turning, is not invention, and is not patentable.

[Nos. 201, 202.]

Argued March 7, 10, 1890. Decided March 24, 1890.

NOTE.—For what patents are granted; when declared void. See note to Evans v. Eaton, 4:438.

As to patentability of inventions, see notes to Thompson v. Bolleseller, 29: 78, and Corning v. Burden, 14: 688.

As to abandonment of invention, see note to Pennock v. Dialogue, 7: 327.

As to distinction between inventions of mechanism, articles or products, and processes; when latter patented,—see note to Corning v. Burden, 14: 688.

As to including process and product in same patent; separate patents therefor,—see note to Evans v. Eaton, 4: 438.

What reissue may cover. See note to O'Reilly v. Morse, 14: 601.

As to assignment, before issuing and reissuing patent; recording; when assignment transfers extended terms,—see note to Gayler v. Wilder, 13: 504.

When assignee may sue for infringement; when patentee must; when they must join. See note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages,—see note to Hogg v. Emerson, 13: 824.

As to notes given for patent-rights; purchaser before maturity,—see note to Mandeville v. Welch, 5: 87.

A PPEALS from decrees of the Circuit Court of the United States for the District of Massachusetts, dismissing suits in equity for the infringement of letters-patent granted May, 10, 1859, to Charles and Andrew Spring for an improvement in lathes, the patent having been extended for seven years from May 10, 1873.

Affirmed.

Opinion below, 21 Fed. Rep. 630.

Statement by *Mr. Chief Justice Fuller*:

These are appeals from decrees of the Circuit Court of the United States for the District of Massachusetts, dismissing bills in equity brought on account of alleged infringement of letters-patent granted May 10, 1859, to Charles and Andrew Spring, for an "Improvement in Lathes for Turning Irregular Forms." The patent was extended for seven years from May 10, 1873. The bills were filed May 27, 1879.

The opinion of the circuit court was announced September 30, 1884, but by reason of the interposition of petitions for rehearing, the final decree was not entered until April 17, 1886.

The specification is as follows:

"To all whom it may concern:

"Be it known that we, Charles and Andrew Spring, both of Boston, in the County of Suffolk and State of Massachusetts, have invented a new combination designed for turning such articles as are to be brought to a point or are to be finished or turned at one end, and therefore cannot conveniently be held to be operated upon otherwise than by the opposite end; and we do hereby declare that the following, taken in connection with the accompanying drawings which form part of this specification, is a clear, full and exact description of our invention and sufficient to enable those skilled in the art to practice it. Fig. 2 is a perspective view embodying our invention, and Fig. 1 is a plan exhibiting more in detail some of its parts. *c* represents the head stock and *b* the tail stock of a lathe fixed upon a bed, *d*. The spindle *a* is supported and rotated in the manner usual in lathes, and carries a chuck which seizes and holds by one end the article *o* to be operated upon. The spindle *l* in the tail stock *k* is capable of traversing backwards and forwards in the axial line of the lathe's rotation, but does not itself rotate. This movement may be accomplished by the means usual for this purpose in lathes. The carriage *m* is raised from the lathe bed *d* in the support *n*, on which it is guided in movements towards and from *o* by means of the usual 'ways.' Rotation of the screw *p* causes the movements of the carriage *m*, and the set-screw *s* is used to gauge the diameter of the article operated upon, which it does by striking on *n*, which is fixed to the lathe bed and arrests further onward movement of *m*. Fixed upon *m* and partaking of its movements is the arrangement which modifies the movement of the tool-carrier. This arrangement consists of two principal parts, *q* and *r*; *q* is pivoted to *n* by screw *t*, and is held in any desired position by the screws *u*, *q* being slotted where these screws pass through it into *m*. It may here be mentioned that this provision for the adjustment of *q* is for the purpose of giving any required taper to *o*, and that the screws *v* aid in the adjustment of *q*. The piece *r* is connected with *q* by the guide

rods *w* passing through the latter and fixed in the former. Compressed spiral springs around *w* act to draw *r* and the roll shown in dotted lines, Fig. 1, towards *q*. The carriage *x* rests upon and slides over *q* and *r*, and bears with it the tool-holder *y*, which is of angular form and can slide within *x* toward and from *o*. It is to *y* that the roll before mentioned, as shown in dotted lines, Fig. 1, is fixed, *x* being slotted where it passes through to admit of movement of *y*. A portion of *x* extends upwards, and is made to fit in a hole bored for that purpose in the spindle *l*. To admit of nice adjustment of the tool *c* the piece *z* is pivoted to *y*, and raised and lowered by operating at the end opposite the pivot, the set-screw *a'*, and holding screw *b'*; *z* is extended above and over the tool *c*, so that by the action of the set-screw *d'* the tool is confined to or released from *y*. On that side of *x* preceding the tool in its cutting movement toward the chuck, and forming a part of or fixed to *x*, is a yoke arranged to contain a die, *e'*. This die is made in two parts, having a hole through them, half in each part, of just the diameter of the material from which the finished article is to be formed. This hole in the die is made and kept concentric with the axis of the lathe's rotation by set-screws, one of which acts on opposite sides of each half, and also one from the top and another from beneath. The sides of *q* and *r*, with which the roll fixed in *y* comes into contact, should conform nearly to the general outline of the article to be turned. A slot is made in *q* from that side touching the roll, and in about the center of its thickness. Within this slot may be placed any desirable pattern projecting beyond the acting face of *q*, and this pattern may be adjustable. In the particular instance illustrated *q* and *r* are formed for turning awls or machine needles. The pattern *e'*, which is adjustable by means of the set-screw *n'*, is pivoted in *q* and serves to shape the shank of the awl or needle, while the pattern *o'*, which is adjustable along the length of *q* as well as outward from it, serves to form and shape the point. A groove is formed in *q*, as shown in dotted lines, Fig. 1, in which the pivot of *o'* is permitted to slide, and the pattern is held in position by the pinch produced by the action of the screws *u u*. The material from which any article is to be turned by the use of our invention must be cylindrical and straight, and the hole in the die must be of its diameter. The carriage *x* is forced forward and drawn back by the spindle *l*, and the direction of its movement is at all times parallel with the axis of the lathe's rotation. The tool-holder *y* partakes of the movement *x*, and is at the same time moved toward and from the piece to be turned by the action of the shaping mechanism described as existing in *q*, *r*, *e'* and *o'* upon the roll or pin fixed in *y* and passing through *x*. The arrangement of the shaping mechanism illustrated by the drawing is that designed and adapted to the formation of awls or machine needles. The action of the springs upon the guide rods *w* draws *r* against the roll fixed in *y* and keeps it constantly pressed against *q* and the projecting parts of the adjustable formers *e'* and *o'* therein arranged. The form and adjustment of *e'* govern the shape of that part of the awl between its haft and shaft, and the form and

adjustment *o'*, the shape of the point, and, as *o'* is adjustable along the length of *g*, any length of awl or needle within the limits of the machine can be brought to a point. Provision is made for giving any desired amount of taper to the shape of the needle or awl by the inclination of *g*, obtainable by pivoting on *t*, and adjustable by the screws *e*. The tool is adjusted and held in the best position for cutting by the screws *d' a' b'*, and the diameter of the article to be turned is varied by the action of screw *p* and gauged by the screws *s*. The chuck used to hold the material to be operated on may be any of the well-known forms of gripping or holding chucks that hold fast by one end the article which is to be turned. We prefer to use such a chuck as we have fully described in an application for letters-patent bearing even date herewith. Prior to our invention, awls and needles have been brought to a point by grinding by hand, a process which evidently is apt to leave the point out of the center of the needle, and the part near the haft has either been left with a square shoulder or else curved by the action of a separate tool from that which formed the shaft, sometimes used as a hand tool. Amongst the advantages derived from the use of our invention may be mentioned that the article is turned perfectly true at one operation, and no time is lost by rechucking, hand-tooling or grinding.

"Having described our invention, what we claim therein as new and desire to secure by letters-patent of the United States is—

"The combination of a gripping chuck, by which an article can be so held by one end as to present the other free to be operated upon, with a rest preceding the cutting tool, when it is combined with a guide cam, or its equivalent, which modifies the movement of the cutting tool, all operating together for the purpose set forth."

The causes were heard before *Mr. Justice Gray* and the district judge, and the opinion of the court was delivered by the latter as follows (21 Fed. Rep. 680):

"NELSON, J.: These suits are bills in equity for the infringement of patent No. 23,957, granted to Charles and Andrew Spring May 10, 1859, for an improvement in lathes for turning irregular forms. The invention, as described in the specification, is a new combination designed for turning such articles as are to be brought to a point or are to be finished or turned at one end, and therefore cannot conveniently be held to be operated upon otherwise than by the opposite end. It consists (1st) of a gripping chuck, by which the article is held by one end so as to present the other end free to be operated upon; (2d) a rest preceding the cutting tool, to afford support to the article in the operation of turning; (3d) a cutting tool; and (4th) a guide cam, or its equivalent, which modifies the movement of the cutting tool. The chuck may be of any of the well-known forms of gripping or holding chucks, which hold the article to be turned fast by one end. The material to be turned must be cylindrical and straight. In the drawings annexed, the guide cam is of a form suitable for turning awls or machine needles, and the plaintiffs

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contend that their machine, as patented, was intended to be and is a lathe for turning sewing-machine needles or awls. The claim is for 'the combination of a gripping chuck, by which an article can be so held by one end as to present the other free to be operated upon, with a rest preceding the cutting tool, when it is combined with a guide cam or its equivalent, which modifies the movement of the cutting tool, all operating together for the purpose set forth.'

"The defendants have proved, by testimony which we cannot doubt, that as long ago as the year 1845, and perhaps still earlier, a machine was in use in the shop of William Murdock, in Winchendon, Massachusetts, which contained all the elements and the precise combination of the Spring patent. It had the gripping chuck, the rest preceding the cutting tool, the cutting tool, and, instead of the guide cam, its equivalent, a pattern, all the parts arranged, combined and operating in the same manner as in the Spring machine. It had, in addition, a fixed cutting tool preceding the rest, which served to reduce the material to the cylindrical form in which it is first received in the Spring lathe. But this extra tool formed no part and was wholly independent of the other combination. The machine still had all the elements of the Spring lathe in the same combination. The Murdock lathe was used for turning tapering wooden skewers or spindles for use in spinning yarn. It was not constructed so as to be capable of turning awls or machine needles from metal.

"It has been decided by the supreme court that 'the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated.' *Pennsylvania R. Co. v. Locomotive E. S. Truck Co.* 110 U. S. 490 [28: 222].

"Applying this rule to the present case, we are of opinion that the application to the turning of machine awls and needles from metal, of mechanism old and familiar in the art of wood turning, is not invention, and is not patentable. We therefore decide that the Murdock lathe was an anticipation of the Spring invention, and that the complainants' patent is void for want of novelty. This view of the case renders it unnecessary for us to consider the other matters urged in defense of the complainants' suit at the argument.

"The entry in each case will be: bill dismissed, with costs."

Mr. Harvey D. Hadlock, for appellants: The discovery for which letters-patent are granted, when it produces new and useful results, is invention.

Leroy v. Tatham, 63 U. S. 22 How. 132 (16: 366); *Smith v. Goodyear Dental Vulcanite Co.* 98 U. S. 436 (23: 952); *Niles Tool Works v. Betts Machine Co.* 27 Fed. Rep. 301; *Kent v. Simons*, 39 Fed. Rep. 607; *Peninsular Novelty Co. v. American Shoe Co.* 39 Fed. Rep. 791; *Root v. Third Ave. R. Co.* 39 Fed. Rep. 281; *Curtis*, Law of Patents, § 227; *Ames v. Howard*, 1 Sumn. 432, 435.

The invention is for turning awls and machine needles from metal.

Bloxam v. Elsee, 1 Car. & P. 558; *Hogg v. Emerson*, 52 U. S. 11 How. 578 (18: 820); *Harworth v. Hardcastle*, 1 Bing. N. C. 182, Web. Pat. Cas. 480; *Seymour v. Osborne*, 78 U. S. 11 Wall. 516 (20: 88).

Rules of construction for patents and specifications must be reasonable.

Bates v. Coe, 98 U. S. 81 (25: 68).

In construing letters-patent the whole instrument should be taken together.

Hudson v. Draper, 4 Cliff. 178; *Geier v. Goetinger*, 7 Pat. Off. Gaz. 563; *Heinrich v. Luther*, 6 McLean, 345.

The drawings and models should be considered as well as the specification.

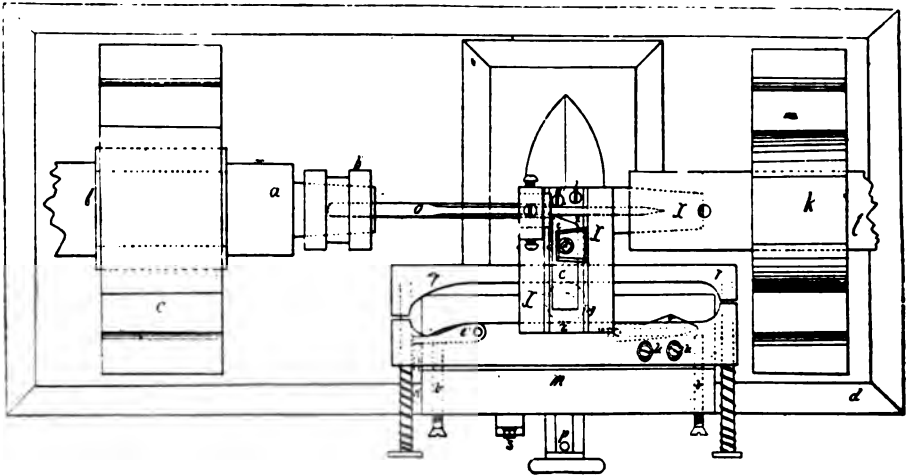
Hoffheins v. Brandt, 8 Fish. Pat. Cas. 218;

Stephens v. Salisbury, 1 MacArth. Pat. Cas. 379.

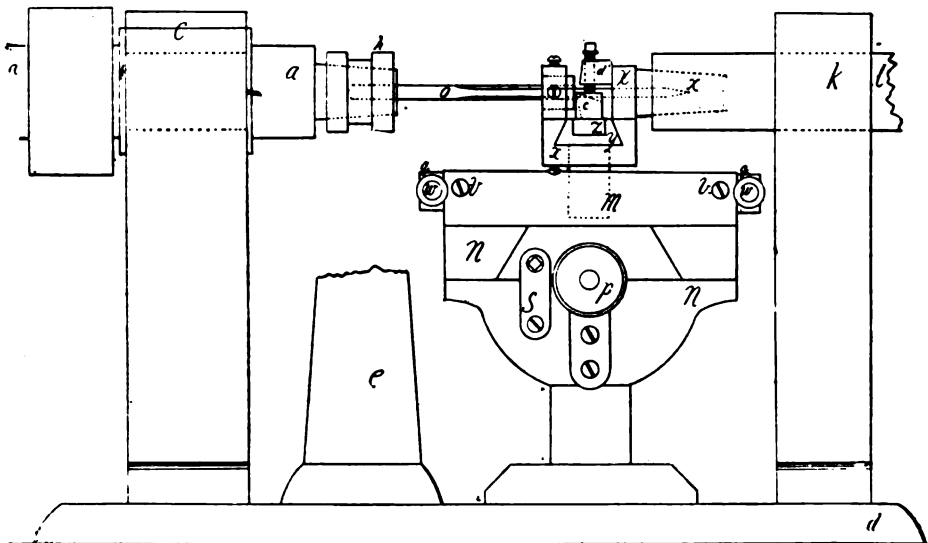
An invention consists, primarily, in finding out what mechanical operation is necessary to produce the practical result arrived at, and must be capable of producing such results.

Wooster v. Blake, 8 Fed. Rep. 429; *Putnam v. Hollender*, 6 Fed. Rep. 882; *Wood v. Packer*, 17 Fed. Rep. 850; *Stewart v. Mahoney*, 5 Fed. Rep. 302; *Spill v. Celluloid Mfg. Co.* 2 Fed. Rep. 707; *Shedd v. Washburn*, 9 Fed. Rep. 904; *Davis v. Fredericks*, 19 Fed. Rep. 99; *Roberts v. Dickey*, 4 Brewst. 260; *Isaacs v. Abrams*, 3 Bann. & Ard. 616; *Miller's Falls Co. v. Backus*, 17 Pat. Off. Gaz. 852.

The Murdock machine is not an anticipation of the Spring patent.



Plan.



Front Elevation

AN ILLUSTRATION OF SPRING MACHINE OR INVENTION.

Clough v. Gilbert & B. Mfg. Co. 106 U. S. 166 (27: 134); *Blake v. Robertson*, 94 U. S. 728 (24: 245); *Fuller v. Yentzer*, 94 U. S. 805 (24: 109); *Bragg v. Fitch*, 121 U. S. 478 (30: 1008); *Snow v. Lake Shore & M. S. R. Co.* 121 U. S. 617 (30: 1004); *Parker v. Stiles*, 5 McLean, 44; *Nathan v. New York Elev. R. Co.* 2 Fed. Rep. 225.

The dissimilarity in the two machines is apparent.

Chicago & N. W. R. Co. v. Sayles, 97 U. S. 554 (24: 1053); *Union Sugar Refinery v. Mathieson*, 3 Cliff. 146; *Jennings v. Kibbe*, 10 Fed. Rep. 669; *Prouty v. Ruggles*, 41 U. S. 16 Pet. 336 (10: 985); *Stimpson v. Balt. & S. R. Co.* 51 U. S. 10 How. 329 (18: 441); *McCormick v. Talcott*, 61 U. S. 20 How. 402 (15: 930); *Eames v. Godfrey*, 68 U. S. 1 Wall. 78 (17: 547); *Sands v. Wardwell*, 8 Cliff. 277; *Foster v. Moore*, 1 Curt. 279; *Storrs v. Howe*, 4 Cliff. 388; *Howe v. Neemes*, 18 Fed. Rep. 40; *Matteson v. Caine*, 17 Fed. Rep. 525; *Bates v. Coe*, 98 U. S. 81 (25: 68); *Purks v. Booth*, 102 U. S. 96 (26: 54); *Parham v. Am. Button Hole Co.* 4 Fish. Pat. Cas. 468; *Haves v. Antidel*, 8 Pat. Off. Gaz. 685.

Messrs. John E. Abbott and G. P. Lowrey, for appellees:

The construction of a patent is for the court, and a liberal construction should be given so far as the state of the art and the language of the patent will permit.

Rubber Co. v. Goodyear, 76 U. S. 9 Wall. 795 (19: 568); *Merrill v. Yeomans*, 94 U. S. 568 (24: 235); *Ransom v. New York*, 1 Fish. Pat. Cas. 252; *Pitts v. Wemple*, 2 Fish. Pat. Cas. 10; *Agawam Co. v. Jordan*, 74 U. S. 7 Wall. 597 (19: 180); *Mitchell v. Tilghman*, 86 U. S. 19 Wall. 395 (22: 186); *White v. Dunbar*, 119 U. S. 47, 51 (30: 303, 304); *Del. Coal & Ice Co. v. Packer*, 1 Fed. Rep. 852; *Roemer v. Neuman*, 132 U. S. 103 (33: 277); *Holliday v. Pickhardt*, 29 Fed. Rep. 853, 859.

The claim of the patentees is so broad that their patent is utterly void.

Parker v. Sears, 1 Fish. Pat. Cas. 99; *Winans v. Boston & P. R. Co.* 2 Story, 412.

Reduction or increase of size of old device for new use is not invention.

Woodbury Planing Machine Co. v. Keith, 101 U. S. 479 (25: 989).

Mechanical adaptation is not patentable.

Dunbar v. Meyers, 94 U. S. 187 (24: 84); *Atlantic Works v. Brady*, 107 U. S. 192 (27: 488).

Change of form, proportions or degree is not such an invention as will sustain a patent.

Smith v. Nichols, 88 U. S. 21 Wall. 115 (22: 566).

The application of an old process or machine to a similar or analogous subject will not sustain a patent.

Pennsylvania R. Co. v. Locomotive E. S. Truck Co. 110 U. S. 490 (28: 222); *Morris v. McMillin*, 112 U. S. 244, 248 (28: 702, 703); *Blake v. San Francisco*, 118 U. S. 879 (28: 1070); *Stephenson v. Brooklyn Cross-Town R. Co.* 114 U. S. 149 (29: 58); *Miller v. Force*, 116 U. S. 22 (29: 552); *Clark Pomace Holder Co. v. Ferguson*, 119 U. S. 335, 338 (30: 406, 407); *Peters v. Active Mfg. Co.* 129 U. S. 530, 537, 541 (32: 738, 741, 742); *Peters v. Hanson*, 129 U. S. 542, 558 (32: 742, 745); *Aron v. Manhattan R. Co.* 132 U. S. 84 (33: 272); *Watson v. Cincinnati, I. St. L. & C. R. Co.* 132 U. S. 161 134 U. S.

(33: 295); *Goodyear v. Hartford Spring Axle Co.* 23 Fed. Rep. 36.

A machine is the equivalent of another when it operates on the same principle and performs the same functions by analogous means, or equivalent combinations.

McCormick v. Talcott, 61 U. S. 20 How. 402 (15: 930); *Blanchard's Gun-Stock Factory v. Warner*, 1 Blatchf. 278; *Wyeth v. Stone*, 1 Story, 278; *Bovill v. Moore*, 2 Marsh. 211; *Blanchard v. Beers*, 2 Blatchf. 411; *Seymour v. Osborne*, 78 U. S. 11 Wall. 516 (20: 33); *Mason v. Graham*, 90 U. S. 23 Wall. 275 (23: 87).

Use in a factory is a public use.

McClurg v. Kingsland, 42 U. S. 1 How. 202 (11: 102); *Perkins v. Nashua Card & G. P. Co.* 5 Bann. & Ard. 897.

A single instance of successful use is sufficient.

Coffin v. Ogden, 85 U. S. 18 Wall. 120 (21: 821); *Egbert v. Lippman*, 14 Pat. Off. Gaz. 822; *Henry v. Providence Tool Co.* 14 Pat. Off. Gaz. 855; *McMillan v. Barclay*, 5 Fish. Pat. Cas. 189; *McNish v. Emerson*, 5 Bann. & Ard. 485.

Mr. Chief Justice Fuller delivered the opinion of the court:

Doubtless a claim is to be construed in connection with the explanation contained in the specification, and it may be so drawn as in effect to make the specification an essential part of it; but since the inventor must particularly specify and point out the part, improvement or combination which he claims as his own invention or discovery, the specification and drawings are usually looked at only for the purpose of better understanding the meaning of the claim, and certainly not for the purpose of changing it and making it different from what it is. As remarked by *Mr. Justice Bradley*, in *White v. Dunbar*, 119 U. S. 47 52 [30: 303, 304]: "The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms."

The patentees state that they "have invented a new combination designed for turning such articles as are to be brought to a point or are to be finished or turned at one end, and therefore cannot conveniently be held to be operated upon otherwise than by the opposite end." In the drawings attached to the patent, *q* and *r* are the guide cam or pattern specially referred to in the specification, and it is said that "in the particular instance illustrated *q* and *r* are formed for turning awls or machine needles," and that "the arrangement of the shaping mechanism illustrated by the drawing is that designed and adapted to the formation of awls or machine needles." They also say that "the material from which any article is to be turned by the use of our invention must be cylindrical and straight;" and that "the chuck used to hold the material to be operated on may be any of the well-known forms of gripping or holding chucks that hold fast by one end the article which is to be turned."

The claim is couched in plain and unambiguous language, and is "The combination of a gripping chuck, by which an article can be so

held by one end as to present the other free to be operated upon, with a rest preceding the cutting tool, when it is combined with a guide cam, or its equivalent, which modifies the movement of the cutting tool, all operating together for the purpose set forth." The alleged improvement is in the mode of producing turned articles of "irregular forms," and the purpose set forth is the turning of such articles as are to be brought to a point or to be turned or finished at one end, and which ought therefore to be held by the opposite end in order to be operated upon. The material is not specified, but it must be cylindrical and straight.

The complainant's expert testifies on cross-examination: "The patent is for a combination. The new part consists of elements, each and all of them old and familiar in pre-existing combinations. They are therefore the gripping chuck; the supporting rest preceding the cutting tool; a cutting tool having the reciprocating motion towards and from the axis of the piece to be operated upon, under the control of a guide cam or former, so organized as to be also under the constant control of delicate adjusting apparatus, by which the required diameter of a piece to be operated upon may be constantly preserved without disturbing the functional performance of former and cutting tool, substantially as set forth and described, all operating together for the purpose set forth. It is, then, the combination of these several elements, as organized, which constitutes the new part." But the combination claimed is the combination of a gripping chuck, a rest preceding the cutting tool, a cutting tool and a guide cam or its equivalent; and complainants cannot now be permitted to read into it any delicate adjusting apparatus not originally included in the claim, and then insist, in the words of the witness, that there is "a margin of patentable novelty."

The Springs completed their first machine in September or October, 1857. Their patent was issued May 10, 1859.

As found by the circuit court, the testimony leaves no doubt that as early as 1845, William Murdock used a lathe at Winchendon, Massachusetts, for turning pointed skewers of wood. This had a chuck; a cutting tool; a rest preceding the cutting tool, and a pattern governing the movement of the cutting tool, to shape the skewer to the desired form; or, in other words, all the elements of the Spring combination, as claimed.

Defendants' expert, Brevoort, correctly says: "This Murdock device shows the combination of a holding chuck which holds the material at one end while the other end is left free, a rest preceding a cutting tool, which latter is controlled in its movements by guide or former, so that the parts operating together will produce irregular forms. Now, this is the invention referred to in the claim of the Spring patent, and this Murdock lathe undoubtedly contains the invention recited in the Spring patent, with the exception that in the Murdock lathe the parts are adapted for turning wood, while in the Spring device they are more especially adapted for turning metal." And he continues: "I understand that this Murdock lathe was used for turning large numbers of

yarn skewers, such as were used at one time in mills where cotton goods were manufactured. 'Defendants' Exhibit Murdock Skewer, W. G. H., Sp. Ex'r,' shows one of these skewers, and when I compare this skewer with a sewing-machine needle, as the question requested me to do, I find that both the needle and the skewer are brought to a point, the Murdock lathe, the Spring device and the Pernot lathe all being adapted for producing points upon the articles subjected to their action, the only difference being that the Pernot and Spring lathes were adapted for making points on metal, while the Murdock lathe is adapted for making points on wooden blanks, all of the three lathes referred to, as well as the Wright lathe and the Waymoth lathe, being so constructed as to produce the desired configuration upon the surface of the turned blank by using a pattern or former of the desired shape. In all the lathes referred to by me in this testimony the irregular form of the article turned is reached by the former, guide or pattern causing the cutting tool, as it was slid toward the holding or gripping chuck, to approach or recede from the axial line of the work, and in all these lathes the cutting tool is preceded by a rest through a hole in which the work revolves, leaving one end of the work free, while the other is held and turned by the chuck."

There is nothing in the specification about the nature of the material to be used, nor is the device limited to the production of awls and needles, although the drawings show that mode of applying the invention, and "the particular instance illustrated" is that "designed and adapted to the formation of awls or machine needles." But the invention claimed is not restricted to lathes for turning sewing-machine needles, nor did the patentees by disclaimer place any such limit upon the construction of the patent.

The rule laid down in *Pennsylvania R. Co. v. Locomotive E. S. Truck Co.*, 110 U. S. 490 [28: 222], that the application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated, has been applied in very many cases by this court. *Thompson v. Boisselier*, 114 U. S. 1 [29: 76]; *Peters v. Active Mfg. Co.*, 129 U. S. 580 [32: 788]; *Peters v. Hanson*, 129 U. S. 542 [32: 742]; *Aron v. Manhattan Railway Co.*, 132 U. S. 84 [38: 272]; *Watson v. Cincinnati, I. St. L. & C. R. Co.*, 132 U. S. 161 [38: 295].

In the employment of the chuck, the rest, the cutting tool and the guide cam, in the making of awls and needles, the patentees displayed the skill of their calling, which involved "only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice." *Hollister v. Benedict Mfg. Co.*, 118 U. S. 59, 78 [28: 901, 905]. The purpose of Murdock, in reference to the wooden skewer, was the same as the purpose of the Springs in reference to articles of any material which could be worked up on their machines. The claim was certainly broad enough to in-

clude Murdock's invention, and no disclaimer was ever filed; and even with a limitation as to the article, patentable novelty was not present, within the rule upon that subject. The art of turning is the art of turning, whether applied to wood or metal; and it would seem that there was here nothing more than the substitution of one material for another, without involving an essentially new mode of construction. And be that as it may, there was no restriction as to material. Operation in metal would, of course, demand variations in organization, but not necessarily anything more than would result from the experience of the intelligent mechanic.

The Springs did not claim a combination of a slotted guide cam, an adjusting screw, a spring, guiding rods, etc., with a former, a cutting tool, a rest and a gripping chuck, and as it stands the claim was, in the existing state of the art, for an analogous or double use, and not patentable.

The Circuit Court was clearly right, and *its decree is affirmed.*

JOHN GLENN, Trustee of the NATIONAL EXPRESS AND TRANSPORTATION COMPANY, *Plff. in Err.*,

v.
HAMILTON G. FANT.

(See B. C. Reporter's ed. 398-401.)

Review of judgment of District of Columbia—special finding of facts or special verdict.

1. Where there is no bill of exceptions presented, for the review of a judgment of the Supreme Court of the District of Columbia, nor any finding of facts, nor any case stated analogous to a special verdict, stating the ultimate facts and presenting questions of law only, this court cannot review the same.
2. An agreement that the parties may refer to and rely upon all the grounds of action or defense to be found in the voluminous records of two equity cases in other courts, including the pleadings and evidence and orders and decrees therein, cannot take the place of a special verdict of a jury or special finding of facts by the court so as to enable this court to determine the questions of law thereon arising.

[No. 357.]

Argued March 11, 1890. Decided March 24, 1890.

IN ERROR to the Supreme Court of the District of Columbia to review a judgment in favor of defendant in an action to recover assessments on shares of stock. *Affirmed.*

Statement by *Mr. Chief Justice Fuller*:

This is an action at law commenced in the Supreme Court of the District of Columbia by the plaintiff in error against the defendant in error on the 11th day of December, 1888, to recover certain amounts, for the payment of which the defendant was alleged to be liable upon an assessment levied on shares of stock in the National Express and Transportation Company of Virginia, held by him.

The defendant demurred to the declaration, but subsequently it was agreed that the demurrer should be overruled, and a stipulation

was filed to the effect that the court should consider the cause as if there had been pleaded the general issue and certain other pleas in the stipulation named, and as if issue had been joined thereon; that the cause should be heard upon an "agreed statement of facts," annexed as part of the stipulation, with leave to any party to refer to Exhibits X and Y, therewith filed; that a jury was thereby waived; that the cause might be submitted to the court to hear and decide upon said agreed statement of facts, exhibits and pleadings; and that either party might "rely upon any and all grounds of action or defense arising from said agreed statement of facts, exhibits and pleadings." The statement referred to was to the effect that the defendant was a subscriber for and assignee of the number of shares of the capital stock of the National Express and Transportation Company of Virginia in respect of which he was sued; that a certain deed of trust was as set forth in the record, therewith filed, marked "Exhibit X;" that Exhibit X was the record of a certain cause between W. W. Glenn and the National Express and Transportation Company of Virginia, in the Chancery Court of the City of Richmond, in the State of Virginia, afterwards removed into the Circuit Court of Henrico County, Virginia; and that on the 8th day of August, 1886, one Reynolds, claiming to be a stockholder of said company, filed his bill against said company in the Circuit Court of the United States for the Eastern District of Virginia, and certain proceedings were therein had, as would appear from the record in that cause, filed and marked "Exhibit Y." It was agreed that the laws of the State of Virginia might be referred to as a part of the statement of facts, and certain other matters of fact were set forth, not material to be repeated here.

The cause came on at special term, the demurrer was overruled, and the stipulation filed "with an agreed statement of facts thereto annexed, and with exhibits, marked 'X' and 'Y,'" and thereupon the cause was certified to the general term of the court to be heard there in the first instance, "upon said stipulation and agreed statement of facts thereto annexed and exhibits therewith filed and the pleadings, in accordance with the provisions of the stipulation aforesaid." A hearing was accordingly had at general term, and judgment rendered in favor of the defendant with costs, and the plaintiff sued out a writ of error from this court.

Messrs. Charles Marshall, John Howard, Henry Wise Garnett and Conway Robinson, Jr., for plaintiff in error.

Messrs. M. F. Morris, Walter D. Davidge, Eugene Carusi and Reginald Fendall for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

No bill of exceptions was taken in this case, nor was there any finding of facts by the Supreme Court of the District of Columbia, nor any case stated by the parties analogous to a special verdict and stating the ultimate facts of the case, presenting questions of law only. What is styled here an "agreed statement of facts" is an agreement as to certain matters, and

that the parties might refer to and rely upon any and all grounds of action or defense to be found in two voluminous exhibits, marked "X" and "Y," being the records of two equity causes in other courts, including all the pleadings and evidence, as well as the orders and decrees therein. The effect of some of that evidence and of the conclusions of fact to be drawn from it is controverted. It is impossible for us to regard this stipulation as taking the place of a special verdict of a jury, or a special finding of facts by the court, upon which our jurisdiction could properly be invoked to determine the questions of law thereon arising. And while the case is governed by the rule laid down in *Campbell v. Boyreau*, 62 U. S. 21 How. 223 [16: 96], yet, even if the statutory provisions in relation to the trial of causes without the intervention of a jury by the circuit courts of the United States were applicable, the result upon this record would be the same. *Raimond v. Terrebonne Parish*, 132 U. S. 192 [38: 809]; *Andes v. Slawson*, 130 U. S. 435 [32: 989]; *Bond v. Dustin*, 112 U. S. 604 [28: 885]; *Lyons v. Lyons Nat. Bank*, 19 Blatchf. 279.

The judgment must be affirmed.

THE CHICAGO, MILWAUKEE, AND ST.
PAUL RAILWAY COMPANY,
Plf. in Err.,
v.

THE STATE OF MINNESOTA, ex rel.
THE RAILROAD AND WAREHOUSE COMMISSION
OF THE STATE OF MINNESOTA.

(See S. C. Reporter's ed. 418-466.)

Charter of Minnesota railroad company, when not a contract—charter, when subject to future legislation—exemption—power of State—rates of toll—power to regulate—state construction of statute—Minnesota law, giving powers to commission, unconstitutional—due process of law—judicial investigation—hearing and notice—reasonableness of railroad rates—right of company.

1. The ninth section of the charter of the Minneapolis & Cedar Valley Railroad Company giving power to the directors of that company to make rules as to rates of toll does not constitute an irrevocable contract with that company that it shall have the right for all future time to prescribe its rates of toll, free from all control by the Legislature of the State.
2. A railroad corporation takes its charter, containing such a provision, subject to the general law of the State, and to such changes as may be made in such general law, and subject to future constitutional provisions and future general legislation, in the absence of any prior contract with it exempting it from liability to such future general legislation.
3. Exemption from future general legislation, either by a constitutional provision or by an Act of the Legislature, does not exist unless it is given expressly or unless it follows by an implication equally clear with express words.
4. The grant of power by section 9 of the charter, to the directors of the company, to make needful rules and regulations touching the rates of toll and the manner of collecting the same, does not deprive the State of its general authority itself to

regulate the rates of toll to be collected by the company.

5. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation.
6. The construction put upon a Minnesota statute by the Supreme Court of Minnesota must be accepted by this court.
7. A law which, as construed by the Supreme Court of the State, allows a railroad commission to establish rates for railroads which are final, without issue made, or inquiry had, as to their reasonableness, and forbids the courts to stay the hands of the commission if the rates established by it are unequal and unreasonable, conflicts with the Constitution of the United States.
8. So construed, it deprives the company of its right to a judicial investigation by due process of law, and substitutes therefor, as an absolute matter, the action of a railroad commission which is not clothed with judicial functions and does not possess the machinery of a court of justice.
9. Where no hearing is provided for, no summons or notice to the company, before the commission has found what it is to find and declared what it is to declare, and no opportunity provided for the company to introduce witnesses before the commission, there is not the semblance of due process of law.
10. The question of the reasonableness of a rate of charge for transportation by a railroad company is eminently a question for judicial investigation, requiring due process of law for its determination.
11. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of a judicial investigation, it is deprived of the use of its property, and, in effect, of the property itself, without due process of law and in violation of the Constitution of the United States.

[No. 762.]

Argued Jan. 13, 14, 1890. Decided March 24 1890.

IN ERROR to the Supreme Court of the State of Minnesota, awarding a writ of mandamus against the Chicago, Milwaukee and St. Paul Railway Company, requiring it to comply with the order of the Railroad and Warehouse Commission of that State by changing its tariffs of rates and charges and substituting therefor the rates recommended by said Commission. *Reversed.*

The facts are fully stated in the opinion.

Reported below, 38 Minn. 281.

This case and the following case of *The Minneapolis Eastern Railway Co. v. State of Minnesota, ex rel. Railroad and Warehouse Commission*, were argued together.

Messrs. John W. Cary, J. H. Howe, W. H. Norris and W. C. Goudy for plaintiffs in error in both cases.

The following are the points and authorities made and cited by Mr. John W. Cary, for plaintiffs in error:

The court erred in holding that the Legislature of Minnesota is authorized to fix the rates and charges for transportation because the exercise of such a power would impair the obligation of the contract contained in the charter.

Stone v. Farmers L. & T. Co. 116 U. S. 326, 327 (29: 642); *Proc. Bank v. Billings*, 29 U. S.

4 Pet. 514 (7: 989); *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 419 (9: 773); *Minot v. Philadelphia R. Co.* 85 U. S. 18 Wall. 206, 226 (21: 888, 895); *Bailey v. Magwire*, 89 U. S. 23 Wall. 215 (22: 850); *Fertilizing Co. v. Hyde Park*, 97 U. S. 659 (24: 1086); *Newton v. Comrs.* 100 U. S. 548 (25: 710).

The judgment of the court violates the natural right which belongs to everyone to fix the price of his services and of his property or its use.

1 Kent, Com. 618; *Allnutt v. Inglis*, 12 East, 527; *State Freight Tax*, 82 U. S. 15 Wall. 277 (21: 162); *Munn v. Illinois*, 94 U. S. 113 (24: 77); *Bolt v. Stennet*, 8 Term. R. 606; 1 Shelford, Railways, 40, 48; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 (30: 244); *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140; Cooley, Const. Lim. 88, 91; *People v. Draper*, 15 N. Y. 582; *Wynehamer v. People*, 18 N. Y. 378; *Sloan v. Pac. R. Co.* 61 Mo. 81.

The legislative power cannot directly reach the property or vested rights of the citizen without trial and judgment in the courts.

Newland v. Marsh, 19 Ill. 876-882; *Irving's App.* 16 Pa. 266; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179 (24: 99).

The court erred in holding that the schedules of rates fixed by said Commission were final and conclusive.

Winona R. Co. v. Blake, 94 U. S. 180 (24: 99); *Dow v. Beidelman*, 125 U. S. 680 (31: 841); *Ruggles v. Illinois*, 108 U. S. 526 (27: 812); *Stone v. Farmers L. & T. Co.* 116 U. S. 807 (29: 636); *Georgia Banking Co. v. Smith*, 128 U. S. 174 (32: 877).

The court erred in holding that the rate fixed by said Commission was a lawful rate which the owner was bound to submit to and obey, and in granting a peremptory writ of mandamus.

Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179 (24: 99); *Munn v. Illinois*, 94 U. S. 125 (24: 84); *Stone v. Farmers L. & T. Co.* 116 U. S. 835 (29: 636).

The court erred in holding that the State of Minnesota has the power to establish the tariff rates over an interstate railway.

The Daniel Ball, 77 U. S. 10 Wall. 557 (19: 999); *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 724 (18: 99); *Hall v. DeCuir*, 95 U. S. 494-497 (24: 146, 147); *Sinnot v. Davenport*, 68 U. S. 22 How. 227 (16: 243).

The following are the points and authorities made and cited by **Mr. W. C. Goudy** in this case:

The parts of the Statute of Minnesota which made the decision of the railroad commissioners conclusive, and not subject to judicial examination, are repugnant to the Fifth Amendment and section 1 of the Fourteenth Amendment to the Constitution of the United States.

Munn v. Illinois, 94 U. S. 113 (24: 77); *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155 (24: 94); *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164 (24: 96); *Stone v. Farmers L. & T. Co.* 116 U. S. 824 (29: 642); *Ruggles v. Illinois*, 108 U. S. 539 (27: 818); *Dow v. Beidelman*, 125 U. S. 680 (31: 841); *Wabash R. Co. v. Illinois*, 118 U. S. 568-570 (30: 248); Cooley, Const. Lim. 357; 5 Webster's Works, 487.

The Minnesota Statute is repugnant to clause 184 U. S.

3, section 8, article 1, of the Constitution of the United States.

Gibbons v. Ogden, 22 U. S. 9 Wheat. 1 (6: 23); 7 Jefferson's Works, 295.

Different decisions of this court make seeming exceptions.

Brown v. Maryland, 25 U. S. 12 Wheat. 419 (6: 678); *Henderson v. Mayor*, 92 U. S. 259 (23: 657); *Walling v. Michigan*, 116 U. S. 449 (29: 698); *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 489 (31: 708); *Brown v. Houston*, 114 U. S. 680 (29: 260); *The Daniel Ball*, 77 U. S. 10 Wall. 562 (19: 1001); *Coe v. Errol*, 116 U. S. 523 (29: 719); *U. S. v. Fisher*, 6 U. S. 2 Cranch, 358 (2: 804); Story, Const. § 480; Cooley, Const. Lim. 63.

For the points and authorities of *Messrs. J. H. Howe* and *W. H. Norris*, see the following case of *Minneapolis E. R. Co. v. Minnesota*.

Messrs. Moses E. Clapp and *H. W. Childs*, for defendant in error:

The Supreme Court of Minnesota held that the law in question gave it original jurisdiction of proceedings in mandamus to compel compliance with its requirements.

State v. Chicago, M. & St. P. R. Co. 88 Minn. 281.

The determination of the state court is conclusive in this court.

Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155 (24: 94); *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164 (24: 97); *Georgia Banking Co. v. Smith*, 128 U. S. 174 (32: 877); *Davis v. Packard*, 83 U. S. 8 Pet. 312 (8: 957); *Wabash R. Co. v. Illinois*, 118 U. S. 557 (30: 244); *Medberry v. Ohio*, 65 U. S. 24 How. 418 (16: 789); *Chicago & N. W. R. Co. v. Dey*, 35 Fed. Rep. 866.

Railroad companies are subject to legislative control as to their rates of fare and freight, unless protected by their charters.

Chicago R. Co. v. Iowa, 94 U. S. 155 (24: 94); *Munn v. Illinois*, 94 U. S. 113 (24: 77); *Chicago R. Co. v. Ackley*, 94 U. S. 179 (24: 99); *Winona R. Co. v. Blake*, 94 U. S. 180 (24: 102); *Stone v. Farmers L. & T. Co.* 116 U. S. 807 (29: 636).

General statutes regulating the use of railroads in a State, or fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not necessarily deprive the corporation owning or operating a railroad within the State of its property without due process of law.

Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521, 529 (24: 784, 787); *Spring Valley Water Works Co. v. Schottler*, 110 U. S. 347, 354 (28: 173); *Dow v. Beidelman*, 125 U. S. 680 (31: 841); *Georgia Banking Co. v. Smith*, 128 U. S. 174 (32: 877).

Mr. Justice Blatchford delivered the opinion of the court:

This is a writ of error to review a judgment of the Supreme Court of the State of Minnesota, awarding a writ of mandamus against the Chicago, Milwaukee & St. Paul Railway Company.

The case arose on proceedings taken by the Railroad and Warehouse Commission of the State of Minnesota, under an Act of the Legislature of that State approved March 7, 1887 (General Laws of 1887, chap. 10), entitled "An

Act to Regulate Common Carriers, and Creating the Railroad and Warehouse Commission of the State of Minnesota, and Defining the Duties of Such Commission in Relation to Common Carriers." The Act is set forth in full in the margin.*

The ninth section of that Act creates a commission to be known as the "Railroad and Warehouse Commission of the State of Minnesota," to consist of three persons to be appointed by the governor by and with the advice and consent of the Senate.

The first section of the Act declares that its provisions shall apply to any common carrier "engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management or arrangement, for a carriage or shipment from one place or station to another, both being within the State of Minnesota."

The second section declares "that all charges made by any common carrier, subject to the provisions of this Act, for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be equal and reasonable; and every unequal and unreasonable charge for such service is prohibited and declared to be unlawful."

The eighth section provides that every common carrier subject to the provisions of the Act shall print and keep for public inspection schedules of the charges which it has established for the transportation of property; that it shall

make no change therein except after ten days' public notice, plainly stating the changes proposed to be made and the time when they will go into effect; that it shall be unlawful for it to charge or receive any greater or less compensation than that so established and published, for transporting property; that it shall file copies of its schedules with the Commission, and shall notify such Commission of all changes proposed to be made; that in case the Commission shall find at any time that any part of the tariffs of charges so filed and published is in any respect unequal or unreasonable, it shall have the power, and it is authorized and directed, to compel any common carrier to change the same and adopt such charge as the Commission "shall declare to be equal and reasonable," to which end the Commission shall, in writing, inform such carrier in what respect such tariff of charges is unequal and unreasonable, and shall recommend what tariff shall be substituted therefor; that in case the carrier shall neglect for ten days after such notice to adopt such tariff of charges as the Commission recommends, it shall be the duty of the latter to immediately publish such tariff as it has declared to be equal and reasonable, and cause it to be posted at all the regular stations on the line of such carrier in Minnesota, and it shall be unlawful thereafter for the carrier to charge a higher or lower rate than that so fixed and published by the Commission; and that, if any carrier subject to the provisions of the Act shall neglect to publish or file its schedules of charges, or to carry out such recommendation made and published by the Com-

*CHAPTER 10.

AN ACT TO REGULATE COMMON CARRIERS, AND CREATING THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, AND DEFINING THE DUTIES OF SUCH COMMISSION IN RELATION TO COMMON CARRIERS.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. (a) That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management or arrangement, for a carriage or shipment from one place or station to another, both being within the State of Minnesota.

Provided, That nothing in this Act shall apply to street railways or to the carriage, storage or handling by any common carrier of property, free or at reduced rates for the United States, or for the State of Minnesota, or for any municipal government or corporation within the State, or for any charitable purpose, or to or from fairs and expositions for exhibition thereat (or stock for breeding purposes), or to the issuance of mileage, excursion or commutation passenger tickets, at rates made equal to all, or to transportation to stock shippers with cars, and nothing in the provisions of this Act shall be construed to prevent common carriers, subject to the provisions of this Act, from issuing passes for the free transportation of passengers.

(b) The term "railroad" as used in this Act shall include all bridges or ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

SEC. 2. (a) That all charges made by any common carrier, subject to the provisions of this Act, for

any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property shall be equal and reasonable; and every unequal and unreasonable charge for such service is prohibited and declared to be unlawful:

Provided, That one carload of freight of any kind or class shall be transported at as low a rate per ton, and per ton per mile, as any greater number of carloads of the same kind and class from and to the same points of origination or destination.

(b) It shall be unlawful for any common carrier, subject to the provisions of this Act, to make or give any unequal or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any unequal or unreasonable prejudice or disadvantage in any respect whatsoever.

SEC. 3. (a) That all common carriers, subject to the provisions of this Act, shall, according to their respective powers, provide, at the point of connection, crossing or intersection, ample facilities for transferring cars, and for accommodating and transferring passengers, and traffic of all kinds and classes, from their lines or tracks, to those of any other common carrier whose lines or tracks may connect with, cross or intersect their own, and shall afford all equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property and cars to and from their several lines and those of other common carriers connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, or on freight coming over such lines; but this shall not be construed as requiring any common carrier to use for another common carrier its tracks, equipments or terminal facilities without reasonable compensation.

(b) That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of

mission, it shall be subject to a writ of mandamus "to be issued by any judge of the supreme court or of any of the district courts" of the State, on application of the Commission, to compel compliance with the requirements of section 8 and with the recommendation of the Commission, and a failure to comply with the requirements of the mandamus shall be punishable as and for contempt, and the Commission may apply also to any such judge for an injunction against the carrier from receiving or transporting property or passengers within the State until it shall have complied with the requirements of section 8 and with the recommendation of the Commission, and for any willful violation or failure to comply with such requirements or such recommendation of the Commission, the court may award such costs, including counsel fees, by way of penalty, on the return of said writs and after due deliberation thereon, as may be just.

On the 22d of June, 1887, the Boards of Trade Union of Farmington, Northfield, Faribault and Owatonna, in Minnesota, filed with the Commission a petition in writing, complaining that the Chicago, Milwaukee & St. Paul Railway Company, being a common carrier engaged in the transportation of property wholly by railroad, for carriage or shipment from Owatonna, Faribault, Dundas, Northfield and Farmington, to the Cities of St. Paul and Minneapolis, all of those places being within the State of Minnesota, made charges for its services in the transportation of milk from said Owatonna, Faribault, Dundas, Northfield and Farmington to St. Paul and Minneapolis, which

were unequal and unreasonable, in that it charged 4 cents per gallon for the transportation of milk from Owatonna to St. Paul and Minneapolis, and 8 cents per gallon from Faribault, Dundas, Northfield and Farmington, to the said cities; and that such charges were unreasonably high, and subjected the traffic in milk between said points to unreasonable prejudice and disadvantage. The prayer of the petition was that such rates be declared unreasonable, and the carrier be compelled to change the same and adopt such rates and charges as the Commission should declare to be equal and reasonable.

A statement of the complaint thus made was forwarded by the Commission, on the 29th of June, 1887, to the Railway Company, and it was called upon by the Commission, on the 6th of July, 1887, to satisfy the complaint or answer it in writing at the office of the Commission in St. Paul, on the 13th of July, 1887.

On the 30th of June, 1887, Mr. J. F. Tucker, the assistant general manager of the Railway Company, addressed a letter from Milwaukee to the secretary of the Commission, saying: "I have your favor of the 29th, with complaint as to milk rates being unreasonable and unequal. They may be unequal if unreasonable. They are unreasonably low for the service performed—by passenger train—and are 25 per cent less than the same commodity is charged into New York, with longer distances and hundred times larger volume in favor of New York. I am frank to say it is hard to appreciate complaints from boards of trade that $\frac{1}{5}$ of a cent per gallon on milk handled on passenger train one mile

time or schedule, or by carriage in different cars, or by any other means or devices, the carriage or freight from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freight from being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act.

(c) Every common carrier operating a railway in this State shall, without unreasonable delay, furnish, start and run cars for the transportation of persons and property, which, within a reasonable time theretofore, is offered for transportation at any of its stations on its line of road and at the junctions of other railroads, and at such stopping places as may be established for receiving and discharging passengers and freights; and shall take, receive, transport and discharge such passengers and property at, from and to such stations, junctions and places, on and from all trains advertised to stop at the same, for passengers and freights, respectively, upon the due payment, or tender of payment, of tolls, freight or fare therefor, if such payment is demanded. Every such common carrier shall permit connections to be made and maintained in a reasonable manner with its side tracks to and from any warehouse, elevator or manufactory without reference to its size or capacity; provided, that this shall not be construed so as to require any common carrier to construct or furnish any side track off from its own land; provided further, that where stations are ten (10) miles or more apart the common carrier, when required to do so by the railroad and warehouse commissioners, shall construct and maintain a side track for the use of shippers between such stations.

(d) Whenever any property is received by any common carrier subject to the provisions of this Act, to be transported from one place to another within this State, it shall be unlawful for such common carrier to limit in any way, except as stated in its classification schedule, hereinafter provided

for, its common-law liability with reference to such property while in its custody as a common carrier (as hereinbefore mentioned); such liability must include the absolute responsibility of the common carrier for the acts of its agents in relation to such property.

SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act, to enter into any contract, agreement or combination with any other common carrier or carriers for the division or pooling of business of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in case of an agreement for the pooling of their business aforesaid each day of its continuance shall be deemed a separate offense.

SEC. 5. That if any common carrier, subject to the provisions of this Act, shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of passengers or property, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 6. That it shall be unlawful for any common carrier, subject to the provisions of this Act, to charge or receive any greater compensation for the transportation of passengers or of like kind or class and quantity of property, for a shorter than for a longer distance over the same line, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, subject to the provisions of this Act, to charge or receive as great compensation for a shorter as for a longer distance.

Provided, however, That upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the commissioners, be au-

is unreasonable. With what is the comparison made that enables such a conclusion? It's not first-class rates by freight train, and was made low to encourage the trade, under the hope and promise that, when the trade were fostered, it would be advanced. This, as usual, has been forgotten."

On the 18th of July, 1887, at the office of the Commission in St Paul, the Company appeared by J. A. Chandler, its duly authorized attorney, and the Boards of Trade Union by its attorney, and the Commission proceeded to investigate the complaint. An investigation of the rates charged by the Company for its services in transporting milk from Owatonna, Faribault, Dundas, Northfield and Farmington, to St. Paul and Minneapolis, was made by the Commission, and it found that the charges of the Company for transporting milk from Owatonna and Faribault to St. Paul and Minneapolis were 8 cents per gallon in ten-gallon cans; that such charges were unequal and unreasonable; and that the Company's tariff of rates for transporting milk from Owatonna and Faribault to those cities, filed and published by it as provided by chapter 10 of the Laws of 1887, was unequal and unreasonable; and the Commission declared that a rate of 2½ cents per gallon in ten-gallon cans was an equal and reasonable rate for such services.

On the 4th of August, 1887, the Commission made a report in writing, which included the findings of fact upon which its conclusions were based, its recommendation as to the tariff which should be substituted for the tariff so found to be unequal and unreasonable, and al-

so a specification of the rates and charges which it declared to be equal and reasonable. This paper was in the shape of a communication, dated at St. Paul, August 4, 1887, signed by the secretary of the Commission and addressed to the Company. It said: "It appearing from your schedule of rates and charges for the transportation of milk over and upon the Iowa and Minnesota Division of your road, that you charge, collect and receive for the transportation of milk over and upon said line from Owatonna and Faribault to the Cities of St. Paul and Minneapolis three cents per gallon, in ten-gallon cans, and from Dundas, Northfield and Farmington to said Cities of St. Paul and Minneapolis two and one half cents per gallon, in cans of like capacity, and complaint having been made that such rates and charges are unequal and unreasonable, and that the services performed by you in such transportation are not reasonably worth the said sums charged therefor; and this Commission having thereupon, pursuant to the provisions of section eight of an Act entitled 'An Act to Regulate Common Carriers, and Creating the Railroad and Warehouse Commission of the State of Minnesota, and Defining the Duties of Such Commission in Relation to Common Carriers,' approved March 7, 1887, examined the cause and reasonableness of said complaint, and finding, pursuant to subdivision (e) of said section, that your said tariff of rates, so far as appertains to the transportation of milk to the Cities of St. Paul and Minneapolis from the other places above named, and inasmuch as said tariff provides for or requires the charging or col-

thorized to charge less, for longer than for shorter distances, for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this Act.

SEC. 7. (a) That it shall be unlawful for any common carrier, subject to the provisions of this Act, to charge or receive any greater compensation, per ton per mile, for the contemporaneous transportation of the same class of freight for a longer than for a shorter distance over the same line, in the same general direction, or from the same original point of departure, or to the same point of arrival; but this shall not be construed as authorizing any common carrier, subject to the provisions of this Act, to charge as high a rate per ton per mile for a longer as for a shorter distance.

(b) Whenever any railway company doing business in this State shall be unable, from any reasonable cause, to furnish cars at any railway station or side track, in accordance with the demands made by all persons demanding cars at such stations or side tracks for the shipment of grain or other freight, such cars as are furnished shall be divided as equally as may be among the applicants until each shipper shall have received at least one car, when the balance shall be divided ratably in proportion to the amount of daily receipts of grain, or other freight, to each shipper, or to the amount of grain offered at such station on side tracks.

(c) There shall in no case be more than one terminal charge for switching or transferring any car, whether the same is loaded or empty, within the limits of any one city or town. If it is necessary that any car pass over the tracks of more than one company, within such city or town limits, in order to reach its final destination, or to be returned therefrom to its owner or owners, then the company first switching or transferring such car shall be entitled to receive the entire charge to be made therefor and shall be liable to the company or companies doing the subsequent switching or transferring thereof for its or their reasonable and equitable share of the compensation received; and if the companies so jointly interested therein cannot agree upon the share thereof which each is entitled

to receive, the same shall be determined by the Board of Railroad and Warehouse Commissioners, whose decision thereon shall be final and conclusive upon all parties interested, and the said Board are authorized to establish such rules, regulations in that behalf as to them may seem just and reasonable and not in conflict with this Act.

SEC. 8. (a) That every common carrier, subject to the provisions of this Act, shall, within sixty (60) days after this Act shall take effect, print and thereafter keep for public inspection, schedules showing the classification, rates, fares and charges for the transportation of passengers and property of all kinds and classes which such common carrier has established, and which are in force at the time, upon its railroad, as defined by the first (1st) section of this Act. This schedule printed as aforesaid by such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain "classification of freight" in force upon each the lines of such railroad, a distance tariff, and a table of interstation distances, and shall also state separately the terminal charges, and any rules or regulations which in any wise change, affect or determine any part of the aggregate of such aforesaid rates, fares and charges. Such schedules shall be plainly printed in large type, and copies, for the use of the public, shall be kept in every depot or station upon any such railroad, in such places and in such form that they can be conveniently inspected.

(b) No change of classification shall be made and no change shall be made in the rates, fares and charges, which have been established and published as aforesaid, by any common carrier, in compliance with the requirements of this section, except after ten (10) days' public notice, which notice shall plainly state the changes proposed to be made in the schedules then in force, and the time when the changed schedules will go into effect, and the proposed changes will be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection.

(c) And when any common carrier shall have established and published its classifications, rates, fares and charges in compliance with the provisions

lection of a greater compensation than two and one half cents per gallon, is unreasonable and excessive: Therefore said Commission recommends and directs that you, the said Chicago, Milwaukee & St. Paul Railway Company, shall alter and change your said schedule by the adoption and substitution of a rate not to exceed two and one half cents per gallon for the services aforesaid from the Cities of Owatonna and Faribault, or either of them, to said St. Paul and Minneapolis. The Commission, as at present advised, approves of the custom and arrangement which, it is informed, has been adopted and is now in use by the Minnesota & Northwestern R. R. Co., of collecting two and one half cents per gallon on all milk transported by it, regardless of distance; but this expression of opinion is no part of the decision, notice or order in this case."

This report was entered of record, and a copy furnished to the Boards of Trade Union, and a copy was also delivered, on the 4th of August, 1887, to the Company, with a notice to it to desist from charging or receiving such unequal and unreasonable rates for such services. The Commission thus informed the Company in writing in what respect such tariff of rates and charges was unequal and unreasonable, and recommended to it in writing what tariff should be substituted therefor, to wit, the tariff so found equal and reasonable by the Commission.

The Company neglected and refused, for more than ten days after such notice, to substitute or adopt such tariff of charges as was recommended by the Commission. The latter thereupon published the tariff of charges which

it had declared to be equal and reasonable, and caused it to be posted at the station of the Company in Faribault on the 14th of October, 1887, and at all the regular stations on the line of the Company in Minnesota prior to November 12, 1887, and in all things complied with the Statute.

The tariff so made, published and posted was dated October 13, 1887, and was headed: "Chicago, Milwaukee and St. Paul Railway Company. (Iowa and Minnesota Division.) Freight Tariff on Milk from Owatonna and Faribault to St. Paul and Minneapolis, taking effect October 15, 1887," and prescribed a charge of $2\frac{1}{2}$ cents per gallon in ten-gallon cans from either the Owatonna Station or the Faribault Station to either St. Paul or Minneapolis, to be the legal, equal and reasonable maximum charge and compensation for such service, and declared that the same was in force and effect in lieu and place of the charges and compensation theretofore demanded and received therefor by the Company.

On the 6th of December, 1887, the Commission, by the attorney-general of the State, made an application to the Supreme Court of the State for a writ of mandamus to compel the Company to comply with the recommendation made to it by the Commission, to change its tariff of rates on milk from Owatonna and Faribault to St. Paul and Minneapolis, and to adopt the rates declared by the Commission to be equal and reasonable. The application set forth the proceedings hereinbefore detailed; that the Company had refused to carry out the recommendation so made, published and posted

of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property or for any service in connection therewith, than is specified in such published schedule of classifications, rates, fares and charges as may at the time be in force.

(d) Every common carrier, subject to the provisions of this Act, shall file with the Commission hereafter provided for in section ten (10) of this Act, copies of its schedules of classifications, rates, fares and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes proposed to be made in the same. Every [such] common carrier shall also file with said Commission copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act, to which contracts, agreements or arrangements it may be a party. And in cases where passengers or freight pass over lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint schedules of rates or fares, or charges or classifications for such lines or routes, copies of such joint schedules shall also, in like manner, be filed with said Commission. Such joint schedules of rates, fares, charges and classifications, for such lines, so filed as aforesaid, shall also be made public by such common carriers in the same manner as hereinbefore provided for the publication of tariffs upon its own lines.

(e) That in case the Commission shall at any time find that any part of the tariffs of rates, fares, charges or classifications so filed and published as hereinbefore provided, are in any respect unequal or unreasonable, it shall have the power and is hereby authorized and directed to compel any common carrier to change the same and adopt such rate, fare, charge or classification as said Commission shall declare to be equal and reasonable. To which end the Commission shall, in writing, inform such common carrier, in what respect such tariffs of rates, fares, charges or classifications are unequal and un-

reasonable, and shall recommend what tariffs shall be substituted therefor.

(f) In case such common carrier shall neglect or refuse for ten (10) days after such notice to substitute such tariff of rates, fares, charges or classifications, or to adopt the same as recommended by the Commission, it shall be the duty of said Commission to immediately publish such tariff of rates, fares, charges or classifications as they had declared to be equal and reasonable, and cause the same to be posted at all the regular stations on the line of such common carrier in this State, and thereafter it shall be unlawful for such common carrier to charge or maintain a higher or lower rate, fare, charge or classification than that so fixed and published by said Commission.

(g) If any common carrier, subject to the provisions of this Act, shall neglect or refuse to publish or file its schedule of classifications, rates, fares or charges or any part thereof as provided in this section, or if any common carrier shall refuse or neglect to carry out such recommendation made and published by such Commission, such common carrier shall be subject to a writ of mandamus, to be issued by any judge of the supreme court, or of any of the district courts of this State upon application of the Commission, to compel compliance with the requirements of this section and with the recommendation of the Commission, and failure to comply with the requirements of said writ of mandamus shall be punishable as and for contempt, and the said Commission, as complainants, may also apply to any such judge for a writ of injunction against such common carrier from receiving or transporting property or passengers within this State until such common carrier shall have complied with the requirements of this section and the recommendation of said Commission; and for any willful violation or failure to comply with such requirements or such recommendation of said Commission, the court may award such costs, including counsel fees, by way of penalty, on the return of said writs and after due deliberation thereon, as may be just.

SEC. 9. (a) That a Commission is hereby created and established, to be known as the "Railroad and Warehouse Commission of the State of Minnesota,"

by the Commission; that it continued to charge 3 cents per gallon for the transportation of milk in ten-gallon cans from Owatonna and Faribault to St. Paul and Minneapolis; that said charge was unequal, unreasonable and excessive; that 2½ cents per gallon for the transportation by it of milk in ten-gallon cans from Owatonna and Faribault to St. Paul and Minneapolis was the maximum reasonable charge for the service; that any rate therefor in excess of 2½ cents per gallon in ten-gallon cans was unequal, unreasonable and excessive; that 3 cents per gallon in ten-gallon cans was a higher rate than was charged for the same distances on passenger trains by any express company or by any other railroad company in Minnesota, engaged in transporting milk to St. Paul or Minneapolis; that 2½ cents per gallon in ten-gallon cans was the highest rate charged for like distances on passenger trains by any such company; that the milk transported by the Company to St. Paul and Minneapolis, over its Iowa and Minnesota Division (extending from Calmar, in Iowa, to LeRoy, in Minnesota, and from LeRoy, through Owatonna and Faribault, to St. Paul and Minneapolis), large quantities of which milk were shipped from Faribault, was so transported by the Company on a passenger train which ran daily from Owatonna to St. Paul and Minneapolis; and that the Company, by means of such excessive charges, subjected the traffic in milk at Faribault and Owatonna to undue and unreasonable prejudice and disadvantage.

Thereupon, an alternative writ of mandamus was issued by the court, returnable before it on the 14th of December, 1887.

On the 23d of December, 1887, the Company filed its return to the alternative writ, in which it set up:

(1) That it was not competent for the Legislature of Minnesota to delegate to a Commission a power of fixing rates for transportation, and that the Act of March 7, 1887, so far as it attempted to confer upon the Commission power to establish rates for the transportation of freight and passengers, was void under the Constitution of the State;

(2) That the Company, as the owner of its railroad, franchises, equipment and appurtenances, and entitled to the possession and beneficial use thereof, was authorized to establish rates for the transportation of freight and passengers, subject only to the provision that such rates should be fair and reasonable; that the establishing of such rates by the State against the will of the Company was *pro tanto* a taking of its property, and depriving it thereof, without due process of law, in violation of section 1 of article 14 of the Amendments to the Constitution of the United States; and that the making of the order of October 13, 1887, was *pro tanto* a taking, and depriving the Company, of its property without due process of law, in violation of said section 1, and therefore void and of no effect;

(3) That the rate of 3 cents per gallon as a freight for carrying milk in ten-gallon cans on passenger trains from Owatonna and Faribault respectively to St. Paul and Minneapolis was a reasonable, fair and just rate; that the rate of 2½ cents per gallon, in ten-gallon cans, so fixed and established by the Commission, was not a reasonable, fair or just compensation to the

which shall be composed of three (3) commissioners, who shall be appointed by the governor, by and with the advice and consent of the Senate.

(b) The commissioners first appointed under this Act shall continue in office for the term of one (1), two (2) and three (3) years respectively, and until their successors are appointed and qualified, beginning with the first (1st) Monday of January, A. D. 1889; the term of each to be designated by the governor, but their successors shall be appointed for a term of three (3) years, and until their successors are appointed and qualified, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. Any commissioner may be removed by the governor for inefficiency, neglect of duty or malfeasance in office. Said commissioners shall not engage in any other business, vocation or employment while acting as such commissioners. No vacancy in the Commission shall impair the right of the remaining commissioners to exercise all the powers of the Commission.

(c) Vacancies occasioned by removal, resignation or other cause shall be filled by the governor as provided in case of original appointments. Not more than two of the commissioners appointed shall be members of the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this Act, or any law of this State, or owning stocks or bonds, or other property thereof, or who is in any manner interested therein, shall enter upon the duties of or hold such office.

(d) The decision of a majority of the Commission shall be considered the decision of the Commission on all questions arising for its consideration. Before entering upon the duties of his office each commissioner shall make and subscribe and file with the secretary of state an affidavit in the following form: "I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of the State of Minnesota, and that I will faithfully discharge my duties as a member of the Railroad and Warehouse Commission of the State of Minnesota, according to the best of my ability; and I

further declare that I am not in the employ of, or holding any official relation to, any common carrier within this State; nor am I in any manner interested in any stock, bonds or other property of such common carrier."

(e) Each commissioner so appointed and qualified shall enter into bonds [to] of the State of Minnesota, to be approved by the governor, in the sum of twenty thousand (\$20,000) dollars, conditioned for the faithful performance of his duty as a member of such Commission, which bond shall be filed with the secretary of state.

(f) The Commission shall conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the commissioners shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may from time to time make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and service thereof, which shall conform as nearly as may be to those in use in the courts of this State. Any party may appear before said Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record and its proceedings shall be public upon the request of either party interested, or at the discretion of the Commission. Said Commission shall have an official seal which shall be judicially noticed. Any member of the Commission may administer oaths and affirmations. The principal office of the Commission shall be in the City of St. Paul, where its general session shall be held.

(g) Whenever the convenience of the public or of the parties may be promoted, or delay or expenses prevented thereby, the Commission may hold special sessions in any part of the State. It may, by one or more of the commissioners, prosecute any inquiry necessary to its duties in any part of the State, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act.

(h) The attorney-general of the State of Min-

Company for the service rendered; and that the establishing of such rate by the Commission, against the will of the Company, was *pro tanto* a taking of its property without due process of law, in violation of said section 1.

The case came on for hearing upon the alternative writ and the return, and the Company applied for a reference to take testimony on the issue raised by the allegations in the application for the writ and the return thereto, as to whether the rate fixed by the Commission was reasonable, fair and just. The court denied the application for a reference, and rendered judgment in favor of the relator and that a peremptory writ of mandamus issue. An application for a reargument was made and denied. The terms of the peremptory writ were directed to be, that the Company comply with the requirements of the recommendation and order made by the Commission on the 4th of August, 1887, and change its tariff of rates and charges for the transportation of milk from Owatonna and Faribault to St. Paul and Minneapolis, and substitute therefor the tariff recommended, published and posted by the Commission, to wit, the rate of 2½ cents per gallon of milk in ten-gallon cans from Owatonna and Faribault to St. Paul and Minneapolis, being the rates published by the Commission and declared to be equal and reasonable therefor. Costs were also adjudged against the Company. To review this judgment, the Company has brought a writ of error.

The opinion of the supreme court is reported in 38 Minn. 281. In it the court in the first place construed the Statute on the question as to whether the court itself had jurisdiction to

entertain the proceeding, and held that it had. Of course, we cannot review this decision.

It next proceeded to consider the question as to the nature and extent of the powers granted to the Commission by the Statute in the matter of fixing the rates of charges. On that subject it said: "It seems to us that, if language means anything, it is perfectly evident that the expressed intention of the Legislature is that the rates recommended and published by the Commission (assuming that they have proceeded in the manner pointed out by the Act) should be not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the Act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and, hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the Commission. Indeed, the language of the Act is so plain on that point that argument can add nothing to its force."

It then proceeded to examine the question of the validity of the Act under the Constitution of Minnesota, as to whether the Legislature was authorized to confer upon the Commission the powers given to the latter by the Statute. It held that, as the Legislature had the power itself to regulate charges by railroads, it could

nesota shall be *ex officio* attorney for the Commission, and shall give them such counsel and advice as they may from time to time require; and he shall institute and prosecute any and all suits which said Railroad and Warehouse Commission may deem it expedient and proper to institute, and he shall render to such Railroad and Warehouse Commission all counsel, advice and assistance necessary to carry out the provisions of this Act, or of any law of this State, according to the true intent and meaning thereof. It shall likewise be the duty of the county attorney of any county in which suit is instituted or prosecuted, to aid in the prosecution of the same to a final issue upon the request of such Commission. Said Commission are hereby authorized, when the facts in any given case shall in their judgment warrant, to employ any and all additional legal counsel that they may think proper, expedient and necessary to assist the attorney-general or any county attorney in the conduct and prosecution of any suit they may determine to bring under the provisions of this Act, or of any law of this State.

SEC. 10. (a) That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers, subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information, necessary to enable the Commission to perform the duties and carry out the objects for which it was created; in order to enable said commissioners efficiently to perform their duties under this Act, it is hereby made their duty to cause one of their number to visit the various stations on the lines of each railroad as often as practicable, after giving twenty (20) days' notice of such visit and the time and place thereof in the local newspapers, and at least once in twelve (12) months to visit each county in the State in which is or shall be located a railroad station and personally inquire into the management of such railroad business, and for this purpose all railroad companies and common carriers, and their officers and employees, are required to aid and furnish each member of the Railroad and Warehouse Commis-

sion with reasonable and proper facilities, and each or all of the members of said Commission shall have the right, in his or their official capacity, to pass free on any railroad trains on all railroads in this State, and to enter and remain in at all suitable times, any and all cars, offices or depots, or upon the railroads of any railroad company, in this State in the performance of official duties; and whenever, in the judgment of the Commission, it shall appear that any common carrier fails in any respect or particular to comply with the laws of this State, or whenever, in their judgment, any repairs are necessary upon its railroad, or any addition to or change of its stations or station-houses is necessary, or any change in the mode of operating its road or conducting its business is reasonable or expedient in order to promote the security, convenience and accommodation of the public, said Commission shall inform such railroad company, by a notice thereof in writing, to be served as a summons in civil actions is required to be served by the statutes of this State in actions against corporations, certified by the Commission's clerk or secretary, and if such common carrier shall neglect or refuse to comply with such order, then the Commission may, in its discretion, cause suits or proceedings to be instituted to enforce its orders as provided in this Act.

SEC. 11. (a) That in case any common carrier, subject to the provisions of this Act, shall do, cause to be done or permit to be done, any act or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons, party or parties, injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee to be fixed by the court in every case of recovery, which attorney's fees shall be taxed and collected as part of the costs in the case.

(b) That any person or persons, party or parties, claiming to be damaged by the action or non-action of any common carrier, subject to the provisions of this Act, may either make complaint to the Commis-

delegate to a Commission the power of fixing such charges, and could make the judgment or determination of the Commission as to what were reasonable charges final and conclusive.

The Chicago, Milwaukee & St. Paul Railway Company is a corporation organized under the laws of Wisconsin. The line of railroad owned and operated by it in the present case extends from Calmar, in Iowa, to LeRoy, in Minnesota, and from LeRoy, through Owatonna and Faribault, to St. Paul and Minneapolis, the line from Calmar to St. Paul and Minneapolis being known as the "Iowa and Minnesota Division," and being wholly in Minnesota from the point where it crosses the state line between Iowa and Minnesota. It was constructed under a charter granted by the Territory of Minnesota to the Minneapolis & Cedar Valley Railroad Company, by an Act approved March 1, 1856 (Laws of 1856, chap. 166, p. 325), to construct a railroad from the Iowa line, at or near the crossing of said line by the Cedar River, through the valley of Strait River to Minneapolis. Section 9 of that Act provided that the directors of the corporation should have power to make all needful rules, regulations and by-laws touching "the rates of toll and the manner of collecting the same;" and section 13, that the company should have power to unite its railroad with any other railroad which was then, or thereafter might be, constructed in the Territory of Minnesota, or adjoining States or Territories, and should have power to consolidate its stock with any other company or companies.

By an Act passed March 3, 1857, chap. 99

(11 Stat. 195), the Congress of the United States made a grant of land to the Territory of Minnesota to aid in constructing certain railroads. By an Act of the Legislature of the Territory, approved May 22, 1857 (Laws of 1857, extra session, p. 20), a portion of such grant was conferred upon the Minneapolis & Cedar Valley Railroad Company. Subsequently, in 1860, the State of Minnesota, by proper proceedings, became the owner of the rights, franchises and property of that company. By an Act approved March 10, 1862, chap. 17 (Special Laws of 1862, p. 226), the State incorporated the Minneapolis, Faribault & Cedar Valley Railroad Company, and conveyed to it all the franchises and property of the Minneapolis & Cedar Valley Railroad Company which the State had so acquired; and by an Act approved February 1, 1864 (Special Laws of 1864, p. 164), the name of the Minneapolis, Faribault & Cedar Valley Railroad Company was changed to that of the Minnesota Central Railway Company. That Company constructed the road from Minneapolis and St. Paul to LeRoy, in Minnesota; and the road from LeRoy to Calmar, in Iowa, and thence to McGregor, in the latter State, was consolidated with it. In August, 1867, the entire road from McGregor, by way of Calmar, LeRoy, Austin, Owatonna and Faribault, to St. Paul and Minneapolis, was conveyed to the Chicago, Milwaukee & St. Paul Railway Company, which succeeded to all the franchises so granted to the Minneapolis & Cedar Valley Railroad Company.

It is contended for the Railway Company that the State of Minnesota is bound by the

sion, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of this State of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies at the same time.

(c) In any action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee or agent of any corporation or company, defendant in such suit, to attend, appear and testify in such case, and may compel the production of the books and papers of such corporation or company, party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence shall not be used against such person on the trial of any criminal proceeding.

SEC. 12. That any common carrier, subject to the provisions of this Act, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for, or employed by, such corporation, who, alone or with any other corporation, company, person or party, shall willfully do or cause to be done, or shall willfully suffer or permit to be done, any act, matter or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter or thing so directed or required by this Act to be done, not to be so done, or shall aid or abet therein any such omission, or shall be guilty of any willful infraction of this Act, or shall aid or abet therein, shall be deemed guilty of a violation of the provisions of this Act and shall, upon conviction thereof in any district court of the State within the jurisdiction of which such offense was committed, be subject to a penalty of not less than two thousand five hundred (2,500) dollars or more than five thousand (5,000) dollars for the first offense, and not less than five thousand (5,000) dollars or more than ten thousand (10,000) dollars for each subsequent offense.

SEC. 13. (a) That any person, firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts.

(b) Whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only, for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission summarily to investigate the matter complained of, in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of absence of direct damages to the complainant. And for the purposes of this Act the Commission shall have power to require the attendance of witnesses and the production of all books, papers, contracts, agreements and documents relating to any matter under investigation, and, to that end, may invoke the aid of any of the courts of this State, in requiring the attendance of witnesses and the production of books, papers and documents, under the provisions of this Act.

(c) Any of the district courts of this State, within the jurisdiction of which such inquiry is carried on, shall, in case of contumacy or refusal to obey a subpoena issued by the commissioners to any common carrier subject to the provisions of this Act, or, when such common carrier is a corporation, to an officer or agent thereof, or to any person connected therewith, if proceedings are instituted in the name of such Commission as plaintiffs, issue an order requiring such common carrier, officer or agent, or person, to show cause why such contumacy or refusal should not be punished as and for

contract made by the Territory in the charter granted to the Minneapolis & Cedar Valley Railroad Company; that a contract existed that the Company should have the power of regulating its rates of toll; that any legislation by the State infringing upon that right impairs the obligation of the contract; that there was no provision in the charter or in any general statute reserving to the Territory or to the State the right to alter or amend the charter; and that no subsequent legislation of the Territory or of the State could deprive the directors of the Company of the power to fix its rates of toll, subject only to the general provision of law that such rates should be reasonable.

But we are of opinion that the general language of the ninth section of the charter of the Minneapolis & Cedar Valley Railroad Company cannot be held to constitute an irrevocable contract with that company that it should have the right for all future time to prescribe its rates of toll, free from all control by the Legislature of the State.

It was held by this court in *Pennsylvania R. Co. v. Miller*, 183 U. S. 75 [33: 267], in accordance with a long course of decisions both in the state courts and in this court, that a railroad corporation takes its charter, containing a kindred provision with that in question, subject to the general law of the State, and to such changes as may be made in such general law, and subject to future constitutional provisions and future general legislation, in the absence of any prior contract with it exempting it from liability to such future general legislation in re-

spect of the subject matter involved; and that exemption from future general legislation, either by a constitutional provision or by an Act of the Legislature, cannot be admitted to exist unless it is given expressly or unless it follows by an implication equally clear with express words.

There is nothing in the mere grant of power, by section 9 of the charter, to the directors of the company, to make needful rules and regulations touching the rates of toll and the manner of collecting the same, which can be properly interpreted as authorizing us to hold that the State parted with its general authority itself to regulate, at any time in the future when it might see fit to do so, the rates of toll to be collected by the company.

In *Stone v. Farmers L. & T. Co.*, 116 U. S. 807, 825 [29: 686, 642], the whole subject is fully considered, the authorities are cited, and the conclusion is arrived at that the right of a State reasonably to limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction cannot be granted away by its Legislature unless by words of positive grant or words equivalent in law; and that a statute which grants to a railroad company the right "from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation," does not deprive the State of its power, within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated. But, after reaching this conclusion, the court said

contempt; and if upon the hearing the court finds that the inquiry is within the jurisdiction of the Commission, and that such contumacy or refusal is willful and the same is persisted in, such contumacy or refusal shall be punished as though the same had taken place in an action pending in the district court for any judicial district in this State. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such persons on the trial of any criminal proceeding.

SEC. 14. (a) Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found. All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of, and the record thereof shall be public.

(b) If in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by testimony of witnesses or other evidence, that anything has been done or omitted to be done by any common carrier, in violation of the provisions of this Act or of any law cognizable by said Commission, or that any injury or damages has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation and to make reparation for the injury so found to have been done, within a brief but reasonable time, to be specified by the Commission; and if within the time

specified it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

(c) But if said common carrier shall neglect or refuse, within the time specified, to desist from such violation of law, and make reparation for the injury done in compliance with the report and notice of the Commission as aforesaid, it shall be the duty of the Commission to forthwith certify the fact of such neglect or refusal, and forward a copy of its report and such certificate to the attorney-general of the State for redress and punishment as hereinafter provided.

SEC. 15. (a) That it shall be the duty of the attorney-general to whom said Commission may forward its report and certificate, as provided in the next preceding section of this Act, when it shall appear from such report that any injury or damages has been sustained by any party or parties by reason of such violation of law by such common carrier, to forthwith cause suit to be brought in the district court in the judicial district wherein such violation occurred, on behalf and in the name of the person or persons injured, against such common carrier, for the recovery of damages for such injury as may have been sustained by the injured party, and the cost and expenses of such prosecution shall be paid out of the appropriation hereinafter provided for for the uses and purposes of this Act.

(b) And the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice shall be served on such common carrier, his or its officers, agents or servants, in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily, and without the formal pleading and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court

(p. 381 [644]): "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

There being, therefore, no contract or chartered right in the Railroad Company which can prevent the Legislature from regulating in some form the charges of the Company for transportation, the question is whether the form adopted in the present case is valid.

The construction put upon the Statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive and not to be re-examined here as to its propriety or accuracy. The supreme court authoritatively declares that it is the expressed intention of the Legislature of Minnesota, by the Statute, that the rates recommended and published by the Commission, if it proceeds in the manner pointed out by the Act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the Statute, the rates published by the Commission are the only ones that are

lawful, and therefore in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the Statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the Commission. In other words, although the Railroad Company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the Commission, if it chooses to establish rates that are unequal and unreasonable.

This being the construction of the Statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the Railroad Company. It deprives the Company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a Railroad Commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

Under section 8 of the Statute, which the Supreme Court of Minnesota says is the only one which relates to the matter of the fixing by the Commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the Commission is required to do

shall have power if it thinks fit to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition. And on such hearing the report of said Commission shall be *prima facie* evidence of the matters therein stated.

(c) And if it be made to appear to such court, on such hearing, or on report of any such person or persons, that the lawful order or requirement of such Commission, drawn in question, has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction, or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or such disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and, if a corporation, against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred (\$500) dollars for every day after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining, or into court to abide the ultimate decision of the court; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court.

Either party to such proceeding before said court may appeal to the Supreme Court of the State, under the same regulations now provided by law in respect to security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon, unless the court hearing or deciding such case should otherwise direct; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable.

(d) In case the attorney-general shall not, within a period of ten (10) days after the making of any order by the Commission, commence judicial proceedings for the enforcement thereof, any railroad company, or other common carrier affected by such order, may at any time within the period of thirty (30) days after the service [of it] upon him or it of such order, and before commencement of proceedings, appeal therefrom to the district court of any judicial district through or into which his or its route may run, by the service of a written notice of such appeal upon some member or the secretary of such Commission. And upon the taking of such appeal, and the filing of the notice thereof, with the proof of service, in the office of the clerk of such court, there shall be deemed to be pending in such court a civil action of the character and for the purposes mentioned in sections eleven (11) and fifteen (15) of this Act. Upon such appeal, and upon the hearing of any application for the enforcement of any such order made by the Commission or by the attorney-general, the court shall have jurisdiction to examine the whole matter in controversy, including matters of fact as well as questions of law, and to affirm, modify or rescind such order in whole or in part, as justice may require; and in case of any order being modified, as aforesaid, such modified order shall, for all the purposes contemplated by this Act, stand in place of the original order so modified.

No appeal as aforesaid shall stay or supersede the order appealed from in so far as such order shall relate to rates of transportation or to modes of transacting the business of the appellant with the public, unless the court hearing or deciding such case shall so direct.

is, on the filing with it by the railroad company of copies of its schedules of charges, to "find" that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the Commission "shall declare to be equal and reasonable," and, to that end, it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the Commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the Commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the Commission, the Company appeared before it by its agent, and the Commission investigated the rates charged by the Company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at.

By the second section of the Statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the Commission was not equal or reasonable, and the supreme court held that the Statute deprived the Company of the right to show that judicially. The question of the reasonableness

of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.

It is provided by section 4 of article 10 of the Constitution of Minnesota of 1857, that "lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use," and that "all corporations, being common carriers, enjoying the right of way in pursuance to the provisions of this section, shall be bound to carry the mineral, agricultural and other productions and manufactures on equal and reasonable terms." It is thus perceived that the provision of section 2 of the Statute in question is one enacted in conformity with the Constitution of Minnesota.

The issuing of the peremptory writ of mandamus in this case was therefore unlawful, because in violation of the Constitution of the United States; and it is necessary that the relief administered in favor of the plaintiff in

SEC. 16. (a) That whenever facts, in any manner ascertained by said Commission, shall, in its judgment, warrant a prosecution, it shall be the duty of said Commission to immediately cause suit to be instituted and prosecuted against any common carrier who may violate any of the provisions of this Act, or of any law of this State. All such prosecutions shall be in the name of the State of Minnesota, except as is otherwise provided in this Act, or in any law of this State, and may be instituted in any county in the State through or into which the line of any common carrier so sued may extend, and all penalties recovered under the provisions of this Act, or of any law of this State, in any suit instituted in the name of the State, shall be immediately paid into the state treasury by the sheriff or other officer or person collecting the same; and the same shall be by the state treasurer placed to the credit of the general revenue fund.

(b) For the purposes of this Act, except its penal provisions, the district courts of this State shall be deemed to be always in session.

SEC. 17. (a) That the Commission is hereby directed to require annual reports from all common carriers subject to the provisions of this Act, to fix the time and prescribe the manner in which said reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same, the dividends paid, the surplus fund, if any, and the number of stockholders, the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises and equipment, the number of employes and the salary paid each class, the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts of each branch of business, and from all sources, the operating and other expenses; the balance of profit and loss; and complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet; also the total number of acres of land received as grants either from the United States or from the State of Minnesota, the number

[of] acres of said grants sold, and average price received per acre, the number acres of grants unsold and the appraised value per acre. Such detailed reports shall also contain such information in relation to rates or regulations concerning fares or freights and agreements, arrangements or contracts with express companies, telegraph companies, sleeping and dining car companies, fast-freight lines, and other common carriers, as the Commission may require, with copies of such contracts, agreements or arrangements.

(b) And the Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers, subject to the provisions of this Act, shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

SEC. 18. (a) That such commissioners shall, on or before the first (1st) day of December in each year, and oftener if required by the governor to do so, make a report to the governor of their doings for the preceding year, containing such facts, statements and explanations as will disclose the actual workings of the system of railroad transportation in its bearings upon the business and prosperity of the people of this State, and such suggestions in relation thereto as to them may seem appropriate.

(b) They shall also, at such times as the governor shall direct, examine any particular subject connected with the conditions and management of such railroads, and report to him in writing their opinion thereon, with their reasons therefor. Said commissioners shall also investigate and consider what, if any, amendment or revision of the Railroad Laws of this State the best interests of the State demand, and they shall make a special biennial report on said subject to the governor. All such reports made to the governor shall be by him transmitted to the Legislature at the earliest practicable time.

(c) Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of

error should be a reversal of the judgment of the supreme court awarding that writ, and an instruction for further proceedings by it not inconsistent with the opinion of this court.

In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a mandamus, if the court should adhere to its opinion that, under the Statute, it cannot investigate judicially the reasonableness of the rates fixed by the Commission. Still, the question will be open for review; and the judgment of this court is, that the judgment of the Supreme Court of Minnesota, entered May 4, 1888, awarding a peremptory writ of mandamus in this case, be reversed, and the case be remanded to that court, with an instruction for further proceedings not inconsistent with the opinion of this court.

Mr. Justice Miller, concurring.*

I concur with some hesitation in the judgment of the court, but wish to make a few suggestions of the principles which I think should govern this class of questions in the courts. Not desiring to make a dissent, nor a prolonged argument in favor of any views I may have, I will state them in the form of propositions:

1. In regard to the business of common carriers limited to points within a single State, that State has the legislative power to establish the rates of compensation for such carriage.

2. The power which the Legislature has to do this can be exercised through a commission which it may authorize to act in the matter, such as the one appointed by the Legislature of Minnesota by the Act now under consideration.

3. Neither the Legislature, nor such commission acting under the authority of the Leg-

*This and the dissenting opinion by Mr. Justice Bradley, which follows, are also entitled in the case of *The Minneapolis E. R. Co. v. State of Minnesota*, post, p. 985.

this Act are in addition to such remedies. *Provided*, That no pending litigation shall in any way be affected by this Act.

SEC. 19. Each commissioner shall receive an annual salary of three thousand (\$3,000) dollars, payable in the same manner as the salaries of other state officers. The commissioners shall appoint a secretary, who shall receive an annual salary of eighteen hundred (\$1,800) dollars, payable in like manner. Said secretary shall, before entering upon the duties of his office, make and file with the secretary of state an affidavit in the following form: "I do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States and the Constitution of the State of Minnesota, and that I will faithfully discharge my duties as secretary of the Railroad and Warehouse Commission of the State of Minnesota, according to the best of my ability; and I further declare that I am not in the employ of, or holding any official relation to, any common carrier or grain warehouseman, within said State; nor am I, in any manner, interested in any stock, bonds or other property of such common carrier or grain warehouseman." The said secretary so appointed and qualified shall enter into bonds to the State of Minnesota, to be approved by the governor, in the sum of ten thousand (\$10,000) dollars, conditioned for the faithful performance of his duty as secretary of such Commission, which bond shall be filed with the secretary of state. The Commission shall have authority to employ and fix the compensation for such other employees as it may find necessary to the proper performance of its duties, subject to the approval of the governor of the State.

The commissioners shall be furnished with a suit-

able office and all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the district courts of the State.

4. In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the Legislature or by the commission is such as to deprive a party of his property without due process of law.

5. But until the judiciary has been appealed to to declare the regulations made, whether by the Legislature or by the commission, voidable for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals.

6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method.

8. But in the present case, where an application is made to the Supreme Court of the

able office and all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the district courts of the State.

All the expenses of the Commission, including all necessary expenses for transportation incurred by the commissioners or by their employes under their order, in making any investigation in any other place than the City of St. Paul, shall be allowed and paid out of the state treasury on the presentation of itemized vouchers therefor, approved by the chairman of the Commission and the state auditor.

SEC. 20. That the sum of fifteen thousand (\$15,000) dollars is hereby appropriated for the use and purposes of this Act for the fiscal year ending July thirty-first (31st), eighteen hundred and eighty-eight (1888), and the sum of fifteen thousand (\$15,000) dollars is hereby appropriated for the use and purposes of this Act for the fiscal year ending July thirty-first (31st), eighteen hundred and eighty-nine (1889).

SEC. 21. That all Acts and parts of Acts inconsistent herewith are hereby repealed; *Provided*, That the provisions of this Act shall apply to and govern the existing Railroad and Warehouse Commissioners appointed by virtue of an Act approved March fifth (5th), eighteen hundred and eighty-five (1885), who are hereby clothed with the powers and charged with the duties and responsibilities of this Act, granted to and imposed upon the Railroad and Warehouse Commissioners of the State of Minnesota.

SEC. 22. This Act shall take effect and be in force from and after its passage.
Approved March 7th, 1887.

State to compel the common carriers, namely, the railroad companies, to perform the services which their duty requires them to do for the general public, which is equivalent to establishing by judicial proceeding the reasonableness of the charges fixed by the Commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the Commission before granting such relief, that it would have if called upon so to do by a bill in chancery.

9. I do not agree that it was necessary to the validity of the action of the Commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary, which I think it is not, for the Legislature to have given such notice if it had established such rates by legislative enactment.

10. But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested in the fare to be considered should have notice and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions. For the refusal of the Supreme Court of Minnesota to receive evidence on this subject, I think the case ought to be reversed on the ground that this is a denial of due process of law in a proceeding which takes the property of the Company, and if this be a just construction of the Statute of Minnesota it is for that reason void.

Mr. Justice Bradley, dissenting:

I cannot agree to the decision of the court in this case [these cases]. It practically overrules *Munn v. Illinois*, 94 U. S. 113 [24: 77], and the several railroad cases that were decided at the same time. The governing principle of those cases was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative prerogative and not a judicial one. This is a principle which I regard as of great importance. When a railroad company is chartered, it is for the purpose of performing a duty which belongs to the State itself. It is chartered as an agent of the State for furnishing public accommodation. The State might build its railroads if it saw fit. It is its duty and its prerogative to provide means of intercommunication between one part of its territory and another. And this duty is devolved upon the legislative department. If the Legislature commissions private parties, whether corporations or individuals, to perform this duty, it is its prerogative to fix the fares and freights which they may charge for their services. When merely a road or a canal is to be constructed, it is for the Legislature to fix the tolls to be paid by those who use it; when a company is chartered not only to build a road, but to carry on public transportation upon it, it is for the Legislature to fix the charges for such transportation.

But it is said that all charges should be reasonable, and that none but reasonable charges can be exacted; and it is urged that what is a reasonable charge is a judicial question. On

the contrary, it is pre-eminently a legislative one, involving considerations of policy as well as of remuneration; and is usually determined by the Legislature, by fixing a maximum of charges in the charter of the company, or afterwards, if its hands are not tied by contract. If this maximum is not exceeded, the courts cannot interfere. When the rates are not thus determined, they are left to the discretion of the company, subject to the express or implied condition that they shall be reasonable; express, when so declared by statute; implied by the common law, when the statute is silent; and the common law has effect by virtue of the legislative will.

Thus, the Legislature either fixes the charges at rates which it deems reasonable, or merely declares that they shall be reasonable; and it is only in the latter case, where what is reasonable is left open, that the courts have jurisdiction of the subject. I repeat: When the Legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common-law rule to that effect to prevail, and leaves the matter there, then resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not till then, is it a judicial question. But the Legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable.

This is just where I differ from the majority of the court. They say in effect, if not in terms, that the final tribunal of arbitration is the judiciary; I say it is the Legislature. I hold that it is a legislative question, not a judicial one, unless the Legislature or the law (which is the same thing) has made it judicial, by prescribing the rule that the charges shall be reasonable, and leaving it there.

It is always a delicate thing for the courts to make an issue with the legislative department of the government, and they should never do so if it is possible to avoid it. By the decision now made we declare, in effect, that the judiciary, and not the Legislature, is the final arbiter in the regulation of fares and freights of railroads and the charges of other public accommodations. It is an assumption of authority on the part of the judiciary which, it seems to me, with all due deference to the judgment of my brethren, it has no right to make. The assertion of jurisdiction by this court makes it the duty of every court of general jurisdiction, state or federal, to entertain complaints against the decisions of the boards of commissioners appointed by the States to regulate their railroads; for all courts are bound by the Constitution of the United States, the same as we are. Our jurisdiction is merely appellate.

The incongruity of this position will appear more distinctly by a reference to the nature of the cases under consideration. The question presented before the Commission in each case was one relating simply to the reasonableness of the rates charged by the Companies,—a question of more or less. In the one case the Company charged 8 cents per gallon for carrying milk between certain points. The Commission deemed this to be unreasonable, and reduced the charge to 2½ cents. In the other case the Company charged \$1.25 per car for handling and switching empty cars over its

lines within the City of Minneapolis, and \$1.50 for loaded cars; and the Commission decided that \$1 per car was a sufficient charge in all cases. The Companies complain that the charges as fixed by the Commission are unreasonably low, and that they are deprived of their property without due process of law; that they are entitled to a trial by a court and jury, and are not barred by the decisions of a legislative Commission. The state court held that the Legislature had the right to establish such a Commission, and that its determinations are binding and final, and that the courts cannot review them. This court now reverses that decision, and holds the contrary. In my judgment the state court was right, and the establishment of the Commission, and its proceedings, were no violation of the constitutional prohibition against depriving persons of their property without due process of law.

I think it is perfectly clear, and well settled by the decisions of this court, that the Legislature might have fixed the rates in question. If it had done so, it would have done it through the aid of committees appointed to investigate the subject, to acquire information, to cite parties, to get all the facts before them, and finally to decide and report. No one could have said that this was not due process of law. And if the Legislature itself could do this, acting by its committees, and proceeding according to the usual forms adopted by such bodies, I can see no good reason why it might not delegate the duty to a board of commissioners, charged as the Board in this case was, to regulate and fix the charges, so as to be equal and reasonable. Such a board would have at its command all the means of getting at the truth and ascertaining the reasonableness of fares and freights, which a legislative committee has. It might, or it might not, swear witnesses and examine parties. Its duties being of an administrative character, it would have the widest scope for examination and inquiry. All means of knowledge and information would be at its command,—just as they would be at the command of the Legislature which created it. Such a body, though not a court, is a proper tribunal for the duties imposed upon it.

In the case of *Davidson v. City of New Orleans*, 96 U. S. 97 [24: 616], we decided that the appointment of a board of assessors for assessing damages was not only due process of law, but the proper method for making assessments to distribute the burden of a public work amongst those who are benefited by it. No one questions the constitutionality or propriety of boards for assessing property for taxation, or for the improvement of streets, sewers and the like, or of commissions to establish county seats, and for doing many other things appertaining to the administrative management of public affairs. Due process of law does not always require a court. It merely requires such tribunals and proceedings as are proper to the subject in hand. In the *Railroad Commission Cases*, 116 U. S. 307 [29: 636], we held that a board of commissioners is a proper tribunal for determining the proper rates of fare and freight on the railroads of a State. It seems to me, therefore, that the Law of Minnesota did not prescribe anything that was not in accordance

with due process of law in creating such a board, and investing it with the powers in question.

It is complained that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect—courts as well as commissions and Legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive unless an appeal is given therefrom. The important question always is, What is the lawful tribunal for the particular case? In my judgment, in the present case, the proper tribunal was the Legislature, or the Board of Commissioners which it created for the purpose.

If not in terms, yet in effect, the present cases are treated as if the constitutional prohibition was, that no State shall take private property for public use without just compensation,—and as if it was our duty to judge of the compensation. But there is no such clause in the Constitution of the United States. The Vth Amendment is prohibitory upon the federal government only, and not upon the state governments. In this matter,—just compensation for property taken for public use,—the States make their own regulations, by Constitution or otherwise. They are only required by the Federal Constitution to provide “due process of law.” It was alleged in *Davidson v. New Orleans* that the property assessed was not benefited by the improvement; but we held that that was a matter with which we would not interfere; the question was, whether there was due process of law. (96 U. S. 106 [24: 620].) If a state court renders an unjust judgment, we cannot remedy it.

I do not mean to say that the Legislature, or its constituted Board of Commissioners, or other legislative agency, may not so act as to deprive parties of their property without due process of law. The Constitution contemplates the possibility of such an invasion of rights. But, acting within their jurisdiction (as in these cases they have done), the invasion should be clear and unmistakable to bring the case within that category. Nothing of the kind exists in the cases before us. The Legislature, in establishing the Commission, did not exceed its power; and the Commission, in acting upon the cases, did not exceed its jurisdiction, and was not chargeable with fraudulent behavior. There was merely a difference of judgment as to amount, between the Commission and the Companies, without any indication of intent on the part of the former to do injustice. The board may have erred; but if they did, as the matter was within their rightful jurisdiction, their decision was final and conclusive unless their proceedings could be impeached for fraud. Deprivation of property by mere arbitrary power on the part of the Legislature, or fraud on the part of the Commission, are the only grounds on which judicial relief may be sought against their action. There was, in truth, no deprivation of property in these cases at all. There was merely a regulation as to the enjoyment of property, made by a strictly competent authority, in a matter entirely within its jurisdiction.

It may be that our Legislatures are vested with too much power, open, as they are, to influences so dangerous to the interests of individuals, corporations and society. But such is the constitution of our republican form of government; and we are bound to abide by it until it can be corrected in a legitimate way. If our Legislatures become too arbitrary in the exercise of their powers, the people always have a remedy in their hands; they may at any time restrain them by constitutional limitations. But so long as they remain invested with the powers that ordinarily belong to the legislative branch of government, they are entitled to exercise those powers, amongst which, in my judgment, is that of the regulation of railroads and other public means of intercommunication, and the burdens and charges which those who own them are authorized to impose upon the public.

I am authorized to say that *Mr. Justice Gray* and *Mr. Justice Lamar* agree with me in this dissenting opinion.

THE MINNEAPOLIS EASTERN RAILWAY COMPANY, *Pf. in Err.*,

THE STATE OF MINNESOTA.

(See S. C. Reporter's ed. 467-482.)

Prior decision followed—contract with corporation as to its rate of charges.

1. The rulings and decision in *Chicago, Milwaukee & St. Paul R. Co. v. State of Minnesota*, ante, p. 970, just decided, apply to the present case.
2. Laws of Minnesota of 1869, chap. 78, p. 95, and sec. 8 of chap. 108 of the General Laws of Minnesota of 1875, do not constitute such a contract with the corporation, as to the fixing by it of its rate of charges, as to deprive the Legislature of its power to regulate those charges.

[No. 1118.]

Argued Jan. 13, 14, 1890. Decided March 24, 1890.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment awarding a peremptory writ of mandamus against the Minneapolis Eastern Railway Company, commanding it to comply with the requirements of the recommendation and order made by the Railroad and Warehouse Commission of the State of Minnesota to change its tariff of rates and charges. *Reversed.*

The facts are stated in the opinion.

This case was argued together with the preceding case of *Chicago, Milwaukee & St. Paul R. Co. v. State of Minnesota*, ante, p. 970.

Mr. James H. Howe, for plaintiff in error:

A State can make a contract with one of its own corporations, which it cannot subsequently impair.

Chicago, B. & Q. R. Co. v. Cutts, 94 U. S. 155 (24: 94).

The order in question impairs the obligation of the contract.

Curran v. Arkansas, 56 U. S. 15 How. 304 (14: 705); *U. S. v. Quincy*, 71 U. S. 4 Wall. 535 134 U. S.

(18: 408); *Edwards v. Kearzey*, 96 U. S. 595 (24: 798); *Olcott v. Bond Du Lac County*, 83 U. S. 16 Wall. 678 (31: 382); *Chicago, St. P. M. & O. R. Co. v. Becker*, 35 Fed. Rep. 883; *Pensacola & A. R. Co. v. State (Fla.)* 3 L. R. A. 661, 2 Inters. Com. Rep. 522; *Atty-Gen. v. Wisconsin R. Co.* 36 Wis. 466; *State v. Minnesota C. R. Co.* 36 Minn. 246; *Redf. Railways*, 605; *Roper, Railways*, 88, and cases cited; *Rea v. Severn & W. R. Co.* 2 Barn. & Ald. 646.

The right to regulate does not include the right to destroy.

Stone v. Farmers L. & T. Co. 116 U. S. 831 (29: 644); *Douglass v. Pike County*, 101 U. S. 686 (25: 971).

Mr. W. H. Norris, also for plaintiff in error:

A special corporate charter is a contract, which, in the absence of reserve power, may not be impaired.

New Orleans Gas Co. v. Louisiana Light Co. 115 U. S. 650, 658 (29: 516, 517); *Bergman v. St. Paul Mut. Bldg. Asso.* 29 Minn. 275, 278; *Grangers L. & H. Ins. Co. v. Kamper*, 73 Ala. 325, 342; *Bray v. Farwell*, 81 N. Y. 600, 606; *People v. O'Brien*, 2 L. R. A. 255, 111 N. Y. 1, 53.

Innumerable adjudications have decided what, in each particular case, did or did not constitute an impairment of such obligation.

Von Hoffman v. Quincy, 71 U. S. 4 Wall. 535 (18: 408); *Edwards v. Kearzey*, 96 U. S. 595 (24: 798); *Murray v. Charleston*, 96 U. S. 432 (24: 760); *Wolf v. New Orleans*, 103 U. S. 858, 865, 867 (26: 895, 898, 899); *Nelson v. St. Martin's Parish*, 111 U. S. 716 (28: 574); *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 122, 197 (4: 529, 549); *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213 (6: 606); *Planters Bank v. Sharp*, 47 U. S. 6 How. 801, 827 (12: 447, 455); *Curran v. Arkansas*, 56 U. S. 15 How. 304 (14: 705); *Pennsylvania R. Co. v. Miller*, 132 U. S. 75 (33: 267).

The order in question, the law authorizing it, the judgment of the court sustaining it, violate the Fourteenth Amendment of the Federal Constitution.

Yick Wo v. Hopkins, 118 U. S. 356, 369 (30: 220, 226); *Shreveport v. Cole*, 129 U. S. 42 (32: 591); *Santa Clara County v. Southern Pac. R. Co.* 118 U. S. 894, 896 (30: 118); *Minneapolis R. Co. v. Beckwith*, 129 U. S. 26, 28 (32: 585).

The Constitution is intended to protect all of the essential elements of ownership which make property valuable.

Mills, Eminent Domain, §§ 80, 81; *Pumpelly v. Green Bay*, 80 U. S. 166 (20: 557); *Eaton v. B. C. & M. R. Co.* 51 N. H. 511; *Chicago & N. W. R. Co. v. Dey*, 35 Fed. Rep. 866; *Chicago, B. & Q. R. Co. v. Dey*, 38 Fed. Rep. 656, 662; *Pensacola & A. R. Co. v. State (Fla.)* 3 L. R. A. 661, 2 Inters. Com. Rep. 522.

Due process of law is the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights.

U. S. v. Cruikshank, 92 U. S. 542 (28: 588); *Columbia Bank v. Okley*, 17 U. S. 4 Wheat. 244 (4: 561); *Pennoyer v. Neff*, 95 U. S. 714 (24: 565); *Davidson v. New Orleans*, 96 U. S. 97 (24: 616); *Foster v. Kansas*, 112 U. S. 205 (28: 629); *Baker v. Kelley*, 11 Minn. 480; *Wynehamer v. People*, 18 N. Y. 392-394; *State v. Becht*, 28 Minn. 411; *State v. Chicago, M. & St. P. R. Co.* 38 Minn.

281; *Dent v. West Virginia*, 129 U. S. 114 (32: 628); *Kennard v. Louisiana*, 92 U. S. 480 (28: 478).

Property cannot be captured by Act of Legislature.

Baker v. Kelley, 11 Minn. 480; *Scott v. Toledo*, 36 Fed. Rep. 885; *Arrowsmith v. Harmoning*, 118 U. S. 194 (30: 248); *Railway Transfer Co. v. Railroad & W. Commission*, 39 Minn. 281; *Pennsylvania R. Co. v. Riblet*, 66 Pa. 164, 169; *Detroit v. Plank Road Co.* 43 Mich. 140; *Atlantic & P. Teleg. Co. v. Chicago, R. I. & P. R. Co.* 6 Biss. 158.

It is not the form a statute is made to assume, but its operation and effect, which is to determine its constitutionality.

Soon Hing v. Crowley, 118 U. S. 708 (28: 1145); *Stone v. Farmers L. & T. Co.* 116 U. S. 807 (29: 686); *Barron v. Burnside*, 121 U. S. 186 (29: 915); *State v. Pugh*, 1 West. Rep. 86, 43 Ohio St. 98.

There is no police power to reduce rates already in themselves reasonable.

Mugler v. Kansas, 123 U. S. 628, 667 (31: 205, 212); *Walling v. Michigan*, 116 U. S. 446 (29: 691); *New Orleans Gas Light Co. v. Louisiana L. & H. Co.* 115 U. S. 650 (29: 516); *Dent v. West Virginia*, 129 U. S. 114 (32: 628); *Cooley*, Const. Lim. (5th ed.) 577; *People v. O'Brien*, 2 L. R. A. 255, 111 N. Y. 1; *Sinking Fund Cases*, 99 U. S. 720, 721 (25: 496, 502); *Greenwood v. Freight Co.* 105 U. S. 13 (26: 961); *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174 (32: 877).

A State may legislate upon rates, but it must do so within constitutional restrictions; such laws must be enforced constitutionally; their mere enactment is not a finality.

Blake v. Winona & St. P. R. Co. 19 Minn. 418, 94 U. S. 180 (24: 99); *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179 (24: 99); *Heiserman v. Burlington, C. R. & N. R. Co.* 63 Iowa, 738; *Hockett v. State*, 2 West. Rep. 764, 105 Ind. 250.

In *Munn v. Illinois*, 94 U. S. 113 (24: 77), and *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155 (24: 94), no specific rate was involved.

In *Stone v. Farmers L. & T. Co.*, 116 U. S. 807 (29: 636); *Atty-Gen. v. Railroad Companies*, 35 Wis. 426, 538; *Tilley v. Savannah F. & W. R. Co.*, 5 Fed. Rep. 641, and *Georgia R. & Bkg. Co. v. Smith*, 9 Am. & Eng. R. R. Cas. 885, there was no specific rate and the action was held premature.

In *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164 (24: 97); *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179 (24: 99); *Ruggles v. Illinois*, 108 U. S. 526 (27: 812), and *Tilley v. Savannah, F. & W. R. Co.*, 5 Fed. Rep. 641, the opinions turned upon constitutional or statutory reservation of power and the implied consent of the corporation.

In *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179 (24: 99); *Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607; *Nebraska v. Fremont, E. & M. V. R. Co.*, 22 Neb. 318, and *Georgia R. Co. v. Smith*, 9 Am. & Eng. R. R. Cas. 885, the question of reasonableness was not involved, and the question of abuse of power was reserved.

Railroad Co. v. Portland, 63 Me. 269, was not a rate case, and investigation was refused only because already had.

In *Spring Valley v. Schottler*, 110 U. S. 347 (28: 178), the question of abuse was saved.

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Considered as a debatable question of fact, how shall reasonableness be determined?

Chicago, St. P. M. & O. R. Co. v. Becker, 35 Fed. Rep. 883.

State cannot require a railway corporation to carry persons or property without reward.

Chicago & N. W. R. Co. v. Dey, 35 Fed. Rep. 886; *Railroad Commission Cases*, 116 U. S. 831 (29: 644); *Dow v. Beidelman*, 125 U. S. 680 (31: 841); *Rice v. Western N. Y. & P. R. Co.* 2 Inters. Com. Rep. 298, 301.

In *Yick Wo v. Hopkins*, 118 U. S. 356 (30: 220), this court very distinctly condemns unjust modes of applying and enforcing a law not in itself void.

For points and authorities of *Messrs. John W. Cary and W. C. Goudy*, see the case of *Chicago, M. & St. P. R. Co. v. State of Minnesota*, ante, p. 970.

Messrs. Moses E. Clapp and H. W. Childs, for defendant in error:

The State has power to regulate the rates of charge.

Blake v. Winona R. Co. 19 Minn. 418, 94 U. S. 180 (24: 99); *State v. Smith*, 35 Minn. 257; *Munn v. Illinois*, 94 U. S. 113 (24: 77); *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164 (24: 97); *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179 (24: 99); *Ruggles v. Illinois*, 108 U. S. 526 (27: 812); *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 420, 547 (9: 773, 988); *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155 (24: 94); *Railroad Commission Cases*, 116 U. S. 807 (29: 636); *Dow v. Beidelman*, 125 U. S. 680 (31: 841).

That the operation of the Act would not amount to a taking of private property without compensation, see—

Railroad Commission Cases, 116 U. S. 807 (29: 636); *Munn v. Illinois*, 94 U. S. 113, 134, 135 (24: 77, 87); *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 529 (24: 734, 737); *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 354 (28: 173, 176); *Georgia Bkg. Co. v. Smith*, 128 U. S. 174, 179 (32: 377, 378); *Stone v. Farmers L. & T. Co.* 116 U. S. 807, 325, 331 (29: 636, 642, 644); *Dow v. Beidelman*, 125 U. S. 680 (31: 841).

When the Legislature fixes a rate, the rate so fixed is by force of the legislative declaration a reasonable rate, because a lawful rate, and the question of its reasonableness ceases to be the subject of judicial inquiry.

Chicago R. Co. v. Iowa, 94 U. S. 155 (24: 94); *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164 (24: 97); *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179 (24: 99).

Mr. Justice Blatchford delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Minnesota, to review its judgment awarding a peremptory writ of mandamus against the Minneapolis Eastern Railway Company, commanding it to comply with the requirements of the recommendation and order made by the Railroad and Warehouse Commission of the State of Minnesota, on the 2d of August, 1887, and to change its tariff of rates and charges for handling and switching any car over the lines of its railway in the City of Minneapolis, regardless of the distance or the character of the freight in such car, and to

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substitute therefor the tariff recommended, published and posted by said Commission, to wit, the rate of \$1 for handling and switching any car over its line of railway in said city, regardless of the distance or the character of the freight in such car, being the rate published by the Commission and declared to be equal and reasonable. The case arose under the same Statute considered in the case of *Chicago, Milwaukee & St. Paul Railway Co. v. State of Minnesota* [ante, p. 970], just decided.

The Minneapolis Eastern Railway Company was and is a railroad corporation duly created and organized under the General Railroad Law of the State of Minnesota, operating one or more lines of railway in the City of Minneapolis in that State, and a common carrier engaged in transporting freight and property by rail within the limits of that city, and more particularly engaged in the business of handling and switching cars over its line or lines of railroad within said limits, and, as such common carrier, enjoying the right to conduct its business within the State of Minnesota, subject to the provision of section 4 of article 10 of the Constitution of that State, and bound to carry minerals, agricultural and other productions, and manufactures, on equal and reasonable terms. Prior to the 7th of July, 1887, the Company had and maintained in force a schedule of its tariff of rates within the City of Minneapolis, as follows: For handling and switching empty cars over its lines of railway within the limits of the city, \$1.25 per car; for handling and switching loaded cars over its lines of railway within the limits of the city, \$1.50 per car; and prior thereto said schedule of rates had been published by the Company.

On the 7th of July, 1887, the Railroad Commission constituted by said Act made an order which was served upon the Company, and on the 2d of August, 1887, made a further order, a notice of which was served on the Company, in the following terms:

"Whereas, at a regular meeting of the Railroad and Warehouse Commission of the State of Minnesota, held at the office of said Commission, in the City of St. Paul, in said State, on the 7th day of July last, and pursuant to sec. 8 of an Act entitled 'An Act to Regulate Common Carriers, and Creating the Railroad and Warehouse Commission of the State of Minnesota, and Defining the Duties of Such Commission in Relation to Common Carriers,' approved March 7, 1887, a notice or order was then and there made and issued by said Commission and duly served upon you, of which the following is a copy, namely:

"Whereas, all railroad companies owning or operating terminal or switching facilities at or within the City of Minneapolis, in said State, with the exception of the Chicago, Milwaukee and St. Paul Railway Company, pursuant to subdivision (d) of section 8 of an Act entitled 'An Act to Regulate Common Carriers, and Creating the Railroad and Warehouse Commission of the State of Minnesota, and Defining the Duties of Such Commission in Relation to Common Carriers,' approved March 7, 1887, have filed with this Commission copies of their several schedules of rates and charges for switching cars on their respective tracks at and

within said city; and whereas it appears from said schedule that the rates and charges made by said companies vary from twenty-five cents per car for empty cars to two dollars per car for loaded cars; and whereas said Commission, after due and careful inquiry and consideration, do find that each and every charge in excess of one dollar per car for switching within the limits of said City of Minneapolis is unreasonable and an excessive compensation for the service performed: Now, therefore, it is ordered and determined by this Commission, pursuant to the authority in them vested by the aforesaid legislative Act, that all such schedules be changed by striking therefrom all charges or rates in excess of one dollar per car for the switching or transfer thereof and insert in room of the words or figures stricken out the words "one dollar" or the appropriate sign and figure therefor. It is the object and purpose of this order to establish one dollar as the maximum charge for the switching or transfer of any car at or within the limits of said city without regard to distance or the kind of goods or merchandise with which the car so switched or transferred may be loaded;

"And whereas, by the subsequent action of said Commission, of which said action you were duly notified by order of the Commission, the said order or notice should not take effect or be considered to be of binding force upon you until the fifteenth day of said month;

"And whereas you have neglected and refused for more than ten days after and since the fifteenth day of July last to substitute such tariff of rates or charges or to adopt the same as recommended and directed by said Commission, as in and by said notice and order you were recommended and required to do, and do still so neglect and refuse:

"Now, therefore, we, the said Commission, do hereby publish and declare the said tariff of rates, namely, one dollar per car for the switching or transfer of any loaded car by you within the limits of the said City of Minneapolis, as and to be the legal, equal and reasonable charge for such switching or transfer of cars by you, and that the same is now in force and effect in place of the charges and rate of compensation by you heretofore charged for such service.

"You, the said Railway Company, your agents and employes, will act accordingly or answer for a violation of the section and Act to which reference is above made."

On the 10th of January, 1889, the Commission, by the attorney-general of the State, made application in writing to the Supreme Court of the State to compel the Company to comply with the recommendations made to it by the Commission to change its tariff of rates for handling or switching cars within the City of Minneapolis, and to substitute therefor the tariff recommended by the Commission, and to adopt the rates declared by the Commission to be equal and reasonable for such services. The application set forth the schedule or tariff of rates so maintained by the Company prior to the 7th of July, 1887, for switching empty and loaded cars over its lines of railway within the limits of the City of Minneapolis, the finding of the Commission, on the 7th of July,

1887, that such schedule of rates was unequal and unreasonable, and its order establishing \$1 as the maximum charge for switching or transferring any car within the limits of the city, without regard to distance or the kind of goods with which it might be loaded; that the Company had been duly notified of such action of the Commission, and had neglected, for more than ten days after the 15th of July, 1887, to substitute or adopt the tariff of charges recommended and directed by the Commission; that the Commission had duly posted and published the tariff declared by it to be equal and reasonable; and that the Company still refused to carry out the recommendation of the Commission so made, published and posted, and continued to charge the rates so specified as its schedule tariff.

An alternative writ of mandamus was applied for and issued, commanding the Company to adopt the rate of charges so declared by the Commission to be equal and reasonable for handling and switching cars within the City of Minneapolis, or to show cause why it had not done so, on the 15th of January, 1889.

By its return, filed January 21, 1889, the Company made answer to the alternative writ as follows:

"That this respondent was organized as a railway company under and by virtue of the General Laws of the State of Minnesota, on or about the 17th day of June, A. D. 1878.

"That on or about the 27th day of January, A. D. 1879, its articles of association were amended so as to declare and make the general nature of its business to be the building and operating of a railway from the City of Minneapolis, in the County of Hennepin, and State of Minnesota, to the City of St. Paul, in the County of Ramsey, in said State, with branches connecting with any and all railroads then built or thereafter to be built or secured or constructed to or into the said cities or either of them; also branches to mills and manufactories in said cities or in either of them; the said railway and branches to be constructed and operated with one or more tracks and with necessary side tracks, turn-outs and connections, and all necessary roadways, right of way, depot grounds, yards, machine shops, warehouses, elevators, station-houses, structures and buildings, rolling stock and all other real estate and personal property necessary or convenient for the operation and management of said railway.

"That the total length of its tracks heretofore constructed is about three and one-half (3½) miles, and that said tracks are and at all times have been wholly within the City of Minneapolis.

"That the total cost to this respondent of its said system of railway and of the equipment thereof is the sum of two hundred and fifty-three thousand one hundred and forty-eight dollars and eleven cents (\$253,148.11), embracing the following items:

"For right of way and damage to buildings, one hundred thousand one hundred and two dollars and ninety-nine cents	\$100,102 99
"For grading and surfacing, nine thousand two hundred and thirty-seven dollars and sixty-four cents	9,237 64
"For bridges, docking and trestle, sixty-four thousand seven hundred and six dollars and ninety-four cents	64,706 94

"For ties, iron and steel, track-laying, crossings, switches and side tracks, twenty-nine thousand twenty dollars and sixty-seven cents	29,020 67
"For buildings, two thousand two hundred and fifty-two dollars and seventy cents	2,252 70
"For incorporation and legal expenses and engraving, six thousand one hundred and fifteen dollars and sixteen cents	6,115 16
"For office furniture and track scales, four hundred and forty-seven dollars and fifty-five cents	447 56
"For one (1) locomotive engine and one (1) hand car, six thousand one hundred and fifty-four dollars and seventy-seven cents	6,154 77
"And for divers other items, thirty-five thousand one hundred and nine dollars and sixty-nine cents	35,109 69

"That, since the acquisition of this respondent's said right of way, the value of real estate in the City of Minneapolis, as well adjacent to said railway as in said city at large, has increased many fold, and the acquisition of said right of way would at this time cost many times the amount laid out and expended therefor by this respondent.

"That but thirty thousand (\$30,000) dollars of its capital stock has ever been issued.

"That on or about the 1st day of January, A. D. 1879, this respondent, being thereunto duly authorized by law, made, executed and delivered to Sherburne S. Merrill and William H. Ferry, as mortgagees, in trust to secure the payment of the bonds hereinafter mentioned, with the interest thereon, a mortgage or deed of trust, bearing date on that day, whereby it granted, bargained, sold and conveyed unto the said trustees all its railroad then in course of construction on the west side of the Mississippi River, being much the greater proportion of its entire present system, including all the railways, ways, rights of way, depot grounds and other lands for rights of way or for railway uses; all tracks, bridges, viaducts, culverts, fences and other structures; all depots, station houses, engine-houses, car-houses, freight houses, wood-houses and other buildings; all shops then held or thereafter to be acquired or used in connection with said railroad or the business thereof, and all locomotives, tenders, cars, rolling stock or equipment; all machinery, tools, implements, fuel and materials for constructing, operating, repairing or replacing said railroad or any part thereof, or of any part of its equipment or appurtenances then held or thereafter to be acquired; also all franchises connected with or relating to said railroad, or to the construction, maintenance or use thereof then held or thereafter to be acquired by the said respondent, including the franchise to be a corporation, and all and singular the hereditaments thereunto belonging or in any wise appertaining, and all the real estate, right, title, interest, property, possession, claims and demands whatsoever, as well in law as in equity, of the said respondent of, in and to the same, and any and every part thereof; which mortgage or deed of trust expressly provided that the trust thereby created should not affect any further extension or branches of said line of railroad, or any property acquired or to be acquired for use in connection with such extension or branch, and which said mortgage or deed of trust was recorded in the office of the register of deeds in and for the said County of

Hennepin, in volume 54 of mortgages, on pages 377 to 387, inclusive.

"That, under and by virtue of the said mortgage or deed of trust, and pursuant to the tenor thereof, this respondent, on or about the first day of January, 1879, made and executed in due form of law, and thereafter negotiated and disposed of, one hundred and fifty (150) bonds or writings obligatory for the sum of one thousand (\$1,000) dollars each, and all of like tenor, bearing date the 1st day of January, 1879, and payable in thirty (30) years after the date thereof, with interest at the rate of seven (7) per cent per annum, payable semi-annually, on the first days of January and July in each year, upon the presentation and surrender of coupons there-to respectively annexed, representing and requiring the payment of each such installment of interest, by reason whereof this respondent became liable to pay the sum of ten thousand and five hundred (\$10,500) dollars per annum for such interest on its said bonds so issued and negotiated; which mortgage is still in full force and effect and all which bonds and coupons are still outstanding and wholly unpaid.

"That all the proceeds of said stock so issued and all the proceeds of said bonds so negotiated were used in the construction and equipment of respondent's said railway.

"That all such proceeds were insufficient for that purpose, and this respondent therefore, from time to time, for that purpose, effected and further became indebted for further loans of money, without security therefor, to the amount of about ninety thousand (\$90,000) dollars, all which was used in the construction and equipment aforesaid.

"That this respondent began the operation of the said railway on or about the 1st day of June, 1879, and has continued to operate the same at all times hitherto.

"That its whole business now is, and at all times has been, the receipt, transportation and delivery, commonly called switching, of cars between the tracks of other railway companies and mills, warehouses and industries situated upon its own lines within said City of Minneapolis.

"That, until the 1st day of September, 1882, it charged for its services in switching only the sum of one dollar (\$1) per loaded car; that on the day last aforesaid it raised its charge for such service, and has ever since charged and received for such service the sum of one dollar and fifty cents (\$1.50) per loaded car.

"That the service so rendered by this respondent is of a character which would otherwise be performed by drays or wagons, at an expense to patrons very much greater than the last-mentioned rate of charge of this respondent.

"That the rate of one dollar and fifty cents (\$1.50) per loaded car above stated does not exceed, but is, a fair and reasonable charge for such service.

"This respondent further says, that from the beginning of the operation of said railway to and including the 30th day of June, 1897, notwithstanding such increase of rate, the gross earnings of this respondent were less than the amount of its operating expenses and of the interest to that date accrued upon its said mortgage bonds, by the sum of twenty-one thou-

sand two hundred and twenty-three dollars and seventy-six cents (\$21,223.76).

"That all the excess of its gross earnings over its operating expenses has been, from year to year, applied to the repayment of the aforesaid unsecured indebtedness for moneys used in construction and equipment and the interest thereon.

"That, on the 30th day of June, 1888, there nevertheless remained unpaid of the indebtedness last mentioned and interest thereon the sum of twelve thousand two hundred and eleven dollars and two cents (\$12,211.02), of which last-mentioned sum, by like application of such excess, the sum of ten thousand dollars (\$10,000) was paid on or before the 30th day of November, 1888, then still leaving a balance of such unsecured indebtedness and of the interest thereon, in the sum of two thousand two hundred and eleven dollars and two cents (\$2,211.02).

"That, by reason of such application of the excess of gross earnings over operating expenses, no interest whatever has ever been hitherto paid, and this respondent has had no funds wherewith to pay any interest whatever, upon its aforesaid bonded indebtedness, but that the same has accumulated and remains unpaid to the amount of one hundred and five thousand (\$105,000) dollars.

"This respondent further says, that, in the year ending on the 30th day of June, 1888, its last-completed fiscal year, it transported over its lines twenty-seven thousand two hundred and seventy-two (27,272) loaded cars, which was its entire business, and that it received as compensation therefor, at the rate of one dollar and fifty cents (\$1.50) per car, the sum of forty thousand nine hundred and eight (\$40,908) dollars, which last-mentioned sum constituted its entire receipts for that year.

"That it therewith paid its operating expenses for the same year, amounting to twenty-two thousand five hundred and eighty-three dollars and seventy-eight cents (\$22,583.78), and paid the whole residue thereof on account and in reduction of its unsecured indebtedness aforesaid and the interest thereon.

"That the said year was an unusually prosperous one, and was the first year in the history of this respondent when it earned a sum equal to the amount of its operating expenses and one year's interest upon its said bonded indebtedness.

"That, induced by its gradual reduction and payment as aforesaid of its said unsecured indebtedness, the creditors of this respondent for the said unsecured indebtedness have hitherto, with the assent and at the request of this respondent, as the said interest coupons have from time to time become due, advanced the amounts thereof to the holders of said coupons, and thereupon and thereby taken the same up from such holders by way of payments for the honor and for the protection of the credit of this respondent, in order to avoid any foreclosure on the part of the holders of said bonds by reason of default in the payment of any such coupons, and that so, and not otherwise, has this respondent hitherto been able to avoid such foreclosure.

"The respondent further says, that a portion of its said railroad upon the west side of said

river, about one thousand and two hundred (1,200) feet in length, is upon wooden trestle-work, which is now nearly ten (10) years old, and about one thousand one hundred (1,100) feet in length of which is so decayed and worn that the same must be almost entirely renewed and rebuilt within the current year 1889, if the operation of said railroad is to be continued.

"That this respondent has no source of revenue to meet the expense of rebuilding other than its earnings.

"That, if said trestle is rebuilt of wood, the cost thereof will exceed the sum of fifteen thousand (\$15,000) dollars, and if of iron or steel will exceed the sum of eighty thousand (\$80,000) dollars.

"The respondent further says, that if the order of the relators set forth in said alternative writ had been forthwith and hitherto enforced, and if this respondent had received but one (\$1) dollar per car for the service rendered during its last fiscal year aforesaid, the entire receipts from all its business in said year would have been but twenty-seven thousand two hundred and seventy-two (\$27,272) dollars, which would have left this respondent but four thousand six hundred and eighty-eight dollars and twenty-two (\$4,688.22) cents wherewith to pay the residue of its unsecured indebtedness aforesaid, then exceeding twelve thousand dollars (\$12,000), or to pay the sum of ten thousand and five hundred dollars (\$10,500) interest accrued upon the said bonded debt, leaving nothing for extraordinary repairs and nothing for renewals of trestles, bridges or rails.

"That this respondent is the owner of all the railway used in conducting its said business, subject only to the lien of said mortgage.

"That it is entitled to the possession and beneficial use thereof to the same extent as the owners of other property are entitled to the beneficial use thereof; that it has the right to fix the price for the use of its property by others, and the rate at which it will do business for others, subject only to the qualification that the rates so fixed shall be equal and reasonable.

"That the rate of one dollar and fifty cents (\$1.50) per car so fixed and collected by it as aforesaid is fair, just, equal and reasonable; that the rate of one dollar (\$1) per car specified in said order of relators is grossly unfair, unjust, unequal and unreasonable, and beyond the jurisdiction and power of the said relators in that behalf.

"That the said recommendation of the said relators set forth in said alternative writ, by means whereof they seek to compel a reduction in the rate fixed by this respondent from one dollar and fifty cents (\$1.50) per car to one dollar (\$1) per car and a consequent loss in revenue of one third ($\frac{1}{3}$) of its entire earnings, was made by said relators without notice to this respondent, and without giving it any opportunity to be heard in its own behalf, and that for that reason the said recommendation is against the common rights of American citizens and is in violation of the Constitution of the United States, and is wholly void.

"And this respondent further says, that if the said order be enforced by the mandate of this court, it will take the property of this re-

spondent against its will, without due process or any process of law, and in violation of section 1 of article 14 of the Constitution of the United States; that if the said order of the said relators be enforced against this respondent, and if its charge be reduced to one dollar (\$1) per car, this respondent will be thereby deprived of the ability to pay the interest upon its said bonded indebtedness, as it has, with the consent of the State of Minnesota, contracted to do, and that any law of the said State, or any order of the said relators, or any judgment of this court, preventing the respondent from performing its said contract, when without such law, order or judgment it might have performed the same, or might thereafter perform the same, is and will be a law, order and judgment impairing the obligation of a contract, and is and will be in violation of section 10 of article 1 of the Constitution of the United States, and is and will be wholly void.

"This respondent, further making return, says, that the said order of the said relators, set forth in said alternative writ, will, if enforced, deprive it of its property for the use and benefit of private citizens, without making any compensation unto it as the owner thereof, in violation of section 18 of article 1 of the Constitution of the State of Minnesota, and is and will be wholly void.

"And this respondent, further making return, says that, by the provisions of section 4 of article 10 of the Constitution of said State, this respondent, being a common carrier, enjoying the right of way in pursuance of the provisions of the said Constitution, is bound to carry the mineral, agricultural and other productions of the people of said State on equal and reasonable terms; that it has always so carried the same whenever tendered or offered to it for that purpose; that the terms offered by it have always been equal and uniform to all persons and have always been reasonable in amount.

"And this respondent avers, that it is entitled to have and receive reasonable compensation for the service it is so bound to render, and that the said order of said relators, set forth in said alternative writ, assumes to fix a grossly-inadequate and unreasonable compensation therefor, is in violation of the constitutional provision last mentioned, and is wholly null and void.

"That, by reason of the matters hereinbefore set forth, this respondent has not complied, and ought not to be by the mandate of this honorable court compelled to comply, with the requirements of the recommendation and order made on the 2d day of August, 1887, and in said alternative writ set forth.

"Wherefore this respondent prays the judgment of the court that the said alternative writ may be discharged and that this respondent may be hence dismissed."

On a hearing on the return, on the 29th of January, 1889, the Company asked leave to make proof of the matters set forth in the return, at such time as the court might appoint; but the request was denied, and the Company excepted. On the motion of the attorney-general, judgment was then entered, on the application, the alternative writ and the return, for

the issuing of a peremptory writ of mandamus, to review which judgment this writ of error is sued out.

The supreme court rendered an opinion stating that, as the case was similar to that of *The State, ex rel. The Railroad and Warehouse Commission, v. The Chicago, Milwaukee & St. Paul Railway Co.*, before decided by it, the decision would follow the decision in that case and upon the reasons stated in the opinion filed therein.

The views and considerations applicable to that case (*Chicago, Milwaukee & St. Paul Railway Co. v. State of Minnesota*), which has just been decided by us, apply with even greater force to the present case, as appears by the return above set forth at length.

The Minneapolis Eastern Railway Company was organized as a corporation in June, 1878, under title 1, chapter 84, of the General Statutes of Minnesota. By § 2 of an Act of the Legislature, approved March 8, 1889 (Laws of 1889, chap. 78, p. 95), it was provided "that any railroad company or corporation organized under the title to which this is an amendment, may charge and receive for the transportation of passengers and freight on their road such reasonable rate as may be from time to time fixed by said corporation or prescribed by law." By § 8 of chapter 103 of the General Laws of Minnesota of 1875, it was provided as follows: "No railroad company shall charge, demand or receive from any person, company or corporation an unreasonable price for the transportation of persons or property, or for the hauling or storing of any freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad corporation." We do not perceive that these statutory provisions constitute such a contract with the corporation, as to the fixing by it of its rates of charges, as to deprive the Legislature of its power to regulate those charges.

The decision of the Commission in the present case appears to be merely a general finding that each and every charge in excess of \$1 per car for switching within the limits of the City of Minneapolis is an unreasonable and excessive compensation for the service performed. The Commission states that it made such finding after due and careful inquiry and consideration; but it does not appear that the Minneapolis Eastern Railway Company had any prior notice of any hearing at which such finding was made, or any opportunity of being heard in regard thereto; while it does appear that it asked leave of the court to make proof of the matters so set up in its return, that its request was denied, and that it excepted to such denial; and it further appears by its return that it claimed that the rate of \$1 per car would be so unfair, unequal, unjust and unreasonable as to take its property against its will without due process of law.

For the reasons set forth in the other case just decided, the judgment of the Supreme Court of Minnesota, rendered February 27, 1889, awarding a peremptory writ of mandamus against the Railway Company, is reversed, and the case is remanded to that court with an instruction to take further proceedings not inconsistent with the opinion of this court.

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Mr. Justice Miller wrote a concurring opinion entitled in this and the next preceding case, which appears on page 982, *ante*.

Mr. Justice Bradley, with whom concurred Mr. Justice Gray and Mr. Justice Lamar, wrote a dissenting opinion entitled in this and the preceding case, which appears on page 988, *ante*.

Ex Parte:

In the Matter of THE LOUISVILLE UNDERWRITERS, of Louisville, Kentucky.

(See S. C. Reporter's ed. 488-494.)

Suits of admiralty and maritime jurisdiction—Act of March 3, 1887—libel in personam, when may be maintained—Judiciary Act—libel in admiralty against corporation—service on foreign corporation.

1. The provision in the Act of March 3, 1887, chap. 373, sec. 1, that no civil suit shall be brought before a circuit or district court against any person in any other district than that whereof he is an inhabitant, has no application to causes of admiralty and maritime jurisdiction.
2. In courts of admiralty, a libel *in personam* may be maintained for any cause within their jurisdiction, wherever a monition can be served upon the libellee, or an attachment made of any personal property or credits of his.
3. The provision of section 11, chap. 20, of the Judiciary Act of Sept. 24, 1789, restricting civil suits to the district of which the defendant was an inhabitant or in which he might be found, did not include causes of admiralty jurisdiction.
4. A libel in admiralty *in personam* may be maintained against a corporation by attachment of its goods in a district not within the State in which it was incorporated.
5. Where the libellee, a foreign corporation, had, in compliance with the law of Louisiana, appointed an agent at New Orleans, on whom legal process might be served, and was there served upon him, this is good service in an action at law and is equally good in admiralty.

[No. 8, Original.]

Argued March 10, 1890. Decided March 31, 1890.

PETITION for writ of prohibition to the Judge of the District Court of the United States for the Eastern District of Louisiana to prohibit him from entertaining a libel in admiralty *in personam* against a corporation of Kentucky in a cause of contract upon a policy of insurance against perils of the seas and rivers. *Denied*.

The facts are stated in the opinion.

Mr. J. R. Beckwith, for petitioner: Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to a suit.

Rhode Island v. Massachusetts, 87 U. S. 12 Pet. 718 (9: 1233).

NOTE.—As to what places the jurisdiction of admiralty is confined, see note to *Allen v. Newberry*, 18: 110.

As to jurisdiction of state and United States courts, as to territory and offenses; ebb and flow of tide; as to criminal and civil jurisdiction,—see notes to U. S. v. Bevans, 4: 404, and to *The Thomas Jefferson*, 6: 358.

A corporation can have its legal home only at the place where it is located by or under its charter.

Ex parte Schollenberger, 96 U. S. 869 (24: 858).

The Act authorizing prohibition was first invoked in 1795 in the case of *United States v. Peters*, 8 U. S. 8 Dall. 121 (1: 535).

Application for the writ of prohibition was afterward made in *Ex parte Christy*, 44 U. S. 8 How. 292 (11: 608); *Ex parte Graham*, 77 U. S. 10 Wall. 548 (19: 982); *Ex parte Warmouth*, 84 U. S. 17 Wall. 64 (21: 543), and *Ex parte Easton*, 95 U. S. 68 (24: 873).

The case of *Ex parte Hager*, 104 U. S. 520 (26: 816), seemed to kill the writ as a restraint on admiralty courts.

We submit that the reasoning in that case is most unsatisfactory, and seems intended to destroy the writ and repeal the Act of Congress.

The decree in *Ex parte Hager* was affirmed in *The Clymene*, 9 Fed. Rep. 165, 12 Fed. Rep. 346.

And the doctrine was again followed in *The Alena*, 14 Fed. Rep. 174.

The result of the refusal of this court to prohibit in *Ex parte Hager* has been the very confusion and trouble that Congress sought to avoid by the Prohibition Act.

In *Ex parte Hager* the court refers to *Ex parte Gordon*, 104 U. S. 515 (26: 814), decided at the same term.

The jurisprudence on the subject of prohibition is unsatisfactory and apparently conflicting. In *Ex parte Gordon* too much seems to have been inferred as the doctrine in *The Char- kie*, L. R. 8 Q. B. 197.

We cannot find that this case has ever been cited in England as in conflict with *Smith v. Brown*, L. R. 6 Q. B. 729, where that court allowed the writ prohibiting admiralty proceedings, nor with *Wadsworth v. Queen of Spain* and *De Haber v. Queen of Portugal*, 17 Q. B. 171.

The whole matter was considered by the House of Lords in *Mayor of London v. Cox*, L. R. 2 H. L. 239, in which the writ was allowed on the ground of the want of jurisdiction of the lower court, not of the class of cases, but of that particular case.

In *Smith v. Whitney*, 116 U. S. 187 (29: 601), the authorities are collected with an indication that the writ should issue when there is no other remedy. The writ is worthless if it cannot issue on all occasions where it is a proper and adequate remedy.

The climax of the confusion wrought by admiralty courts in Pennsylvania was reached in 1883, in *Ex parte Pennsylvania*, 109 U. S. 175 (27: 895), in which prohibition was refused.

This court has never been before called on to determine whether it can arrest a district court usurping jurisdiction over a defendant in the face of a statutory inhibition.

The English courts seem to be called on more frequently to arrest the ecclesiastical courts than any other of their tribunals, for the reason, probably, that these courts have only a statutory jurisdiction. In this respect they are similar to our admiralty courts of first instance.

Serjeant v. Dale, L. R. 2 Q. B. Div. 558; *Reg. v. Shropshire County Judge*, L. R. 20 Q. B. Div. 242.

Jacob says that it should issue to inferior

courts of every description, whenever they attempt to take cognizance of causes over which they have no jurisdiction.

Jac. Fisher's Dig. title *Prohibition*.

In *Darby v. Cozens*, 1 T. R. 552, the king's bench sent out prohibition.

In *Leman v. Goulty*, 8 T. R. 8, the court allowed the writ.

A defendant ought not to be compelled to incur the delay and expense of litigation, where the court never acquired authority over the defendant.

Mr. O. B. Sansum, for respondent:

The Louisville Underwriters, a corporation created by the State of Kentucky, can be sued in the Eastern District of Louisiana.

Lafayette Ins. Co. v. French, 59 U. S. 18 How. 404 (15: 840); *Bank of Augusta v. Earle*, 38 U. S. 18 Pet. 519 (10: 274); *Baltimore & O. R. Co. v. Harris*, 79 U. S. 12 Wall. 65 (20: 854); *Baltimore & O. R. Co. v. Gallahue*, 12 Gratt. 658; *Ex parte Schollenberger*, 96 U. S. 869 (24: 858).

This is a proceeding *in personam* by libel in admiralty against the Louisville Underwriters on a maritime contract. The citizenship of the parties is therefore of no consequence. The defendants, having appointed an agent within the district, authorized by them to receive service of process issued against them, and service of process being made upon that agent, they are found within the district.

That part of the Act of Congress restraining the courts from proceeding with a cause against a person not an inhabitant of the district, does not include a proceeding in admiralty *in personam*.

Atkins v. Disintegrating Co. 85 U. S. 18 Wall. 272 (21: 841); *Cushing v. Laird*, 3 Am. L. T. 50; *Smith v. Miln*, Abb. Adm. 378.

The prohibition does not apply to suits in admiralty.

2 Parsons, Mar. L. 686, note; 2 Parsons, Ship. and Adm. 380; Benedict, Adm. 425; *The S. C. Ives*, Newb. Adm. 214.

Mr. Justice Gray delivered the opinion of the court:

This is a petition by a corporation of the State of Kentucky for a writ of prohibition to the judge of the District Court of the United States for the Eastern District of Louisiana, to prohibit him from entertaining jurisdiction of a libel in admiralty *in personam*, filed April 23, 1889, by the Natchez and New Orleans Packet and Transportation Company, also a corporation of Kentucky, against the petitioner, "in a cause of contract civil and maritime," upon a policy of insurance by which the petitioner insured against perils of the seas and rivers and other perils a steamboat of the libellant employed in the navigation of the Mississippi River.

By the Public Statute of Louisiana of February 26, 1877, chap. 21, no insurance company organized under the laws of any other State shall take risks or transact any business through an agent in Louisiana, without having filed in the office of the secretary of state a certified copy of a vote of its directors, appointing such an agent there to transact business and to take risks, accompanied by a warrant of appointment from the company, containing an express

consent that service of legal process on him shall be as valid as if served on the company.

By a copy of the record of the proceedings in the district court, annexed to the return to the rule to show cause why a writ of prohibition should not issue, it appears that the libellee had filed with the secretary of state of Louisiana a copy of a vote of its directors, as well as a warrant of appointment, appointing William M. Railey its attorney at New Orleans, as required by the Statute of Louisiana; that the policy sued on was signed by the libellee's president and secretary at Louisville in the State of Kentucky, was not to be binding until countersigned by its authorized agent at New Orleans, and was countersigned by Railey; that a citation to the libellee was issued by the district court, and served by the marshal upon Railey in person; that a motion to quash the libel, and an exception to it, upon the ground, among others, that neither party was an inhabitant of the Eastern District of Louisiana and that the libellee had no property or credits within the district, were overruled by the district court, and the libellee ordered to answer; and that the libellee thereupon answered, and took depositions under commission.

Before the cause had been brought to a hearing, the petition for a writ of prohibition was presented to this court.

It is admitted that the district courts of the United States, sitting in admiralty, have jurisdiction of the matter of the libel. *New England M. Ins. Co. v. Dunham*, 78 U. S. 11 Wall. 1 [20: 90]. But it is argued, in support of the prohibition, that no libel *in personam* can be sustained against a corporation in a district not within the State in which it is incorporated; and this argument is rested on the latter part of the following provision in the Act of March 3, 1887, chap. 373, § 1:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process of proceeding in any other district than that whereof he is an inhabitant." 24 Stat. 552.

A brief reference to previous Acts of Congress and decisions of this court makes it clear that this provision has no application to causes of admiralty and maritime jurisdiction.

By the ancient and settled practice of courts of admiralty, a libel *in personam* may be maintained for any cause within their jurisdiction, wherever a monition can be served upon the libellee, or an attachment made of any personal property or credits of his; and this practice has been recognized and upheld by the rules and decisions of this court. Rule 2 in Admiralty; *Manro v. Almeida*, 23 U. S. 10 Wheat. 473 [6: 369]; *Atkins v. Disintegrating Co.* 85 U. S. 18 Wall. 272 [21: 841]; *New England Ins. Co. v. Detroit & C. Steam Nav. Co.* 85 U. S. 18 Wall. 807 [21: 846]; *Cushing v. Laird*, 107 U. S. 69 [27: 891]; *Devco Mfg. Co., Petitioner*, 108 U. S. 401 [27: 764].

The judgment, delivered at October Term, 1873, in *Atkins v. Disintegrating Co.*, just cited, is really decisive of this case.

The question there presented was the construction of that provision of the Judiciary Act of September 24, 1789, chap. 20, § 11, by which,

after defining the jurisdiction of the circuit courts in "suits of a civil nature at common law or in equity," in which the United States were plaintiffs, or an alien was a party, or the suit was between a citizen of the State where it was brought and a citizen of another State; and also defining the criminal jurisdiction of the circuit and district courts,—it was provided as follows:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." 1 Stat. 79.

Upon a consideration of the Acts of Congress upon the subject, and especially of other sections of the Judiciary Act of 1789, of which section 9 conferred upon the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction," and jurisdiction concurrent with the circuit courts of certain "suits at common law" by the United States (1 Stat. 77); section 21 authorized "final decrees in a district court in causes of admiralty and maritime jurisdiction" to be reviewed in the circuit court on appeal, and section 22 authorized "final decrees and judgments in civil actions in a district court" to be reviewed in the circuit court by writ of error (1 Stat. 88, 84); it was demonstrated that the provision of section 11, above quoted, restricting "civil suits" to the district of which the defendant was an inhabitant or in which he might be found, did not include causes of admiralty jurisdiction; and it was therefore adjudged that a libel in admiralty *in personam* might be maintained against a corporation by attachment of its goods in a district not within the State in which it was incorporated.

The provisions of sections 9, 11, 21 and 22 of the Judiciary Act of 1789, above quoted, were re-enacted in substantially the same words in the Revised Statutes. Rev. Stat. §§ 563, cls. 4, 8; 629, cls. 1-3; 631, 633, 739.

The provision of section 11 of the Act of 1789, embodied in § 739 of the Revised Statutes, was re-enacted with no material alteration in the Act of March 3, 1875, chap. 137, § 1, as follows:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding." 18 Stat. 470.

The only changes (beyond the substitution of "person" for "inhabitant of the United States") consisted in inserting, in the middle of the sentence, after the words "any original process," the words "or proceeding;" and in substituting, at the end of the sentence, for the words "serving the writ," the words "serving such process or commencing such proceeding." These changes in no way extended the meaning of the leading words "civil action" and

"civil suit;" but merely affected the mode of commencing such action or suit, and were probably intended to cover actions at law commenced otherwise than by process, according to the practice, pleadings and forms of proceeding in the courts of the States, which had been made applicable to the circuit and district courts of the United States by the Act of 1872, re-enacted in the Revised Statutes. Act of June 1, 1872, chap. 255, § 5 (17 Stat. 197); Rev. Stat. § 914.

The provision of the Act of 1887 on which the petitioner relies differs from the corresponding provision of the Act of 1875 in two particulars only:

1st. In the clerical mistake, "process of proceeding" for "process or proceeding," which has been set right by the Act of 1888 correcting the enrolment of the Act of 1887. Act of August 18, 1888, chap. 866, § 1 (25 Stat. 433).

2d. In striking out the last clause, permitting civil suits to be brought in the district in which the defendant is found at the time of service, and thus confining them to the district of which he is an inhabitant. This change, far from weakening the reason of the decision in *Atkins v. Disintegrating Co.*, above cited, greatly strengthens it.

Courts of admiralty are established for the settlement of disputes between persons engaged in commerce and navigation, who, on the one hand, may be absent from their homes for long periods of time, and, on the other hand, often have property or credits in other places. In all nations, as observed by an early writer, such courts "have been directed to proceed at such times, and in such manner, as might best consist with the opportunities of trade, and least hinder or detain men from their employments." Zouch, Adm. Jur. 141. In the same spirit this court has more than once said: "Courts of admiralty have been found necessary in all commercial countries, for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin." *The Genesee Chief*, 53 U. S. 12 How. 448, 454 [13: 1058, 1061]; *New England M. Ins. Co. v. Dunham*, 78 U. S. 11 Wall. 1, 24 [20: 90, 97]. To compel suitors in admiralty (when the ship is abroad and cannot be reached by a libel *in rem*) to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons or his goods or credits attached, would not only often put them to great delay, inconvenience and expense, but would in many cases amount to a denial of justice.

In the present case, the libellee had, in compliance with the law of Louisiana, appointed an agent at New Orleans, on whom legal process might be served, and the monition was there served upon him. This would have been a good service in an action at law in any court of the State or of the United States in Louisiana. *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 404 [15: 451]; *Ex parte Schollenberger*, 96 U. S. 369 [24: 853]; *New England Ins. Co. v. Woodworth*, 111 U. S. 188, 146 [28: 879, 881]. And no reason has been or can be suggested why it should not be held equally good in admiralty.

The District Court for the Eastern District of Louisiana having jurisdiction both of the

cause and of the parties, *the writ of prohibition is denied.*

A similar decision was made in the case, argued and decided at the same time, No. 9 Original, *Ex parte The St. Paul Fire and Marine Insurance Company of St. Paul, Minnesota*, which differed only in the petitioner and libellee being a corporation of Minnesota.

WILLIAM PRESTON HILL, Executor,
Plff. in Err.

THE MERCHANTS' MUTUAL INSURANCE COMPANY.

(See S. C. Reporter's ed. 515-527.)

Review of state judgment—remedy of creditors to reach unpaid subscriptions to stock—Missouri Act of 1879—did not increase stockholder's liability—provision of charter—new remedy—power of Legislature—remedy may be altered.

1. This court has jurisdiction to review a state judgment, where the case presents the question whether a certain state statute, to which that judgment gave effect, impaired the obligation of a contract arising out of a subscription by plaintiff in error to the stock of an insurance company created by the laws of Missouri.
2. Although prior to the Missouri Act of 1866 no specific remedy was prescribed for creditors to reach the unpaid subscriptions of stockholders, yet creditors could obtain the same relief by suit in equity.
3. The Missouri Act of 1879 did not increase the liability of the stockholder. He was liable by virtue of his subscription and his notes to the company to pay the whole amount of his subscription. The Act of 1879 did not enlarge this liability; it authorized an execution only for the unpaid balance of his stock.
4. While, under the original charter of the company, he was liable to a suit in equity, under the Statute of 1879 he was liable to be proceeded against by notice and motion in the action in which judgment was rendered against the corporation. In either mode he had opportunity to make defense.
5. The provision in the company's charter, that "the balance due on each share shall be subject to the call of the directors," did not give the stockholder the right, as between himself and the company, or as between him and the company's

NOTE.—As to powers of a corporation beyond the territorial limits of the sovereignty which created it, see note to *Rumyan v. Coester*, 10: 382.

Charter or by-laws of corporation, as to transfer of stock; lien on stock for debt due by stockholders. See note to *Union Bank of Georgetown v. Laird*, 4: 269.

As to rights to pledge stock; rights of pledgee of same,—see note to *Anderson v. Phila. Warehouse Co.*, 28: 478.

As to preferred stock, its issue; rights of holders of,—see note to *Warren v. King*, 27: 769.

When taxation of stock or shares in corporation impairs obligation of contracts. See note to *Prov. Bank v. Billings*, 7: 939.

As to individual liability of stockholders for corporate debts, see note to *Hatch v. Dana*, 26: 885.

creditors, to withhold payment of the balance due from him until the necessities of the company required payment in full for the shares subscribed.

6. His undertaking was to pay each and all of his notes on demand, and it was entirely competent for the Legislature to give the creditors of the company a new or additional remedy by which this undertaking could be enforced in their behalf,—such remedy not increasing the debtor's liability.
7. The condition is implied in every grant of corporate existence that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the Legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created.
8. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract.

[No. 215.]

Submitted Mar. 19, 1890. Decided Mar. 31, 1890.

IN ERROR to the Supreme Court of the State of Missouri, to review a judgment of the St. Louis Court of Appeals which affirmed the judgment of the Circuit Court of the City of St. Louis, directing an execution to be issued against Hill, the plaintiff's testator, for the unpaid balance upon his share of the capital stock of the Excelsior Insurance Company.

Affirmed.

Reported below, 1 West. Rep. 424, 86 Mo. 466, 12 Mo. App. 148.

Statement by Mr. Justice Harlan:

This writ of error brings up for re-examination a judgment of the Supreme Court of Missouri, and presents the question whether a certain statute, to which that judgment gave effect, impaired the obligation of a contract arising out of a subscription by Britton A. Hill to the stock of an Insurance Company created by the laws of Missouri.

By the second section of an Act of the Missouri Legislature, approved March 3, 1857, creating the Washington Insurance Company, it was provided in reference to subscriptions to its stock, that "at the time of subscribing there shall be paid on each share one dollar, and nine dollars more within twenty days after the first election of directors; if any stockholder fails to make such payment, such stockholder shall forfeit the amount paid on such stock at the time of subscribing; the balance due on each share shall be subject to the call of the directors, and the said company shall not be authorized to make any policy or contract of insurance until the whole amount of shares subscribed shall be actually paid in, or secured to be paid on demand by approved notes or mortgages on real estate." The same Act contained the following provisions: "This Act shall be, and the same is hereby declared, a public Act, and the same shall be deemed and construed as such; and the corporation established by this Act shall be, and the same is hereby, exempted from the operation of sections seven, thirteen, fourteen, fifteen, sixteen and eighteen of article 1st of the Act entitled 'An Act Concerning Corporations,' approved November 23, 1855;

and said sections shall be deemed as repealed, so far as the same concerns the corporation hereby established." Laws of Mo. 1856-57, pp. 544, 545, §§ 2, 8.

Sections seven, thirteen, fourteen, fifteen, sixteen and eighteen of the above Act of 1855, from the operation of which the Washington Insurance Company was thus exempted, are as follows:

"§ 7. The charter of every corporation that shall hereafter be granted by the Legislature shall be subject to alteration, suspension and repeal in the discretion of the Legislature."

"§ 18. In all corporations hereafter created by the Legislature, unless otherwise specified in their charter, in case of deficiency of corporate property, or estate liable to execution, the individual property, rights and credits of every member of the copartnership, or body politic, having a share or shares therein, shall be liable to be taken on execution, to an additional amount equal to that of the amount of his stock, and no more, for all debts of the corporation contracted during his ownership of such stock; and such liability shall continue, notwithstanding any subsequent transfer of such stock, for the term of one year after the record of the transfer thereof on the books of the corporation, and for the term of six months after judgment recovered against such corporation, in any suit commenced within the year aforesaid: *Provided*, That in every such case the officer holding the execution shall first ascertain and certify upon such execution that he cannot find corporate property or estate.

"§ 14. In such case, the officer may cause the property of such stockholder to be levied upon by execution in the same manner as if the same were against him individually, after giving him forty-eight hours' previous notice of his intention, and the amount of the debt or deficiency, if he resides within the county, or if not within the county, to his agent, if he have any within the county, otherwise to the clerk or cashier or some other officer of the corporation, unless such stockholder, his agent, or the clerk or other officer, on demand and notice as aforesaid, shall disclose and show to the execution creditor, or the said officer, corporate property or estate subject to execution sufficient to satisfy said execution and all fees.

"§ 15. Such creditor, after demand and notice as mentioned in the preceding section, at his election, may have an action against any such stockholder or stockholders, on whom such demand and notice may have been served, jointly or severally, or so many of them as he may elect, to recover of him, or them, individually, the amount of his execution and costs, or of the deficiency as aforesaid, not exceeding the amount of the stock held by such stockholder or stockholders.

"§ 16. The clerk, or other officer having charge of the books of any corporation, on demand of any officer holding any execution against the same, shall furnish the officer with the names, places of residence (so far as to him known) and the amount of liability of every person liable as aforesaid."

"§ 18. Every corporation hereafter created shall give notice annually in some newspaper printed in the county where the corporation is

established, and in case no paper is printed therein, then in the nearest paper, of the amount of all the existing debts of the corporation, which notice shall be signed by the president and a majority of the directors; and if any of the said corporators shall fail so to do, all the stockholders of the corporation shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such notice shall be given." Rev. Stat. Mo. 1865, p. 372, 373.

By an Act of the Legislature of Missouri, approved February 9, 1859, the Excelsior Insurance Company was created. That Act is as follows:

"§ 1. That an insurance company be, and is hereby, established in the City of St. Louis, to be known by the name and style of the 'Excelsior Insurance Company,' the stockholders of which are herety declared a body corporate and politic, with the same amount of capital stock and period of existence, and the same rights, privileges and restrictions, as were conferred upon the 'Washington Insurance Company' of St. Louis, by an Act of the General Assembly of the State of Missouri, approved March the third, eighteen hundred and fifty-seven, with the exception of so much of section eight of said Act as declares the same a public Act, and exempts said corporation from the operation of section eighteen of article first of the Act, entitled 'An Act Concerning Corporations,' approved November the twenty-third, eighteen hundred and fifty-five.

"§ 2. James H. Lucas, Henry L. Patterson, Thomas Stein, Morris Collins, James G. Brown and John C. Porter, or any three of them, or such person or persons as they may appoint, are hereby constituted commissioners to open books for subscription to the capital stock, in the same manner as is prescribed in the charter of said Washington Insurance Company. This Act to take effect from and after its passage." Sess. Acts Mo. 1859, p. 74.

Section 6, article 8, of the Constitution of Missouri, which went into effect in 1865, provides as follows: "Dues from private corporations shall be secured by such means as may be prescribed by law; but in all cases each stockholder shall be individually liable, over and above the stock by him or her owned, and any amount unpaid thereon, in a further sum at least equal in amount to such stock."

In order to give effect to this constitutional provision, the Legislature, by an Act which went into effect March 19, 1866, amended section 18 of the above Act of 1855 so as to read as follows:

"§ 11. If any execution shall have been issued against the property or effects of a corporation, and if there cannot be found whereon to levy such execution, then such execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon: *Provided always*, That no execution shall issue against any stockholder except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon

such motion, such court may order execution to issue accordingly." Rev. Stat. Mo. 1866, p. 328.

In July, 1866, Hill subscribed for 64 shares, of the par value of \$100 for each share, of the stock of the Excelsior Insurance Company, paying part cash and giving to the company four notes for \$750 each, dated respectively July 20, 1866, and one note dated July 11, 1866, for \$1,800. Each one of these notes was payable on demand to the order of the insurance company. At the commencement of these proceedings his stock had become reduced to 37 shares.

The Constitution of Missouri of 1875 provided that "dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him or her." Art. 13, § 9.

In 1879 the Statutes of Missouri were revised, and the above section of the Act of 1866 was amended so as to read as follows:

"§ 736. If any execution shall have been issued against any corporation, and there cannot be found any property or effects whereon to levy the same, then such execution may be issued against any of the stockholders to the extent of the amount of the unpaid balance of such stock by him or her owned: *Provided, always*, That no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceedings shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon such motion, such court may order execution to issue accordingly: *And provided further*, That no stockholder shall be individually liable in any amount over and above the amount of stock owned."

The present action was brought under the Statute last quoted. It was commenced by notice to Hill on behalf of the Merchants' Mutual Insurance Company that it would move the Circuit Court of the City of St. Louis for execution against him, as a stockholder of the Excelsior Insurance Company, for the balance unpaid upon his thirty-seven shares of the capital stock of the Excelsior Insurance Company. The proceeding was docketed as a suit against that company by the Merchants' Insurance Company. Hill appeared, and upon the trial of the action the court found that the unpaid balance on said shares was \$2,127.50. For that amount, with costs, an execution was directed to be issued against Hill. Upon appeal to the St. Louis Court of Appeals that judgment was affirmed, and the judgment of the Court of Appeals was affirmed by the Supreme Court of the State. 12 Mo. App. 148; 86 Mo. 466 [1 West. Rep. 424].

Mr. G. M. Stewart, for plaintiff in error: The Acts of 1866 and 1879, as they have been applied to plaintiff in error, are retroactive.

Fairchild v. Masonic Hall Assn. 71 Mo. 526.

Each shareholder agrees to contribute or pay upon his unpaid stock his *pro rata* share of the indebtedness of the corporation, and, when this is paid, his liability is at an end.

Morawetz, Priv. Corp. (2d ed.) 151, 158.

The remedy subsisting when a contract was made is a part of the obligation, and any subsequent law of the State which so affects that remedy as substantially to impair or lessen the value of that contract is forbidden by the Constitution of the United States.

Edwards v. Kearney, 96 U. S. 595 (24: 798); *Siebert v. Lewis*, 122 U. S. 284, 294 (31: 1168, 1165); *Denny v. Bennett*, 128 U. S. 489, 495 (32: 491).

The remedy provided by the charter of a corporation is the only remedy that can be applied in recovering from a stockholder for his unpaid stock.

Pollard v. Bailey, 87 U. S. 20 Wall. 520 (22: 876); *Terry v. Tubman*, 92 U. S. 156 (28: 587); *Horner v. Henning*, 98 U. S. 228 (28: 879); *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747 (30: 825).

A construction which would make an Act unconstitutional will not be given to it, unless it in clear and express terms admit of no other rational explanation.

Hope Mut. Ins. Co. v. Flynn, 38 Mo. 488; *Provident Sav. Inst. v. Bathing Rink*, 52 Mo. 557; *Fairchild v. Masonic Hall Asso.* 71 Mo. 531, 582; *Woart v. Winnick*, 3 N. H. 477; *Society v. Wheeler*, 2 Gall. 105-139; *Sedg. Stat. and Const. Law*, 188; *Smith, Stat. and Const. Law*, §§ 149, 157, 172, 368, 538.

At common law, and independently of general statutes, no action would lie by a creditor of the corporation against a stockholder, though in equity he could have a bill against all or some of the stockholders of an insolvent corporation.

Lionberger v. Broadway Sav. Bank, 10 Mo. App. 499; *Vosé v. Grant*, 15 Mass. 505; *Spear v. Grant*, 16 Mass. 15; *Wood v. Dummer*, 8 Mason, 308; *Briggs v. Penniman*, 8 Cow. 887; *Hume v. Winyan*, 1 Car. L. J. 217; *Nathan v. Whitlock*, 9 Paige, Ch. 152; *Mann v. Pentz*, 3 N. Y. 422.

Mr. Everett W. Pattison, for defendant in error:

If no provision of the Federal Constitution has been violated, the construction placed upon the Acts of the Legislature by the state courts is conclusive.

Com. Bank v. Buckingham, 46 U. S. 5 How. 317, 341 (12: 169, 177); *Lawler v. Walker*, 55 U. S. 14 How. 149 (14: 364).

The liability of plaintiff in error was governed by the law in force at the time he subscribed.

Fairchild v. Masonic Hall Asso. 71 Mo. 526. The Federal Constitution does not inhibit a change of remedy.

Bronson v. Kinzie, 42 U. S. 1 How. 816 (11: 144).

An action would lie against a single stockholder to compel him to pay in full.

Ogilvie v. Knox Ins. Co. 63 U. S. 22 How. 887 (16: 351).

There is no such thing as a vested right to a particular remedy.

Springfield v. Comrs. 6 Pick. 508; *People v. Tweed*, 6 Hun, 392.

And the Legislature may always alter the form of administering right and justice.

Terry v. Anderson, 95 U. S. 633 (24: 366); *McElrath v. Pittsburg & S. R. Co.* 55 Pa. 189,

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204; *Story, Const.* (4th ed.) § 1885, note 3, p. 245, and notes 2 and 3, p. 246; *Ochiltree v. Iowa R. Co.* 88 U. S. 21 Wall. 253 (22: 548).

Mr. Justice Harlan delivered the opinion of the court:

The plaintiff in error contends that the Act creating the Excelsior Insurance Company was a private Act, and its charter exempted from alteration, suspension or repeal by subsequent legislation; that its stockholders were exempted from the levy of an execution upon their individual property at the instance of a judgment creditor of the corporation in case of a deficiency of corporate property, and from actions at law by creditors; that the rights of its stockholders were not affected by subsequent legislation of a general nature; and that the method of collecting unpaid stock, specially provided for in the company's charter, was exclusive of any other remedy, except that supplied by a court of equity.

The assignment of error which gives this court jurisdiction to re-examine the judgment of the state court is, that when the testator of the plaintiff in error purchased the stock of the Excelsior Insurance Company he entered into a contractual relation, not only with the company, but with the State, both as to the method of paying for his stock, and in respect to the extent of his liability; and that the rights vested in him by the contract were taken away, and therefore the obligations of his contract were impaired, by the legislation of 1879, the validity of which was sustained by the court below.

We assume, in conformity with the decision of the Supreme Court of Missouri—and that view is favorable to the plaintiff in error—that the Excelsior Insurance Company was not subject to the seventh section of the General Statute of November 23, 1855, declaring that the charters of all corporations thereafter created should be granted subject to alteration, suspension and repeal in the discretion of the Legislature; and that the other sections of that Statute, specially named in the charter of the insurance company, were to stand as repealed so far as that company was concerned. The result of this construction of the charter of the insurance company is, that prior to the passage of the Act of 1866, which took effect March 19, 1866, no specific remedy was prescribed for creditors seeking to reach the unpaid subscriptions of stockholders. But it was open to them to proceed by a suit in equity. That such a remedy could be used without violating any provision of the company's charter, or any right of a stockholder, cannot be doubted. But neither the company nor its stockholders had any vested right in that particular remedy. They could only insist that the extent of their liability should not be increased. The Act of 1866 authorized an execution to be issued against a stockholder "to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon," where no property or effects of the corporation could be found. This Statute, if given a retrospective operation, certainly did increase the liability of those who became stockholders in the Excelsior Insurance Company prior to its passage. But the defendant in er-

ror contends that it was applicable to all who, like Hill, became stockholders after its passage. Waiving any consideration of this question, it is certain that the Act of 1879, under which this action was instituted, did not increase Hill's liability. He was liable, by virtue of his original subscription and by his notes to the company, to pay the whole amount of his subscription. The Statute of 1879 did not enlarge this liability, for it authorized an execution against a stockholder, where there was no corporate property to be levied on, only "to the extent of the amount of the unpaid balance of such stock by him or her owned." While, under the original charter of the company, he was liable to a suit in equity, under the Statute of 1879 he was liable to be proceeded against by notice and motion in the action in which judgment was rendered against the corporation. In either mode he had opportunity to make defense.

It is, however, contended that under the charter of the company the stockholder was not bound to pay any amount beyond ten dollars on each share except upon a call of the directors, and that the provision allowing an execution for the unpaid balance, pursuant to the judgment of the court, was a change of the contract. The provision in the company's charter, that "the balance due on each share shall be subject to the call of the directors," did not give the stockholder the right, as between himself and the company, or as between him and the company's creditors, to withhold payment of the balance due from him until the necessities of the company required payment in full for the shares subscribed. The company was forbidden to make any policy or contract of insurance "until the whole amount of shares subscribed shall be actually paid in, or secured to be paid on demand, by approved notes or mortgages on real estate." Hence Hill executed demand notes, with surety, for the entire balance due on his original subscription. The authority of the company to call for the payment of those notes, by installments, did not give him a right, as a part of his contract, to make payment in that particular mode. His undertaking was to pay each and all of his notes on demand, and it was entirely competent for the Legislature, as a regulation of the business and affairs of the company, to give its creditors a new or additional remedy by which this undertaking could be enforced in their behalf—such remedy not increasing the debtor's liability. As said by this court in *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 580 [28: 1084, 1087], the condition is implied in every grant of corporate existence that "the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the Legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created."

Upon the point made by the plaintiff in error, that under the original charter of the company Hill was liable only to a suit in equity, to which all the stockholders could be made parties, and in which he could compel contribution from other stockholders, whereas under

the Statute of 1879 he could be proceeded against alone, it is sufficient to say that if neither the Statute of 1866 nor that of 1879 had been passed, he could have been sued at law upon the notes he gave the company. The proceeding authorized by the Statute of 1879 is, in effect, a suit upon his notes for the amount due thereon. His liability to pay that amount has no such connection with the liability of other stockholders as to exempt him from a suit at law to compel him to pay the sum he agreed to pay. *Hatch v. Dana*, 101 U. S. 205 [25: 885]. The Statute restricts any judgment against him to the amount he originally assumed to pay. Consequently, no substantial right of his has been violated. "Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract." *Bronson v. Kinzie*, 42 U. S. 1 How. 811, 816 [11: 148, 145]; *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 122, 200 [4: 529]; *Fourth Nat. Bank v. Francklyn*, 130 U. S. 747, 755 [30: 825, 828], and cases there cited.

Judgment affirmed.

JAMES W. ELWELL, Trustee, by the NATIONAL CITY BANK, of Ottawa, Illinois,
Appl.,

v.

WILLIAM R. FOSDICK ET AL., Trustees.

(See S. C. Reporter's ed. 500-514.)

Release by trustee binds those he represents—trustee for bondholders—evidence dehors the record, such as release of errors, received—provisions of mortgage—one who appeals in name of trustee, bound by trustee's preceding acts.

1. A written release by a trustee of all errors had or committed in and concerning a decree, and releasing and waiving his right as such trustee to appeal from the decree in an action to foreclose a mortgage made by a railroad company to secure its bonds, in which such trustee was a party defendant as being a trustee in a second mortgage given by the company, binds all the bondholders represented by him as such trustee.
2. The trustee represented the bondholders not only in the proceedings which resulted in the entry of the decree, so that the bondholders were not necessary parties, but he also bound them by his release of errors, his relations to them not having changed between the time of the entry of the decree and the time of the execution of the release.
3. This court is compelled, as all courts are, to receive evidence *dehors* the record affecting their proceedings in a case before them on error or appeal, such as the death or transfer of the interest of one of the parties. A release of errors may be filed as a bar to the writ.
4. Where, by the provisions of the mortgage to the trustee, he could proceed to collect the mortgage debt, by litigation or otherwise, only at the request of the holders of a majority of the bonds, and the majority of such holders desired the litigation to cease, the trustee was authorized to put an end to it, and his waiver of an appeal binds all who act in his name as trustee.

5. Where a bank was not a party to the suit, and its right to appeal depended entirely upon the trustee, and the circuit court allowed it to appeal in the name of the trustee, the bank is bound by all the preceding acts of the trustee, done in good faith.

[No. 216.]

Argued Mar. 19, 20, 1890. Decided Mar. 31, 1890.

A PPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois in a suit to foreclose a mortgage.

On motion to dismiss. *Dismissed.*

The facts are stated in the opinion.

Mr. Will-H. Lyford, for motion to dismiss:

This appeal should be dismissed because it seeks to reverse a joint decree against several defendants, while only one defendant is prosecuting this appeal.

Masterson v. Herndon, 77 U. S. 10 Wall. 416 (19: 958); *Owings v. Kincannon*, 82 U. S. 7 Pet. 899 (8: 727); *Simpson v. Greeley*, 87 U. S. 20 Wall. 152 (22: 838); *Estes v. Trubus*, 128 U. S. 225 (32: 487); *Piebleman v. Packard*, 108 U. S. 14 (27: 634); *Wilson v. L. & F. Ins. Co.* 37 U. S. 12 Pet. 140 (9: 1082).

This appeal should be dismissed, because its prosecution is barred by a written release of errors and waiver of right of appeal, signed by Elwell, trustee, in whose name the appeal was granted.

Sage v. Central R. Co. 99 U. S. 384, 346 (25: 394, 398); *Shaw v. Little Rock & Ft. S. R. Co.* 100 U. S. 605, 611 (25: 757, 759); *Barnes v. Chicago, M. & St. P. R. Co.* 122 U. S. 1 (31: 1128); *First Nat. Bank v. Shedd*, 121 U. S. 74, 86 (30: 877, 881); *Dakota Co. v. Glidden*, 118 U. S. 222, 225 (28: 961, 982); *Ex parte Cutting*, 94 U. S. 14, 21 (24: 49, 51); *Ex parte Cockcroft*, 104 U. S. 578 (26: 856).

Messrs. Charles M. Osborn and Samuel A. Lynde, in opposition:

The decree from which this appeal is prosecuted was not a joint decree within the meaning of the rule requiring all of the parties against whom a joint decree shall be rendered to join in the appeal.

Simpson v. Greeley, 87 U. S. 20 Wall. 157 (22: 338); *Germain v. Mason*, 79 U. S. 12 Wall. 259 (20: 392); *Forgay v. Conrad*, 47 U. S. 6 How. 201 (12: 404); *Brewster v. Wakefield*, 68 U. S. 22 How. 128 (16: 304); *Milner v. Meek*, 95 U. S. 253 (24: 444); *Norwich & W. R. Co. v. Johnson*, 82 U. S. 15 Wall. 8 (21: 118); *Todd v. Daniels*, 41 U. S. 16 Pet. 523 (10: 554).

The order of the circuit court allowing this appeal amounts to a sufficient severance of the parties to authorize the prosecution of this appeal in the name of Elwell alone.

Masterson v. Herndon, 77 U. S. 10 Wall. 418 (19: 954); *O'Doud v. Russell*, 81 U. S. 14 Wall. 402 (20: 857); *Sage v. Central R. Co.* 99 U. S. 412 (23: 935).

These releases of error were not necessary parts of the record on this appeal, but have become material because of this motion and may be filed.

Dakota Co. v. Glidden, 118 U. S. 222 (28: 961).

Elwell had no power or authority as trustee in the second mortgage to release errors and to waive the right to appeal.

Duncan v. Mobile & O. R. Co. 2 Woods, 542; *Richter v. Jerome*, 128 U. S. 246 (31: 186).
184 U. S.

Mr. Justice Blatchford delivered the opinion of the court:

This case grows out of proceedings which took place in the Circuit Court of the United States for the Northern District of Illinois, in the suit of William R. Fosdick and James D. Fish, mortgagees in trust, against The Chicago, Danville & Vincennes Railroad Company and others, wherein this court, in *Chicago, D. & V. R. Co. v. Fosdick*, and *Same v. Huidekoper*, 106 U. S. 47 [27: 47], on the appeal of the railroad company, had under review decrees made by the circuit court in the cause.

The suit was brought March 27, 1875, to foreclose a mortgage executed by the Company, on March 10, 1869, to Fosdick and Fish as trustees, to secure \$2,500,000 of bonds. The defendants in the bill were the railroad company and James W. Elwell, one of the two trustees (the other being the said James D. Fish), in a second mortgage executed by the company December 16, 1872, to secure \$1,000,000 of convertible bonds. Elwell, as such trustee, filed a cross-bill, May 17, 1875, setting up a default in the payment of interest on the bonds secured by the second mortgage, and praying for a foreclosure of it. A receiver was appointed May 20, 1875, and an amended bill was filed by Fosdick and Fish September 14, 1875. Answers were filed by the company and by Elwell to the amended bill, and answers to the cross-bill of Elwell by the company and by Fosdick and Fish. The cause was referred to a master, whose report, made June 24, 1876, sustained the allegations of the original bill, and fixed the amount due under the mortgage to Fosdick and Fish and also that due under the mortgage to Elwell. A decree of foreclosure and sale was entered on the 5th of December, 1876. The property was sold under that decree by a master, February 7, 1877, and was purchased by Huidekoper and others, a committee of the first-mortgage bondholders, the purchase price being \$1,450,000. The purchasers paid in cash \$362,500, being one fourth of their bid, and petitioned the court on February 17, 1877, to be allowed to discharge the remainder of their bid by surrendering \$2,815,000 of the first-mortgage bonds held by them, and to be let into possession of the property. On the 23d of February, 1877, Elwell answered this petition, denying the right of the purchasers to a deed, on the ground that, as the statute of Illinois provided for a redemption at any time within fifteen months after the sale, he ought to be allowed that time in which to redeem from the sale. The master made to the court a report of the sale, the court confirmed the report on the 12th of April, 1877, and, on the 16th of April, 1877, the master reported that he had executed a deed to the purchasers. They conveyed the property, on the 28th of August, 1877, to The Chicago and Nashville Railroad Company, a corporation which had been organized on the 7th of February, 1877, and which, on the 28th of August, 1877, was consolidated with an Indiana corporation, by the name of The Chicago & Eastern Illinois Railroad Company.

The decree of foreclosure made December 5, 1876, was reversed by this court, by its decision in 106 U. S., and the mandate thereon, dated May 17, 1882, was filed in the circuit

court on the 25th of May, 1882. The grounds of the reversal were, that it was not shown that default in the payment of interest on the bonds had been continued for six months prior to the filing of the bill, nor that the trustee received a written request from the holders of a majority of the bonds to commence proceedings for foreclosure, as provided by the terms of the first mortgage.

After the cause returned to the circuit court, and on the 7th of July, 1882, Fosdick and Fish filed an amended and supplemental bill, setting forth (1) that there had been default, continued more than six months after presentation and demand, in the payment of interest coupons on the first-mortgage bonds; and (2) that a majority of the bondholders, being the holders of more than 92 per cent of all the outstanding bonds, had in writing demanded that the trustees immediately declare the principal of the bonds due and payable, and obtain a final decree to appropriate the net proceeds of the sale of the property, as such sale was confirmed, to the payment of the first-mortgage bonds and interest thereon. But immediate foreclosure for the full amount of principal and interest was prayed for. The Chicago, Danville & Vincennes Railroad Company demurred to the amended and supplemental bill, and petitioned the court to appoint a receiver to take possession of the property out of the hands of The Chicago and Eastern Illinois Railroad Company.

The Chicago & Eastern Illinois Railroad Company was made a party defendant to the suit. It answered the amended and supplemental bill, and on the 6th of December, 1882, filed its cross-bill against The Chicago, Danville & Vincennes Railroad Company, Fosdick and Fish, trustees, and Elwell, trustee. The material allegations of this cross-bill were as follows: The purchasers at the master's sale were bona fide purchasers at an open sale, which was attended with much competition, and the property brought a full and fair price. The sale was reported by the master and was confirmed by the court, and neither The Chicago, Danville & Vincennes Railroad Company nor Elwell had ever filed exceptions to the report or appealed from the decree of confirmation. Nearly all of the \$362,500 paid by the purchasers at the master's sale had been paid out to creditors of The Chicago, Danville & Vincennes Railroad Company, under decrees of the court. A large part of that amount was contributed by the holders of Indiana Division bonds, who were strangers to the record and innocent purchasers for value. On September 1, 1877, The Chicago & Eastern Illinois Railroad Company issued, negotiated and put in general circulation \$8,000,000 of 6 per cent bonds, secured by a trust deed on the property so purchased at the sale; and on December 1, 1877, issued \$1,000,000 of income bonds. The Chicago & Eastern Illinois Railroad Company had also issued \$8,000,000 of capital stock; and by consolidation with The Danville & Grape Creek Railroad Company had incurred an additional bonded debt of \$750,000. By means of certain perpetual leases The Chicago & Eastern Illinois Railroad Company had acquired additional railroad, and had also built certain branches, and procured additional rolling stock. The appeal from the foreclosure

decree of December 5, 1876, was not prayed until October 30, 1878, and was not perfected until January 29, 1879. During the five years which intervened between the purchase of the property by Huidekoper and others, on the 7th of February, 1877, and March 6, 1882, when the decree of foreclosure of December 5, 1876, was reversed by this court, the \$4,000,000 of bonds and \$8,000,000 of capital stock issued by The Chicago & Eastern Illinois Railroad Company, on the faith of its title to the property, had been largely dealt in on the stock exchanges of Boston and New York, and had so far changed ownership that, on March 6, 1882, when the decree of foreclosure was reversed, nearly all the bonds and a majority of the stock were owned by strangers to the litigation, who had purchased in good faith for full value.

The prayer of the cross-bill was that the title of The Chicago & Eastern Illinois Railroad Company, and of its stockholders and bondholders, to the property be forever quieted, as against The Chicago, Danville & Vincennes Railroad Company, Fosdick and Fish, and Elwell; and that it be decreed that The Chicago & Eastern Illinois Railroad Company had acquired a good title in fee simple absolute as against each of the defendants.

Answers were filed to the cross-bill by each of the defendants, and replications to such answers; and, on a reference, a master took a large amount of testimony on the issues joined, and filed the same, with his report, on the 9th of June, 1884.

On the 24th of June, 1884, The National City Bank of Ottawa, Illinois, a corporation, filed a petition as the owner and holder of \$14,000 of the convertible mortgage bonds of The Chicago, Danville & Vincennes Railroad Company, secured by the mortgage to Fish and Elwell, praying to be made a party defendant to the suit, and to be allowed to file an answer in the suit, on the ground that Elwell was not properly protecting the rights of the bank in the premises.

The case was heard on all the pleadings and proofs, before Judge Blodgett, and on the 30th of June, 1884, a decree was entered finding the equities of the cause in favor of the original plaintiffs as against all the defendants except The Chicago & Eastern Illinois Railroad Company, and also finding the equities of the cause in favor of the latter company by reason of the matters set forth in its cross-bill, as against all of the defendants thereto. The decree also contained the following provisions: "By virtue of the original deed of Henry W. Bishop, master in chancery, dated April 16, 1877, to Huidekoper, Shannon and Dennison, and the confirmation thereof by this court, and by the subsequent conveyance by said Huidekoper, Shannon and Dennison to the Chicago & Nashville Railroad Company, on August 28, 1877, and the subsequent consolidation between the Chicago & Nashville Railroad Company and the State Line & Covington Railroad Company, on August 28, 1877, as set forth in its cross-bill, the Chicago & Eastern Illinois Railroad Company acquired a perfect and indefeasible title to all and singular the Illinois Division of said Chicago, Danville & Vincennes railroad, as hereinbefore specifically

described, and also as described in said master's deed of April 16, 1877, reference being thereto had, free and clear of all lien, claim, title or equity of any kind whatever of said William R. Fosdick, James D. Fish, James W. Elwell, R. Biddle Roberts and the Chicago, Danville & Vincennes Railroad Company, or either of them, or any of the bondholders, stockholders or creditors of said Chicago, Danville & Vincennes Railroad Company, or any persons claiming by or under it or any of said trustees.

And it is further ordered that the petition of the National City Bank of Ottawa, Illinois, filed herein on the 24th day of June, 1884, for leave to intervene herein as holders of certain second-mortgage bonds of said Chicago, Danville & Vincennes Railroad Company, be dismissed at the cost of said petitioner, it appearing to the court that the trustees under said second mortgage are parties to this suit and have appeared and answered herein, and that there is no proof showing that said trustees are not acting in good faith."

On the 11th of October, 1884, The National City Bank of Ottawa prayed the circuit court for leave to prosecute an appeal in its own name to this court from the decree of June 30, 1884, the grounds of its prayer being the facts set forth in its intervening petition of June 24, 1884, and also the fact that such decree was entered by consent of all the parties to the record, including Elwell, notwithstanding the effect of the decree was to leave the bank wholly without remedy on its bonds, while other holders of like bonds were provided for by a secret agreement, with the knowledge and consent of Elwell, and against the protest of the bank, and that Elwell had refused to appeal from such decree.

On the 8d of August, 1885, the court made an order authorizing the bank to appeal from the decree of June 30, 1884, in the name of James W. Elwell, trustee, on executing to him an indemnity against all costs and expenses which might be incurred. The appeal thus allowed was not perfected, but on the 28th of June, 1886, the court entered an order which recited the fact that the bank had requested Elwell, as trustee, to perfect an appeal to this court from the decree of June 30, 1884, and that he had refused to comply with such request; and ordering that the bank have leave to appeal from that decree to this court, in the name of Elwell, as trustee, on condition that it should give a bond to indemnify Elwell, and on the further condition that the bank, or someone in its behalf, should give the usual appeal bond, in the sum of \$1,000, both of said bonds to be filed on or before June 30, 1886. Those bonds were duly filed, and the transcript of the record was filed in this court on October 18, 1886, and an addition thereto, by stipulation between the parties, on January 14, 1890. The appeal bond runs to Fosdick and Fish, trustees, "for the use and benefit of themselves and for the use and benefit of each and all parties affected or to be affected by the appeal in the condition hereunder written to this obligation." The bond recites that the appeal is from the decree of June 30, 1884, made on the original and supplemental bills of Fosdick and Fish, the cross-bill of Elwell, the cross-bill of

The Chicago & Eastern Illinois Railroad Company and another cross-bill.

The Chicago & Eastern Illinois Railroad Company now moves to dismiss the appeal of Elwell, trustee, by The National City Bank of Ottawa, on the ground, among others, that Elwell, trustee, on the 16th of October, 1884, before the appeal was allowed, executed and delivered to The Chicago & Eastern Illinois Railroad Company a written release of all errors had or committed in and concerning such decree, and especially releasing and waiving his right as such trustee to appeal from the decree; which release, on the 15th of November, 1884, was filed in the office of the clerk of the circuit court. A duly certified copy of such release is presented to this court as part of the moving papers. Its execution and authenticity are not denied on the part of the bank. It is entitled in the bill filed by Fosdick and Fish, and in the cross-bill brought by The Chicago & Eastern Illinois Railroad Company. It contains this statement:

"Comes now James W. Elwell, trustee, etc., one of the defendants in the above-entitled cause and cross-cause, and says that of the one million convertible mortgage bonds referred to in said original bill, secured by trust deed, of which he is sole trustee, as therein charged, forty-five of said bonds, of one thousand dollars each, have not been issued by the company, and are now deposited with the clerk of said court. Fifty-eight of said bonds, representing fifty-eight thousand dollars, were issued in exchange for coupons, under the funding contract or scheme referred to in said original bill and decree. That all of said coupons have been paid out of the proceeds of sale of said railroad and property, as provided by said decree. And that the holders of six hundred and seventeen of the balance of said bonds, amounting to six hundred and seventeen thousand dollars, do not desire further litigation in said cause and cross-cause; and that the holders of the balance of said bonds have hitherto declined to contribute to the cost of this litigation, or to protect him, as such trustee, against loss or the payment of costs or counsel fees. Now, therefore, the said James W. Elwell, trustee, as in said trust deed provided, representing the bondholders in said deed mentioned, for himself as such trustee, releases all errors whatsoever had or committed in or concerning the decree entered in the aforesaid cause and cross-cause by said court on the thirtieth (30th) day of June, A. D. 1884, and in and about the proceedings in said cause leading to said decree, and especially releases all his right, as such trustee, of appeal from said decree and proceedings, without intending, however, to prejudice the right of the holders of any of said convertible mortgage bonds to enforce the payment of their said bonds, or any part thereof."

It is contended for the bank that Elwell had no authority, as trustee in the second mortgage, to release errors in the foreclosure proceedings or in the decree and to waive the right to appeal from the decree; that his attempt to do so was a breach of trust, and outside of the powers and duties conferred upon him by the trust

deed; and that the release does not bar the right of the bank, as the holder of bonds secured by the trust deed to Elwell and Fish, to prosecute this appeal by the leave of the court, in the name of Elwell, nor furnish any reason for dismissing it. In the petition of intervention filed by the bank on the 24th of June, 1884, six days before the final decree was entered, it was alleged "that neither before the rendition of the final decree in this cause in this court, nor after its reversal by the supreme court, has the said Elwell shown any diligence or attempted to make any arrangement to prevent a sacrifice of the interests of your petitioner and others similarly situated;" and "that, unless it shall be permitted to become a party to this suit and file its answer therein, it will lose its rights in the premises under some collusive compromise or colorable sale, or through the indifference or neglect of the said Elwell." The court denied the prayer of the intervening petition of the bank, stating "that the trustees under said second mortgage are parties to this suit and have appeared and answered herein, and that there is no proof showing that said trustees are not acting in good faith."

It thus appears that the court passed upon the question of collusion on the part of Elwell, and held that the bank was bound by the acts of Elwell, representing it as trustee. No action was taken by the bank to appeal for more than three months. By an order made August 3, 1885, it was allowed to appeal in the name of Elwell, trustee, but it failed to perfect any appeal under such allowance. Such appeal was re-allowed on the 28th of June, 1886, and was perfected on the 30th of June, 1886, being exactly two years after the entry of the final decree and the last day on which the appeal could be taken. Meantime, by an instrument executed in October, 1884, and filed in the circuit court in November, 1884, at a time when no appeal was pending from the decree, the release of errors was executed by Elwell, trustee.

We are of opinion that this release bound all bondholders represented by Elwell. It appears by the release that only 955 of the convertible bonds were issued; that 58 were issued in exchange for coupons, all of which coupons had been paid out of the proceeds of the sale of the property; that, of the remaining 897, the holders of 617 did not desire further litigation; and that the holders of the remaining 280 had hitherto declined to contribute to the cost of the litigation or to protect the trustee against loss or the payment of costs or counsel fees. No substantial reasons appear for permitting the bank, as the holder of only \$14,000 of the bonds, to defeat the plainly expressed will of the holders of the remainder. *Sage v. Central R. Co.* 99 U. S. 384 [25: 394].

The allegation of neglect or collusion on the part of Elwell, as trustee, was found by the circuit court to be untrue. The trustee represented the bondholders not only in the proceedings which resulted in the entry of the decree, so that the bondholders were not necessary parties, but he also bound them by his release of errors. His relations to them had not changed between the time of the entry of the decree and the time of the execution of the release. *Shaw v. Little Rock & Ft. S. R. Co.*

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100 U. S. 605, 611, 612 [25: 757, 758, 759]; *First Nat. Bank v. Shedd*, 121 U. S. 74, 86 [30: 882]; *Barnes v. Chicago, M. & St. P. R. Co.*, 122 U. S. 1 [31: 1128].

The release of errors, although not found in the transcript of the record, is properly brought before this court, for the purpose for which it is presented. In *Dakota Co. v. Glidden*, 118 U. S. 222, 225 [28: 981, 982], this court, speaking by Mr. Justice Miller, said: "But this court is compelled, as all courts are, to receive evidence *dehors* the record affecting their proceedings in a case before them on error or appeal. The death of one of the parties after a writ of error or appeal requires a new proceeding to supply its place. The transfer of the interest of one of the parties by assignment or by a judicial proceeding in another court, as in bankruptcy or otherwise, is brought to the attention of the court by evidence outside of the original record, and acted on. A release of errors may be filed as a bar to the writ. A settlement of the controversy, with an agreement to dismiss the appeal or writ of error, or any stipulation as to proceedings in this court, signed by the parties, will be enforced."

By the provisions of the mortgage to Elwell, he, as trustee, could proceed to collect the mortgage debt, by litigation or otherwise, only at the request of the holders of a majority of the bonds. As appears from the terms of the release, and is not controverted, the majority of such holders desired the litigation to cease. The trustee was authorized to put an end to it, and his waiver of an appeal binds all who act in his name as trustee. The bank was not a party to the suit, and its right to appeal depended entirely upon the action of the trustee. *Ex parte Cutting*, 94 U. S. 14, 21 [24: 49, 51]; *Ex parte Cockcroft*, 104 U. S. 578 [26: 856]. All that the circuit court did was to allow the bank to appeal in the name of the trustee. The bank is bound by all the preceding acts of the trustee, done in good faith. On the facts of the case, the appeal must be considered as the appeal of the trustee, and as barred by his release executed long before the appeal was granted.

The result is that *the appeal must be dismissed, and it is so ordered.*

Mr. Chief Justice Fuller, having been of counsel in this case, did not sit in it or take any part in its decision.

DAVID C. WHITTEMORE, *Appt.*,

c.

AMOSKEAG NATIONAL BANK ET AL.

(See S. C. Reporter's ed. 527-530.)

Jurisdiction of circuit court of action against national bank—jurisdiction of this court—where national banks may be sued—secs. 5209, 5239, U. S. Rev. Stat.—practice.

1. Where, in an action by a stockholder of a national bank in behalf of himself and such stock-

NOTE.—As to jurisdiction of United States circuit court depending on parties and residence, see note to *Emory v. Greenough*, 1: 640.

Jurisdiction of state and United States courts, as to territory and offense. See note to *U. S. v. Bevans*, 4: 404.

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- holders as might join therein, against the bank and its directors, all the parties are citizens of the District of New Hampshire and the bank is located therein, the circuit court for that district has no jurisdiction.
2. This court has appellate jurisdiction to determine whether the circuit court had original jurisdiction.
 3. Prior to July 12, 1882, suits might be brought by or against national banks in the circuit courts of the United States in the district where the banks were located, but by the Act of that date the jurisdiction for suits thereafter brought by or against national banks, except suits between them and the United States, or its officers and agents, must be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States. 22 Stat. 162, 163, chap. 290, sec. 4.
 4. The suit cannot be retained by reason of anything contained in sections 5209, 5239, Rev. Stat.
 5. As the circuit court had no jurisdiction in this case, but dismissed the bill upon another ground, this court reverses the decree of the circuit court with a direction to dismiss the bill for want of jurisdiction.

[No. 219.]

Argued March 20, 1890. Decided March 31, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of New Hampshire dismissing a suit by a stockholder against a National Bank, its directors and its cashier to recover moneys lost by their illegal conduct. *Reversed, with direction to the Circuit Court to dismiss for want of jurisdiction.*

The facts are stated in the opinion.

Messrs. Frederick P. Fish and Thos. L. Livermore, for appellees, in favor of motion:

The objection of want of jurisdiction may be raised at any stage of the case, and it is not necessary to plead it, except to contradict the record.

Sullivan v. Fulton Steamboat Co. 19 U. S. 6 Wheat. 450 (5: 302); *Peale v. Phipps*, 55 U. S. 14 How. 869 (14: 459); *Mississippi & R. R. Boom Co. v. Patterson*, 98 U. S. 403 (25: 206); *Grace v. Am. Cent. Ins. Co.* 109 U. S. 278 (27: 932); *Hartog v. Memory*, 116 U. S. 588 (29: 725).

Jurisdiction must appear affirmatively on the record.

Turner v. Bank of N. A. 4 U. S. 4 Dall. 8 (1: 718); *Ex parte Smith*, 94 U. S. 455 (24: 165); *Robertson v. Cease*, 97 U. S. 648 (24: 1057); *Grace v. Am. Cent. Ins. Co.* 109 U. S. 278 (27: 932); *Bore v. Preston*, 111 U. S. 252 (28: 419).

The Act of July 12, 1882, chap. 290, sec. 4, repealed clause 10 of section 629 of the Revised Statutes, which gave the circuit court jurisdiction of suits by or against national banks, and the mere fact that a national bank is a party no longer gives jurisdiction.

Leather Mfrs. Bank v. Cooper, 120 U. S. 778 (80: 816); *Jefferson Nat. Bank v. Fore*, 25 Fed. Rep. 209; *Union Nat. Bank v. Miller*, 15 Fed. Rep. 703.

Revised Statutes, sec. 5239, has no reference to misapplication of funds by the directors of a national bank.

Brinckerhoff v. Bostwick, 88 N. Y. 52; *Conway v. Halsey*, 44 N. J. L. 462; *Trenholm v. Com. Nat. Bank*, 88 Fed. Rep. 328.

The willful misapplication referred to in section 5209 must be for the benefit of the directors, and not for the benefit of the bank, as charged in this case.

U. S. v. Britton, 107 U. S. 655 (27: 520); *U. S. v. Harper*, 38 Fed. Rep. 471.

Mr. H. G. Wood for appellant, in opposition.

Mr. Chief Justice Fuller delivered the opinion of the court:

David C. Whittemore, of Manchester, in the District of New Hampshire, in his own behalf and in behalf of such stockholders of the Amoskeag National Bank, a corporation duly established under the laws of the United States and having its principal place of business at said Manchester, as might join therein, brought his bill of complaint, May 9, 1885, against the Amoskeag National Bank, Moody Currier, George B. Chandler, David B. Varney, John B. Varick, Henry Chandler, John S. Kidder, Edson Hill and Reed P. Silver, all of Manchester, in said district, six of them directors, one of them the cashier and the other a former director of said Bank, alleging in substance that complainant was the owner of five shares of the capital stock of the Bank; that in 1875, a firm styled Dunn, Harris & Co. was adjudicated bankrupt by the United States District Court for said District of New Hampshire and an assignee appointed, being indebted at the time to the Bank in the sum of one thousand dollars, and one of the members of the firm, Cyrus Dunn, being indebted to the Bank in the sum of five thousand dollars; that the firm offered a composition of fifteen per cent to their creditors, and Cyrus Dunn offered a composition of twenty per cent to his creditors; that the Bank, by a vote of its directors, constituted one of their number its agent in the bankruptcy proceedings, and he entered into an agreement with Cyrus Dunn that, in consideration that the Bank should furnish him with money sufficient to carry out the compromise, he would pay the agent of the Bank a sum equal to the sum due to the Bank; that in pursuance of this agreement, the Bank advanced from its funds a large sum without security, in doing which the directors and officers violated their duties and obligations to the Bank's stockholders, and their acts were in violation of the charter of the Bank and the laws of the United States; that the sum advanced was used in purchasing claims against Cyrus Dunn; that the compromise was confirmed, and the property of Cyrus Dunn conveyed by the assignee to the agent of the Bank, and by him to the Bank; that afterwards the composition was set aside and the assignee brought suit against the Bank to recover the property, which was decided by the district court in favor of the assignee; that in 1876, a note was given to the Bank signed by two of its directors and Cyrus Dunn of the insolvent firm, for the money advanced by said Bank in excess of what was received from the assignee, and this note was included as part of the assets of the Bank; and that the Bank has made no attempt to collect the note, and has expended large sums of money in defense of its illegal acts; and complainant prays that the respondents, the directors of the Bank, may be decreed to pay to the Bank whatever it may

have lost by reason of this illegal conduct; and that a receiver may be appointed to collect said note, and for such other relief as may be just, etc. The bill was demurred to by the respondents, and the demurrer sustained upon the ground that the plaintiff could not maintain his bill because of his failure to bring himself within Equity Rule 94; and thereupon a decree was entered dismissing the bill with costs, and an appeal was prayed to this court.

All the parties were citizens of the District of New Hampshire, and the Bank was located therein; and in our judgment the circuit court for that district had no jurisdiction. A motion to dismiss the appeal on this ground has heretofore been made, but was overruled, as this court undoubtedly has appellate jurisdiction to determine whether the circuit court had original jurisdiction.

Prior to July 12, 1892, suits might be brought by or against national banks in the circuit courts of the United States in the district where the banks were located, but by the Act of that date it was provided that "the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suits may be begun." 22 Stat. 162, 163, chap. 290, sec. 4.

But counsel for complainant claims that the circuit court had jurisdiction under §§ 5209 and 5289 of the Revised Statutes. Section 5209 prescribes punishment for the embezzlement, abstraction or willful misapplication of any of the moneys, funds or credits of a national banking association, by any president, director, cashier, teller, clerk or agent thereof, and for other acts done without authority of the directors, with intent to defraud the bank; and section 5289 provides for a suit by the controller of the currency to forfeit the franchises of national banks for the intentional violation by their directors, or the intentional permission by them of such violation by any of the officers, agents or servants of the association, of any of the provisions of the title of the Revised Statutes relating to national banks. This bill obviously cannot be retained by reason of anything contained in those sections.

As the Circuit Court had no jurisdiction, but dismissed the bill upon another ground, *we reverse its decree, with a direction to dismiss the bill for want of jurisdiction.*

EVELINE L. HATHAWAY, Ex'x, Plff.
in Err.,

THE FIRST NATIONAL BANK OF
CAMBRIDGE.

(See S. C. Reporter's ed. 494-499.)

Errors in findings of fact—in finding of law—court, when sole judge of facts—refusal to find incidental facts—ratification of agent's acts.

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1. Errors in the findings of fact by the court are not subject to revision by this court, if there was any evidence upon which such findings could be made.
2. Assignments of error in findings of fact amount, in substance, to the same thing as the alleged error in finding as a matter of law that the findings of fact stated could lawfully be made from the evidence admitted and considered.
3. Where the case is tried by the court, without a jury, it is, like a jury, the sole judge of the credibility of the witnesses, and the questions of fact, on the evidence, where there is any evidence to justify the findings.
4. The refusal of the court to find immaterial or incidental facts, amounting only to evidence bearing on the ultimate facts found, is not a proper subject of review.
5. Where the action is brought for the alleged wrongful acts of the defendant in selling certain bonds of plaintiff and using the proceeds to pay the notes of one Hubbard, if Hubbard, by arrangement between him and plaintiff, had authority to and did consent to such acts, and the plaintiff, having full knowledge of the transactions, ratified and confirmed what was done, he cannot maintain the action.

[No. 223.]

Argued March 20, 21, 1890. Decided March 31, 1890.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment for defendant in an action for the conversion of certain bonds of the United States with the interest coupons thereon. *Affirmed.*

The facts are stated in the opinion.

Messrs. Duane E. Fox and L. D. Norris, for plaintiff in error:

One of the sureties to a bond erased his name; this avoided the bond as to a surety not informed of the erasure.

Smith v. U. S. 69 U. S. 2 Wall. 219 (17: 788).

The alteration of the date on commercial paper, if made without consent of the party sought to be charged, extinguishes his liability.

Wood v. Steele, 73 U. S. 6 Wall. 80 (18: 725); *Brink v. Proff*, 40 Mich. 611; *Brandt, Surety and Guar.* 79, 80; *Miller v. Stewart*, 22 U. S. 9 Wheat. 702, 703 (6: 196, 197); *Oakley v. Aspinwall*, 4 N. Y. 517; *Whitcher v. Hall*, 5 Barn. & C. 269; *Dobbin v. Bradley*, 17 Wend. 422; *Wright v. Johnson*, 8 Wend. 512.

The surety must be consulted, and consent, otherwise the change of the agreement will discharge him.

Calvo v. Davies, 78 N. Y. 211, 216, 217; *Paine v. Jones*, 76 N. Y. 274, 278, 279; *General Steam Nav. Co. v. Rolt*, 6 C. B. N. S. 595, 596; *Brandt, Surety and Guar.* §§ 331, 333, 345; *Bethune v. Dozier*, 10 Ga. 235; *Atlanta Nat. Bank v. Douglass*, 51 Ga. 205; *Rowan v. Sharp's Rifle Co.* 83 Conn. 22, 24; *Manufacturers Bank v. Cole*, 39 Me. 188; *Fay v. Smith*, 1 Allen, 477; *Harsh v. Klepper*, 28 Ohio St. 200; *Gardner v. Walsh*, 5 El. & Bl. 89.

The sale of the bonds, under the circumstances of this case, was an unlawful conversion of them.

Smith v. Sheldon, 35 Mich. 48; *Pierce v. Benjamin*, 14 Pick. 356; *Johnson v. Stear*, 15 C. B. N. S. 331.

Plaintiff is not estopped from questioning defendant's right to make sale of the bonds.

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Combs v. Scott, 12 Allen, 498; *Fitzgerald v. Blocher*, 32 Ark. 742; *Ingram v. Harts*, 48 Pa. 380; *Simpson v. Pierson*, 81 Ind. 5.

Messrs. George F. Hoar and Wm. Gaston for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court:

This is an action at law, brought in the Circuit Court of the United States for the District of Massachusetts, by a writ, dated September 22, 1881, by James S. P. Hathaway against The First National Bank of Cambridge, a national banking corporation.

The declaration contains three counts in tort, the substance of which is that the defendant had converted to its own use certain bonds of the United States, with the interest coupons thereon, the property of the plaintiff; and that it had converted to its own use the proceeds of the unlawful and unauthorized sale by it of such bonds, with the coupons thereon, the property of the plaintiff; and that it had unlawfully sold such bonds, with the interest coupons thereon, the property of the plaintiff, and converted the proceeds to its own use. The bonds were seven bonds of \$1,000 each, commonly called 5-20 bonds, with interest coupons attached; five of the same bonds, of \$500 each, with coupons; and five of the same bonds, of \$100 each, with coupons.

The declaration also contains two counts in contract, one for money received by the defendant for the sale of the bonds, and for interest on the money so received, from the time of the sale. The second count in contract alleges that Gilbert Hathaway, the father of the plaintiff, in 1865, placed with the defendant and in the hands of its cashier certain bonds, his property, which were to stand as collateral security for the payment of certain notes which might become due to the defendant from one Appleton Hubbard; that those bonds were afterwards converted by the defendant into such 5-20 bonds, and thenceforth, by agreement of the parties, the 5-20 bonds were to be held by the defendant as collateral security for the payment of any notes which might thereafter become due to the defendant from Hubbard; that certain notes were afterwards made by Hubbard to the defendant, for which the bonds were to stand as collateral security, but only on the express agreement by the defendant that it had no right to sell or dispose of any of the bonds, except upon and after the maturity and nonpayment by Hubbard of such notes, and then only to such an amount as would be sufficient to pay any overdue and unpaid note; that the defendant knew that the bonds were the property of Gilbert Hathaway, and not the property of Hubbard; that Hathaway died in 1871, and the plaintiff, as residuary legatee under his will, which had been duly proved, became the owner of the bonds and coupons; that the defendant agreed with Gilbert Hathaway, and after his death agreed with the plaintiff, to keep the bonds safely and return them to the plaintiff on his demand therefor, subject only to the right to sell sufficient of them to pay any overdue and unpaid note of Hubbard, for which the bonds were so held as collateral security; that the defendant sold all of the bonds at a time when no note of Hubbard was due

and unpaid to it, and when it had no right to sell the same; and that the defendant owes the plaintiff \$20,000, for the proceeds of the sale of such bonds, and for the interest coupons attached thereto, and for interest on such proceeds from May 1, 1879, when the same was demanded by the plaintiff from the defendant, and which the defendant then refused to pay to the plaintiff.

The answer of the defendant denies all the allegations of the writ and the declaration, and sets up that whatever bonds were sold by it were rightfully sold; that it had the legal right to retain whatever money it had retained from the proceeds of the sale of any of the bonds; and that whatever of the acts complained of were done by the defendant were done by the consent of the plaintiff, so far as his consent was necessary and proper to the validity of such acts, and were ratified by the plaintiff, so far as he had any interest therein.

There was a trial in 1883 by a jury, which failed to agree on a verdict. In September, 1885, by a written stipulation, a trial by a jury was waived, and the case was tried by the court without a jury. On the 16th of January, 1886, the court found as facts:

(1) That, prior to April 24, 1879, the plaintiff's testator delivered to Appleton Hubbard, of Cambridge, certain bonds of the United States amounting, at their face value, to \$10,000, with power and authority to dispose of them and to deal with them in the manner in which the same were disposed of and dealt with by said Hubbard, as hereinafter stated;

(2) That, after such delivery, Hubbard pledged them to the defendant as collateral security for the payment of twenty-five promissory notes made by said Hubbard and payable to and owned by the defendant, which notes were in the whole for the sum of \$10,000, and were to mature on different days from the 24th of April, 1879, to the 5th of August, 1879;

(3) That, on the 24th of April, 1879, Hubbard agreed with the defendant that said bonds should be sold and the proceeds invested in other bonds of the United States;

(4) That, on the 25th of April, 1879, the defendant sold said bonds and received for them the sum of \$10,156.25;

(5) That, on the 29th or 30th of April, 1889, Hubbard agreed with the defendant that the proceeds of the sale of said bonds should not be invested in other bonds of the United States, but that such proceeds should be applied by the defendant to the payment of the notes of Hubbard then held by the defendant, part of which were due and part of which were to become due, and that proper allowances of interest by way of charge or rebate should be made in respect of said notes;

(6) That thereupon the defendant applied said proceeds according to said agreement, and that the surplus of said proceeds over and above the amount of all said notes, with allowance of interest as aforesaid, was \$175.85;

(7) That, on the 16th of May, 1879, the defendant paid said sum of \$175.85 to Hubbard, and on the 19th of May, 1879, Hubbard paid the same amount to the plaintiff;

(8) That the plaintiff afterwards had knowledge of all the facts hereinbefore stated, and, having knowledge of the same, ratified and

confirmed the said contracts, dealings and transactions between Hubbard and the defendant.

On these findings of fact the court held as matter of law: (1) That the evidence offered by the defendant to prove proceedings in insolvency against Appleton Hubbard is irrelevant and inadmissible; (2) That the above findings of fact may lawfully be made from the evidence admitted and considered; (3) That, on the above findings of fact, there should be judgment for the defendant, for costs.

On the same day, a judgment was entered that the plaintiff take nothing by his writ, and that the defendant recover the costs of suit from the plaintiff.

There is a bill of exceptions, which states that each party introduced evidence to maintain on his part the issue joined; that the evidence on both sides is annexed to the bill of exceptions and made part thereof; that, after the close of the evidence, the plaintiff insisted that he was entitled to judgment, and filed with the court certain prayers for findings of fact and of law, which are annexed to and made part of the bill of exceptions; that the court refused to make any of such findings, except in so far as they were consistent with the findings of fact and of law which the court afterwards made, being the findings above set forth, to which refusal the plaintiff excepted; and that the plaintiff also filed exceptions to the findings of fact and of law so made, and to the refusal of the court to make the findings of fact and of law so requested by the plaintiff.

The plaintiff brought a writ of error to review the judgment; and, he having died, the writ is prosecuted in the name of his executrix.

The assignments of error filed in the circuit court and sent up with the record allege that the court erred, first, in making the finding of fact numbered (1); second, in making the finding of fact numbered (5); third, in making the findings of fact numbered respectively (7) and (8); fourth and fifth, in making its findings of law numbered (2) and (3), and sixth, in making its mixed finding of law and fact, that there was ratification and confirmation of the dealings of Hubbard and the defendant concerning the \$10,000, face value, of the United States government bonds in controversy.

The first three assignments of error allege errors merely in the findings of fact by the court. Those errors are not subject to revision by this court, if there was any evidence upon which such findings could be made. *The Francis Wright*, 105 U. S. 381, 387 [26: 1100, 1102]; *McClure v. United States*, 116 U. S. 145, 152 [29: 572, 574]; *Union Pacific R. Co. v. United States*, 116 U. S. 154, 157 [29: 584, 586]; *Merchants Ins. Co. v. Allen*, 120 U. S. 67, 71 [30: 858, 860]. Those three assignments of error amount, in substance, to the same thing as the alleged error in finding as a matter of law that the findings of fact stated could lawfully be made from the evidence admitted and considered.

The assignment of error numbered 6 raises the same question which is raised by that numbered 4, namely, whether there was any evidence in the case which authorized the court to make the finding of fact numbered (8), covered

by the assignment of error numbered 3, as to ratification and confirmation.

As to the findings of fact numbered (1) and (2) we are of opinion that, on the evidence of Hubbard, and that of the defendant's cashier, Bullard and that of the plaintiff, and the other evidence in the case, the court was justified in making those findings. It was, like a jury, the sole judge of the credibility of the witnesses, and the questions were questions of fact, on the evidence. It would serve no good purpose to examine the evidence critically, nor is it our province to do so. It is sufficient to say that the case was not one where there was no evidence to justify the findings of the court.

The same remarks may be made as to the other findings of fact made by the court, and especially as to its finding that the plaintiff, with knowledge of all the facts found by the court, ratified and confirmed the contracts, dealings and transactions between Hubbard and the defendant, set forth by the court.

As to the refusal of the court to find certain facts specified by the plaintiff, and certain propositions of law based on those facts, they were either immaterial facts or incidental facts amounting only to evidence bearing on the ultimate facts found. *The Francis Wright*, 105 U. S. 381, 389 [26: 1100, 1102]; *McClure v. United States*, 116 U. S. 145, 152 [29: 572, 574]; *Union Pacific R. Co. v. United States*, 116 U. S. 154, 157 [29: 584, 586]; *Merchants Ins. Co. v. Allen*, 121 U. S. 67, 71 [30: 858, 860].

The action being founded on the alleged wrongful acts of the defendant in selling the bonds and using the proceeds to pay the notes of Hubbard, it follows that, if Hubbard consented to such acts, and if, by the arrangement between Hubbard and Gilbert Hathaway, the former had authority to consent to such acts, and if the plaintiff, having full knowledge of the transactions, ratified and confirmed what was done, he could not maintain this action.

Judgment affirmed.

SANDFORD S. SMALL, *Appt.*,

v.

THE NORTHERN PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 514-515.)

Filing of record—effect of omission to file.

1. Where the record is not filed at the term succeeding the allowance of the appeal, the appeal ceases to have any operation or effect.
2. As in this case there was no allowance of a second appeal, and when the record was filed the time had expired on the first appeal, for filing it, such filing was not done in pursuance of an appeal still in force; nor could an appeal then have been allowed, as two years had expired from the date of the final decree.

[No. 226.]

Submitted Mar. 21, 1890. Decided Mar. 31, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Minnesota dismissing a suit with costs. *Dismissed.* The facts are stated in the opinion.

Mr. John G. Woolley for appellant.
Messrs. W. P. Clough, A. H. Garland
 and **H. J. May** for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court:

This appeal must be dismissed for want of jurisdiction. Small filed his bill in the District Court of the Fourth Judicial District of the State of Minnesota, whence the cause was subsequently removed into the Circuit Court of the United States for the District of Minnesota, and, upon hearing, resulted on the 24th day of June, 1884, in a decree dismissing the complainant's bill, and rendering judgment in favor of the defendant for its costs to be taxed. On the 25th day of June, 1884, the complainant prayed an appeal to this court which was granted. On the 21st day of May, 1886, complainant filed an appeal bond and a citation was issued, returnable at the October Term, 1886, dated April 30, 1886. The record herein was filed October 19, 1886. The only appeal which from the record before us appears to have been prayed and allowed was that of the 25th day of June, 1884.

But, as we have said many times before, inasmuch as the record was not filed at the term succeeding the allowance of the appeal, that appeal ceased to have any operation or effect, and the case stood as if it had never been allowed. There was no allowance of an appeal after that, and when the record was filed on the 19th day of October, 1886, this was not done in pursuance of an appeal still in force, nor could an appeal then have been allowed, as two years had expired from the date of the final decree. This appeal was not "taken" as provided, and we are therefore compelled to dismiss it. *Credit Co. v. Arkansas Cent. R. Co.* 128 U. S. 258 [32: 448]; *Richardson v. Green*, 180 U. S. 104 [32: 872]; *Evans v. State Nat. Bank*, ante, p. 917.

Appeal dismissed for want of jurisdiction.

UNITED STATES, Appt.,

v.

RICHARD M. JONES.

(See S. C. Reporter's ed. 483-488.)

Fees of U. S. commissioner—approval of account by court.

1. A commissioner of the United States circuit court is entitled to the fee of \$5 a day for hearing and deciding motions upon bail and the sufficiency thereof, and for the continuance of cases before him.
2. The approval of a commissioner's account by a circuit court of the United States, under the Act of February 22, 1875 (18 Stat. 383), is prima facie evidence of the correctness of the items of that account, and, in the absence of clear and unequivocal proof of mistake on the part of the court, is conclusive.

[No. 1554.]

Submitted Mar. 3, 1890. Decided Mar. 24, 1890.

A PPEAL from a judgment of the Court of Claims in favor of claimant for services rendered by him as a Commissioner of the Circuit Court of the United States. *Affirmed.*

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Statement by **Mr. Justice Lamar**:

This is an appeal from a judgment rendered by the Court of Claims against the United States in favor of Richard M. Jones, for services rendered by him as a commissioner of the Circuit Court of the United States for the Western District of North Carolina.

The material facts of the case, as found by the court upon the evidence, are, that the claimant had been a commissioner of the said court from 1883 to the bringing of the action; that from December 8, 1885, to June 30, 1886, as such commissioner, he issued warrants in six cases, in which issue was joined and testimony taken, in three cases in which issue was joined and no testimony was taken, and in three cases in which issue was not joined, the defendants discharged and no testimony taken; and that he duly made his docket entries in each and all of those cases by order and authority of the court, and in the manner required by its rules.

His accounts for fees and for keeping his dockets were verified by oath, and presented to the court in the presence of the district attorney, and approved by the court in due form. For those accounts, thus approved, he was allowed a fee of three dollars in each case where issue was joined and testimony taken, two dollars where issue was joined but no testimony taken, and one dollar where issue was not joined, and the defendant discharged. His account also showed charges on eleven different days from March 12, 1884, to September 15, 1887, in as many criminal cases, each of which charges was either "for hearing and deciding on criminal charges, in deciding on amount of bail and sufficiency thereof," or "for hearing and deciding on criminal charges, in hearing and deciding on motion for continuance." These charges were approved by the circuit court, but not paid.

The court found as a conclusion of law that the claimant was entitled to \$55 for these last eleven cases, and entered a judgment in his favor for \$76. From that judgment the United States brings this appeal.

The only assignment of error presented by the government in this appeal is, that the court erred in finding that claimant is entitled to \$55 for hearing and deciding on amount of bail and sufficiency thereof in four cases, and for hearing and deciding on motion for continuance in seven cases.

Messrs. John B. Cotton, Assistant Atty-Gen., and **F. P. Devoees** for appellant.

Mr. George A. King for appellee.

Mr. Justice Lamar delivered the opinion of the court:

A brief reference to the powers and duties of a commissioner, as an examining and committing magistrate, will be sufficient to dispose of the only question presented by this appeal. Section 1014 of the Revised Statutes of the United States provides that, "for any crime or offense against the United States, the offender may, by . . . any commissioner of the circuit court to take bail, . . . be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies

of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case," etc., etc.

By section 1015 it is further provided that "bail may be admitted" by such commissioner "upon all arrests in criminal cases where the offense is not punishable by death."

By section 1982 such commissioners are vested with the power to institute proceedings against persons violating any of the provisions of chapter seven of the title *Crimes*.

Section 1983 provides for the increase of the number of commissioners "so as to afford a speedy and convenient means for the arrest and examination of persons charged with the crimes referred to in the preceding section."

By section 1984 these officers are vested with other important powers; and by section 1985 every marshal and deputy marshal is required to obey and execute all warrants or other process that the commissioners may issue in the lawful performance of their duties.

By other sections numerous duties of a purely clerical and ministerial character are attached to this office. The compensation of a commissioner is clearly prescribed and classified by section 847 of the Revised Statutes according to the character of the services performed. For acts purely clerical and ministerial, such as administering oaths, taking acknowledgments, taking and certifying depositions to file or furnishing a copy of the same, specific fees are provided, and for issuing writs or warrants or other services he has the same compensation as is allowed to clerks for like services. For acts not merely clerical, but which are performed by the commissioner in his judicial capacity, his fees are regulated on a basis of *per diem* compensation. Among the provisions of this kind is the one upon which this controversy has arisen, viz.: "For hearing and deciding on criminal charges, five dollars a day for the time necessarily employed."

It is admitted that from March 12, 1884, to June 20, 1888, the period covered by the claim in dispute, there came before the appellee, in his capacity as commissioner, on eleven different days, eleven separate cases to be heard and decided against various persons, each charged with a crime against the laws of the United States; that in four of these cases he heard and decided motions upon bail, and the sufficiency thereof; and in the other seven motions for continuance were heard and decided by him.

There can be but one answer, in our opinion, to the question whether the commissioner should be allowed a fee of five dollars a day for his services on those eleven days. The decision, upon a motion for bail and the sufficiency thereof, is a judicial determination of the very matter which the Statutes authorize and require him "to hear and decide," to wit, whether a party arrested for a crime against the United States, when brought before him for examination, shall be discharged, or committed on bail for trial, and in default thereof imprisoned. With respect to motions for continuance, the granting or refusal of them is unquestionably a necessary incident to, and a part of, the hearing and determining of criminal charges; and the exercise of that power in such

criminal proceedings is indispensable to the right of the accused to have a fair and full investigation of the offense charged against him and to a sufficient time for the summoning of his witnesses as well as for employing and consulting with counsel to aid him in his defense.

It is contended by the assistant attorney-general that the *per diem* fee in such case is not only intended for the service specified, but that the "time actually employed is also an element to be considered." A sufficient answer to this objection is furnished in the findings of the court below that the account of the commissioner for the fees charged for the services in question was verified by oath and presented to the United States court of which he was the commissioner, in open court, in the presence of the district attorney, approved by the court, and an order, approving the same as being in accordance with law and just, was entered upon the records of the court. The approval of a commissioner's account by a circuit court of the United States, under the Act of February 22, 1875 (18 Stat. 383), is *prima facie* evidence of the correctness of the items of that account; and in the absence of clear and unequivocal proof of mistake on the part of the court it should be conclusive.

We think the authorities cited by the attorney for the appellee in support of the claim in question are directly in point.

The judgment of the Court of Claims is affirmed.

M. M. WHEELER ET AL., *Appts.*,

v.

J. C. CLOYD ET AL.

(See S. C. Reporter's ed. 537-547.)

Jurisdiction as to amount—distinct decrees against several parties cannot be joined to give jurisdiction.

1. Where a foreclosure has been had on different tracts of land claimed by different owners, and it was decreed that each owner, a defendant, could redeem the land by paying the amount his tract sold for within a year or be foreclosed, and no tract sold for as much as five thousand dollars, several defendants cannot join in an appeal to this court and consolidate the several amounts awarded against them, and thereby give this court jurisdiction.
2. Distinct decrees against distinct parties on distinct causes of action, or on a single cause of action in which there are distinct liabilities, cannot be joined to give this court jurisdiction on appeal.

[No. 147.]

Argued Dec. 6, 9, 1889. Decided April 7, 1890.

A PPEAL from a decree of the Circuit Court of the United States for the Southern District of Illinois decreeing that the owners of the equity of redemption or residuary interest in several tracts of land may each redeem the tract owned by him from a sale under a decree of foreclosure. On motion to dismiss. *Dismissed.*

The facts are stated in the opinion.

Messrs. Lucien Birdseye and Edwin

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Beecher, for appellees, in favor of motion to dismiss:

This court has no jurisdiction of the present appeal, the matter in dispute not exceeding \$5,000.

U. S. Rev. Stat. § 602; Act of Feb. 16, 1875, chap. 77, § 3 (18 Stat. 316).

Several defendants against whom decrees of this character have been rendered cannot consolidate the amounts awarded against them, and by a joint appeal give this court jurisdiction.

Gibson v. Shufeldt, 122 U. S. 27 (30:1088); *Oliver v. Alexander*, 31 U. S. 6 Pet. 143 (8:849); *Rich v. Lambert*, 53 U. S. 12 How. 347 (18:1017); *Ex parte Baltimore & O. R. Co.* 106 U. S. 5 (27:78); *Farmers L. & T. Co. v. Waterman*, 106 U. S. 265 (27:115); *Hasall v. Wilcox*, 115 U. S. 598 (29:504); *Stratton v. Jarvis*, 33 U. S. 8 Pet. 4 (8:846); *Spear v. Place*, 52 U. S. 11 How. 522 (18:796); *Seaver v. Bigelow*, 72 U. S. 5 Wall. 208 (18:595); *Terry v. Hatch*, 93 U. S. 44 (28:796); *Russell v. Stansell*, 105 U. S. 303 (26:990); *Chatfield v. Boyle*, 105 U. S. 231 (26:944); *Ballard Paving Co. v. Mulford*, 100 U. S. 148 (25:591); *Schued v. Smith*, 106 U. S. 188 (27:156); *Howley v. Fairbanks*, 108 U. S. 543 (27:820); *Fourth Nat. Bank v. Stout*, 118 U. S. 684 (28:1152); *Ex parte Phoenix Ins. Co.* 117 U. S. 367 (29:923); *Tupper v. Wise*, 110 U. S. 398 (28:189); *Lynch v. Bailey*, 110 U. S. 400 (28:190); *Friend v. Wise*, 111 U. S. 797 (28:602); *Henderson v. Wadsworth*, 115 U. S. 264 (29:877); *Stewart v. Dunham*, 115 U. S. 61 (29:329); *Estes v. Gunter*, 121 U. S. 188 (30:884).

Messrs. H. Tompkins, Jas. McCartney and T. J. Golden, for appellants, in opposition to motion:

An appeal lies in this case as the jurisdiction of the court below is a proper one for review and it had no jurisdiction. The limited jurisdiction of the circuit court is always a subject of inquiry in this court when the record shows the want of it.

Scott v. Sandford, 60 U. S. 19 How. 393 (15:691).

Jurisdictional fact may be looked into from the whole record.

Orignon v. Astor, 43 U. S. 2 How. 319 (11:283).

Parties cannot join to give jurisdiction.

Oliver v. Alexander, 31 U. S. 6 Pet. 143 (8:349); *Spear v. Place*, 52 U. S. 11 How. 522 (18:796).

Each complainant must be able to sue each defendant.

Rich v. Lambert, 53 U. S. 12 How. 347 (18:1017); *Strawbridge v. Curtiss*, 7 U. S. 3 Cranch, 267 (2:435); *New Orleans v. Winter*, 14 U. S. 1 Wheat. 91 (4:44); *Ballard Paving Co. v. Mulford*, 100 U. S. 147 (25:591).

As record shows circuit court had no jurisdiction, the supreme court will dismiss the suit.

Bingham v. Cabbot, 3 U. S. 8 Dall. 19 (1:491); *McCormick v. Sullivan*, 23 U. S. 10 Wheat. 191 (6:300).

Appearance cannot enlarge the power of the court nor prevent motion to dismiss the suit for want of jurisdiction.

U. S. v. Yates, 47 U. S. 6 How. 605 (12:575); *Capron v. Van Noorden*, 6 U. S. 2 Cranch, 126 (2:220).

An appellate court before whom a cause is brought of which the court below had no juris-

diction may take jurisdiction so far as to annul and reverse the proceedings below.

U. S. v. Nourse, 31 U. S. 6 Pet. 470, 495 (8:487, 477).

An appeal lies in this case, as appellees' action is to enjoin the Illinois Supreme Court from further proceedings until appellees can foreclose. If the action is to foreclose, then it is *in solido* for the whole debt.

The matter in dispute is the debt claimed, not the damages or prayer for judgment.

Rich v. Lambert, 53 U. S. 12 How. 352 (18:1018); *Lee v. Watson*, 66 U. S. 1 Wall. 337 (17:557); *Wilson v. Daniel*, 3 U. S. 8 Dall. 401, 408 (1:655, 657).

Purchasers of the equity of redemption, to redeem, must pay the whole debt. There can be no severance until the debt is paid, or foreclosed, under a legal proceeding.

Jones, Mortg. §§ 1068, 1070, 1075; *Powell, Mortg.* 342; *Bradley v. Snyder*, 14 Ill. 263; *Meacham v. Steele*, 98 Ill. 141.

Mr. Justice Lamar delivered the opinion of the court:

This is a motion to dismiss an appeal upon the ground that the interests of each of the appellants in the case are separate and distinct, and do not involve an amount sufficient to give this court jurisdiction.

The case grows out of *Kenicott v. Wayne County*, 38 U. S. 16 Wall. 452 [21:319], and *Wayne County v. Kennicott*, 94 U. S. 498 [24:260]; and those cases are referred to for a more minute statement of all the early facts of the controversy than is necessary to be made for the purpose of considering the question now before us. A brief summary of some of the leading facts of the controversy will be sufficient for present purposes.

On the 20th of April, 1859, the County of Wayne in the State of Illinois, by virtue of an authority derived from an Act of the State Legislature, executed a mortgage and a deed of trust upon about 100,000 acres of its swamp and overflowed lands, to Isaac Seymour of New York City, as trustee, to secure the payment of \$300,000 of its bonds, which had been issued for the purpose of raising funds with which to construct a railroad. On the same day the Mount Vernon Railroad Company, the corporation that had been organized to build the road for the benefit of which the aforesaid aid had been granted, as a part of the same general transaction of raising funds with which to build its road, executed a mortgage to Seymour, upon its contemplated railroad, its appurtenances, franchises and other property and effects, both present and prospective, as an additional security for the aforesaid bonds. The bonds were sold and came into the hands of bona fide purchasers for value, and default having been made in the payment of the interest on them, as it came due, a bill for foreclosure of the mortgages and deed of trust was filed, on the 7th of March, 1865, by John W. Kennicott and other claimants of a number of the bonds which had been sold, against the County of Wayne and the Mount Vernon Railroad Company. The railroad company defaulted, and, upon a hearing in the Circuit Court of the United States for the Southern District of Illinois, the bill was dismissed as to the County of Wayne,

on the ground that the mortgage was invalid because the proofs failed to show that at the date it was made there was any line of railroad constructed or authorized to be constructed through that county, with which the Mount Vernon railroad was connected in any manner. Upon appeal, this court reversed that decree, and held that the mortgage in controversy was valid, as to bona fide holders of the bonds it was intended to secure, and that the complainants were entitled to a decree in their favor. *Kenicott v. Wayne County*, *supra*. A final decree in the case was rendered by the circuit court in June, 1874, which was affirmed by this court on appeal. *Wayne County v. Kenicott*, *supra*. In pursuance of that decree the lands covered by the mortgage were sold at a master's sale on the 18th of September, 1877, for an amount insufficient to satisfy the claims of the bondholders, and, the time for redemption having expired, the master, on May 27, 1879, executed and delivered a deed for them to one Broadwell, who had come into possession of the certificates of purchase at the aforesaid sale. The appellees in this case, who were complainants below, claim under Broadwell.

Between the date of the execution of the deed of trust and the mortgage before mentioned, and March 7, 1865, when the foreclosure suit was commenced, the County of Wayne had sold a large amount of the lands embraced in those incumbrances to individuals who were not made parties to the foreclosure proceedings. The appellants here claim under those purchases from the county.

The case, as it now stands, is a consolidation of four others and an intervening petition filed by leave of the court. The first of those consolidated cases was a suit in equity brought on the 25th of January, 1882, by the appellee, J. C. Cloyd, a citizen of New York, against Clarissa Jordan and some twenty-four or more other defendants, all but two of whom were citizens of Illinois, one of those two being a citizen of Ohio, and the other a citizen of Colorado. The bill set out, somewhat in detail, the various steps in the proceedings above referred to, and further alleged that, by reason thereof and also by reason of the conveyances before mentioned, the County of Wayne had no right, title or interest in and to the lands in dispute and was not in any other manner interested in the present suit.

The prayer of the bill was that a subpoena issue commanding each of the defendants to appear and answer, but not under oath, all and singular the allegations of the bill; that an account be taken, under the direction of the court, to ascertain how much was due on the decree in the case of *Kenicott v. Wayne County*, *supra*, and also to ascertain the amount for which each tract of land involved in the suit was sold at the master's sale, with interest. It then continued as follows: "That said defendants, within a short time to be fixed by this court, pay to complainant the amount so found to be due on said decree, or, in the alternative, that each of said defendants pay to your orator the amount for which the land so claimed by each of said defendants was sold for at said master's sale, with the interest thereon, and in default of making such payment that your honor, by a decree of this court, declare the

equity of redemption of said defendants be forever barred and foreclosed; and if your honor should deem it right and equitable that the equity of redemption of said defendants in and to said premises should be sold, then that your honor order the same to be sold in such manner as may seem best to your honor;" and concluded with a prayer for other and further relief, etc.

The second and third of the consolidated cases were brought on the same day as the first one, in the court below, and were similar in every respect to that one. The second one was brought by C. T. Austin, a citizen of New York, against Michael Book and four other defendants, all citizens of Illinois; and the third one was brought by John B. Cornell, also a citizen of New York, against Thomas J. Pettijohn and some fifty-five or more other defendants, all of whom were citizens of Illinois, except C. M. Wakefield, who was a citizen of Texas.

The fourth one was brought in the court below on the 26th of January, 1882, by Elizabeth H. Taylor, J. Sargent Smith and Arthur F. Gould, citizens of Massachusetts; Henry M. Alexander, administrator of the last will and testament of Peter McMartin, deceased; Joseph Waxelbaum and Charles A. Coe, citizens of New York; and William L. Rolston, a citizen of Ohio, against J. B. Bozarth and sixty-five other defendants, who were all citizens of Illinois; and was similar to the three preceding cases in every respect, except that the lands involved were described, and the name of the owner of each particular tract was set forth in the bill itself, instead of in an exhibit thereto, as was the case in the others.

These cases were consolidated by an order of court entered January 2, 1884, and were ordered to proceed as one case, under the title of the first one; and at the same time leave was given to amend the bills in all of the causes in order to make them harmonious.

By leave of the court, on the 4th day of April, 1884, Fernando B. Hane, a citizen of Ohio, filed his intervening petition in the case, as consolidated, against all of the defendants impleaded therein, and also against John J. Backman and one hundred and seventy-four other defendants, all citizens of Illinois, alleging substantially the same facts as did the preceding cases, with a like prayer and with an additional prayer for an injunction against a number of the defendants and their attorney, H. Tompkins, to restrain and enjoin them from prosecuting certain suits brought by them in the Circuit Court of Wayne County against certain vendees of petitioner based upon the claim that the aforesaid mortgage and deed of trust were invalid, and therefore not binding upon them, until the final hearing of this cause.

To these pleadings various defendants interposed demurrers, some filed separate answers, and the rest filed a joint answer. The main ground of defense was, that upon a similar state of facts to those alleged by complainants in this case the Supreme Court of Illinois, in *Scates v. King*, 110 Ill. 456, had affirmed a decree rendered by the Circuit Court of Wayne County in a case regularly brought before it, which held that a conveyance of a part of the

lands sold at the mortgage sale aforesaid, made by a claimant under Broadwell, was a cloud upon the title thereto of a party claiming under a sale made by the county between the date of the execution of the before-mentioned mortgage and deed of trust and the commencement of the foreclosure proceedings, and should be set aside.

Replications having been filed, and also intervening petitions by W. S. Rolston, J. C. Cloyd and Lucinda A. Walker, the case was finally put at issue. Proofs were taken by the respective parties, and upon a hearing on the pleadings and proofs, the court below, on the 25th of January, 1886, rendered a decree finding the material facts substantially as we have recited them. The decree then set out and exhibited, in its seventh finding of facts, a list and schedule of the lands involved in this consolidated suit, "together with the names, respectively, of the several and respective persons to whom the County of Wayne sold its equity of redemption or residuary interest." That list and schedule further contained a statement of the present owners, respectively, of the title acquired by the master's sale aforesaid, which afterwards passed to Broadwell and from him by mesne conveyances; and also "a statement of the amounts, respectively, which were bid at said decretal sale for said tracts of land respectively."

The court then found as matter of law:

"1. That the opinions and decisions of the Supreme Court of the United States upon the appeals heretofore prosecuted from the decrees of this court and reported in 88 U. S. 16 Wall. 452 [21: 319], and in 94 U. S. 498 [24: 360], are binding upon this court, and there is nothing in record or evidence in this case as consolidated to invalidate the said mortgage and trust deed or the respective amounts found due to the several parties to this suit as consolidated. Both the findings as to the said several amounts so found due should be sustained.

"2. The purchasers from Wayne County, after the recording of the mortgage, took the lands purchased by them severally subject to the lien of the mortgage, and the proceedings to foreclose the said trust deed and mortgage did not release or discharge this lien so long as the mortgage debt remains unsatisfied.

"3. The purchasers from the county, both after the recording of the mortgage and after the service of process on Wayne County on March 11, 1865, cannot acquire tax titles as against the mortgagees or those acquiring title under the foreclosure sale.

"4. That the master's deed under the decretal sale of September 18, 1877, transferred to the several purchasers thereat an equitable right to so much of the mortgage debt as was bid upon each tract severally.

"5. That the *lis pendens* as to purchasers from the county attaches from the 11th of March, A. D. 1865, the date of service of process on Wayne County, and that upon the facts averred in the several bills and sustained by the proofs the purchasers of lands at the decretal sale which were sold by Wayne County between April 20, 1859, and March 11, 1865, are entitled to file a bill in the nature of a supplemental bill against the parties holding title

from the county subject to the mortgage to have the lien of the mortgage enforced by a decree of foreclosure."

The decree then continued as follows:

"That each of said owners of the said equity of redemption or residuary interest of the County of Wayne of, in and to said several tracts of land which were purchased from the county between April 20, 1859, and March 11, 1865, who have been summoned in this case, or who may have entered their voluntary appearance therein, or their assigns, respectively, *each acting for himself or herself, and not for any other, may and shall redeem the respective tracts of land of which they, at date of service upon them, respectively, of process or entry of appearance, respectively, held and owned the equity of redemption, or residuary interest of the County of Wayne within or at the expiration of one year from this date, by paying into this court the amount for which each of said tracts of land was bid and sold at said decretal sale, for the use and benefit of the owners, respectively, under title deraigned from said decretal sale of the tract or tracts so redeemed, and that the judgment creditors, respectively, of any such persons so owning the equity of redemption may and shall redeem any tracts thereof in default of such parties so redeeming, at any time within three months of and after the expiration of said twelve months, by paying the amount so decreed to be redeemed from, in accordance with the Statutes of the State of Illinois concerning redemption from judicial sales; and it is further ordered, adjudged and decreed that the decree of foreclosure of June 25, 1874, hereinbefore referred to, shall be vacated and annulled as to each and every tract (but as to none others) thus redeemed as aforesaid, and that in default of redemption, as provided for herein as aforesaid, then and from the date of the expiration of such period of limitation all rights of such owners of the said equity of redemption, or their respective assigns, so failing to redeem shall be forever barred and foreclosed of their equities of redemption, respectively, and of all rights of, in and to said lands of any kind or nature adversely to the owners under title deraigned from said decretal sale, and that each and all of such defendants so being barred and foreclosed, and their agents, attorneys, solicitors and servants or assigns shall, from and after the expiration of said fifteen months, cease to exercise any acts of ownership over said lands, and shall at once thereafter vacate, abandon and leave the same, and not intermeddle any further therewith under pain of being considered in contempt of this court, and that the respective titles of said several and respective tracts of land not so redeemed shall be, and they are, confirmed in said several parties so owning the same by title deraigned from said decretal sale, as aforesaid, and their assigns, and that any tax deed or certificate to any tract of land, and not thus redeemed, which may belong to any such person thus entitled, but failing to redeem such tract, is hereby declared to be vacated, annulled and for nothing taken hereafter." (The italics are our own.)*

On the same day that the decree was en-

tered a motion for rehearing was filed, the first ground of which recited as follows: "That the result of the decree in said cause would be a great hardship to the respondents, as there is not enough in amount in any case to allow an appeal." This motion was denied on the 29th of March, 1886, but on the 31st of May following it was ordered by the court that said motion "stand continued until the next June Term" of the court. On the 10th of June following the motion for rehearing was again considered, and again denied, an order being entered "that the order of March 29th, 1886, denying the application for a rehearing of the cause, stand affirmed."

On the 18th of July, 1886, a motion was made to correct the decree by striking from it the names of thirty-seven of the defendants, thirty-four of whom, it was alleged, had neither entered their appearance nor been served with summons, and the other three had disclaimed; and on the 5th of August, 1886, a petition for summons and severance on appeal, and also an appeal bond, were filed by fifty-six of the defendants jointly.

It is clear that the appeal must be dismissed. The decree from which it is taken was not a joint decree, as is readily observed by a mere inspection of it. The liability of each one of the defendants under that decree can be neither increased nor diminished by any action on the part of any of his co-defendants. The right of every one of the defendants to appeal from the decree is separate and distinct from that of the other defendants. The amount adjudged against any one of them, in order that he might redeem his respective tract or tracts of land, does not in any case reach the amount necessary to give us jurisdiction to entertain the appeal. In no case is it \$5,000.

In *Ex parte Phoenix Ins. Co.*, 117 U. S. 367, 369 [29: 923, 924], Chief Justice Waite, delivering the opinion of the court, said: "The rule is well settled that distinct decrees against distinct parties on distinct causes of action, or on a single cause of action in which there are distinct liabilities, cannot be joined to give this court jurisdiction on appeal,"—citing a long list of authorities. The question was finally put at rest in *Gibson v. Shufeldt*, 122 U. S. 27 [30: 1083], where, after a thorough examination of the subject, on principle, and an exhaustive review of the authorities bearing upon it, the court sustained a motion to dismiss an appeal similar in all its essential features to the motion in this case, and in concluding its opinion said: "This result, as we have seen, is in accordance with a long series of decisions of this court, extending over more than half a century. During that period Congress has often legislated on the subject of our appellate jurisdiction, without changing the phraseology which had received judicial construction. The court should not now unsettle a rule so long established and recognized." (pp. 39, 40 [1087, 1088]). See also *McMurray v. Moran*, at this term, 134 U. S. 150 [33: 814].

It is not necessary to multiply authorities upon a point so well settled. Neither do we think any of the points made by the appellants, in their brief, in opposition to the motion to dismiss, are well taken.

The motion to dismiss the appeal is granted.

JOHN H. MENDENHALL, *Appt.*,

v.

CLARK N. HALL ET AL.

(See S. C. Reporter's ed. 559-571.)

Citation, when not necessary to jurisdiction—practice—appeal, when brings up prior decree—defendants in mortgage suit—tender of taxes, when unnecessary—Louisiana Constitution—tax title, when may be questioned without direct suit to set it aside.

1. The jurisdiction of this court does not depend upon a citation being issued, where an appeal was allowed, an appeal bond executed and the record duly filed; but this court will not hear the cause until the parties are brought into court by citation.
2. The appeal in this case brings before us not only the final decree, but that sustaining the demurrer and plea of Charles F. Hall, and dismissing the suit as to him. It was not necessary to take an appeal from the latter order until after the whole case was determined in the court below.
3. In a suit to establish a mortgage, and for a sale thereunder, it is competent to unite as defendants both the mortgagor and the party claiming the property adversely to the lien of the mortgage, by virtue of proceedings for a sale for taxes had subsequently to its execution.
4. Where a mortgagor, who had agreed not to sell or encumber the property to the prejudice of the mortgage, has fraudulently combined with his brother to defeat the mortgage lien by means of a sale for taxes due from the mortgagor, at which sale the brother was to bid in the property, in his own name, for the benefit of the mortgagor, it is not necessary that the mortgagee, in order to maintain a suit to enforce his lien, should tender the amount of the taxes, with interest thereon, the nonpayment of which by the mortgagor had caused the sale to the prejudice of the mortgagee.
5. The Louisiana constitutional provision that "no sale of property for taxes shall be annulled for any informality in the proceedings until the price paid, with ten per cent interest, be tendered to the purchaser," has no application to such a case.
6. The principle that a tax title must be held good until it is annulled in a direct action applies only as to those titles that are bona fide, and are acquired without fraud, or that are real and not simulated.

[No. 158.]

Submitted Dec. 13, 1889. Decided April 7, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Louisiana in favor of plaintiff in an action to set aside a tax sale and establish a mortgage and for a sale of the land, adjudging that the plaintiff's demand for recognition of the mortgage be rejected and that he recover against one of the defendants certain moneys. *Reversed, with directions to enter a decree establishing the mortgage and ordering a sale of the mortgaged property.*

Statement by Mr. Justice Harlan:

By a deed executed December 24, 1875, John H. Mendenhall and wife, citizens of Ohio, conveyed to Clark N. Hall, a resident of Louisiana, an undivided one fourth of certain lands in Carroll Parish in that State, known as the Concord plantation. The price agreed to be paid

was \$5,128, for which the vendee executed to the grantor his three promissory notes, the first one for \$2,000, payable January 1, 1877; the second for a like sum, payable January 1, 1878; and the third for \$1,128, payable January 1, 1879; each note bearing interest at the rate of eight per cent per annum from date until paid. In order to secure the payment of the principal and interest of those notes, the grantee, by the same instrument, mortgaged and hypothecated the property for the benefit of the vendor, or any future holder or holders of the notes, "binding and obligating himself not to sell, mortgage or in any wise incur said property to the prejudice of this act of mortgage."

The deed was duly filed for record in the proper office on the day of its date.

By an indenture executed February 10, 1876, the owners of the Concord plantation, William C. White, James Andrews and Clark N. Hall, made a partition thereof among themselves.

On the 5th of March, 1882,—no part of the principal sum having been paid and the interest only having been paid up to January 1, 1879—Clark N. Hall wrote to Mendenhall, giving the reasons why he had not for some time made a payment. After stating that he and his brother had tried together to make arrangements to meet his notes and that they had been compelled, in order to run the plantation, to deposit what money they had as security for aid supplied by others, he said: "So we deposited the money we had and are going ahead, and I can assure you it has given me a heap more pain than it has you; and one more thing I can assure you, I am going to attend strictly to business, and am going to get as little as possible, and work to best advantage, and I know this fall will be able to make you a payment that will satisfy you. My aim is to pay you the \$2,500 this fall without a doubt; with what I have left out of the place, and what Charley will be able to raise then, we can do it like a flash, and to do it now will be a stop to all things. . . . So, under the circumstances, I am not going to pay one dollar now, and if it don't suit you I cannot, for the life of me, help it. If you had rather resort to law, all right. If not, wait until fall with patience and I am sure everything will be made O. K. . . . Everybody predicts a good crop year. Has Mrs. M. received my package of photos? I mailed them, and wrote her a letter some months ago. Hoping you will have compassion upon a poor soul, I will close, by subscribing myself," etc. By way of further assurance that the representations as to his financial condition were true, and that his request for time was made in good faith, he adds, by way of postscript, these words: "I want you to bear in mind that if W. B. Keene had not failed to comply with his contract I would surely have remitted the money. You may believe me or not; nevertheless it is the candid truth."

On the same day of the above letter, Charles F. Hall, a brother of Clark N. Hall, and the person described in that letter as "Charley," wrote to Mendenhall, saying: "I take the liberty to pen you a few lines in regard to Concord and the business pertaining thereto. Some time ago Clark took the trouble and expense upon himself to go up and see you to try and effect a settlement. At that time you

could just as well as not have had \$2,500 in cash; but it appears you would not take that. Well, since then things have changed here, so that it is going to be impossible for us to do anything until, say, January 1, 1888, for the following reasons, viz.: W. B. Keene, a merchant doing business close to Concord, had arranged to supply Clark this year, but about two weeks ago failed in a manner; anyway, his commission merchants in N. O. say they will not advance him supplies for more than enough to run his own place; therefore it will necessarily compel us to take our money to run the place. I presume Clark has written you about this ere now, and also that he had rented Andrews' portion of the place. You can certainly see that it would be of no use to pay you the amount agreed to and then have no way or means of running the place, for we could make no other payments, as the place would lay idle and would therefore bring in no revenue. The way everything is now fixed the place will bring it in rent. I am here working for \$1,000 a year and all my expenses paid, and by January 1, 1888, we can and will pay you \$2,500. I have been here for two years and have saved nearly all my salary—and for what? To try and help Clark pay you for the place. I am anxious to settle this matter up, and you have been very kind in waiting as long as you have, and you have my word and honor that you shall be paid this fall the \$2,500 if the levee does not break at or near Concord. You can satisfy yourself by writing to Mr. Benjamin Keene, or anyone that knows anything about our affairs here, whether I have written how things are here or not. And I feel safe in here saying that you will look at this matter just as I have, and think we have done just the best that could have been done under the existing circumstances. Please let me hear from you on this subject and I shall take pleasure in keeping you posted about things here, and you can depend on my doing all I can to help pay up. Please remember me kindly to Mrs. M., and with best wishes and trusting to hear from you ere long, I remain yours resp."

On the 17th of January, 1888, the land was sold for state and parish taxes due from Clark N. Hall for the years 1877 and 1878, and was purchased at the sum of \$211.47 by Charles F. Hall, who took a deed from the sheriff.

The present suit was brought on the 4th of September, 1888, by Mendenhall against Clark N. Hall and Charles F. Hall. After setting out the above facts in relation to the purchase by Clark N. Hall, the execution of the notes for the price, the partition of the plantation among the owners and the payment of the interest up to January 1, 1879, the bill alleges that Clark N. Hall had indulgence from the plaintiff from year to year, and visited the latter at his home in Ohio about the first of the year 1882, promising while there that upon his return home he would make a payment of \$1,500 on the notes; that after his return he and his brother Charles entered into a scheme to defraud the plaintiff; that with knowledge that the sheriff would be compelled by the Statute of the State (Act No. 38 of 1882) to sell the property for unpaid taxes within four months after the promulgation of that Act, Clark N. Hall fraudulently failed to pay the

taxes for 1877 and 1878, although he had agreed not to encumber the property to the prejudice of the plaintiff or the said act of mortgage, and although he represented to the plaintiff that he had paid the taxes on the land; that Clark N. Hall and Charles F. Hall agreed between themselves that, in order to defeat the plaintiff's rights, the latter would become the purchaser at the tax sale and take the title in his own name, intending thereby to procure the release of the property from the plaintiff's mortgage and privilege; and that although Charles F. Hall pretends to have bought the property and claims to be the owner thereof, his brother was living on the plantation and cultivating it as before the tax sale. The bill stated various grounds upon which the tax sale should be declared null and void, and prayed that the sale be set aside; that the plaintiff's mortgage and vendor's privilege to secure the balance due on the notes, together with the accruing interest, be recognized and rendered executory; that the land be sold by due process of law, to pay and satisfy that balance; and that he might have such relief as was proper.

Charles F. Hall demurred to the bill for multifariousness and filed a special plea to effect that, by article 210 of the Constitution of Louisiana, tax titles are declared to be *prima facie* valid, and cannot be set aside without a previous tender to the purchaser of the price and ten per cent per annum interest thereon, having been made, which has not been done.

Clark N. Hall pleaded to so much of the bill as sought judgment against him for the amount of the notes, that equity was without jurisdiction *ratione materiae* to try the issues presented on said obligations.

The court below sustained both the demurrer and the plea of Charles F. Hall, and by a decree entered May 12, 1885, dismissed the bill as to him, without prejudice to the plaintiff's right to file a new bill. It overruled the demurrer of Clark N. Hall, and the latter filed an answer, averring that he was no longer the owner of the premises, nor in possession thereof. He also averred that he was the lawful owner of two judgments against the plaintiff, one for \$300 and \$4.15 costs taxed, and one for \$240, with interest from April 4, 1876, and \$4.70 costs taxed, both rendered May 12, 1876, by a justice of the peace in Delaware County, Ohio, in favor of the Elkart Wood Pulp Company, against John H. Mendenhall and others, partners doing business under the firm name of the Delaware Paper Company. He also averred that he was the legal holder and owner of a note for \$1,733.61 executed by the said Delaware Paper Company, through their secretary, J. L. Klein, and made payable to the order of Jacob A. Sharer, who indorsed it to James Andrews, the latter indorsing it in blank to the defendant in due course of trade and for a valuable consideration. He pleaded the said demands "in compensation of the notes sued upon."

To this answer a replication was filed, in which the plaintiff denied that he was bound for the payment of the obligations set up in the answer; denied that they were owned by the defendant; and averred, in respect to the note for \$1,733.61, that it was executed and obtained by fraud, was without consideration,

was never negotiated or placed on the market until after its maturity, and was not a just debt against the Delaware Paper Company. A replication of this special character was not in accordance with correct chancery practice. But no objection was made on that ground, and it was treated as a proper replication.

Upon final hearing, on the 14th of April, 1886, the court gave judgment in favor of the plaintiff against Clark N. Hall for \$5,123, with interest at the rate of eight per cent per annum from December 24, 1875, until paid, and the costs, that amount to be credited with \$1,340.52 to date January 1, 1879, and also with \$544.15 with eight per cent interest from April 4, 1876, to date and take effect from May 9, 1879. It also adjudged that the plaintiff's demand for recognition of the mortgage and vendor's privilege claimed in the bill be rejected as in case of nonsuit without prejudice to his right to assert the same in a subsequent action.

Messrs. John Johns and D. A. McKnight, for appellant:

A court of equity will enforce strict truth in the dealings of one man with another.

Lorley v. Heath, 27 Beav. 532.

Where persons who have a duty to perform represent to those interested in the performance of that duty that it has been performed, they make themselves responsible for all the consequences of nonperformance.

Blair v. Bromley, 5 Hare, 542, 2 Phill. Ch. 354.

Appellee obligated himself to pay the taxes; and if they were unpaid, he should in equity and good conscience have notified the vendor and mortgagee of the fact, but he failed to notify his vendor; that concealment in itself was a fraud.

Crosby v. Buchanan, 90 U. S. 23 Wall. 420 (23: 138); *Austin v. Citizens Bank*, 30 La. Ann. 691; *Reynell v. Sprye*, 1 De G. M. & G. 698; *Dobell v. Stevens*, 3 Barn. & C. 625.

The fact de non alienando relieves the plaintiff from the necessity of making the third person, who purchases, a party to the action.

Watson v. Bondurant, 88 U. S. 21 Wall. 129 (22: 511); *Aegeo v. Schmidt*, 113 U. S. 293 (28: 976); *Shields v. Schiff*, 124 U. S. 351 (31: 445).

The judgments are neither proved nor authenticated so as to have any effect in Louisiana.

Taylor v. Barron, 80 N. H. 78; *Snyder v. Wise*, 10 Pa. 187; *Robinson v. Prescott*, 4 N. H. 450.

Equity will not allow a set-off of a joint debt against a separate debt.

Story, Eq. § 1437; *Dade v. Irwin*, 43 U. S. 2 How. 383 (11: 308).

Mr. John T. Ludeling, for appellees:

It was a prerequisite to the institution of a suit to rescind a sale, that the purchaser should be paid the price given by him, or he should be tendered the price.

Civ. Code, art. 1912; *Barelli v. Gauche*, 24 La. Ann. 824; *Daquin v. Coiron*, 6 Mart. N. S. (La.) 684; *Donaldson v. Rouzan*, 8 Mart. N. S. (La.) 162; *Donaldson v. Winter*, Id. 175; *Andrews v. Ackerson*, Id. 210; *Elliott v. Labarre*, 3 La. 541; *Dearmond v. Courtney*, 12 La. Ann. 251; *Latham v. Hicky*, 21 La. Ann. 425, and authorities there cited; *Gormley v. Palmes*, 13

La. Ann. 213; *Blanton v. Ludeling*, 30 La. Ann. 1232; *Müller v. Montagne*, 32 La. Ann. 1290; *Barrow v. Lapene*, 30 La. Ann. 310.

The supreme court has no power to receive an appeal in any other mode than that provided by law.

Villobolas v. U. S. 47 U. S. 6 How. 81 (12: 352); *U. S. v. Curry*, 47 U. S. 6 How. 106 (12: 363).

The supreme court has no jurisdiction unless the case is brought up in conformity with the regulations which Congress has prescribed.

Castro v. U. S. 70 U. S. 3 Wall. 46 (18: 163).

The appeal is barred by limitation.

Brooks v. Norris, 52 U. S. 11 How. 204 (18: 665); *The San Pedro*, 15 U. S. 2 Wheat. 182 (4: 202).

Mr. Justice Harlan delivered the opinion of the court:

It is suggested that no appeal has been taken as to Charles F. Hall, and that this court is without jurisdiction over the cause as to him. In this view we do not concur. The cause was not finally disposed of as to Clark N. Hall, the remaining defendant, until the 14th of April, 1886, and on the 30th day of the same month the plaintiff was allowed an appeal "in the cause." His appeal bond was executed September 9, 1886, and ran "to the defendants." The record was filed here on the 12th of October, 1886. It appearing, when the case was reached on our docket, that Charles F. Hall had not been served with notice of the appeal, a citation was directed to be served upon him, or, if he was dead, upon his representative. The citation was executed January 13, 1890, upon his widow, who is also administratrix of his estate. There is no ground to question the jurisdiction of this court to proceed to a hearing of the appeal. The record was filed in this court on the day to which the appeal was returnable. Our jurisdiction did not depend upon a citation being issued (*Evans v. State Nat. Bank*, 134 U. S. 380 [83: 917]), although we could not properly proceed to hear the case until Charles F. Hall, as to whom the suit was dismissed in 1885, or his representative, was brought into court by citation. Rev. Civ. Code La. arts. 1041, 1049, 1155; *McCalop v. Fluker*, 12 La. Anh. 345. And the appeal brings before us not only the final decree of 1886, but that of 1885 sustaining the demurrer and plea of Charles F. Hall, and dismissing the suit as to him. It was not necessary to take an appeal from the latter order until after the whole case was determined in the court below. For these reasons the objections to our jurisdiction are overruled.

The first question, upon the merits, to be considered, relates to the demurrer and plea of Charles F. Hall. It is contended that he was not a necessary party to the suit to fix the amount of the indebtedness of Clark N. Hall, and that the demurrer, for that reason, was properly sustained. If that had been the sole object of the suit the plaintiff could undoubtedly have proceeded at law against Clark N. Hall alone. But such a suit would not have given the relief required. The plaintiff claimed a lien on the mortgaged property to secure the payment of the notes given by the mortgagor. The property was claimed by Charles F. Hall

in virtue of a tax sale. While the latter might have been proceeded against alone for the purpose of determining whether his right to the land was not subordinate to the mortgage lien, it was competent, under the practice in equity prevailing in the courts of the United States, and in order that full and adequate relief might be had, to unite in the same suit both the mortgagor and the party claiming the property adversely to the lien of the mortgage, by virtue of proceedings had subsequently to its execution. If the plaintiff was entitled to have the property sold in satisfaction of the debt secured by the mortgage, it was his right to have it sold freed from any apparent claim thereon wrongly asserted by the holder of the tax title. Such relief could not be had without making the latter a party to the suit.

In respect to the plea of Charles F. Hall, we are of opinion that it ought not to have been sustained. The constitutional provisions that "all deeds of sale made, or that may be made, by the collector of taxes, shall be received by the courts in evidence as prima facie valid sales," and that "no sale of property for taxes shall be annulled for any informality in the proceedings until the price paid, with ten per cent interest, be tendered to the purchaser," have no application to cases like the present one. If Clark N. Hall had attempted to have the tax sale set aside for mere informality, it would have been a good plea in bar to any suit by him against the purchaser, that he had not tendered the amount paid by him, with interest thereon—the plea showing distinctly the amount so paid. *Barrow v. Lapene*, 30 La. Ann. 310; *Blanton v. Ludeling*, 30 La. Ann. 1232. It is to suits of that character that the authorities cited apply. The case before us is altogether different. It proceeds upon the ground that a mortgagor who had agreed "not to sell, mortgage or in any wise incumber the property," to the prejudice of the mortgage, had fraudulently combined with his brother to defeat the mortgage lien by means of a sale for taxes due from the mortgagor, at which sale the brother was to bid in the property, in his own name, and, for the protection of the mortgagor, assert his absolute ownership of it. It certainly was not intended that the mortgagee, in order to maintain a suit to enforce his lien, should tender to the mortgagor, or to his agent, the amount of the taxes, with interest thereon, the nonpayment of which by the mortgagor had caused the sale to the prejudice of the mortgagee.

The case, in many respects, is like *Austin v. Citizens Bank*, 30 La. Ann. 689, 691, in which it appeared that a mortgage creditor proceeded directly against the mortgaged property which had been sold for taxes, and the title taken in the name of a third person. The holder of the tax title brought a suit to enjoin such proceeding. The court said: "The plaintiff [the holder of the tax title] entrenches himself behind our ruling in *Lannes v. Workmen's Bank*, 29 La. Ann. 112, and insists that his title must be held good until it is annulled in a direct action. But that principle holds good only as to those titles that are bona fide, and are acquired without fraud, or that are real and not simulated. Unquestionably a purchaser at a tax sale may acquire a good title to a valuable

property for a small price, if the requisite formalities have preceded and attended the sale. . . . But no government will permit its machinery, constructed to enforce the payment of public dues to the fisc, to be used to manipulate a fraud, and if the purchaser is a party to the fraud he must share its punishment. It might be very different if he were wholly disconnected and unacquainted with it. The purchase by Moss was nothing more or less than a purchase by Mrs. Austin, the debtor and mortgagor, through her son, the plaintiff. The money paid as the price at the tax sale was only what she, as the owner of the property, owed the State, and what she honestly and in good conscience ought to have paid without, and before, and to prevent, a sale. If she could not pay it, the debt being exigent and of so high a rank, she should have acquainted her creditor and mortgagee with its imminence, instead of observing the suspicious reticence which characterized her conduct. The creditor's rights, as mortgagee and vendor, cannot be imperiled by the mortgagor's collusive combination with others to interpose an apparent but fraudulent obstacle in his way in enforcing those rights."

All that was said in that case is pertinent to the one before us. The mortgagor had obtained liberal indulgence as to time from the mortgagee. He made such representations of his embarrassed financial condition as induced the mortgagee to forbear taking steps to enforce his lien upon the property. He gave positive assurances that he would make a payment of twenty-five hundred dollars on the mortgage debt by the fall of 1883. He knew that there were taxes upon the property which it was his duty to pay, and that their nonpayment endangered the security upon which his generous creditor depended for the payment of the notes given for the property. And his brother, with many expressions of friendship for the mortgagee and his family, joined in the appeals for time, assuring the mortgagee that he would himself assist in meeting the mortgagor's engagements to pay, if the mortgagee would wait until January 1, 1883. He voluntarily promised that he would keep the mortgagee "posted about things." But neither the mortgagor nor his brother informed the mortgagee that the land was advertised to be sold for the taxes which the mortgagor was under a duty to pay. The way in which Charles F. Hall complied with his promise to keep the plaintiff posted was to withhold information as to the tax sale, buy the land for the amount of the taxes and take the title in his own name. The evidence leaves no doubt that the nonpayment of taxes by the mortgagor, and the purchase of the property by his brother, was in execution of a scheme upon their part to defeat the mortgagor's lien upon the land.

In respect to the credits allowed by the decree below upon his notes to the mortgagor, no error was committed. The credit of \$1,340.52, as of January 1, 1879, was a trifling amount in excess of the aggregate interest that had been paid by the mortgagor up to that date. The credit of \$544.15 was for the amount of the two judgments rendered against Mendenhall by a justice of the peace in Ohio, of which Clark N. Hall became the owner on the 9th of May, 1879. The plaintiff being a nonresident

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of Louisiana it was proper to allow that amount as a set-off against the notes. *Spinney v. Hyde*, 16 La. Ann. 250; *Woolfolk v. The Graham's Polly*, 18 La. Ann. 698. As to the note for \$1,788.61 dated June 1, 1875, and executed by the Delaware Paper Company, the court below properly disallowed it as a set-off. The evidence clearly showed that it was not an enforceable obligation against that company. The attempt to use it against Mendenhall is only additional evidence of the purpose to defraud him. But, for the reason stated, the court below erred in rejecting the plaintiff's demand for recognition of the mortgage lien upon the property.

To the extent indicated the decree is reversed, with directions to enter a decree recognizing and establishing the mortgage of December 24, 1875, as against Clark N. Hall, and the succession of Charles F. Hall, and as giving a lien in behalf of the plaintiff superior and paramount to any right which the succession of Charles F. Hall has in the mortgaged property by virtue of the sale for taxes and the sheriff's deed to him, and ordering a sale of the mortgaged property to satisfy the above balance due the plaintiff upon the notes given by Clark N. Hall.

HENRY S. LITTLE, Receiver of the CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Plff. in Err.*,

v.

SAMUEL D. BOWERS, Comptroller, ET AL.

(See S. C. Reporter's ed. 547-550.)

Payment, when voluntary—effect of protest—voluntary payment of taxes—compromise—where there is no real controversy, suit will be dismissed—when may be shown—agreed case and consent do not confer jurisdiction.

1. Where a party pays an illegal demand with a full knowledge of all the facts which render such

NOTE.—Payment voluntary, and under protest; when money wrongfully and illegally exacted can be recovered back. See note to Bank of U. S. v. Bank of Washington, 8: 290.

As to action to recover back duties paid under protest, see note to Greely v. Thompson, 18: 398.

Payment, when voluntary; when may be recovered back.

Money voluntarily paid under license for use of a patent cannot be recovered on the subsequent determination of the invalidity of the patent. *Schwarzenbach v. Odorless Excavating Co.* 2 Cent. Rep. 860, 65 Md. 34.

An assessment voluntarily paid by the holder of full-paid stock of a corporation, in accordance with an agreement of all the stockholders, cannot be recovered. *Bidwell v. Pittsburgh, O. & E. L. Pass. R. Co.* 5 Cent. Rep. 287, 114 Pa. 585.

Money paid under a mistake of material facts may in general be recovered back, although there was negligence on the part of the person making the payment. *Walker v. Conant*, 8 West. Rep. 181, 65 Mich. 194.

An action cannot be maintained to recover back money voluntarily paid in satisfaction of an illegal tax. *Younger v. Santa Cruz County*, 68 Cal. 241.

Money paid for a void assessment for local im-

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- demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party, at the time of making the payment, files a written protest does not make the payment involuntary.
2. The payment of taxes on lands, where no warrant had been issued, and no proceedings taken, and none could be taken for several months for their collection, and without protest or objection, and after re-adjustment and reduction of the taxes obtained by the company on whose lands they had been assessed, and after a correction therein was made at the request of the company's agent, who wrote to the commissioners that if the correction was made the taxes would be paid, is not a payment under duress.
 3. Their payment, under the circumstances, was in the nature of a compromise, by which the city agreed to take and the company agreed to pay a less sum than originally assessed, the effect of

which was to extinguish the controversy between the parties.

4. When there is no actual controversy, involving real and substantial rights, between the parties to the record, the case will be dismissed.
5. The fact that there is no controversy between parties to the record may be allowed to be shown at any time before the decision of the case.
6. Nor is it material that the case was agreed to by the parties as one in which the question of taxation under the New Jersey statutes could be finally decided by this court. Consent does not confer jurisdiction.

[No. 194.]

Submitted Mar. 3, 1890. Decided April 7, 1890.

IN ERROR to the Court of Errors and Appeals of the State of New Jersey affirming the judgment of the Supreme Court of that State affirming certain assessments of taxes made by the City of Elizabeth upon property of the Central Railroad Company of New Jersey. On motion to dismiss. *Dismissed.*

provements, which assessment is an apparent lien upon the premises, is paid under duress of goods, and may be recovered back. *Vaughn v. Port Chester*, 48 Hun, 427.

Payment of a false claim for demurrage, made to obtain possession of the cargo, may be recovered back. *Fergusson v. Winslow*, 34 Minn. 384.

No debt is implied in law from the voluntary payment of the debt of another. *First Nat. Bank v. Saratoga County*, 9 Cent. Rep. 424, 106 N. Y. 488.

Money paid through mutual mistake of law is not recoverable. *Wolf v. Beaird*, 13 West. Rep. 276, 123 Ill. 585.

A voluntary payment under a mistake of law is not recoverable. *Gould v. McFall*, 11 Cent. Rep. 63, 118 Pa. 455.

An overpayment, under an honest ignorance of the state of an account and reliance upon the defendant's statement of a proper balance, is recoverable. *Byrnes v. Martin*, 11 West. Rep. 487, 67 Mich. 399.

Interest paid, by mistake, on a note designedly written without interest is recoverable. *Hathaway v. Hagan*, 4 New Eng. Rep. 128, 59 Vt. 75.

Where a judgment debtor cannot resist its execution, he may pay the judgment and recover back the amount on reversal. *Chapman v. Sutton*, 68 Wis. 657.

Money paid by a minor in consideration of being admitted as a partner cannot be recovered back, unless he was induced to enter into the partnership by fraudulent representations. *Adams v. Beall*, 7 Cent. Rep. 430, 67 Md. 53.

The obligor in a real estate bond cannot recover what he has voluntarily paid under the terms of the bond, upon his failure to complete the required payments. *Grimes v. Goud (Me.)* 4 New Eng. Rep. 671.

Payments made under a gross mistake of fact can be recovered back, if not returned on demand. *Lane v. Pere Marquette Boom Co.* 62 Mich. 63.

Money paid under a mistake of law or fact, without consideration, and not as the result of a compromise, to another to whom it was not owing in law or conscience, may be recovered back. *McMurtry v. Kentucky Cent. R. Co.* 84 Ky. 462.

An action will not lie to recover back money paid voluntarily with a full knowledge of the facts and circumstances. *Lewis v. Hughes*, 12 Colo. 206; *Gilliam v. Alford*, 66 Tex. 267.

One who recognizes a judgment to the extent of paying the money thereon, even under protest, to the clerk of the court, cannot recover back the money on the ground that it is invalid. *McBride v. Lathrop*, 24 Neb. 93.

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Money paid on a judgment to prevent a sale of defendant's property under execution may be recovered back if the judgment is afterwards reversed. *Cleveland v. Tufts*, 66 Tex. 580.

The payment, under protest, of an unlawful demand, to avoid serious injury or risk in respect to property, is not voluntarily made, and the money may be recovered back. *State v. Nelson (Minn.)* 4 L. R. A. 300; *Lyman v. Lauderbaugh*, 75 Iowa, 481.

One who pays money to a city under a mistaken belief as to the validity of an ordinance which is in fact invalid may recover the money back. *Fecheimer v. Louisville*, 84 Ky. 806.

A payment of a tax is not voluntary so as to preclude an action to recover back the money paid, if the tax collector is authorized, in case of its non-payment, to enforce payment by levy and sale without suit. *Mills v. Hopkinsville (Ky.)* 11 Ky. L. Rep. 164, 11 S. W. Rep. 776.

The voluntary payment, without duress of person or goods, of an assessment for the paving of a street, under an ordinance which was void on its face, is a mistake of law, and no action will lie to recover back the money so paid. *Phelps v. New York*, 2 L. R. A. 626, 112 N. Y. 216.

One who by force of the statute is unable to place on record a deed of real estate, by reason of illegal taxes upon the land, may pay such taxes in order to record his deed, without such payment being deemed voluntary. *State v. Nelson (Minn.)* 4 L. R. A. 300.

Where a widow, the administratrix of her deceased husband, under a mistaken belief that the estate is solvent and will refund the amount to her, pays the debts of her husband out of the proceeds of a policy on his life to which she is entitled, the creditors will be required to refund the amount paid, and share *pro rata* in the assets of the estate. *Moore v. Moore (Ky.)* 11 Ky. L. Rep. 210, 11 S. W. Rep. 780.

Interest paid by mistake on a judgment which did not bear interest is recoverable back. *McMurtry v. Kentucky Cent. R. Co.* 84 Ky. 462.

Money paid in the discharge of an execution on a dormant judgment which is voidable, but not void, either with or without protest, is a voluntary payment. *Gerecke v. Campbell*, 24 Neb. 806.

A bank may recover back money paid on forged paper, although both parties were ignorant of the forgery and no express warranty was made of the genuineness of the paper. *Leather Mfrs. Nat. Bank v. Merchants Nat. Bank*, 128 U. S. 26 (32: 342).

When one volunteers to pay a debt for another, the latter is under no obligation to reimburse it. *Breneman's Appeal*, 121 Pa. 641.

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The case was argued upon its merits on Jan. 30, 1890, by **Mr. R. W. De Forest** for plaintiff in error, no counsel for defendants in error appearing upon such argument. Subsequently defendants in error were given leave to file briefs and they also filed a motion to dismiss the writ of error.

The facts are stated in the opinion.

Mr. Frank Bergen, for defendants in error, in support of motion to dismiss:

Courts will not entertain jurisdiction of cases when there is no real or substantial controversy between the parties.

Cleveland v. Chamberlain, 66 U. S. 1 Black, 419 (17: 98); *Lord v. Veazie*, 49 U. S. 8 How. 251 (12: 1067); *Smith v. Junction R. Co.* 29 Ind. 546; *San Mateo Co. v. Southern Pac. R. Co.* 116 U. S. 188 (29: 589); *Henkin v. Guernsey*, 12 East, 247; *Breuster v. Kitchin*, Comb. 424; *Coze v. Phillips*, Lee t. Hardw. 237; *Re Elam*, 8 Barn. & C. 597; *Essex County v. Union County*, 44 N. J. L. 438.

When claims for taxes have been voluntarily paid to municipalities, an action cannot be maintained to recover the money so paid.

Dill. Mun. Corp. (3d ed.) §§ 941-947, and cases cited.

The facts on this motion can properly be brought before the court by affidavits.

Cleveland v. Chamberlain, 66 U. S. 1 Black, 419 (17: 98); *Lord v. Veazie*, 49 U. S. 8 How. 251 (12: 1067).

Messrs. Robert W. DeForest, George R. Kaercher and Benjamin Williamson, for plaintiff in error, in opposition to motion.

Mr. Justice Lamar delivered the opinion of the court:

This was a writ of certiorari issued out of the Supreme Court of the State of New Jersey, on the 6th of November, 1882, at the instance of Henry S. Little, receiver of the Central Railroad Company of New Jersey, a corporation of that State, commanding Samuel D. Bowers, comptroller of the City of Elizabeth, and the City of Elizabeth, to certify and send to that court their proceedings relative to an assessment of certain taxes made by that City upon real property of the Company within the city limits, particularly described in the writ, for the year 1876.

Upon the hearing of the case in that court, the investigation extended to like assessments made by the City for the years 1877 to 1882, inclusive; and the judgment of the court was, that the assessments should stand affirmed. That judgment having been affirmed by the Court of Errors and Appeals of the State, this writ of error was prosecuted. The federal question involved is as to whether these assessments impaired the obligation of a contract which the Company claimed existed between it and the State by virtue of an Act of the State Legislature, approved March 17, 1854, and were therefore violative of sec. 10, art. 1, of the Constitution of the United States.

After the argument of the case in this court upon its merits, the defendants in error were given leave to file briefs, a privilege of which they availed themselves; and they also filed a motion to dismiss the writ of error. This motion is based upon the following grounds:

First. Because the taxes levied on the prop-

erty of the Company in the City of Elizabeth in and for the years 1876 to 1882, inclusive, being the same taxes mentioned in the record in this cause, have been paid and satisfied in full since the writ of error was issued, together with the costs in the case.

Second. Because the writ of error is being prosecuted by the plaintiff in error for the sole purpose of obtaining the opinion of this court as to the validity of an alleged contract on the subject of taxation between the State of New Jersey and the Company, and the State is not a party in the form or sense in which a party in interest must be a party to a litigation in order to be bound by the judgment of the court.

Third. Because the plaintiff in error does not owe any taxes to the City of Elizabeth, to Samuel D. Bowers, the former comptroller of the City, or to any existing officer of the City, nor does the Company owe any sum of money to the City for taxes.

Fourth. Because all claims for taxes heretofore made or held by the City of Elizabeth, or any officer thereof, against the Central Railroad Company of New Jersey, or the property of the Company, or any receiver of it, have been adjusted, compromised and paid in full, voluntarily, by the Railroad Company or its appropriate officer or representative.

The motion is supported by a number of affidavits of the tax officers of the City of Elizabeth, including the present comptroller, and the commissioners of adjustment. From these affidavits it appears that, during the year 1887, by virtue of a Statute of the State passed in 1886, the commissioners of adjustment for the City of Elizabeth readjusted and reduced, to a considerable extent, the taxes levied by the City upon the property of the Railroad Company for the years 1876 to 1882, inclusive, and also for the year 1883; that during the progress of that revision and readjustment, H. W. Douty, real estate agent of the Company, appeared before the commissioners, from time to time, and urged the reduction of the claims of the City for taxes against the property of the Company; that after the adjustment had been completed, the taxes were paid by the Railroad Company, before interest on them began to accrue under the Act by virtue of which the adjustment was made; that no warrant was issued or other step or proceeding taken by or on the part of the City for the collection of the taxes prior to the time of payment, nor could any proceedings have been taken to enforce their payment for several months thereafter; and that no protest against the payment, or objection thereto, was made by the Company, or any person acting on its behalf. It appears that, during the progress of the readjustment, the commissioners committed an error by including therein certain taxes for the years 1884, 1885 and 1886. Douty requested them by letter to correct that error, saying, "If this is done, I am satisfied the adjustment will be promptly paid after confirmation." The correction was made as requested, and the taxes thus readjusted and reduced—the same taxes here in dispute—were paid by the Company, as above set forth.

As regards the costs of the proceedings in the court below, it seems they were paid under the

following circumstances: After the judgment of the court of errors and appeals had been rendered, an entry was made upon its record, reciting the fact that the judgment of the supreme court had been affirmed at the costs of the plaintiff in error, and further ordering that the record and proceedings be remitted to the Supreme Court of the State, to be proceeded with in accordance with law and the practice of the court. As the counsel for the plaintiff in error supposed that that form of the judgment would preclude the taking of a writ of error from this court, by an arrangement between counsel for both parties the record was changed to its present form, and the costs in the case were then paid by the plaintiff in error.

As opposed to this motion, there is no denial of the fact that the taxes in dispute have been paid. It is insisted, however, that such payment was not voluntary, but was made under duress, as the only means of avoiding execution; and that payments were made before suit brought only when imposed by the court as a condition for being permitted to bring suit, and after suit brought, only to save property from sale in the absence of any stay or possibility of getting one. But an examination of the affidavit of the principal attorney for the Railroad Company, filed here, discloses the fact that the taxes which are referred to in this connection are the taxes assessed for the years 1884 to 1887, inclusive. In the case of those taxes, the proceedings for their collection were regulated by an Act of the New Jersey Legislature passed in 1884, which in its 16th section provided that if any company should desire to contest the validity of any tax levied thereunder, such contest should be made by certiorari, which might be granted "on such terms as the justice or court granting the writ may impose."

But that Act and the proceedings for the collection of taxes under it are in nowise before the court in this case. In the nature of things the proceedings which the attorney describes could not have applied to the collection of the taxes for the years 1876 to 1882, inclusive, for this suit which relates to them was disposed of by the Supreme Court of the State long before the Act of 1884 was passed. There is nothing in the record to show that the payment of the taxes in dispute was imposed by the court as a condition precedent to the Company's right to bring suit to test their legality. In fact, no such condition was imposed, or could have been imposed, when this suit was brought; for there was no statute of the State at that time giving any such power to the court.

In respect to the taxes here in dispute, it is claimed that they were also paid involuntarily, because, under the Readjustment Act of 1886, the readjustment made by the commissioners was "final and conclusive upon all persons, became immediately due, was collectible by the comptroller without interest, if paid within sixty days, and, if not paid within six months, it was made the comptroller's mandatory duty to sell the lands assessed, at public auction, to the highest bidder, and the purchaser at such sale obtained title by fee simple absolute."

We do not think the payment of the taxes, under the circumstances detailed in the affidavits before referred to, and admitted substan-

tially by plaintiff in error, was an involuntary payment, or a payment under duress, within the meaning of the law. In *Wabaunsee County v. Walker*, 8 Kan. 431, cited with approval in *Lamborn v. County Commissioners*, 97 U. S. 181 [24:926], and also in *Railroad Co. v. Commissioners*, 98 U. S. 541, 548 [25:196, 197], it was said: "Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party, at the time of making the payment, files a written protest, does not make the payment involuntary."

The case in 98 U. S., *supra*, was a suit by the Union Pacific Railroad Company to recover taxes it had paid upon certain of its lands granted to it by Act of Congress. The lands had been assessed by the county in which they lay for general and local taxes, and in due time the tax lists, with warrants attached for their collection, were delivered to the treasurer of the county. The warrants authorized the treasurer, if default should be made in the payment of any of the taxes charged upon the list, to seize and sell the personal property of the persons making the default, to enforce the collection. Under the law of Nebraska no demand of taxes was necessary, but it was the duty of every person subject to taxation to attend the treasurer's office and make payment. The company paid the taxes before any demand had been made for their collection, and before any special effort had been put forth by the treasurer to enforce their collection, at the same time filing with the treasurer a written protest against their payment, for the reason that they were illegally and wrongfully assessed, and were unauthorized by law, and gave notice that suit would be instituted to recover back the money paid. In delivering the opinion of the court, *Mr. Chief Justice Waite* said: "The real question in this case is, whether there was such an immediate and urgent necessity for the payment of the taxes in controversy as to imply that it was made upon compulsion. The treasurer had a warrant in his hands which would have authorized him to seize the goods of the company to enforce the collection. This warrant was in the nature of an execution running against the property of the parties charged with taxes upon the lists it accompanied, and no opportunity had been afforded the parties of obtaining a judicial decision of the question of their liability. As to this class of cases *Chief Justice Shaw* states the rule, in *Preston v. Boston*, 12 Pick. 14, as follows: 'When, therefore, a party not liable to taxation is called upon peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and, by showing that he is not liable, recover it back as money had and received.' This we think, is the true rule, but it falls far short of what is required in this case. No attempt has been made by the treasurer to serve his warrant. He had not even personally demanded the taxes

from the Company, and certainly nothing had been done from which his intent could be inferred to use the legal process he held to enforce the collection, if the alleged illegality of the claim was made known to him. All that appears is, that the Company was charged upon the tax lists with taxes upon its real and personal property in the county. After all the taxes had become delinquent under the law, but before any active steps whatever had been taken to enforce their collection, the Company presented itself at the treasurer's office, and in the usual course of business paid in full everything that was charged against it, accompanying the payment, however, with a general protest against the legality of the charges, and a notice that suit would be commenced to recover back the full amount that was paid. No specification of alleged illegality was made, and no particular property designated as wrongfully included in the assessment of the taxes. The protest was in the most general terms, and evidently intended to cover every defect that might thereafter be discovered, either in the power to tax or the manner of executing the power. . . . Under such circumstances we cannot hold that the payment was compulsory, in such a sense as to give a right to the present action." See also *Dillon on Municipal Corporations*, secs. 941-947, and cases there cited.

The reasoning of the court in that case applies equally to the facts of this. In no sense do we think the payment of the taxes in suit was made under duress. Their payment, under the circumstances above set forth, was in the nature of a compromise, by which the City agreed to take, and the Company agreed to pay, a less sum than was originally assessed. The effect of this act was to extinguish the controversy between the parties to this suit.

This case is clearly distinguishable from *Robertson v. Bradbury*, 132 U. S. 491 [83: 405]. In that case the jury, by returning a verdict in favor of the plaintiff, virtually found that he had been compelled to pay the illegal duties assessed against his goods by the collector of the Port at New York in order to get possession of them from the collector. Here there is no question as to the seizure of goods at all. The lands which had been assessed were still in the possession and under the control of the Railroad Company. No warrant had been issued against them, and no active steps had been taken by the City to enforce the collection of the taxes assessed, nor could any such proceedings have been resorted to by the City for at least several months thereafter. Moreover, the question of the validity of the taxes was involved in pending litigation.

It is true that the judgment of the court below stands unsatisfied except so far as relates to the costs, which, as before stated, have been paid; but that is immaterial, inasmuch as the controversy upon which that judgment was rendered had been extinguished. That in effect satisfied the judgment. Neither the affirmance nor the reversal of that judgment would make any difference as regards the controversy brought here by this writ of error. It matters not that the taxes from 1884 to 1887, inclusive, were paid under duress. They are in no wise before the court; and according to the showing of the plaintiff in error they differ

materially from the taxes in dispute in this case.

It is well settled that, when there is no actual controversy, involving real and substantial rights, between the parties to the record, the case will be dismissed. In *Lord v. Veazie*, 49 U. S. 8 How. 251 [12: 1067], a writ of error was dismissed by this court where it appeared from affidavits and other evidence by persons *not parties to the suit* that there was no real controversy between the plaintiff and defendant, but that the suit was instituted to procure the opinion of this court upon a question of law, in the decision of which they had a common interest opposed to that of other persons, who were not parties to the suit, and had no knowledge of its pendency in the circuit court. Chief Justice Taney, in delivering the opinion of the court, said: "It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves, and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court."

In *Cleveland v. Chamberlain*, 66 U. S. 1 Black, 419 [17: 98], the rule laid down in *Lord v. Veazie*, *supra*, was adhered to, and held applicable to a case in which it appeared that the appellant had purchased and taken an assignment of all the appellee's interest in the decree appealed from; and the appeal was dismissed.

In *Wood Paper Co. v. Heft*, 75 U. S. 8 Wall, 333 [19: 378], an appeal upon a bill for the infringement of a patent was dismissed, it having been made to appear to the court that, after the appeal, the appellants had purchased a certain patent from the defendants under which the defendants sought to protect themselves; and that the defendants, as compensation, had taken stock in the company which was the appellant in the case. And it was further held that the fact that damages for the infringement alleged in the bill had not been compromised did not affect the propriety of the dismissal.

In *San Mateo County v. Southern Pac. R. Co.*, 116 U. S. 138 [29: 589], a writ of error was dismissed where it appeared that the taxes assessed against the company had been paid to the county after the suit had been commenced, the court resting its judgment upon the reason *that there was no longer an existing cause of action in favor of the county against the railroad company*. To the same effect see *Henkin v. Gueres*, 12 East, 247; *Re Elam*, 3 Barn. & C. 597; *Smith v. Junction R. Co.* 29 Ind. 546; *Essex County v. Union County*, 44 N. J. L. 438.

A further defense urged against this motion is laches. It is urged that the facts upon which it is based were known to the defendants in error at least two years ago, and that any objection to the writ of error should have been made before the argument of the case upon its merits. It is also insisted, incidentally, that the motion was filed in violation of professional courtesy, inasmuch as it was through the intercession of the attorney for the plaintiff in error

that an extension of time was allowed the defendants in error within which they could be heard on brief, after the argument on the merits.

We do not think, however, the question of laches has any bearing upon this question. The fact that there is no controversy between parties to the record ought, in the interest of a pure administration of justice, to be allowed to be shown at any time before the decision of the case. Any other rule would put it in the power of designing persons to bring up a feigned issue in order to obtain a decision of this court upon a question involving the rights of others who have had no opportunity to be heard.

If, as is contended on behalf of the plaintiff in error, the question involved in this case is one of great importance to the Railroad Company and to the State, and is identical with that in a number of other cases pending in the court below, so much the more important is it that it should not be decided in a case where there is nothing in dispute. Nor is it material that the case was selected by the plaintiff in error and agreed to by the defendant in error before the writ of error was prosecuted, as one in which the question of taxation under the New Jersey statutes could be fully considered and finally decided by this court; for it is well understood that consent does not confer jurisdiction.

For the reasons above stated the motion to dismiss the writ of error is granted at the costs in this court of the plaintiff in error.

It is so ordered.

BROWN, BONNELL & COMPANY, Appt.,
v.
THE LAKE SUPERIOR IRON COMPANY ET AL.

(See S. C. Reporter's ed. 530-536.)

Technical objection, acquiesced in, will not be given effect—want of jurisdiction, in equity—when objection must be taken—power of court—objection that complainant has remedy at law.

1. A debtor, to destroy equality and accomplish partiality, cannot ignore its long acquiescence and plead an unsubstantial technicality to overthrow protracted, extensive and costly proceedings, carried on in reliance upon its consent.
2. If the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court, having the general jurisdiction, will exercise it.
3. The court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery at the pleasure of the parties interested.
4. But where the subject matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal, it comes too late, even though, if taken in time, it might have been worthy of attention.

[No. 227.]

Argued March 24, 1890. Decided April 7, 1890.
184 U. S. U. S., Book 33.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Ohio in favor of complainants in an action in equity for the appointment of a receiver of a corporation decreeing the amount of indebtedness of its creditors and that upon default in payment the property be sold in satisfaction thereof. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry Crawford, for appellant:

This suit was of such a character that the circuit court was prohibited from exercising any jurisdiction.

N. Y. Guar. Co. v. Water Works Co. 107 U. S. 20 (27: 484); Rev. Stat. § 728.

The judicial power of the United States is not to be exerted in a case to which it does not extend, even if all parties desire to have it extended.

Thompson v. Central Ohio R. Co. 78 U. S. 6 Wall. 184 (18: 765); *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379 (28: 462).

Judicial duty requires that the court at any stage of the cause shall enforce the prohibition, *ex sponte*, wholly independent of the pleadings or wishes or conduct of the parties.

Grand Chute v. Winegar, 82 U. S. 15 Wall. 874 (21: 174); *Killian v. Ebbinghaus*, 110 U. S. 568 (28: 246); *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 206 (26: 981); *Fussell v. Gregg*, 118 U. S. 550 (28: 993); *Hipp v. Babin*, 60 U. S. 19 How. 271 (15: 688); *Penn v. Holme*, 62 U. S. 21 How. 481 (16: 198).

A federal court has no equitable cognizance of such a suit, because the legal remedy was ample and apparent.

Schwed v. Smith, 106 U. S. 188 (27: 156); *Seaver v. Bigelow*, 72 U. S. 5 Wall. 208 (18: 595); *Woodgate v. Field*, 2 Hare, 211; *Balch v. Wastall*, 1 P. Wms. 445.

A judgment, execution and its return unsatisfied are indispensable conditions precedent to a creditor's right to proceed in equity, to reach and apply assets not subject to execution.

Marsh v. Burroughs, 1 Woods, 468; *Co. v. Draw Bridge Co. v. Shepherd*, 62 U. S. 21 How. 112 (16: 89); *Ogilvie v. Knox Ins. Co.* 68 U. S. 22 How. 380 (16: 349); *Case v. Beauregard*, 99 U. S. 119 (25: 370); *Ex parte Boyd*, 105 U. S. 647 (26: 1200); *Angell v. Draper*, 1 Vern. 399; *Neate v. Duke of Marlborough*, 3 Myl. & Cr. 408; *Lord Redesdale*, Treat. 126; 2 Story, Eq. Jur. § 1216; *Edgell v. Haywood*, 3 Atk. 352; *Mitford*, Pl. 1101; *Smith v. Hurst*, 10 Hare, 30; *Beck v. Burdett*, 1 Paige, 305; *Brinkerhoff v. Brown*, 4 Johns. Ch. 677; *Mohawk Bank v. Atwater*, 2 Paige, 54; *Freedman's S. & T. Co. v. Earle*, 110 U. S. 710 (23: 301); *Taylor v. Bowker*, 111 U. S. 110 (28: 368); *Jones v. Green*, 68 U. S. 1 Wall. 330 (17: 558); *Birdsall v. Coolidge*, 93 U. S. 64 (23: 802); *Gilmore v. Miami Ex. Co.* 2 Ohio, 294; *Bomberger v. Turner*, 18 Ohio St. 270; *Bowry v. Odell*, 4 Ohio St. 623; *Hubble v. Perrin*, 3 Ohio, 237; *Brown v. Bank of Mississippi*, 31 Miss. 454; *Candler v. Pettit*, 1 Paige, 168.

A creditor at large has only the right to prosecute his claim in the ordinary courts of law and have it adjudicated before he can pursue the property of his debtor by a direct proceeding in equity.

Case v. Beauregard, 99 U. S. 119 (25: 370); *People's Sav. Bank v. Bates*, 120 U. S. 556 (30: 1021)

754); *Van Weel v. Winston*, 115 U. S. 228 (29: 384); *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 189 (26: 975); *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Angell v. Draper*, 1 Vern. 399; *Shirley v. Watts*, 8 Atk. 200; *Bennet v. Musgrove*, 2 Ves. Sr. 51; *Balch v. Wastall*, 1 P. Wms. 445.

Such a bill must be preceded by a judgment at law.

Smith v. Ft. S. H. & W. R. Co. 99 U. S. 898 (25: 437); *Clark v. Strong*, 16 Ohio, 817.

A charge of insolvency, even resulting from fraud, does not dispense with the general rule that a debt must be ascertained by judgment and legal remedies exhausted before the creditor can proceed to collect it out of the assets liable in equity for its payment.

Estes v. Wilcox, 67 N. Y. 264; *Baxter v. Moses*, 77 Me. 476; *Adsit v. Butler*, 87 N. Y. 585; *Adee v. Bigler*, 81 N. Y. 349; *Smith v. Ft. S. H. & W. R. Co.* 99 U. S. 401 (25: 438).

Chancery, usurping the powers of a common-law tribunal, proceeded to ascertain the validity and amount due them and awarded a pecuniary recovery to be collected by execution.

Such exercise of judicial power was a plain denial of the right of jury trial.

Parsons v. Bedford, 28 U. S. 3 Pet. 433 (7: 782); *Thompson v. Central Ohio R. Co.* 73 U. S. 6 Wall. 187 (18: 767); *Levis v. Cocks*, 90 U. S. 23 Wall. 466 (23: 70); *Hipp v. Babin*, 60 U. S. 19 How. 271 (15: 638); *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 206 (26: 981).

Chancery is without power to grant decrees which are in effect mere judgments at law.

Young v. Porter, 8 Woods, 342; *Hayward v. Andrews*, 106 U. S. 672 (27: 271); *Fussell v. Gregg*, 113 U. S. 550 (28: 993); *Buzard v. Houston*, 119 U. S. 351 (30: 453); *Kilbourn v. Sunderland*, 130 U. S. 505 (32: 1005).

Only creditors whose situation entitled them to file an original bill can prove up under the decree in a judgment creditors' action.

Parmelee v. Egan, 7 Paige, 610; *Edmeston v. Lyde*, 1 Paige, 688; *Re Ingraham*, 2 Barb. Ch. 35; *Richmond v. Irons*, 121 U. S. 52 (30: 872); *Sterndale v. Hankinson*, 1 Sim. 398.

Creditors at large without lien or charge upon specific property cannot have a receiver.

Bigelow v. Andress, 31 Ill. 322; *Rich v. Levy*, 16 Md. 74; *Parmyl v. Tenth Ward Bank*, 3 Edw. Ch. 895; *Holdrege v. Gwynne*, 18 N. J. Eq. 26; *Mills v. Northern R. of Buenos Ayres Co. L. R.* 5 Ch. 627; *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Uhl v. Dillon*, 10 Md. 500.

The grounds on which the receivership was granted were inadequate.

Prince v. Bartlett, 12 U. S. 8 Cranch, 434 (3: 615); *Conard v. Atlantic Ins. Co.* 26 U. S. 1 Pet. 438 (7: 213); *Brundred v. Paterson Mach. Co.* 4 N. J. Eq. 294.

The order taking the supplemental bill as confessed and proceedings to decree thereon, was error.

Kennedy v. Bank of Georgia, 49 U. S. 8 How. 586 (12: 1209); *Winn v. Albert*, 2 Md. Ch. 42; *Story, Eq. Pl. § 383*; *Shaw v. Bill*, 95 U. S. 10 (24: 333); *Chapman v. Barney*, 129 U. S. 677 (32: 800); *Washington R. Co. v. Bradleys*, 77 U. S. 10 Wall. 308 (19: 894); *Terry v. McLure*, 103 U. S. 442 (26: 403).

The pleadings are not sufficient to support the decree as rendered.

Chapman v. Hunt, 14 N. J. Eq. 149; *Ryces v. Ryces*, 3 Ves. Jr. 343; *Braithwaite, Pr.* 233; *Bennett, Lis Pen.* 153; *Griffith v. Griffith*, 1 Hoffm. Ch. 153; *McGee v. Smith*, 16 N. J. Eq. 462; *Miller v. Sherry*, 69 U. S. 2 Wall. 237 (17: 827).

The decree must conform to the scope and object of the prayer and cannot go beyond them.

Washington R. Co. v. Bradleys, 77 U. S. 10 Wall. 308 (19: 895); *Falk v. Lord Clinton*, 12 Ves. Jr. 48; *Chalmers v. Chambers*, 6 Har. & J. 29; *Langdon v. Godard*, 2 Story, 287; *Thomson v. Wooster*, 114 U. S. 113 (29: 106); *Clark v. Reyburn*, 75 U. S. 8 Wall. 318 (19: 854); *McAllister v. Kuhn*, 96 U. S. 87 (24: 615); *Slacum v. Pomeroy*, 10 U. S. 6 Cranch, 221 (8: 204).

Equity courts as such have no inherent power to ascertain the debts and settle all the affairs of insolvent corporations. Such jurisdiction is wholly statutory.

Clark v. Smith, 88 U. S. 13 Pet. 195 (10: 123); *Freedman's S. & T. Co. v. Earle*, 110 U. S. 710 (28: 302); *Cutlin v. Eagle Bank*, 6 Conn. 233; *Hartun v. Bishop*, 3 Wend. 13; *Dana v. Bank of U. S.* 5 Watts & S. 224; *DeRuyter v. St. Peter's Church*, 3 N. Y. 238; *Bank of U. S. v. Huth*, 4 B. Mon. 423; *State v. Maryland Bank*, 6 Gill & J. 205; *Arthur v. Commercial & R. Bank*, 9 Smedes & M. 430; *Neall v. Hill*, 16 Cal. 146; *French Bank Case*, 53 Cal. 495; *Treadwell v. Salisbury Mfg. Co.* 7 Gray, 399; *Baker v. Louisiana P. R. Co.* 84 La. Ann. 754; *State v. Merchants Ins. & T. Co.* 8 Humph. 238.

Messrs. Francis J. Wing, C. C. Baldwin, Samuel Shellabarger, J. M. Wilson and C. D. Hyne, for appellees:

The jurisdiction of the courts of the United States in their administration of equitable remedies is not confined to the very rights and remedies existing at the time the Constitution was adopted, but embraces all new rights created by state statutes, and also new forms of remedy created by such state statutes.

Chicago & N. W. R. Co. v. Whitton, 80 U. S. 13 Wall. 287 (20: 571); *Dennick v. Central R. Co. of N. J.* 103 U. S. 11 (26: 489); *Ellis v. Davis*, 109 U. S. 497 (27: 1010); *Ex parte Boyd*, 105 U. S. 647 (26: 1200); *Broderick's Will*, 88 U. S. 21 Wall. 520 (22: 599); *Ex parte McNeil*, 80 U. S. 13 Wall. 243 (20: 627); *Holland v. Challen*, 110 U. S. 24 (28: 55); *Reynolds v. Crawfordville Bank*, 112 U. S. 410 (28: 738); *U. S. v. Wilson*, 118 U. S. 89 (30: 110).

The property and assets of a corporation are a trust fund for the payment of its debts, especially in case of insolvency.

Wood v. Dummer, 3 Mason, 311; *Upton v. Tribilcock*, 91 U. S. 45, 47 (23: 203, 204); *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352 (33: 178).

In *Graham v. La Crosse & M. R. Co.*, 103 U. S. 148, 161 (26: 106, 111), this court said that when a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds which, in other circumstances, are as much the absolute property of the corporation as any man's property is his.

Mumma v. Potomac Co. 33 U. S. 8 Pet. 281, 184 U. S.

286 (8: 945, 946); *Morgan County v. Allen*, 108 U. S. 498, 509 (26: 498, 502); *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S. 587, 594 (29: 285, 288); 2 Story, Eq. Jur. § 1252; 1 Perry, Trusts, § 242.

A company confessing a judgment and entering an appearance and waiving notice at once for the sake of having an appointment of a receiver made at once, fairly acquiesces in the appointment.

Wallace v. Loomis, 97 U. S. 168 (24: 901); *Little Rock Waterworks Co. v. Barrett*, 108 U. S. 517 (26: 524); *Case v. Beauregard*, 101 U. S. 688, 690, 691 (25: 1004, 1005).

Where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference.

Turner v. Adams, 46 Mo. 95; *Postlewait v. Howes*, 8 Iowa, 865; *Ticonic Bank v. Harcey*, 16 Iowa, 141; *Botsford v. Beers*, 11 Conn. 369; *Payne v. Sheldon*, 68 Barb. 169.

So it has been held that a creditor, without having first obtained a judgment at law, may come into a court of equity to set aside fraudulent conveyances of his debtor, made for the purpose of hindering and delaying creditors, and to subject the property to the payment of the debt due him.

Thurmond v. Reese, 8 Ga. 449; *Cornell v. Radway*, 22 Wis. 260; *Sanderson v. Stockdale*, 11 Md. 563; *Brisay v. Hogan*, 58 Me. 554; *Day v. Washburne*, 65 U. S. 24 How. 352 (16: 712).

Whenever a creditor has a trust in his favor, or a lien upon property for the legal debt due him, he may go into equity without exhausting legal processes or remedies.

Tappan v. Evans, 11 N. H. 811; *Holt v. Bancroft*, 30 Ala. 193; *Union Trust Co. v. Midland R. Co.* 117 U. S. 434 (29: 963); *Sage v. Memphis & L. R. Co.* 125 U. S. 361 (31: 694); *Clapp v. Dittman*, 21 Fed. Rep. 18.

The appointment of the receiver was within the power of the court.

Morgan County v. Allen, 103 U. S. 508, 509 (26: 501); *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S. 594, 596-598 (29: 288, 289); *Upton v. Tribilcock*, 91 U. S. 45 (23: 203); *Webster v. Upton*, 91 U. S. 65 (23: 885); *Hatch v. Dana*, 101 U. S. 205 (25: 885).

Equity has the right to make complete settlement.

Ober v. Gallagher, 93 U. S. 206 (28: 881); *Taylor v. Merchants Fire Ins. Co.* 50 U. S. 9 How. 405 (18: 190); *Ward v. Todd*, 103 U. S. 329 (26: 840); *Barton v. Barbour*, 104 U. S. 133, 134 (26: 676); *Carwood Patent*, 94 U. S. 695 (24: 238); *Marsh v. Seymour*, 97 U. S. 348 (24: 963); *Florence Mining Co. v. Brown*, 124 U. S. 385 (31: 424).

The remedy at law must be as plain and adequate and as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity.

Boyce v. Grundy, 28 U. S. 3 Pet. 210 (7: 655); *Watson v. Sutherland*, 72 U. S. 5 Wall. 74 (18: 580); *Payne v. Hook*, 74 U. S. 7 Wall. 430 (19: 262); *Van Norden v. Morton*, 99 U. S. 378 (25: 453); *Krippendorf v. Hyde*, 110 U. S. 280 (28: 147); *Buzard v. Houston*, 119 U. S. 352 (30: 454); *La Mothe v. Fink*, 3 Biss. 500; *De Menacho v. Ward*, 23 Blatchf. 510.

134 U. S.

Mr. Justice Brewer delivered the opinion of the court:

On February 20, 1883, two of the appellees, the Lake Superior Iron Company and the Jackson Iron Company, together with the Negaunee Concentrating Company, filed their bill against the appellant, in the Circuit Court of the United States for the Northern District of Ohio. The appellant was a corporation, created under the laws of the State of Ohio, and each of the complainants was a creditor, two holding claims evidenced by notes not then due, and the other, the Negaunee Concentrating Company, holding a judgment. The prayer of the bill was for the appointment of a receiver to take charge of the property and assets of the defendant, and for such other and further relief as was proper. On the same day the defendant entered its appearance, and accepted service of notice of a motion for the appointment of a receiver; and Fayette Brown was thereupon immediately appointed receiver. On the next day subpoena was served on the defendant. On March 28 a supplemental bill was filed making other parties defendants, and on June 14 an order *pro confesso* was entered against all of the defendants in the original and supplemental bills. On April 28 an order was entered directing all creditors to file their claims by petition, and on October 20 nearly every creditor had appeared and filed his petition. On July 17 an order was entered appointing a special master to report on the claims of creditors and marshal the liens thereof.

Up to the 28d of November, the appellant made no opposition to the proceeding, and apparently assented to the action which was being taken by the creditors, looking to the appropriation of its property to the payment of their claims. On that day a change took place in its attitude towards this suit. It went into the state courts and confessed judgment in behalf of several of its creditors; and on the 24th deposited in the registry of the circuit court money enough to pay off the judgment in favor of the Concentrating Company, and filed two pleas—one setting forth the fact of payment, and the other that the original and supplemental bills disclosed that the complainants had a plain, adequate and complete remedy at law; and that therefore the court, sitting as a court of equity, had no jurisdiction; and praying a dismissal of the bills. Subsequently, on December 18, it filed a motion to discharge the receiver. This motion was overruled, the pleas seem to have been ignored, the master reported upon the claims presented, and on February 23, 1886, the court entered a decree which, finding the indebtedness to be as stated by the master, also what property was in possession of the receiver, decreed that upon default in the payment of those debts the property be sold in satisfaction thereof. From this decree the defendant has brought this appeal; and its principal contention is, that the circuit court had no jurisdiction whatever over the subject matter of the suit, because it appeared upon the face of the bills, original and supplemental, that the complainants had a plain, adequate and complete remedy at law.

As heretofore stated, the bill showed that two of the complainants held claims not yet due

and the third only a judgment with no execution. The supplemental bill alleged that execution had, since the filing of the original bill, been issued on that judgment, and returned *nulla bona*. The original bill, besides disclosing the nature of complainants' claims, set forth that they were proceeding not alone in their own behalf, but in that of all other creditors, whose number was so great as to make it impossible to join them as parties; it then averred the insolvency of the defendant; that it was engaged in large and various business, manufacturing and mining; that its plant and good will was of great extent and value; and that it employed operatives to the number of at least four thousand; and then alleged as follows: "And your orators further say that vexatious litigation has been commenced against the said defendant, and many more such are threatened, and that such litigations are accompanied by attachments and seizures of property, and such threatened litigations will also be accompanied by attachments and seizures, and that such attachments and seizures will give to those creditors who are pursuing them undue and unfair advantage and priority over your complainants, whose claims are not yet due, and make them irreparable injury and damage; that if such litigations be further instituted and its property seized in attachment, as it already has been, there is great danger that the valuable property of the defendant will be irreparably injured and to a great extent destroyed, and your orators say that such seizures and interference with the business and the property of the defendant would wholly destroy the value of the good will of the Company as an asset, and wholly break up its long-established business, and thereby cause detriment and irreparable injury to your orators and all other creditors. And your orators further say that unless this court shall interfere and protect and preserve the property and assets of said defendant by putting it into the hands of a receiver, the said property will be in great danger of destruction and dissipation by the large number of operatives who would necessarily be discharged and left without work or means of obtaining it, and such operatives, by reason of the great distrust they already have, and on account of a fear that they will not in future receive remuneration, will abandon their employment and thereby cause a stoppage of the extensive business of said defendant, to the extent that the creditors of said defendant would not be able to realize one half of the amount upon the several claims that they would if the said business of the defendant were continued."

The appellees, while admitting the general rule to be that creditors must show that they have exhausted legal remedies before coming into a court of equity, insist that the bill disclosed a case in equity on two grounds: first, that upon the insolvency of a corporation its properties become a trust fund for the benefit of its creditors, which can be seized and disposed of by a receiver, and in equitable proceedings; and, second, that the vast interests and properties of this corporation, with their threatened disintegration through several attachment suits, justified the interference of a court of equity to preserve, for the benefit of

creditors, that large value which resulted from the unity of the properties. In support of these propositions counsel cite, as especially applicable, *Terry v. Anderson*, 95 U. S. 628 [24: 365]; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 434 [29: 968]; *Sage v. Memphis & L. R. Co.* 125 U. S. 361 [31: 694]; *Mellen v. M. M. Iron Works*, 131 U. S. 352 [33: 178]; *Barbour v. National Exchange Bank*, 45 Ohio St. 133 [10 West. Rep. 458]; *Rouse v. Merchants Nat. Bank*, 46 Ohio St. 498 [5 L. R. A. 378].

But were it conceded that the bill was defective; that a demurrer must have been sustained; and that the appellant, if it had so chosen to act in the first instance, could have defended its possession, and defeated the action,—still the decree of the circuit court must be sustained. Whatever rights of objection and defense the appellant had, it lost by inaction and acquiescence. Obviously the proceedings had were with its consent. Immediately on filing the bill it entered its appearance; and the same day a receiver was appointed, without objection on its part. It suffered the bills to be taken *pro confesso*. It permitted the receiver to go on in the possession of these properties for nine months, transacting large business, entering into many contracts and assuming large obligations, without any intimation of a lack of authority, or any objection to the proceedings.

After a lapse of nine months, suddenly its policy changed—it contested where theretofore it had acquiesced. And this, not because of any restored solvency or purpose to resume business, but with the evident intent to prevent the equality among creditors which the existing equitable proceedings would secure, and to give preference to certain creditors. For clearly it was the thought of the president of the corporation, himself the owner of a large majority of its stock, whose management had wrought its financial ruin, that after the setting aside of the equitable proceedings the lien of the confessed judgments would attach, and thus those favored creditors would be preferred.

So the case stands in this attitude. The corporation was insolvent. Its extensive and scattered properties had been brought into single ownership, and so operated together that large benefit resulted in preserving the unity of ownership and operation. Disintegration was threatened through separate attacks, by different creditors, on scattered properties. The preservation of this unity, with its consequent value, and the appropriation of the properties for the benefit of all the creditors equally, were matters deserving large consideration in any proper suit. Certain creditors, acting for all, initiated proceedings looking towards this end. In such proceedings the corporation acquiesced. Substantially all of the creditors came into the proceedings. After months had passed, much business had been transacted and large responsibilities assumed, the corporation, for the benefit of a few creditors and to destroy the equality between all, comes in with the technical objection that the creditors initiating the proceedings should have taken one step more at law before coming into equity. But the maxim, "He who seeks equity must do equity," is as appropriate to the conduct of the defendant as to that of the

complainant; and it would be strange if a debtor, to destroy equality and accomplish partiality, could ignore its long acquiescence and plead an unsubstantial technicality to overthrow protracted, extensive and costly proceedings carried on in reliance upon its consent. Surely no such imperfection attends the administration of a court of equity. Good faith and early assertion of rights are as essential on the part of the defendant as of the complainant. This matter has recently been before this court, in *Reynes v. Dumont*, 180 U. S. 354, 395 [32: 934, 945], and was carefully considered, and the rule, with its limitations, thus stated: "The rule as stated in 1 Daniell's Chancery Practice, 555 (4th Am. ed.), is that, if the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court, having the general jurisdiction, will exercise it; and in a note on page 550, many cases are cited to establish that 'if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity. The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject matter.' . . . It was held in *Lewis v. Cocks*, 90 U. S. 23 Wall. 466 [23: 70], that if the court, upon looking at the proofs, found none at all of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact and give it effect, though not raised by the pleadings nor suggested by counsel. To the same effect is *Oelrichs v. Spain*, 82 U. S. 15 Wall. 211 [21: 43]. The doctrine of these and similar cases is, that the court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery at the pleasure of the parties interested; but it by no means follows, where the subject matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal, that the latter can exercise no discretion in the disposition of such objection. Under the circumstances of this case, it comes altogether too late, even though, if taken *in limine*, it might have been worthy of attention." See also *Kilbourn v. Sunderland*, 180 U. S. 505 [32: 1005]; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 484, 468 [29: 963, 975].

Further comment is unnecessary. *The ruling of the Circuit Court was correct, and its decree is therefore affirmed.*

THE HOME INSURANCE COMPANY OF
NEW YORK, *Plff. in Err.*,

v.

THE PEOPLE OF THE STATE OF NEW
YORK.

(See S. C. Reporter's ed. 594-607.)

U. S. bonds not taxable—tax on corporate franchise lawful—privilege of being a corporation—legislative power—mode of fixing amount of tax—limitation of taxing power—capital stock—14th Amendment to U. S. Constitution, effect of.

1. The bonds or obligations of the United States for the payment of money cannot be the subject of taxation by a State; this inhibition upon the States cannot be evaded by any change in the mode or form of the taxation, provided the same result is effected.
2. Where a state statute imposes a tax upon the "corporate franchise or business" of a company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year, this is not a tax on the capital stock or property of the company, but upon its corporate franchise, and is not therefore subject to the objection that it is a tax on United States securities, although a portion of its capital stock is invested in such securities.
3. By the term "corporate franchise or business," as here used, is meant the right or privilege of being a corporation, that is, of doing business in a corporate capacity.
4. The granting of such right or privilege rests entirely in the discretion of the State, and, when granted may be accompanied with such conditions as its Legislature may judge most befitting to its interests and policy.
5. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. Its action in this matter is not the subject of judicial inquiry in a federal tribunal.
6. The taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the Legislature may choose.
7. Such tax cannot be affected in any way by the character of the property in which its capital stock is invested.
8. The objection is not tenable that the statute, in imposing such tax, conflicts with the last clause of the first section of the Fourteenth Amendment of the Constitution of the United States, declaring that no State shall deprive any person within its jurisdiction of the equal protection of the laws, although corporations are persons within the meaning of this Amendment.
9. The Amendment does not prevent the classification of property for taxation, subjecting one kind of property to one rate of taxation, and another kind of property to a different rate, nor distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property.

[No. 1.]

Re-argued March 18, 19, 1890. Decided April 7, 1890.

NOTE.—When an injunction to restrain the collection of a tax will be granted. See note to *Dows v. Chicago*, 20: 65.

When taxes illegally assessed can be recovered back. See note to *Erskine v. Van Arsdale*, 21: 63.

IN ERROR to the Supreme Court of the State of New York to review a judgment in favor of the State against the Home Insurance Company of New York for the payment of a tax. *Affirmed.*

This cause was argued in this court at the October Term, 1886. The judgment was affirmed by a divided court. 119 U. S. 129 (30: 350). Thereafter a rehearing was granted and the cause restored to the docket. 122 U. S. 636 (30: 1241).

Statement by Mr. Justice Field:

The plaintiff in error, The Home Insurance Company of New York, is a corporation created under the laws of that State. Its capital stock during the year 1881 was three millions of dollars, divided into thirty thousand shares of the par value of one hundred dollars each, all fully paid. In the months of January and July of that year a dividend of \$150,000 was declared by the Company, making together ten per cent upon the par value of its capital stock. A portion of that capital stock was invested in bonds of the United States, amounting, when the dividend was declared in July, 1881, and also on the first of November of that year, to \$1,940,000.

By an Act of the Legislature of New York passed May 26, 1881 (chap. 361), amending a previous Act providing for the taxation of certain corporations, joint-stock companies and associations, it was declared that every corporation, joint-stock company or association, then or thereafter incorporated under any law of the State, or of any other State or country, and doing business in the State, with certain designated exceptions not material in this case, should be subject to a tax upon "its corporate franchise or business," to be computed as follows:—if its dividend or dividends made or declared during the year ending the first day of November amount to six per cent or more upon the par value of its capital stock, then the tax to be at the rate of one quarter mill upon the capital stock for each one per cent of the dividends. A less rate is provided where there is no dividend, or a dividend less than six per cent, and also where the corporation, company or association has more than one kind of capital stock—as, for instance, common and preferred stock—and upon one of them there is a dividend amounting to six or more per cent, and upon the other there is no dividend or a dividend of less than six per cent. The purpose of the Act is to fix the amount of the tax each year upon the franchise or business of the corporation by the extent of dividends upon its capital stock, or, where there are no dividends, according to the actual value of the capital stock during the year. We are concerned in this case, however, only with the tax where the amount is computed by the extent of the dividends.

The tax payable by the Home Insurance Company, estimated according to its dividends, under the above law of the State, aggregated \$7,500. The Company resisted its payment, assuming that the tax was in fact levied upon the capital stock of the Company, and contending that there should be deducted from it a sum bearing the same ratio thereto that the amount invested in bonds of the United States

bears to its capital stock, and that the law requiring a tax without such reduction is unconstitutional and void. An agreed case was accordingly made up embodying a statement of the facts, between the Company and the Attorney-General of New York representing the State, and submitted to the Supreme Court of the State. That court gave judgment in favor of the State against the Company, which, on appeal to the Court of Appeals of the State, was affirmed. 92 N. Y. 328. The judgment of the latter court having been remitted to the supreme court and entered there, the case is brought to this court for review on writ of error.

Messrs. B. H. Bristow and David Wilcox, for plaintiff in error:

No tax can be imposed upon that part of defendant's capital invested in United States bonds. A State cannot burden the operations of the national government by taxing its bonds without its consent.

McCulloch v. Maryland, 17 U. S. 4 Wheat. 316, 436 (4: 579, 585); *Weston v. Charleston*, 27 U. S. 2 Pet. 449 (7: 481); *Banks v. Mayor*, 74 U. S. 7 Wall. 16 (19: 57); *People v. Comrs. of Taxes*, 90 N. Y. 63.

A tax upon the capital of a corporation is a tax upon the property in which the capital is invested. No part of the capital invested in United States bonds, therefore, is taxable.

Bank of Commerce v. New York, 67 U. S. 2 Black, 620 (17: 451); *Bank Tax Case*, 69 U. S. 2 Wall. 200 (17: 798).

Whether or not this is a tax upon capital is to be determined, not by the form of the Statute, but by its effect. When the Statute was first enacted the Legislature merely imposed the tax. The following year it inserted the definition thereof "as a tax upon corporate franchise or business." But if the tax is, in its nature and effect, a tax upon capital, it is none the less so because of this amendment declaring it to be a tax upon franchise or business.

In *Brown v. Maryland*, 25 U. S. 12 Wheat. 419 (6: 678), a State Statute required all importers of foreign goods to take out a license and pay a fee. The court held that this was a regulation of commerce.

The same thing was ruled in *Ward v. Maryland*, 79 U. S. 12 Wall. 418 (20: 449); *Welton v. State*, 91 U. S. 275 (23: 347); *Webber v. Virginia*, 103 U. S. 344 (26: 565); *Walling v. Michigan*, 116 U. S. 446 (29: 691); *Leloup v. Mobile*, 127 U. S. 640 (32: 311); *Smith v. Turner*, 48 U. S. 7 How. 283 (12: 702); *Henderson v. Mayor*, 92 U. S. 259 (23: 543); *Cook v. Penn.* 97 U. S. 566 (24: 1015), and *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691 (27: 534).

The intent of the law is not material.

Almy v. California, 65 U. S. 24 How. 169 (16: 644); *Bank Tax Case*, 69 U. S. 2 Wall. 200 (17: 798); *Cummings v. Missouri*, 71 U. S. 4 Wall. 277, 325 (18: 356, 363); *Grandall v. Nevada*, 73 U. S. 6 Wall. 35 (18: 745); *State Freight Tax*, 82 U. S. 15 Wall. 232 (21: 146); *Inman Co. v. Tinker*, 94 U. S. 238 (24: 118); *Hannibal R. Co. v. Huen*, 95 U. S. 465 (24: 527); *Western U. Tel. Co. v. Texas*, 105 U. S. 460 (26: 1067); *Moran v. New Orleans*, 112 U. S. 69 (28: 653); *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337 (29: 414, 419); *Pickard v. Pullman Co.* 117

U. S. 84 (29: 785); *Robbins v. Shelby Taxing Dist.* 120 U. S. 489, 496 (30: 694, 697); *Fargo v. Michigan*, 121 U. S. 230, 244 (30: 888, 894); *Bouman v. Chicago & N. W. R. Co.* 125 U. S. 465 (31: 700); *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 276, 281; *People v. Allen*, 42 N. Y. 404, 418; *Re Deansville Cemetery Asso.* 66 N. Y. 569; *Re Jacobs*, 98 N. Y. 98.

The declaration by the Legislature that this is a tax on franchise or business is not controlling. The name of this imposition is immaterial: it is the substance we are to consider.

Imman Co. v. Tynker, 94 U. S. 288 (24: 118).

The franchises of a corporation may be taxed by imposing a fixed sum, or a graduated contribution proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise.

State Tax on Railway Gross Receipts, 82 U. S. 15 Wall. 284 (21: 164); *Delaware Railroad Tax*, 85 U. S. 18 Wall. 206, 231 (21: 888, 896).

These provisions of the Act do not impose a fixed sum. Nor do they impose a contribution proportioned to the extent of the exercise of the franchise to the amount of business done.

The franchise is the right to use the tangible property in a special manner for purposes of gain.

State Railway Tax Cases, 92 U. S. 575 (28: 668).

It is itself a part of the property of the corporation, but quite distinct and separate from its tangible property.

Gordon v. App. Tax Court, 44 U. S. 8 How. 138, 150 (11: 529, 535); *Wilmington R. Co. v. Reid*, 80 U. S. 18 Wall. 264, 265 (30: 568).

It is a thing capable of appraisal and ascertainable by evidence, and is frequently made the subject of taxation by the sovereign power. It is a right separate and distinct from the capital and moneyed assets of a corporation, and as to the value of which they furnish no evidence.

Conaughty v. Saratoga Bank, 92 N. Y. 401; *Veazie Bank v. Fanno*, 75 U. S. 8 Wall. 533, 547 (19: 482, 487); *Monroe Savings Bank v. Rochester*, 37 N. Y. 365, 367; *Porter v. Rockford R. Co.* 76 Ill. 561, 578.

Its value is determined by subtracting from the total actual value of the capital stock the total value of all items of property other than the franchise. The remainder is the value of the franchise—the value of the right to use the tangible property in a special manner for the purposes of gain.

State Railway Tax Cases, 92 U. S. 575, 602-607 (28: 668, 669, 671); *Spring Valley Works v. Schottler*, 62 Cal. 69, 117; *Burke v. Badlam*, 57 Cal. 594; *San José Co. v. January*, 57 Cal. 614.

Here neither the value of this part of the property of the corporation nor the results of its use are in any way ascertained.

The tax is a percentage upon that part of defendant's income which it has distributed in dividends. This is a tax upon the property from which the income arises.

Bank of Kentucky v. Com. 9 Bush, 46; *Opinion of the Justices*, 53 N. H. 634; *People v. Comrs. of Taxes*, 90 N. Y. 68; *Weston v. Charleston*, 27 U. S. 2 Pet. 472, 475, 478 (7: 489, 490, 491); *Philadelphia Co. v. Pennsylvania*, 122 U. S. 826 (30: 1200).

As this tax includes property not taxable, it

cannot be sustained as a tax on the franchise.

Santa Clara County v. Southern Pac. R. Co. 118 U. S. 394 (30: 118); *California v. Central Pac. R. Co.* 127 U. S. 1 (32: 150).

The cases relied upon by the State, to wit: *Society for Savings v. Coite*, 73 U. S. 6 Wall. 594 (18: 897); *Provident Inst. v. Mass.* 73 U. S. 6 Wall. 611 (18: 907); and *Hamilton Co. v. Mass.* 73 U. S. 6 Wall. 632 (18: 904),—have no present application.

They are controlled by *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326 (30: 1200).

In that case, a state statute imposed a tax upon the gross receipts of a steamship company of the State, which were derived from the transportation of persons and property by sea between different States and to and from foreign countries. It was held that the tax was imposed not upon the franchise but upon the commerce itself from which the receipts arose, and was therefore unconstitutional.

Fargo v. Mich. 121 U. S. 230 (30: 888); *Leloup v. Port of Mobile*, 127 U. S. 640 (32: 811).

Where a tax is upon the property in which the capital is invested, corporations upon which it is imposed are entitled to deduct their United States bonds from the amount of the assessment.

Bank of Commerce v. N. Y. 67 U. S. 2 Black, 620 (17: 451); *Bank Tax Case*, 69 U. S. 2 Wall. 200 (17: 793).

In matters of taxation, it is a sacred duty to impose the burdens equally.

People v. Comrs. of Taxes, 76 N. Y. 64, 71.

Equality of taxation is a fundamental principle of our government, which no Legislature, in the absence of the most explicit provisions, will be presumed to have intended to violate.

People v. Suprs. 20 Barb. 81, 88, affirmed 16 N. Y. 424.

The tax is a percentage upon the capital—upon the dividends which it has earned. The rate of tax increases or diminishes with the rate of dividend.

Oswego Starch Factory v. Dolloway, 21 N. Y. 449; *Com. v. Cleveland, P. & A. R. Co.* 29 Pa. 370; *Lehigh Crane Iron Co. v. Com.* 55 Pa. 448; *People v. Ferguson*, 88 N. Y. 89.

The provisions of this Act were copied literally from a Statute of Pennsylvania (Laws of 1879, p. 114, sec. 4), and have long existed there in the same substantial form.

Laws of 1844, p. 498, sec. 33; Laws of 1859, p. 529; Laws of 1868, p. 109, sec. 4.

It is well settled there that they impose a tax upon the property of the corporation (*Westchester Co. v. Chester Co.* 30 Pa. 232; *Lackawanna Iron & Coal Co. v. Luzerne Co.* 42 Pa. 424, 430; *Phenix Iron Co. v. Com.* 59 Pa. 104; *Com. v. Pittsburg, Fort Wayne & C. R. Co.* 74 Pa. 88; *Catawissa Co's App.* 78 Pa. 59; *Coatesville Gas Co. v. Chester Co.* 97 Pa. 476, 481); and that the dividend of profit earned by the stock is but a means of ascertaining its value.

Lehigh Co. v. Com. 55 Pa. 448, 451; *Com. v. Standard Oil Co.* 101 Pa. 119.

The Pennsylvania Statute was before this court in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29: 158), and was then regarded as imposing a tax upon the capital of corporations affected.

Bank of Commerce v. New York, 67 U. S. 2 Black, 620 (17: 451); *Bank Tax Case*, 69 U. S. 2 Wall. 200 (17: 793).

Any question in the premises is finally disposed of by *Philadelphia Co. v. Penn.* 122 U. S. 326 (30: 1200).

If, however, defendant be taxable upon the basis of its entire capital, including the bonds, the tax is repugnant to the Fourteenth Amendment to the Constitution of the United States.

The defendant is a person within the meaning of this provision.

Santa Clara County v. Southern Pac. R. Co. 118 U. S. 394 (30: 119); *Pembina Co. v. Pennsylvania*, 125 U. S. 181, 189 (31: 650, 655); *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205 (32: 107).

Inequality of taxation is a denial of equal protection.

Strauder v. West Va. 100 U. S. 803 (25: 664); *California v. Central Pac. R. Co.* 127 U. S. 1 (32: 150); *San Mateo County v. Southern Pac. R. Co.* 8 Sawy. 238, 13 Fed. Rep. 722; *Exchange Bank v. Hines*, 3 Ohio St. 1; *People v. Weaver*, 100 U. S. 539 (25: 705); *Supra. v. Stanley*, 105 U. S. 305 (26: 1044); *Evansville Bank v. Britton*, 105 U. S. 322 (26: 1053).

The Legislature has power to classify corporations for purposes of taxation.

State Railway Tax Cases, 92 U. S. 575 (23: 663).

But there can be no classification by arbitrary rules among those engaged in the same business, in the same locality.

Kentucky Railroad Tax Cases, 115 U. S. 837 (29: 419); *Missouri v. Lewis*, 101 U. S. 22, 31 (25: 989, 992); *Gilman v. Sheboygan*, 67 U. S. 2 Black, 510 (17: 805); *Albany City Nat. Bank v. Maher*, 9 Fed. Rep. 884; *Dundas M. T. Investment Co. v. School Dist. No. 1*, 19 Fed. Rep. 359; *Stuart v. Palmer*, 74 N. Y. 183; *State v. Township*, 36 N. J. L. 66, 70; *Lexington v. McQuillan*, 9 Dana, 518; *Houell v. Bristol*, 8 Bush, 498, 498; *Atty. Gen. v. Winnebago Co.* 11 Wis. 35, 42; *New Orleans v. Home Mut. Ins. Co.* 23 La. Ann. 449; *Re Ah Fong*, 3 Sawy. 144, 145; *Ah Kou v. Nunan*, 5 Sawy. 552; *Re Parrott*, 6 Sawy. 849; *Louisville & N. R. Co. v. Tennessee Railroad Commission*, 19 Fed. Rep. 679.

Upon principle the rule in regard to uniformity of taxation upon franchises must be the same as in regard to taxes upon any other property.

San Mateo County v. Southern Pac. R. Co. 8 Sawy. 256; *Portland Bank v. Apthorp*, 12 Mass. 252, 258; *Com. v. People's Savings Bank*, 5 Allen, 428, 431; *Oliver v. Washington Mills*, 11 Allen, 268; *State v. Merchants Ins. Co.* 12 La. Ann. 802; *Parish of Orleans v. Cochran*, 20 La. Ann. 873; *Eust St. Louis v. Wehrung*, 46 Ill. 392.

If the right to impose a tax at all exists, it is a right which in its nature acknowledges no limits.

Bank of Commerce v. N. Y. 67 U. S. 2 Black, 620, 634 (15: 451, 455).

The power to tax involves the power to destroy.

California v. Central Pac. R. Co. 127 U. S. 1, 41 (32: 150, 168).

The States have no power, by taxation or otherwise, to retard, impede, burden or in any

manner control the operations of the national government.

McCulloch v. Maryland, 17 U. S. 4 Wheat. 316, 436 (4: 579, 609); *Lane Co. v. Oregon*, 74 U. S. 7 Wall. 71, 77 (19: 101, 104).

Mr. Charles F. Tabor, Atty.-Gen. of New York, for defendants in error:

The tax imposed upon the plaintiff in error was a tax upon its franchises, and not upon its property or capital stock.

Laws of 1860, 1881.

Franchises are special privileges conferred by government upon individuals.

Bank of Augusta v. Earle, 38 U. S. 13 Pet. 595 (10: 811).

The State may impose taxes upon the corporation as an entity existing under its laws.

Delaware Railroad Tax Cases, 85 U. S. 18 Wall. 206 (21: 888).

The privileges and franchises of a private corporation may be taxed by a State for the support of the state government.

Society for Savings v. Coite, 78 U. S. 6 Wall. 594 (18: 897); *State Railway Tax Cases*, 92 U. S. 575 (23: 663); *State Tax on Railroad Gross Receipts*, 82 U. S. 15 Wall. 284 (21: 164).

This tax, being upon the franchise of the plaintiff, was lawful, and it matters not how its capital stock or property may be invested, whether in United States securities or otherwise.

People v. Comrs. 71 U. S. 4 Wall. 244 (18: 344); *Louisville First Nat. Bank v. Com.* 76 U. S. 9 Wall. 353 (19: 701); *Van Allen v. Assessors*, 70 U. S. 3 Wall. 573 (18: 229); *Webber v. Virginia*, 103 U. S. 350 (26: 567); *Society for Savings v. Coite*, 78 U. S. 6 Wall. 594 (18: 897); *Provident Inst. v. Mass.* 78 U. S. 6 Wall. 612 (18: 907); *Hamilton Mfg. Co. v. Mass.* 78 U. S. 6 Wall. 632 (18: 904); *Mercantile Nat. Bank v. Mayor*, 121 U. S. 158 (30: 903); *Bank Tax Case*, 69 U. S. 2 Wall. 209 (17: 795); *Philadelphia C. Ins. Co. v. Com.* 93 Pa. 58.

The tax in question being upon the franchises of the plaintiff in error, the first section of the Fourteenth Amendment to the United States Constitution has no application.

State Railway Tax Cases, 92 U. S. 575, 611 (23: 663, 673); *Kentucky Railroad Tax Cases*, 115 U. S. 321 (29: 414); *Com. v. Delaware Div. Canal Co.* 123 Pa. 594; *San Mateo County v. Southern Pac. R. Co.* 13 Fed. Rep. 737.

The court has in many cases indicated the restrictions, limitations and qualifications which are to be applied to the words: "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws,"—showing clearly that they cannot be given the broad construction sought for them.

Kirtland v. Hotchkiss, 100 U. S. 499 (25: 562); *Memphis Gas. Co. v. Shelby Co.* 109 U. S. 400 (27: 977); *Barbier v. Connolly*, 118 U. S. 83 (28: 925); *Soon Hing v. Crowley*, 118 U. S. 709 (28: 1147); *Missouri Pac. R. Co. v. Humes*, 115 U. S. 528 (29: 467); *Davenport Bank v. Board of Equalization*, 123 U. S. 88 (31: 94); *Missouri P. R. Co. v. Mackey*, 127 U. S. 209 (32: 108); *Minneapolis R. Co. v. Beckwith*, 129 U. S. 32 (32: 588); *Nat. Bank of Redemption v. Boston*, 125 U. S. 69 (31: 692).

Improper motives cannot be attributed to a State Legislature.

Amy v. Watertown, 180 U. S. 320 (82: 953).

A statute must be interpreted so as, if possible, to make it consistent with the Constitution and the paramount law.

Parsons v. Bedford, 28 U. S. 3 Pet. 483 (7: 782); *Grenada Co. v. Brogden*, 112 U. S. 261 (28: 704); *Presser v. Illinois*, 116 U. S. 252, 269 (29: 615, 620); *Ogden v. Saunders*, 25 U. S. 12 Wheat. 270 (6: 282).

Mr. Justice Field delivered the opinion of the court:

The contention of the plaintiff in error is that the tax in question was levied upon its capital stock, and therefore invalid so far as the bonds of the United States constitute a part of that stock. If that contention were well founded there would be no question as to the invalidity of the tax. That the bonds or obligations of the United States for the payment of money cannot be the subject of taxation by a State is familiar law settled by numerous adjudications of this court. It is a tax upon the exercise of the power of Congress to borrow money; a tax which, if permitted, could be limited in amount only by the discretion of the State, and might therefore be carried to an extent impairing, if not destructive of, the efficiency of the power, to the serious detriment of the general government. As held in *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 436 [4: 608], the States have no power by taxation to impede, burden or in any manner control the operation of the Constitution and laws enacted by Congress to carry into execution the powers vested in the general government, a doctrine which, applied in *Weston v. Charleston*, 27 U. S. 2 Pet. 449 [7: 481], annulled a tax levied by the authority of a law of South Carolina on stock issued for loans to the United States.

Nor can this inhibition upon the States be evaded by any change in the mode or form of the taxation provided the same result is effected—that is, an impediment is thereby interposed to the exercise of a power of the United States. That which cannot be accomplished directly cannot be accomplished indirectly. Through all such attempts the court will look to the end sought to be reached, and if that would trench upon a power of the government, the law creating it will be set aside or its enforcement restrained. Thus in *Henderson v. New York City*, 92 U. S. 259, 268 [23: 548], a Statute of New York provided that the master or owner of any vessel bringing passengers from foreign ports into the Port of New York should give a bond in the sum of \$300 for each passenger landed, against his becoming a public charge for four years thereafter, or pay within twenty-four hours thereafter \$150 for each passenger, and that, if neither bond was given nor payment made, a penalty of \$500 for such failure would be incurred, which should be a lien upon the vessel. It was contended that the object of the requirement was not taxation but protection against pauperism, and therefore valid as within the police power. But the court said that in whatever language the statute may be framed its purpose must be determined by its reasonable and natural effect, and judged by that criterion the tax was either on the owners of the vessel for the right of landing passengers or upon the passengers

themselves; and that therefore the Statute was a regulation of commerce and void.

To the same purport is the familiar case of *Brown v. Maryland*, 25 U. S. 12 Wheat. 419 [6: 678], so often cited in this court, where it was contended that a license tax required of an importer to sell his goods while held in bulk as imported was a tax only upon his occupation. But the court observed that this was only changing the form without varying the substance of the tax, adding that "it is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

Looking now at the tax in this case upon the plaintiff in error, we are unable to perceive that it falls within the doctrines of any of the cases cited, to which we fully assent, not doubting their correctness in any particular. It is not a tax in terms upon the capital stock of the Company, nor upon any bonds of the United States composing a part of that stock. The Statute designates it a tax upon the "corporate franchise or business" of the Company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

By the term "corporate franchise or business," as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its Legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue, which is not exempted from taxation.

Its action in this matter is not the subject of judicial inquiry in a federal tribunal. As was said in *Delaware Railroad Tax Case*, 85 U. S. 18 Wall. 206, 231 [21: 888, 896]: "The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." It is true, as said by this court in *California v. Pacific R. Co.*, 127 U. S. 41 [32:157], that the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the Legislature may choose; it may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the Legislature of the State; it cannot be furnished by the federal tribunals.

The tax in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed and put into real property or bonds of New York, or of other States. From the very nature of the tax, being laid upon a franchise given by the State, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the State over the corporate franchise, and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other.

In some States the franchise and privileges of a corporation are declared to be personal property. Such was the case in New York with reference to the privileges and franchises of savings banks. They were so declared by a law passed in 1866, and made liable to taxation to an amount not exceeding the gross sum of the surplus earned and in the possession of the banks. The law was sustained by the Court of Appeals of the State in *Monroe Sav. Bank v. Rochester*, 37 N. Y. 365, 367, although the bank had a portion of its property invested in United States bonds. In its opinion the court observed that in declaring the privileges and franchises of a bank to be personal property the Legislature adopted no novel principle of taxation; that the powers and privileges which constitute the franchises of a corporation were in a just sense property, quite distinct and separate from the property which, by the use of such franchises, the corporation might acquire; that they might be subjected to taxation if the Legislature saw fit so to enact; that such taxation being within the power of the Legislature, it might prescribe a rule or test of their value; that all franchises were not of equal value, their value depending, in some instances, upon the nature of the business authorized, and the extent to which permission was given to multiply capital for its prosecution; and that the tax being upon the franchises and privileges, it

was unimportant in what manner the property of the corporation was invested. And the court added: "It is true that where a state tax is laid upon the property of an individual or corporation, so much of their property as is invested in United States bonds is to be treated, for the purposes of assessment, as if it did not exist. But this rule can have no application to an assessment upon a franchise, where a reference to the property is made only to ascertain the value of the thing assessed." And again: "It must be regarded as a sound doctrine that the State, in granting a franchise to a corporation, may limit the powers to be exercised under it and annex conditions to its enjoyment, and make it contribute to the revenues of the State. If the grantee accepts the boon it must bear the burden."

This doctrine of the taxability of the franchises of a corporation without reference to the character of the property in which its capital stock or its deposits are invested is sustained by the judgments in *Society for Savings v. Coit* and *Provident Institution v. Massachusetts*, which were before this court at the December Term, 1867. 78 U. S. 6 Wall. 594, 611 [18:897, 907]. In the first of these cases it appeared that a law of Connecticut of 1863 provided that savings banks in that State should make an annual return to the controller of public accounts "of the total amounts of all deposits in them, respectively, on the first day of July in each successive year," and should pay to the treasurer of the State a sum equal to three fourths of one per cent on the total amount of deposits in such banks on those days, and that the tax should be in lieu of all other taxes upon the banks or their deposits. On the 1st day of July, 1863, the Society for Savings, one of the banks, had invested over \$500,000 of its deposits in securities of the United States, which were declared by Congress to be exempted from taxation by state authority, whether held by individuals, corporations or associations. (12 Stat. 348.) Upon the amount of its deposits thus invested, the society refused to pay the sum equal to the prescribed percentage. In a suit brought by the treasurer of the State to recover the tax, the payment of which was thus refused, the Supreme Court of Connecticut held that the tax was not on property but on the corporation as such. The case being brought here, the judgment was affirmed, this court holding that the tax was on the franchise of the corporation and not upon its property, and the fact that a part of the deposits was invested in securities of the United States did not exempt the society from the tax. Said the court: "Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the state government. Authority to that effect resides in the State independent of the federal government, and is wholly unaffected by the fact that the corporation or individual has or has not made investment in federal securities."

It was contended in that case that the deposits in the bank were subjected to taxation from the fact that the extent of the tax was determined by their amount. But the court said: "Reference is evidently made to the total

amount of deposits on the day named, not as the subject matter for assessment, but as the basis for computing the tax required to be paid by the corporation defendants. They enjoy important privileges, and it is just that they should contribute to the public burdens. The views of the defendants are, that the sums required to be paid to the treasury of the State is a tax on the assets of the institution, but there is not a word in the provision which gives any satisfactory support to that proposition. Different modes of taxation are adopted in different States, and even in the same State at different periods of their history. Fixed sums are in some instances required to be annually paid into the treasury of the State, and in others a prescribed percentage is levied on the stock, assets or property owned or held by the corporation, while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period. Experience shows that the latter mode is better calculated to effect justice among the corporations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted and to the extent of their exercise. Existence of the power is beyond doubt, and it rests in the discretion of the Legislature whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained." p. 608 [908].

In the second case mentioned, *Provident Institution v. Massachusetts*, it appeared that the Statute of Massachusetts, passed in 1862, levying taxes on certain insurance companies and depositors in savings banks, provided that every institution for savings incorporated under its laws should pay to the Commonwealth a tax of one half of one per cent per annum on the amount of its deposits, to be assessed one half of said annual tax on the average amount of its deposits for the six months preceding the 1st day of May, and the other half on the average amount of its deposits for the six months preceding the 1st day of November.

The Provident Institution for Savings in that State was authorized to invest its deposits in securities of the United States. Its average amount of deposits for the six months preceding the 1st day of May, 1865, was over eight millions, of which over one million was invested in such securities. It paid all the taxes demanded except on the portion which was thus invested. Upon that it declined to pay the tax. In a suit brought by the Commonwealth to recover the same, the Supreme Judicial Court of the State held that the tax was one on the franchise of the company and not on property, and therefore gave judgment for the Commonwealth. The case being brought here, the judgment was affirmed. In deciding the case, this court said, referring to a section of the Statute under which the tax was levied: "Deposits, as the word is employed in that section, are the sums received by the institution from depositors, without regard to the nature of the funds. They are not capital stock in any sense, nor are they even investments, as the word is there used, which simply means the sums received wholly irrespective of the disposition

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made of the same, or their market value." And speaking of the difference existing between taxes upon franchises and taxes upon property it said: "Franchise taxes are levied directly by an Act of the Legislature; and the corporations are required to pay the amount into the state treasury. They differ from property taxes as levied for state and municipal purpose in the basis prescribed for computing the amount, in the manner of assessment and in the mode of collection;" and again, "Comparative valuation in assessing property taxes is the basis of computation in ascertaining the amount to be contributed by an individual, but the amount of a franchise tax depends upon the business transacted by the corporation and the extent to which they have exercised the privileges granted in their charter." pp. 681, 682 [913].

The court also referred to a decision made by the Supreme Court of the State to the effect that the assessment imposed was to be regarded as an excise or duty on the privilege or franchise of the corporation, not as a tax on the moneys in its hands belonging to the depositors. It was the corporation, it said, that was to make the payment, and if it failed to do so it was liable not only to an action for the amount of the tax, but might also be enjoined from the future exercise of its franchise until all taxes should be fully paid. *Com. v. People's F. C. Sav. Bank*, 5 Allen, 481.

And the court held that the valuation of the property had nothing to do with determining the amount of the tax, but that the amount depended on the average amount of deposits for the six months preceding the respective days named, and that there was no necessary relation between the average amount of the deposits and the amount of property owned by the institution, and not being a property tax it was to be considered as a franchise tax laid upon the corporation for the privileges conferred by its charter, which by all the authorities it was competent for the State to tax irrespective of what disposition the institution had made of its funds, or in what manner they had been invested.

In *Hamilton Mfg. Co. v. Massachusetts*, 78 U. S. 6 Wall. 632 [18: 904], a Statute of Massachusetts which required corporations having a capital stock divided into shares, to pay a tax of a certain percentage upon the excess of the market value of such stock over the value of its real estate and machinery, was sustained as a statute imposing a franchise tax, notwithstanding a portion of the property which went to make the excess of the market value consisted of securities of the United States, this court, however, placing its decision upon the fact that under the provisions of the State Constitution and the practice under it the tax had been so considered by the highest tribunal of the State. This decision goes much further than is necessary to sustain the judgment of the Court of Appeals of New York in the present case.

In this case we hold, as well upon general principles as upon the authority of the first two cases cited from 6 Wallace, that the tax for which the suit is brought is not a tax on the capital stock or property of the Company, but upon its corporate franchise, and is not

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therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States.

Nor is the objection tenable that the Statute, in imposing such tax, conflicts with the last clause of the first section of the Fourteenth Amendment of the Constitution of the United States, declaring that no State shall deprive any person within its jurisdiction of the equal protection of the laws. It is conceded that corporations are persons within the meaning of this Amendment. It has been so decided by this court. *Pembina Con. Silver Co. v. Pennsylvania*, 125 U. S. 181 [81: 650]. But the Amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the Amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the Statute of New York all corporations, joint-stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class. See *Barbier v. Conolly*, 118 U. S. 82 [28: 925]; *Soon Hing v. Crowley*, Id. 709 [1147]; *Missouri Pac. R. Co. v. Hume*, 115 U. S. 523 [29: 466]; *Missouri R. Co. v. Mackey*, 127 U. S. 209 [32: 109]; *Minneapolis R. Co. v. Beckwith*, 129 U. S. 82 [32: 588].

Judgment affirmed.

Mr. Justice Miller:

Mr. Justice Harlan and myself dissent from the judgment in this case, because we think that, notwithstanding the peculiar language of the Statute of New York, the tax in controversy is in effect a tax upon bonds of the United States held by the Insurance Company.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Pf. in Err.*,

v.

EDDY WOODSON.

(See S. C. Reporter's ed. 614-624.)

Tennessee Statute as to granting new trials, constitutional—construction of the Statute—errors of law—insufficiency of evidence—power of court—application of Statute—new trial after two verdicts—construction of judgment.

NOTE.—As to jurisdiction in the United States Supreme Court, where federal question arises, or where are drawn in question statutes, treaty or Constitution, see notes to *Martin v. Hunter*, 4: 97; *Matthews v. Zane*, 2: 654; *Williams v. Norris* 6: 571.

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1. The Statute of Tennessee forbidding the granting of more than two new trials in the same cause on the facts is not in conflict with the Fourteenth Amendment to the Constitution of the United States.
2. By the decisions of Tennessee, the Statute was intended to limit the power of the courts over the findings of fact by the jury upon regular proceedings and a correct charge.
3. It does not prevent the granting of new trials for errors committed by the court, or for improper conduct which may vitiate the verdict.
4. It applies to a case where, in the opinion of the judge, the verdict should have been otherwise than as rendered, because of the insufficiency of the evidence to sustain it, but not to a case where there is no evidence at all.
5. The truth of the facts and circumstances offered in evidence must be determined by the jury. But it is for the court to decide whether or not those facts and circumstances, if found by the jury to be true, are sufficient in point of law to maintain the allegations in the pleadings.
6. Whenever the Statute is applied, it must be upon the assumption that although the court would have found a different verdict, because of the weakness of the evidence, yet there was some evidence tending to establish the cause of action.
7. Courts rarely grant a new trial after two verdicts upon the facts in favor of the same party, except for error of law, and the Statute, in the interest of the termination of litigation, makes that imperative which would otherwise be discretionary.
8. The statement in the judgment of affirmance in this case, that "the court adjudges that there is no evidence to support the verdict of the jury," indicates simply the opinion of the court that the jury ought not to have found the verdict that they did, and that the judgment of the court below, refusing to grant a new trial upon the facts, would have been reversed but for the existence of the Statute, which made it error to award it, [No. 1182.]

Submitted March 24, 1890. Decided April 7, 1890.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment affirming a judgment of the Circuit Court of Haywood County in that State, in favor of plaintiff, for damages for injuries sustained by him through the negligence of the defendant, the Louisville and Nashville Railroad Company. On motion to dismiss united with a motion to affirm. *Affirmed.*

The facts are stated in the opinion.

Mr. A. A. Freeman, for defendant in error, in support of motion.

Mr. Ed. Baxter, for plaintiff in error, in opposition.

Mr. W. M. Baxter, counsel in a similar case, filed a brief in opposition to motions, by leave of the court.

Mr. Chief Justice Fuller delivered the opinion of the court:

Woodson sued the Louisville and Nashville Railroad Company to recover damages for injuries sustained by him through its negligence. The defendant plead not guilty. Upon the trial in the Circuit Court of Haywood County, Tennessee, the jury returned a verdict in favor of the plaintiff, assessing his damages at \$3,000, which on motion was

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set aside, and a new trial granted upon the ground that the verdict was not sustained by the evidence. A second trial was then had, which resulted in a verdict for the plaintiff of \$5,000, which was again set aside on motion, upon the same ground. A third trial was then had resulting in a verdict of \$3,000, upon which judgment was entered. And the record then states: "In this cause, on this the 31st day of August, 1888, the defendant moved the court to grant it a new trial herein and to arrest the judgment herein because the verdict of the jury, returned herein August 30, 1888, was not supported by the law and the evidence submitted, and because of error in his honor the trial judge in allowing plaintiff to make proof of others than the plaintiff swinging on to trains at other times prior to the day of the accident, and of the habit of plaintiff and other boys in swinging to moving trains prior to the day of the accident; which motions are by the court seen and understood, and the same are by the court overruled and disallowed. Thereupon the defendant presented its bill of exceptions to the ruling of the court in overruling its motions aforesaid and in overruling its objection to the admission of the testimony aforesaid in the progress of the trial; which bill of exceptions is signed by the court and ordered to be made a part of the record herein." Defendant prayed an appeal to the Supreme Court of Tennessee, which was granted, and an appeal bond given accordingly.

The bill of exceptions sets forth all the evidence adduced upon the trial, and the charge of the court in full. This charge is of considerable length, and presented the case to the jury with apparent care. It is nowhere therein stated that there was no evidence upon which the plaintiff would be entitled to recover; on the contrary, it assumes that there was some evidence which would justify a verdict for the plaintiff.

It was said by the trial judge, among other things: "On the other hand, if you find the injury was the direct and proximate result of the defendant's negligence or misconduct, you will return your verdict for the plaintiff; or if you find the plaintiff was a child of tender years when injured, and that his conduct and wrong did not contribute to the injury, but that he was not possessed of such discretion and judgment on account of his infancy as would reasonably be calculated to cause him to avoid such danger, and you further find that the defendant might have prevented and avoided the accident by the exercise of ordinary and reasonable prudence and caution, then in that event you should return your verdict for the plaintiff. The plaintiff would be a trespasser if he was on the defendant's freight trains or swinging to one of them, or in the defendant's yard or on its grounds trying to seize on to one of its cars. He would have no right to complain of a clearance post or staub being located on the defendant's track or road-bed if he was such trespasser, and defendant had put up or caused to be put up such clearance staub in its regular business.

"If you find that the defendant is a corporation running freight trains on its line of rail-

road through Brownsville, Tennessee, and that plaintiff, in December, 1881, was a small boy, about six years old, and that he and other small boys had been, prior to that date, for a long while in the habit daily of jumping on and off of the freight and passenger trains of defendant while they were in motion and riding thereon in and about the yards of defendant in said city, and that the conductors, brakemen and trainmen and agent of defendant at its depot in Brownsville had knowledge of such practices and habit of the plaintiff and other boys, and that the said conductors, agents or brakemen, or other employes of the defendant, willingly permitted and encouraged the plaintiff to so ride on and jump on and off of such moving trains, and that the agent or assistant agent of defendant and the conductor of the freight train by which plaintiff was hurt knew that plaintiff was at the depot or in the yards of defendant or near the train, ready and likely to try to jump on said train when it might be put in motion, and that said train was so put in motion and moved off, and that plaintiff was hurt by being thrown under the wheels thereof while swinging to one of the freight cars or while running along by one of said cars endeavoring to swing on the same, and that no effort or precaution was taken by said conductor or said assistant agent of defendant possessing such knowledge as aforesaid, then in that event I charge you the plaintiff would be entitled to a verdict for some damages against the defendant, and if you find such to be the facts you should return a verdict for the plaintiff."

It is stated that the bill of exceptions is to the judgment of the court in overruling the objections to the admission of testimony, and also in overruling the motion for new trial and in arrest of judgment. It does not appear that the court was asked to instruct the jury, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish; and it is evident from the extracts above given from the charge of the court that the trial judge must have been of opinion that a verdict for the plaintiff could be sustained upon some view that might be properly taken.

The Railroad Company assigned thirteen errors in the Supreme Court of the State as grounds for the reversal of the judgment of the circuit court. Nearly all of these questioned the rulings of the court in relation to the admission of testimony and in different parts of the charge. The first error assigned was in permitting, under the pleadings, the plaintiff below to make proof of boys besides himself, "at other times prior to the one when plaintiff below was injured, swinging to trains of defendant below other than the freight train which ran over and injured him." The second error was as follows: "Because the proof introduced in accordance with the pleadings wholly fails to show that defendant below was guilty of any negligence whatever in running its freight train as alleged, at the time and place alleged, over the plaintiff below, but, on the contrary, shows that plaintiff's injury was the result of his

own gross negligence." This second error therefore rested on essentially the same ground as the first, in that it claimed there was a failure of proof, if the evidence were confined to that contended to be alone admissible under the pleadings. The thirteenth error reads thus: "Because, from the uncontroverted facts in the record, the verdict should have been for defendant."

The assignment nowhere specifically alleged that the circuit court erred as matter of law, in the entry of judgment, because there was no evidence to go to the jury, nor is there any allusion to the Statute hereafter referred to.

The Supreme Court of Tennessee affirmed the judgment in these words: "This cause was heard upon the transcript of the record from the Circuit Court of Haywood County, and the court adjudges that there is no evidence to support the verdict of the jury, but the defendant having obtained three verdicts of separate juries upon different trials, two of which have been heretofore set aside by the circuit judge, and now alone upon this ground, the Statute of Tennessee forbidding the granting of more than two new trials in the same cause on the facts, which Statute is not in conflict with the Constitution of the United States, Fifth and Fourteenth Amendments, it is considered by this court that said judgment be affirmed, and that defendant in error, Eddie Woodson, by W. H. Lea, as next friend, recover of the plaintiff in error, The Louisville and Nashville Railroad Company, the sum of three thousand dollars (\$3,000), amount of judgment of court below, and the costs of said court," etc.

A writ of error was sued out from this court upon the ground that the validity of a Statute of the State of Tennessee was drawn in question, as being repugnant to the Fourteenth Amendment to the Constitution of the United States, and that the decision was in favor of its validity. A motion is now made to dismiss the writ of error and with it is united a motion to affirm the judgment.

In each of the Constitutions of the State of Tennessee of 1796, 1834 and 1870, it is declared that "the right of trial by jury shall remain inviolate," and also that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Const. 1796, art. 1, sec. 6, art 5, sec. 5; 1834, art. 1, sec. 6, art. 6, sec. 9; 1870, art 1, sec. 6, art. 6, sec. 9. The purpose of this latter provision was stated in *Ivey v. Hodges*, 4 Humph. 155, to be to put a stop to the practice in summing up, of "telling the jury not what was deposed to, but what was proved."

In *Claxton v. State*, 2 Humph. 181, it was held that where the court charged the jury that if they should find a special verdict which presented the testimony of one of the witnesses as the facts of the case, he should declare it a case of manslaughter, "this charge announced a conclusion of law upon a hypothetical state of facts, and did not trench upon the constitutional rights of the defendant."

And so in *Williams v. Norwood*, 2 Yerg. 329, the court decided that "a party has a

right to the opinion of the court, distinctly as to the law, whether certain facts constitute probable cause or not, if the jury believe the facts as stated were proved."

Since 1801 there has been upon the statute book of the State of Tennessee the following provision: "Not more than two new trials shall be granted to the same party in any action at law, or upon the trial by jury of an issue of fact in equity." Acts 1801, chap. 6, sec. 59; Laws Tenn. 1881, p. 229; Code 1858, sec. 3122, p. 590; Code Tennessee 1884, sec. 3835, p. 735.

In *Trott v. West*, 10 Yerg. 499, 500 (1837), the Supreme Court of Tennessee says that this Statute "means that where the facts of the case have been fairly left to the jury upon a proper charge of the court, and they have twice found a verdict for the same party, each of which having been set aside by the court, if the same party obtain another verdict in like manner, it shall not be disturbed. But this Act did not intend to prevent the court granting new trials for error in the charge of the court to the jury, for error in the admission of, or rejection of testimony, for misconduct of the jury, and the like." *Turner v. Ross*, 1 Humph. 16 (1839); *East Tennessee & G. R. Co. v. Hackney*, 1 Head, 170 (1858).

In *Knorrville Iron Co. v. Dobson*, 15 Lea, 409, 416 (1885), it is said that "this court has uniformly held that the Statute was intended to limit the power of the courts over the findings of fact by the jury upon regular proceedings and a correct charge. If the court in the same case has set aside, upon the motion of the same party, the verdicts of two juries, upon the ground that the evidence is not sufficient to sustain them, the power of the court is at an end to grant another new trial to the same party upon the facts or merits. The Statute does not prevent the granting of new trials for errors committed by the court, or for improper conduct which may vitiate the verdict." *Wilson v. Greer*, 7 Humph. 518.

In *Tate v. Gray*, 4 Sneed, 594, it was held that it is the duty of the circuit judge "to grant a new trial in all cases where he believes the preponderance of the proof is decidedly against the finding;" and that "although by the theory of our system the jury are the proper and exclusive triers of the facts, yet the law requires the circuit judge, who is presumed to have more practice and skill in the investigation of truth, to set aside their verdicts, whenever in his opinion they have disregarded or misconceived the force of proof, that a new trial may be had."

From these decisions it is clear that in Tennessee, as elsewhere, although the jury are the judges of the facts, yet the judge has power to set aside the verdict when, in his judgment, it is against the weight of the evidence, but that that supervisory power cannot be exercised under the Statute when the triers of the facts have three times determined them the same way. This manifestly refers to a state of case where, in the opinion of the judge, the verdict should have been otherwise than as rendered, because of the insufficiency of the evidence to sus-

tain it, but not to a case where there is no evidence at all. It is the settled law of this court that "when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant" (*Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 482 [27: 1008, 1005]; *Gunther v. Liverpool & L. & G. Ins. Co.*, 134 U. S. 110 [38: 857]); while, on the other hand, the case should be left to the jury, unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Dunkley v. North-eastern R. Co.*, 130 U. S. 649, 652 [32: 1058, 1059]. In such case the practice of a demurrer to the evidence can be resorted to, or a motion to exclude the evidence from the jury, or to instruct them that the plaintiff cannot recover, which motions are in the nature of demurrers to evidence, though less technical, and have in many of the States superseded the ancient practice of a demurrer to evidence. *Parks v. Ross*, 52 U. S. 11 How. 362 [13: 730]; *Schuchardt v. Allens*, 68 U. S. 1 Wall. 359 [17: 642]. Such a motion, like the demurrer to evidence, admits not only what the testimony proves but what it tends to prove. The ultimate facts, in other words, are admitted. In *Bacon v. Parker*, 2 Overton (Tenn.), 57, it was decided that an involuntary nonsuit could not be ordered, but a demurrer to evidence was allowed in *Bedford v. Ingram*, 5 Haywood (Tenn.), 155; and it must be that as the duty devolves upon the judge "to declare the law," he may be requested, in some form, to advise the jury that the plaintiff cannot recover when that is the conclusion of law arising upon the record, and should do so though not specifically directed. It is true that it was held in *Kirtland v. Montgomery*, 1 Swan, 452, that it was error for the trial judge to assume to answer both the questions of law and the questions of fact involved in that case, which was one, however, in which there was evidence raising questions of fact to be determined; and in *Ayres v. Moulton*, 5 Coldw. 154, it was held error in the circuit judge to charge the jury that from the facts as proven the plaintiffs were "entitled to recover of the defendant, the sum sued for," because "the facts to be deduced from the evidence must be left exclusively to the jury." But that also was a case where it evidently did not follow from the ultimate facts that the plaintiffs were entitled as matter of law to recover as stated. To the same effect is *Cuse v. Williams*, 2 Coldw. 239, where it was ruled that if the charge of the trial judge "be equivalent to a determination of the facts involved, a new trial will be granted." This is and must be so, whenever there are deductions of fact to be drawn by the jury, but where that is not the case, although a direct instruction to return a verdict for the defendant may not be in accordance with the practice in Tennessee, yet the decisions show that the question whether a recovery can be had

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at all or not can be presented in some appropriate form in that State.

Thus, in *Whirley v. Whiteman*,¹ Head, 616, it is said: "In trials by jury, the court is to decide the questions of law, and the jury questions of fact; what are called mixed questions, consisting of both law and fact, as questions in respect to the degree of care, skill, diligence, etc., required by law in particular cases, are to be submitted to the jury, under proper instructions from the court, as to the rules and principles of law by which they are to be governed in their determination of the case. The truth of the facts and circumstances offered in evidence, in support of the allegations on the record, must be determined by the jury. But it is for the court to decide whether or not those facts and circumstances, if found by the jury to be true, are sufficient in point of law to maintain the allegations in the pleadings. And this must be done in one of two modes: either the court must inform the jury hypothetically whether or not the facts which the evidence tends to prove, will, if established in the opinion of the jury, satisfy the allegations, or the jury must find the facts specially, and then the court will apply the law and pronounce whether or not the facts so found are sufficient to support the averments of the parties. 1 Stark. on Ev. 447. The principle of law by which the jury must be governed in finding a verdict cannot be left to their arbitrary determination. The rights of parties must be decided according to the established law of the land, as declared by the Legislature or expounded by the courts, and not according to what the jury in their own opinion may suppose the law is or ought to be; otherwise the law would be as fluctuating and uncertain as the diverse views and opinions of different juries in regard to it." *Memphis Gayoso Gas Co. v. Williamson*, 9 Heisk. 314, 341; *Gregory v. Underhill*, 6 Lea, 211.

Tested by this rule, whenever the Statute is applied, it must be upon the assumption that although the court would have found a different verdict, because of the weakness of the evidence, yet there was some evidence tending to establish the cause of action. Courts rarely grant a new trial after two verdicts upon the facts in favor of the same party, except for error of law, and the Statute, in the interest of the termination of litigation, makes that imperative which would otherwise be discretionary. For decisions under similar statutory provisions see *Silabe v. Lucas*, 58 Ill. 479; *Illinois Cent. R. Co. v. Patterson*, 93 Ill. 290; *Carmichael v. Geary*, 27 Ind. 362; *Boyce v. Smith*, 16 Mo. 817; *Wildy v. Bonney*, 35 Miss. 77; *Rains v. Hood*, 23 Tex. 555; *Watterson v. Moore*, 23 W. Va. 404.

We can perceive nothing in the Statute thus applied which amounts to an arbitrary deprivation of the rights of the citizen, and concur with the Supreme Court of Tennessee that this Act, which had been in force for more than sixty years before the adoption of the Fourteenth Amendment, was not invalidated by it, while the Fifth Amendment had no application whatever.

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The statement in the judgment of affirmance is that "the court adjudges that there is no evidence to support the verdict of the jury;" and if this were taken literally, it would follow that no recovery could be had, as matter of law; and we therefore suppose that the language used indicates simply the opinion of the court that the jury ought not to have found the verdict that they did, and that the judgment of the court below, refusing to grant a new trial upon the facts, would have been reversed, but for the existence of the Statute, which made it error to award it. *Knorrville Iron Co. v. Dobson*, 15 Lea, 409, 418.

Assuming that the validity of the Statute was drawn in question, yet there was clearly color for the motion to dismiss, and the case may be disposed of upon the motion to affirm. That motion is sustained, and the judgment is accordingly affirmed.

WILLIAM H. BLOUNT, *Plff. in Err.*,
v.
JULIUS H. WALKER, *Ex'r and Trustee*,
ET AL.

(See S. C. Reporter's ed. 607-614.)

Construction of will—execution of power—probate of will in one State, effect of in another State—jurisdiction over state judgments.

1. Where a will of a citizen of South Carolina, executed there, directed a power of appointment to be executed by the will of the person therein authorized to execute the power, he intended a will executed according to the laws of South Carolina.
2. Where the will of a person executing the power was made in North Carolina, she residing there, the probate of the will in North Carolina established that the will was executed according to the law of that State, but did not establish that the will was executed according to the law of South Carolina, nor did it undertake to adjudge that it was a good execution of the power.
3. Where the Supreme Court of South Carolina decided that the will was not executed according to the law of that State and therefore held that it was not a good execution of the power, it did not refuse to give the judgment of the probate court of North Carolina, establishing the will, full faith and credit, nor the same force and effect as it had in North Carolina.
4. To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

[No. 1399.]

Submitted March 24, 1890. Decided April 7, 1890.

NOTE.—As to jurisdiction in the United States Supreme Court, where federal question arises, or where are drawn in question statutes, treaty or Constitution, see notes to *Martin v. Hunter*, 4: 97; *Matthews v. Zane*, 2: 654; *Williams v. Norris*, 6: 571.

IN ERROR to the Supreme Court of South Carolina to review a judgment of that court reversing a judgment of the Court of Common Pleas in Richmond County in that State that a power contained in a will was well executed and that the plaintiff, William H. Blount, was entitled to the property. On motion to dismiss. *Dismissed*.

The facts are stated in the opinion.

Messrs. Jos. Dan'l Pope and Robt. W. Shand, for defendant in error, for motion to dismiss.

Messrs. S. F. Phillips, Allen & Green and Blount & Murray in opposition to motion.

Mr. Chief Justice Fuller delivered the opinion of the court:

Sarah J. Harris, a citizen of the State of South Carolina, died at her residence in that State in December, 1885, leaving a last will and testament bearing date September 11, 1885, and, her surviving, an only child, Mrs. Mary D. Blount, whose domicile was that of her husband, William H. Blount, in Wilson County, in the State of North Carolina. Mrs. Harris' next nearest of kin was her sister, Caroline S. Walker, mother of Julius H. Walker. By her will Mrs. Harris gave, bequeathed and devised her estate, real and personal, which was all situated in South Carolina, to her nephew, Julius H. Walker (who was appointed executor), in trust for Mary D. Blount "for and during the term of her natural life," unless the trust were sooner executed, as provided in an item of the will not material to be considered here, and upon the death of Mrs. Blount the estate was "bequeathed and devised to the issue of the said Mrs. Blount, to them and their heirs forever, *per stirpes* and not *per capita*;" and if the said Mrs. Blount die without issue surviving her at the time of her death, then the same is devised and bequeathed to such person or persons and in such proportions as the said Mrs. Mary Delia Blount may appoint by her last will and testament duly executed, to the said appointees and their heirs forever." Mrs. Blount died at her home in North Carolina, without issue, in April, 1886. She left a will dated March 16, 1886, providing that "all my estate, both real and personal, whether legal or equitable, I devise, bequeath and absolutely give unto my beloved husband, to his only use and behoof, and hereby direct the trustee appointed by the last will and testament of my deceased mother, Mrs. S. J. Harris, of Columbia, in the State of South Carolina, to execute all such needful conveyances and releases as may effectually vest his title as such trustee, and convey the property and effects, to him devised by said last will of Mrs. S. J. Harris, to my said husband, W. H. Blount, to him and his heirs absolutely." This will was duly admitted to probate in the Probate Court of Wilson County, North Carolina, on the 26th day of April, 1886, the order of that court finding from the evidence of the subscribing witnesses that the paper writing propounded "is the last will and testament of M. Delia Blount, and that the same was duly executed by said M. Delia Blount." Letters testamentary issued June 3, and an

exemplification of the probate proceedings was duly filed and admitted to probate in the proper probate court in South Carolina, in accordance with the Statute in that behalf, which provided: "If a will be regularly proved in any foreign court, an exemplification of such will may be admitted to probate in this State upon the exemplification and certificate of the judge of the court of probate; and the exemplification shall also be evidence of the devise of land in this State where the title of lands comes in question." Gen. Stat. S. C. 1882, p. 549, § 1875.

William H. Blount instituted an action on the equity side of the Court of Common Pleas in Richland County, South Carolina, against Julius H. Walker, who had qualified as executor and was in possession as trustee, and Mrs. Caroline S. Walker, setting forth the deaths of Mrs. Harris and Mrs. Blount and the wills, and claiming the entire estate of Mrs. Harris as the appointee by Mrs. Blount's will; alleging demand upon the trustee and executor and refusal; and demanding judgment that he be adjudged to be the owner of said estate; that Walker be required to account; and for general relief. Walker answered, submitting, under the advice of counsel, the question to the court "whether the will of M. Delia Blount is a valid execution of the power conferred upon her by the will of Sarah J. Harris, and whether said will of Mrs. Blount has been duly executed so as to pass the property of said Sarah J. Harris in the hands of this defendant." Mrs. Walker also answered, claiming to be entitled to the whole estate of Mrs. Harris as her sole heir after the death of Mrs. Blount, and alleging that Mrs. Blount's will was not executed as required by the laws of South Carolina, and was not, therefore, a valid execution of the power.

The cause was heard by the judge of the court of common pleas, who found, among other things, "that Mrs. Blount's will was duly proved in the probate court of North Carolina, in the county in which she resided, and a proper exemplification under the laws of South Carolina was admitted to probate in Richland County on the 19th May, 1886. The court of probate of North Carolina is, under the laws of North Carolina, a court of general jurisdiction in all matters testamentary. The exemplification of the judgment of that court, establishing this will, was properly proved according to the Acts of Congress. Mrs. Blount's will is not executed according to the laws of South Carolina. The question to be determined is whether Mrs. Blount's will is a valid execution of the power contained in Mrs. Harris' will. It is conceded in the argument, and is undoubtedly sound, that the appointee, under a power like the one under consideration, takes under the instrument creating the power, and not under the instrument of appointment. And in this case Mrs. Harris' will expressly conveys the property to the appointee under the power. The only requisite required by Mrs. Harris' will for the execution of this power, is that the same shall be by 'will duly executed;' and in this case that formality has been complied with,

and is shown by the judgment of the court of her domicil." And it was "ordered, adjudged and decreed that the power is well executed, and the plaintiff is entitled to the property set out in the complaint and in the hands of the defendant, Julius H. Walker."

Defendants appealed from this decree to the Supreme Court of South Carolina, which on the 28d day of April, 1888, reversed the judgment of the circuit court. The court held that the power was not well executed, for the reason that Mrs. Harris had by her will conferred a power which the donee could only exercise "by her last will and testament duly executed," which meant a will duly executed according to the laws of South Carolina, which this will was not; and the court said: "This paper was doubtless a valid will in North Carolina, sufficient to pass any property which Mrs. Blount was entitled to in her own right in that State, and any personal property which she owned anywhere, and was therefore, no doubt, properly admitted to probate there, as well as here, upon the exemplification under the Statute. But the question here is, not whether Mrs. Blount has made a will disposing of her own property, but whether the paper propounded as such is a valid execution of the power conferred by the will of Mrs. Harris; and for the reasons above stated we do not think it is." *Blount v. Walker*, 28 S. C. 545. The cause was remanded, and subsequent proceedings taken in the court of common pleas, and another judgment rendered by the supreme court upon the question of who was or were entitled to take upon the failure of Mrs. Blount to make a valid appointment; but it is not claimed here that any federal question arose thereon.

To the judgment of the supreme court a writ of error was sued out from this court, and the federal question relied on to sustain our jurisdiction is, that the Supreme Court of South Carolina did not give full faith and credit to the judgment of the Probate Court of Wilson County, North Carolina, admitting Mrs. Blount's will to probate.

We cannot see that any such question is presented by this record. The Probate Court of Wilson County, North Carolina, had no jurisdiction to declare the will duly executed "according to the laws of South Carolina," or that it was a good execution of the power of appointment, and did not undertake to adjudge to that effect, and it is not denied that Mrs. Blount's will was not executed according to those laws. The Supreme Court of South Carolina did not refuse to the judgment of the probate court of North Carolina full faith and credit. It assumed that the will was properly admitted to probate in North Carolina, as well as in South Carolina, by an exemplification thereof, under the Statute to that effect in the latter State, but it held that when Mrs. Harris prescribed the mode in which the power of appointment should be exercised, by the use of the words "by her last will and testament duly executed," she intended a will duly executed according to the laws of South Carolina, and not a will duly executed according to the laws of any State or country in which the

donee of the power, Mrs. Blount, might happen to be domiciled at the time of her death. The probate of Mrs. Blount's will in North Carolina established that the will was executed according to the law of the State where she was domiciled, but it did not establish that the will was executed according to the law of South Carolina, as it is conceded it was not. When, therefore, the Supreme Court of South Carolina, in construing Mrs. Harris' will, arrived at the conclusion that the estate of the latter would only pass to such person as might receive an appointment by a will duly executed according to the laws of South Carolina, that was an end of the case, and whether that conclusion was right or wrong is a matter with which we are not concerned. If we were of a different opinion, and, entertaining jurisdiction, were to reverse the judgment of the Supreme Court of South Carolina, we should do it upon the ground that that court erred in the construction of Mrs. Harris' will, and not upon any ground connected with the judgment of the probate court of North Carolina, which could not and did not determine that question. Counsel says that the position of the plaintiff in error is, "that the decision of the state court necessarily involved the question whether the will of Mrs. Blount was her 'last will and testament duly executed'; that the judgment of the probate court of North Carolina is conclusive of this; and whether in the decision the state court has given this judgment the same force and effect as it has in North Carolina, is the federal question." But the state court conceded that the judgment of the probate court of North Carolina established that the will of Mrs. Blount was her last will and testament duly executed, and its decision did not in the slightest degree proceed upon the denial of that fact, but gave the judgment the same force and effect that it had in North Carolina, for in neither of the States would the will, as such, dispose of property that did not belong to the testatrix.

To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.* 125 U. S. 18, 29 [31: 607, 610]; *Klinger v. Missouri*, 80 U. S. 13 Wall. 257, 263 [20: 635, 637]; *De Saussure v. Gaillard*, 127 U. S. 216 [32: 125]; *Hopkins v. McLure*, 133 U. S. 380 [33: 660].

The motion to dismiss the writ of error must be sustained. Writ of error dismissed.

ISABELLA LEE, *Appt.*,

v.
RICHARD W. SIMPSON.

(See S. C. Reporter's ed. 572-593.)

Will, construction of—power of disposition, how exercised—South Carolina law—execution of power—method of execution—words construed.

1. The court is authorized to put itself in the position occupied by a testator, in order, in view of the circumstances then existing, to discover from that standpoint what the testator intended by his will.
2. The power given by a will to dispose of, by will, a bequest of three fourths of a bond and mortgage, the enjoyment of which for life is bequeathed to the donee of the power, is properly executed by the will of the donee which, after referring to the bequest, devises and bequeaths the entire property and estate, to which she is "in any wise entitled," to her husband.
3. By the Constitution of South Carolina, adopted in 1868, and the legislation in pursuance thereof, Mrs. Clemson had as full legal capacity to make a will as if she were a *feme sole*.
4. If the donee of the power intends to execute it, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative.
5. Three classes of cases have been held to be sufficient demonstrations of an intended execution of a power: (1) where there has been some reference in the will, or other instrument, to the power; (2) or a reference to the property, which is the subject on which it is to be executed; (3) or where the provision in the will or other instrument, executed by the donee of the power, would otherwise have no operation, except as an execution of the power.
6. The words "in any wise entitled" are sufficient to cover not only property which the donee of the power held in her own full right, but also property which she held in a limited right under her mother's will.

[No. 1418.]

Submitted Mar. 17, 1890. Decided Apr. 7, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of South Carolina dismissing a suit brought to declare the trusts on which land was held and to remove cloud upon plaintiff's title and for an account of rents and profits. *Affirmed.*

The facts are stated in the opinion.

Messrs. Leroy F. Youmans, J. P. Carey and A. C. King, for appellant:

The power of appointment by will, given to Mrs. Clemson, did not enlarge the express life estate devised to her use.

Williman v. Holmes, 4 Rich. Eq. (S. C.) 475; *Fay v. Fay*, 1 Cush. 93, 94; *Hatfield v. Sohler*, 114 Mass. 48-53; *Doe v. Conzidine*, 73 U. S. 6 Wall. 458, 471 (18: 869, 873).

The words "to become entitled" mean an acquisition of interest.

Re Clinton's Trust, L. R. 13 Eq. 295; An-

NOTE.—As to interpretation of wills; intention of testator to govern,—see note to *Pray v. Belt*, 7: 308.

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derson, Law Dict. *Legacy*, p. 607; *Pratt v. McGhee*, 17 S. C. 482-484.

Where one having two powers makes reference to one of them only, this excludes the idea that he intended to exercise the other.

1 Sugd. Powers, 181, 182, 359; *Thompson v. Murray*, 2 Hill, Ch. (S. C.) 214.

The intention must be found in the acts or dispositions of the donee, and not alone in any previously expressed purpose.

Blake v. Hawkins, 98 U. S. 815 (25: 189).

The definition of the words controls the meaning:

Property. That which is one's own.

Anderson, Law Dict. 835.

Estate. The quantity of interest which one has in the things of which he is the owner.

Anderson, Law Dict. 414; 2 Bl. Com. 108; *Kutter v. Smith*, 69 U. S. 2 Wall. 500 (17: 833).

The words "property," "estate," "entitled," "acquire," exclude the idea of the execution of a power which relates wholly to the estate of another.

Jones v. Curry, 1 Swanst. 66; *Evans v. Evans*, 28 Beav. 1; *Bilderback v. Boyce*, 14 S. C. 528, 535; *Osgood v. Bliss*, 141 Mass. 474-477.

A power or authority is not executed unless by reference to the power or authority or to the property which was the subject of it.

Denn v. Roake, 6 Bing. 475; *Blagge v. Miles*, 1 Story, 426.

The intention to execute a power of appointment must appear by a reference in the will to the power or to the subject of it.

Mory v. Michael, 18 Md. 227, 241; *Michael v. Morey*, 26 Md. 239, 259; *Maryland Mut. Ben. Society v. Clendinen*, 44 Md. 429, 435; *Michael v. Baker*, 12 Md. 158; *Schley v. McCeney*, 36 Md. 266, 275; *Sewall v. Wilmer*, 132 Mass. 181, 184; *White v. Hicks*, 83 N. Y. 888-407; *Frank v. Eggleston*, 92 Ill. 515; *Roake v. Denn*, 4 Bligh, N. R. 1; *Andreas v. Brumfield*, 32 Miss. 107-117; *Bilderback v. Boyce*, 14 S. C. 528-535.

Where a rule of real property has been settled in the state courts, the same rule will be applied by this court.

Jackson v. Chew, 25 U. S. 12 Wheat. 153-162 (6: 583, 585); *Ramsay v. Marsh*, 2 McCord, L. 252; *Henderson v. Griffin*, 30 U. S. 5 Pet. 151, 155 (8: 79, 80); *Beauregard v. New Orleans*, 59 U. S. 18 How. 497 (15: 469); *Suydam v. Williamson*, 65 U. S. 24 How. 427 (16: 742); *Orvis v. Powell*, 98 U. S. 176 (25: 238).

In respect to the execution of a power, there must be a reference to it, unless it be in a case in which the will would be inoperative without the aid of the power.

4 Kent, Com. 334; *Webb v. Honnor*, 1 Jac. & W. 352; *Lovell v. Knight*, 3 Sim. 275; *Lempriere v. Malpy*, 5 Sim. 108; *Jones v. Trucker*, 2 Meriv. 538; *Furmer v. Bradford*, 8 Russ. 355.

The words "my property and estate" relate alone to testator's own property.

Evans v. Evans, 28 Beav. 1; *Jones v. Curry*, 1 Swanst. 66; *Bingham's App.* 64 Pa. 347.

The intention to execute the power must

be so clearly manifested in the act of execution that it is impossible to impute any other.

Wetherill v. Wetherill, 18 Pa. 265; *Andreas v. Emmot*, 2 Bro. Ch. 297; *Doe v. Roake*, 2 Bing. 497; *Patterson v. Wilson*, 64 Md. 197; *Smith v. Adkins*, 41 L. J. N. S. Ch. 628; *Doe v. Bird*, 5 Barn. & Ad. 695; Sugd. Powers, 873; *Doe v. Johnson*, 7 Man. & Gr. 1047; *Lowson v. Lowson*, 8 Bro. Ch. 272; *Molton v. Hutchinson*, 1 Atk. 558; *Hales v. Margerum*, 8 Ves. Jr. 299; *Mory v. Michael*, 18 Md. 241; *Maryland Mut. Ben. Society, I. O. R. M. v. Clendinen*, 44 Md. 429; *Foss v. Scarf*, 55 Md. 309; *Pease v. Pilot Knob Iron Co.* 49 Mo. 124; *Blake v. Hawkins*, 98 U. S. 815 (25: 189).

Equity has jurisdiction to prevent or remove a cloud upon title.

Cunningham v. Macon & B. R. Co. 109 U. S. 446 (27: 992); *United States v. Duluth*, 1 Dill. 469; *Redmond v. Packenham*, 66 Ill. 434; *Plant v. Barclay*, 56 Ala. 561; *Thompson v. Lynch*, 29 Cal. 189; *Hager v. Shindler*, 29 Cal. 47; *Kennedy v. Northrup*, 15 Ill. 148, 152; *Branch v. Mitchell*, 24 Ark. 431, 439; *King v. Carpenter*, 37 Mich. 863; *Ormsby v. Barr*, 22 Mich. 80, 84; *Low v. Staples*, 2 Nev. 209, 212; *Pier v. Fond du Lac*, 38 Wis. 470; *Lawrence v. Zimbleman*, 37 Ark. 643, 645; *Booth v. Wiley*, 102 Ill. 84, 114; *Lamb v. Farrell*, 21 Fed. Rep. 5; *Martin v. Graves*, 5 Allen, 601; *Clouston v. Shearer*, 99 Mass. 209; *Sullivan v. Finnegan*, 101 Mass. 447; *Loring v. Downer*, 1 McAll. 360; *Bunce v. Gallagher*, 5 Blatchf. 481, 7 Am. L. Reg. N. S. 35; *Young v. Porter*, 8 Woods, 342; *Carroll v. Safford*, 44 U. S. 3 How. 441, 468 (11: 671, 681); *Orton v. Smith*, 59 U. S. 18 How. 268 (15: 398).

If a stranger intrudes upon an infant's lands and takes the profits, he is compellable to account for them, and will be treated as a guardian or trustee for the infant.

Cary v. Bertie, 2 Vern. 342; *Story, Eq. Jur.* § 511; *Pulteney v. Warren*, 6 Ves. Jr. 89; *Hicks v. Sallitt*, 3 De G. M. & G. 782; *Pascov v. Swan*, 27 Beav. 508; *Whitman v. Aitken*, L. R. 2 Eq. 414.

An infant may proceed on a legal title for account, and a court, having taken jurisdiction for one purpose, can try the title.

Lewin, *Trusts* (Flint's notes to 8th ed.) 890, 891; *Townsend v. Ash*, 3 Atk. 336; *Edwards v. Morgan*, McClell. 541; *Reynolds v. Jones*, 2 Sim. & Stu. 206; *Blomfield v. Byre*, 8 Beav. 253-259; *Dormer v. Fortescue*, 3 Atk. 180; *Morgan v. Morgan*, 1 Atk. 489; *Robert-deau v. Rous*, 1 Atk. 544.

To oust the jurisdiction of equity, it is not enough that there is a remedy at law; it must be complete and adequate.

Boyce v. Grundy, 28 U. S. 3 Pet. 215 (7: 658); *Wylie v. Coxe*, 56 U. S. 15 How. 415 (14: 753); 1 Pom. Eq. Jur. §§ 181, 281, 234; *Oelrichs v. Spain*, 82 U. S. 15 Wall. 211 (21: 43); *Horsburg v. Baker*, 26 U. S. 1 Pet. 233 (7: 126).

Messrs. Augustine T. Smythe, A. M. Lee, Joseph H. Earle, Atty-Gen. of South Carolina, and *J. L. Orr*, for appellee:

A will must be construed in the light of circumstances surrounding the testator.

Blake v. Hawkins, 98 U. S. 324 (25: 141); *Postlethwaite's App.* 68 Pa. 477; *Clark v. Clark*, 19 S. C. 348; *Seafie v. Thomson*, 15 S. C. 857; *Ladd v. Ladd*, 49 U. S. 8 How. 10 (12: 987); *Crane v. Morris*, 81 U. S. 6 Pet. 605 (8: 516); *Kelly v. Jackson*, 81 U. S. 6 Pet. 622 (8: 523).

The intention must govern, not technical words.

Warner v. Conn. Mut. L. Ins. Co. 109 U. S. 366 (28: 965); *Bilderback v. Boyce*, 14 S. C. 528.

If the donee of the power intends to execute, and the mode be, in other respects, unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative.

Blagge v. Miles, 1 Story, 445; *Cernagy v. Woodcock*, 2 Munf. (Va.) 284, 5 Am. Dec. 470; *Punk v. Eggleston*, 93 Ill. 515, 84 Am. Rep. 186; *Reck's App.* 78 Pa. 482; *Still v. Spear*, 45 Pa. 168; *Den ex dem. McMurtrie v. McMurtrie*, 15 N. J. L. 276; *Finlay v. King*, 28 U. S. 8 Pet. 377 (7: 712).

No technical words are necessary to render the execution of a power effectual, if the intention be clear.

Maundrell v. Maundrell, 10 Ves. Jr. 246-258; *Warner v. Howell*, 8 Wash. C. C. 14.

Courts in construing wills are not bound by adjudicated cases, unless the wills in both cases, and the surrounding circumstances, are exactly alike.

Gulliver v. Poynts, 3 Wils. 141, 2 W. Bl. 726; *Smith v. Coffin*, 2 H. Bl. 444; *Baddeley v. Leppingwell*, 3 Burr. 1588; *Conedy v. Jones*, 19 S. C. 305.

It is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient that it shall appear by words, acts or deeds, demonstrating the intention.

Pomery v. Partington, 3 T. R. 665; *Griffith v. Harrison*, 4 T. R. 787, 748, 749; *Bailey v. Lloyd*, 5 Russ. 330, 341; *Punk v. Eggleston*, 92 Ill. 515; *Warner v. Conn. Mut. L. Ins. Co.* 109 U. S. 366 (27: 965); *Blake v. Hawkins*, 98 U. S. 315-326 (25: 139, 141).

It is sufficient if the act shows that the donee had in view the subject of the power.

White v. Hicks, 33 N. Y. 383-392; *Sevall v. Wilmer*, 182 Mass. 181-184; *Boyd v. Satterwhite*, 10 S. C. 52; *Bilderback v. Boyce*, 14 S. C. 538; *Moody v. Tedder*, 16 S. C. 564; 1 Sugd. Powers, 871; Farwell, Powers, 155, 156.

The intention to execute the power of appointment, by devising the whole estate in the land, is obvious, and the property passed which was covered by the power.

Hopkins v. Mazyck, Rich. Eq. Cas. (S. C.) 269; *Atty-Gen. v. Wilkinson*, L. R. 2 Eq. 816; *Standen v. Standen*, 2 Ves. Jr. 589; 1 Sugd. Powers, 378; Farwell, Powers, 154; *Wildbore v. Gregory*, L. R. 12 Eq. 482; *Monk v. Maudsley*, 1 Sim. 286.

This court has uniformly refused to be bound by state decisions as to personal property.

Swift v. Tyson, 41 U. S. 16 Pet. 1 (10: 865).

Mr. Justice Blatchford delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of South Carolina, dismissing the bill of complaint of Isabella Lee, an infant, by her next friend, Gideon Lee, against Richard W. Simpson.

The following are the material facts involved in the case:

On May 18, 1854, Mrs. Floride Calhoun was seized and possessed of the tract of land situate in that part of Pickens district which is now Oconee County, in the State of South Carolina, on the east side of the Seneca River, known as the Fort Hill place, containing eleven hundred and ten acres, more or less, and on that day she and her daughter, Cornelia M. Calhoun, sold and conveyed that tract of land, together with certain personal property, to Andrew P. Calhoun, for the sum of \$49,000, Cornelia M. Calhoun having no interest in the real estate. Andrew P. Calhoun executed his bond under seal to Mrs. Calhoun and Cornelia M. Calhoun, conditioned for the payment of \$40,200 to Mrs. Floride Calhoun, and the remaining \$8,800 to Cornelia, and, to secure the payment of the bond representing the purchase money, and as a part of the same transaction, at the same time executed and delivered to Mrs. Calhoun and Cornelia separate mortgages of the same tract of land and of the personal property, to secure the payment of the sums of money mentioned in the bond.

On the 27th of June, 1863, Mrs. Calhoun made her last will and testament, whereby, among other things, she devised and bequeathed as follows:

"2. To my daughter Anna Maria, wife of Thomas G. Clemson, of Maryland, I give, devise and bequeath during her life, and for her sole and separate use, the following property: my house and lot in Pendleton and the land attached and belonging thereto, purchased by me from Mrs. William Adger, together with the furniture and everything in the house and upon the premises, reserving, however, the silver and such other articles as I may hereinafter specifically give to others; also all my jewelry and the silver cross and prayer book presented to me by the church at Newport, Rhode Island. At Anna's death I devise and bequeath all the above-mentioned property to her daughter, Floride Clemson, and at the death of Floride, if she dies without issue, I devise and bequeath it to my sons, John's and William's, children then living equally, among them, or, if they be dead, to their issue then living."

"19. I am possessed still of a large residue of property, consisting principally of a debt due me by my son Andrew for the purchase of Fort Hill, amounting to about forty thousand two hundred dollars, secured to me by bond and mortgage. I have also an unsecured interest in a gold mine in Dahlonega, Georgia, belonging to the estate of my late husband, and also an interest in the estate of my second son, Patrick, and second daughter, Cornelia, besides other property. Whatever real or personal property I may possess at my death and not hereinbefore specifically or otherwise disposed of, I direct my executors to sell whenever they shall deem it advisable.

I direct my executors to collect, as fast as possible, the above-mentioned residue of my estate, and, after paying off my debts and the legacy to Calhoun Clemson, the remainder I wish divided into four parts, which I dispose of as follows:

"20. One part, being the fourth of the above residue, I give and bequeath to my daughter Anna during her life and for her sole and separate use; and at her death I will and bequeath it to her daughter Floride, and at Floride's death, if she dies without issue, I will and bequeath it to the children of my deceased sons John and William then living, equally among them, or to their issue if they be dead, issue to represent the parent. The better to effect my intentions in regard to the property in this and the second clause given to Anna, I appoint Edward Noble, of Abbeville, trustee for it and vest in him the legal title. Should Anna at any time wish to sell the house and lands in Pendleton or all or any portion of the property given to her for life, the trustee, provided it meets with his approval, is authorized to dispose of it according to the wishes of my daughter, upon having her written request for so doing. The proceeds of such sale the trustee shall hold subject to the trusts and limitations declared in reference to the original property. The trustee is authorized and required to invest the proceeds, and also the fourth part of the residue herein given to her, in such property or in such way as she may in writing direct, provided it meets with his approval. The trustee is authorized and required from time to time to change such investments as often as he may be directed so to do by my said daughter in writing, provided it meets with his approval, holding always the substituted property or reinvestments subject to the trusts and limitations aforesaid. If from death or any other cause there is no trustee, or if Anna at any time shall desire to change her trustee, she shall have the power so to do and to appoint another by any instrument in writing, under seal, executed by her in the presence of two subscribing witnesses; and as often as she may desire to change her trustee she shall have the power so to do by observing the form and solemnity above described.

"21. One fourth part of said residue of my said estate I give and bequeath to my granddaughter Floride Elizabeth Clemson, but if Floride should die without leaving issue I give and bequeath it at her death to the children of my sons John and William, or the issue of them if they be dead, the issue to take by representation.

"22. The remaining two fourths I dispose of as follows: To Kate P. Calhoun, my daughter-in-law, I give and bequeath the one half of the one fourth of said residue of my estate, to be enjoyed by her during widowhood. At her death or marriage, whichever first happens, I give and bequeath the same to such of her children—being my grandchildren—as may then be alive; but should either of my said grandchildren die under twenty-one years of age, leaving no child or children, the share of such deceasing grandchild shall go to the survivors or sur-

vivor of them or their issue, the issue representing the parent. If Kate should die before me, what I have given her in this will is not to revert to my estate, but is to go to her children—my grandchildren—living at my death, subject to the conditions and limitations above expressed.

"23. The remaining fourth and half of a fourth of the aforesaid residue of my estate I give and bequeath to my grandsons, John C. Calhoun and Benjamin A. P. Calhoun, sons of my deceased son John, and William Lowndes Calhoun, child of my second son William, equally among them; and should either of them die under twenty-one years of age, leaving no issue, the share of such deceased child shall go to the survivor or survivors."

On the 22d of January, 1866, Mrs. Calhoun duly made a codicil to her last will and testament, wherein, among other things, she revoked the devise of the real property in Pendleton made to Anna Clemson in the second paragraph of her will, and devised the same to other persons, and provided as follows:

"2. By the nineteenth clause of the will I directed the said bond debt on my deceased son Andrew, secured by mortgage on Fort Hill, together with all other property possessed by me and not before disposed of, to be collected by my executors and the proceeds to be divided into four parts. One part I gave to Anna, one part to her daughter Floride, and the two other parts to Kate and her children, as will appear by clauses 20, 21, 22 and 23 of the will. I desire now to change the disposition of the said bond and mortgage debt, and do now give and bequeath it in the following manner: Three fourths of my interest in said bond and mortgage debt, amounting to about forty thousand two hundred dollars, I hereby give and bequeath to my daughter, Anna M. Clemson, to be enjoyed by her under clause twenty of the will, and according to the provisions of that clause to vest in the same trustee and to be subject to all the powers, trusts, conditions and limitations of that clause precisely as the bequests therein made were subject to them, with this exception and alteration, that my daughter Anna is hereby authorized and empowered by a last will and testament duly executed by her, to dispose of this bequest of three fourths of said bond and mortgage debt as she pleases. If she does not thus dispose of it at her death, I give and bequeath it, the said three fourths, to her daughter Floride, and should the said Floride die without leaving issue I give and bequeath it at her death to her brother, Calhoun Clemson; but nevertheless, Floride shall likewise have power to dispose of it at her death as she pleases, by a last will and testament duly executed by her. By clause second of the will I gave the furniture and every article of the property in my house in Pendleton and upon the premises, with certain reservations, and also my jewelry and some other small articles, to my said daughter Anna. I now confirm to her the bequests of aforesaid furniture and all other personal

property embraced in said second clause, which it is my will that she shall enjoy for life as her sole and separate estate, and at her death I give and bequeath all this personal property to her daughter Floride absolutely. To Anna I also give and bequeath the oil portrait of my mother, which by clause fifth of my will I gave to my daughter-in-law Kate.

"8. The remaining one fourth part of my interest in said bond-and-mortgage debt against the estate of my deceased son Andrew I give and bequeath to Floride Elizabeth Clemson, my granddaughter, but if she dies without leaving issue I give and bequeath it to her brother, John Calhoun Clemson. She, nevertheless, is hereby authorized and empowered to dispose of said fourth part as she pleases, by her last will and testament duly executed.

"4. Should my granddaughter Floride's death occur before mine, what I have given her in the will and codicil shall not fall into the residuum of my estate, but I give and bequeath it to her mother, my daughter Anna, who shall take it subject to all the trusts, powers and limitations imposed upon the direct bequest to her; and should my daughter Anna's death occur before mine, what I have given her in the several clauses of the will and codicil shall not fall into the residuum of my estate, but I give and bequeath the same to her daughter Floride, who shall take and enjoy it as her mother would have done if living, subject to the same trusts, powers, limitations and conditions; and should both Anna and Floride die before me, what has been given them in the several clauses of the will and codicil shall not fall into the said residuum, but I give and bequeath the whole to my grandson, John Calhoun Clemson.

"5. Should I at any time collect the aforesaid bond-and-mortgage debt, or any part of it, or should Fort Hill be purchased with it, or the money be invested in any other property or be retained in hand, the property thus purchased, the property thus obtained by investment and the money thus retained shall be considered and held to be in the place of and the same as the aforesaid bond and mortgage, and shall pass under this codicil as if the same were still in the form of said bond and mortgage—that is to say, shall pass to my daughter Anna and granddaughter Floride, as aforesaid bond and mortgage debt is directed to be divided between them."

On the 12th of March, 1866, Mrs. Floride Calhoun and Thomas G. Clemson (to whom letters of administration had been granted in February, 1866, on the personal estate of Cornelia M. Calhoun, who had departed this life intestate and unmarried in that year), as administrator of the personal estate of Cornelia, exhibited their bill in the Court of Equity for the District of Pickens, State of South Carolina, against Andrew P. Calhoun and others, for the foreclosure of the mortgage on the tract of land known as the Fort Hill place, executed to secure payment of the bond aforesaid, and for the sale of the land for that purpose, and at the July Term, 1866, of the court a decree was made, whereby

it was adjudged that the mortgage be foreclosed and the land sold, which decree, on appeal, was affirmed by the Supreme Court of the State of South Carolina, and the cause remanded to the circuit court for further proceedings in accordance therewith.

During the pendency of that suit, and on the 25th of July, 1866, Mrs. Floride Calhoun departed this life, leaving in full force her last will and testament, as modified by the codicil aforesaid; and thereafter, on the 7th of August, 1866, her last will and testament and the codicil thereto were duly admitted to probate, and Edward Noble, one of the persons mentioned as executors therein, duly qualified as such on the same day.

In August, 1869, Floride E. Clemson intermarried with Gideon Lee, of the State of New York, and the plaintiff, Isabella Lee, is the only child of such marriage, and, on the 27th of August, 1871, the said Floride E. Lee, formerly Clemson, died intestate, leaving surviving her, as her sole heirs-at-law and distributees, her husband, Gideon Lee, and her daughter, Isabella Lee, the plaintiff.

On the 29th of September, 1871, Mrs. Anna C. Clemson made her last will and testament, as follows:

"In the name of God, Amen.

"Whereas I am entitled to legacies under the last will of my deceased mother, Floride Calhoun, and to a distributive share in the several estates of my deceased sister, Cornelia Calhoun, and my brother, Patrick Calhoun, and, notwithstanding my coverture, have full testamentary power to dispose of the same:

"Now I, Anna Calhoun Clemson, the wife of Thomas G. Clemson, of the Town of Pendleton, in the County of Anderson and State aforesaid, being of sound and disposing mind, memory and understanding, do make this my last will and testament in manner following:

"I will, devise and bequeath the entire property and estate to which I am now in any wise entitled and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee simple; but should my husband, Thomas G. Clemson, depart this life leaving me his survivor, or should he survive me and then die intestate, in either event I will, devise and bequeath my entire property and estate, as well as that which I may hereafter acquire, of whatever the same may consist, to my granddaughter, Isabella Lee, the child of Gideon Lee, of the State of New York, absolutely and in fee simple. I hereby nominate and constitute Thomas G. Clemson executor of this my will."

The proceedings for foreclosure against Andrew P. Calhoun duly went to decree, Noble, executor, having been substituted as one of the complainants, under which the Fort Hill property was sold and purchased by Thomas G. Clemson, as trustee of his wife, on January 1, 1872; and on June 10, 1875, title was made for the same, in pursuance of an order of the court, to Thomas G. Clemson, as trustee of Anna M. Clemson, under the will of Mrs. Floride Calhoun, he having been duly appointed such trustee on the 18th of December, 1871. The consideration for

said purchase and conveyance appears to have been the mortgage debt of Andrew P. Calhoun, and Mr. Clemson, it is alleged, also discharged legacies and demands to the amount of \$6,964.98 in the purchase and redemption of said property.

On the 5th of November, 1873, a partition in kind was made of the Fort Hill property between Anna M. Clemson and Thomas G. Clemson, as her trustee, on the one part, and the plaintiff and Gideon Lee, as her guardian, on the other part, by which one fourth part thereof, amounting to about 288 acres, was allotted and set off to the plaintiff, and the remainder, amounting to about 814 acres, was allotted and set off to said Anna M. Clemson and Thomas G. Clemson; and the plaintiff thereupon entered into possession of the parcel so allotted to her, and has ever since remained in possession thereof.

On the 12th of September, 1875, Anna M. Clemson, otherwise known as Anna C. Clemson, died, leaving in full force and unrevoked her said last will and testament, bearing date September 29, 1871, which was duly admitted to probate; and from September, 1875, to the time of his death, Thomas G. Clemson remained in quiet, open and continuous possession of the property, claiming to hold the same as his individual property in fee simple.

On April 6, 1888, Thomas G. Clemson died, leaving in full force and unrevoked his last will and testament, bearing date the 6th of November, 1886, together with a codicil thereto, bearing date the 26th of March, 1887, which will and codicil were duly admitted to probate on the 20th of April, 1888. In and by the codicil the defendant Simpson was named and constituted the sole executor of the will, and the Fort Hill property was devised to him on certain trusts, fully set out therein, in virtue whereof the defendant entered into and now remains in possession of the Fort Hill property.

The bill in this case was filed on the 26th of November, 1888. After setting forth the contents of the will and codicil of Mrs. Floride Calhoun, the foreclosure of the mortgage given by Andrew P. Calhoun, the death of Mrs. Floride Calhoun, the probate of her will and codicil, the marriage of her granddaughter, Floride Elizabeth Clemson, to Gideon Lee, the status of the plaintiff as their daughter, the death of Mrs. Lee, leaving her husband, Gideon Lee, and the plaintiff as her sole heirs-at-law and distributees, it alleged that the property so devised by Mrs. Floride Calhoun for the use of Mrs. Clemson passed to the plaintiff under the provisions of the will of Mrs. Calhoun; that, after the death of Mrs. Calhoun, a decree was made in the foreclosure suit for the sale of the property; that under that decree it was sold, in January, 1872, to Thomas G. Clemson, as trustee for his wife, the said Anna M. Clemson, under the last will of Mrs. Calhoun and the codicil thereto, Clemson having been substituted as trustee in the place of Edward Noble; that the sale was confirmed and the title to the property conveyed to Clemson, trustee as aforesaid, in consideration of the premises, which were a recital of the pro-

ceedings in the case and the nominal consideration of three dollars, no money having been paid, and no cash paid into court or into the hands of its officers, except the costs; that the deed to Clemson was duly recorded, and the property thus taken in part payment of the debt of Andrew P. Calhoun was held continuously by Clemson as trustee, up to the time of his death, under the trusts created by the will and codicil of Mrs. Calhoun; that thereafter, the plaintiff being then entitled to one fourth of the property in fee simple absolute under the will and codicil of Mrs. Calhoun, and Mrs. Clemson being entitled to a life estate in three fourths thereof for her sole and separate use, with remainder to the plaintiff on the death of Mrs. Clemson, in case the latter did not exercise the power of appointment by her last will and testament, as provided by the will and codicil of Mrs. Calhoun, the plaintiff's father, acting for her, and Clemson, as trustee under the will and codicil of Mrs. Calhoun, made an informal partition of the property, and since that time the plaintiff had been in possession of about 300 acres of it, and the remainder of it, consisting of about 814 acres, had been in possession of Clemson up to the time of his death, and since that time in the possession of the defendant, claiming under Clemson, as trustee under the will and codicil of Mrs. Calhoun; that Mrs. Clemson died in September, 1875, without having exercised the power of appointment conferred upon her by the will and codicil of Mrs. Calhoun; that thereupon the plaintiff became entitled, in fee simple absolute, to the three fourths of the property then in the possession of Clemson, as trustee, and to the rents and profits of that part of the property from that time; that Clemson remained in possession of that part of the property subject to the trusts of the will and codicil of Mrs. Calhoun, from the time of the death of Mrs. Clemson until he died, in April, 1888, leaving the plaintiff his sole heir-at-law, during the whole of which time he collected the rents and profits of the property, amounting in all to over \$31,000, without including interest; that since the death of Clemson the defendant had in some manner, claiming under Clemson, acquired possession of the 814 acres, and of the rents and profits thereof, without having been appointed trustee under the will and codicil of Mrs. Calhoun; and that the defendant was about to make a deed of the 814 acres, and of such accumulated rents and profits, to uses and purposes which would wholly defeat such rights of the plaintiff.

The bill waived an answer on oath, and prayed for an accounting by the defendant of the rents and profits of the 814 acres; that the trusts on which Clemson held the property be declared; that the cloud upon the plaintiff's title to it be removed; that she be adjudged to hold the property in fee simple absolute; that the defendant account for the personal property in which Mrs. Clemson had a life estate, and in which the plaintiff has an estate in remainder or otherwise which came into his possession; and that he be enjoined from conveying any part of the property, or any of the property of which Clem-

son died possessed, to any use or trust which would tend in any manner to cloud the title of the plaintiff or defeat her rights in the premises; and for general relief.

The answer set up that Mrs. Clemson, by her last will and testament, duly executed and duly admitted to probate, disposed of the property held under the trusts of the will and codicil of Mrs. Calhoun, in favor of her husband, Thomas G. Clemson; that from and immediately after her death the property vested in him in fee simple; and that his continuous and undisturbed possession thereof from that time was in his own right, and not as trustee.

After a replication, proofs were taken, and the case was heard by the circuit court, with the result before stated.

The opinion of that court is reported in 89 Fed. Rep. 235. It passed upon what is the only material question in the case, namely, as to whether Mrs. Clemson, by her will, exercised the power given to her by the will and codicil of Mrs. Calhoun, to dispose of the bequest of three fourths of the interest of Mrs. Calhoun in the bond-and-mortgage debt of Andrew P. Calhoun, amounting to about \$40,200. The conclusion of the court was, that the will of Mrs. Clemson referred to the property which was the subject of the power and also to the power itself; that it was her intention to dispose of the property in question by her will; and that such intention was carried out in due execution of the power.

The recital in the will of Mrs. Clemson is as follows: "Whereas I am entitled to legacies under the last will of my deceased mother, Floride Calhoun, and to a distributive share in the several estates of my deceased sister, Cornelia Calhoun, and my brother, Patrick Calhoun, and, notwithstanding my coverture, have full testamentary power to dispose of the same." It then proceeds as follows: "I will, devise and bequeath the entire property and estate to which I am now in any wise entitled and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee simple; but should my husband, Thomas G. Clemson, depart this life, leaving me his survivor, or should he survive me and then die intestate, in either event I will, devise and bequeath my entire property and estate, as well as that which I may hereafter acquire, of whatever the same may consist, to my granddaughter, Isabella Lee, the child of Gideon Lee, of the State of New York, absolutely and in fee simple."

As Mrs. Clemson died before her husband, and as he did not die intestate, this last devise and bequest to the plaintiff did not become operative, and the clause containing it is of no effect, except as its language may bear upon the proper construction of the entire instrument.

The view taken by the circuit court was that, as Mrs. Clemson had the right, for her life, to the enjoyment of the property held in trust for her under the will and codicil of Mrs. Calhoun, and the absolute power of disposing of it by will, she treated it by her

will as being as much hers as the distributive share, referred to in her will, in the several estates of her sister and brother; that it would be too narrow and technical a construction of the will, under the circumstances, so to limit the language of the devise and bequest as to exclude the exercise of the power; that the mention of the distributive share in the estates of her sister and her brother allowed it to be said that the language of the devise and bequest might have some effect by means of her interest in such distributive share, but that would not be all the effect which the words imported; that if the intention to pass the property held in trust could be discovered, such intention ought to prevail; that the intent to dispose of such property was apparent on the face of the will; that, as it plainly referred to the property covered by the power, its language could not be satisfied unless the instrument should operate as an execution of the power; that the recital in the will that, notwithstanding her coverture, she had "full testamentary power to dispose of the same" (referring to the legacies under the will of her mother and to a distributive share in the estates of her sister and brother), could not be regarded as merely a reference to the fact that, shortly before that time, married women in South Carolina had, by the Constitution of 1868, and the legislation consequent thereon, been enabled to dispose of their property by will, because in that view such statement would have been wholly uncalled for, as she could alienate her own property in any way she chose, while the property held in trust for her for her life could be disposed of by her only by will; and that therefore the more reasonable inference was that she referred, by the words "full testamentary power," to the will of her mother, rather than to her own recently acquired legal capacity, though a married woman, to make a will, as to the property in which she did not have merely a life estate, with a power of appointment.

By the will and codicil of Mrs. Calhoun, the following bequests or legacies were left to Mrs. Clemson: (1) a bequest for life of three fourths of the bond and mortgage debt due by Andrew P. Calhoun; (2) a devise and bequest for life of certain real estate, furniture and other personal property mentioned in the second clause of the will and in the second clause of the codicil; (3) a share for life in a part of the residuary estate left after the payment of debts; (4) a share for life in the remainder of such residuary estate, if her grandsons should die under age and without issue; (5) her grandmother's portrait. All of these legacies, except such portrait, were made to Mrs. Clemson for her life. In regard to the portrait, as Mrs. Calhoun died in July, 1866, and Mr. and Mrs. Clemson were then both of them living, the rights of Mr. Clemson under the common-law rule immediately attached to the portrait, and it became at once his personal property. The legacies to Mrs. Clemson or for her benefit were all personal property at the time of her death. The fifth clause of the codicil to the will of Mrs. Calhoun directs that if Fort Hill, the property in question, should be

purchased with the bond-and-mortgage debt, the property so purchased should "be considered and held to be in the place of and the same as the aforesaid bond and mortgage," and should "pass under this codicil as if the same were still in the form of said bond and mortgage;" that is to say, should pass to Mrs. Clemson and her daughter Floride, as the "aforesaid bond-and-mortgage debt is directed to be divided between them." In her will and codicil, Mrs. Calhoun speaks of the provisions made for Mrs. Clemson as "bequests" and also as the "property" given to her.

At the time Mrs. Clemson's will was made, the court had ordered, in July, 1871, the sale of the Fort Hill property to satisfy the mortgage debt, which then amounted to over \$65,000. It was manifest that the property would have to be purchased by the mortgagees; but as, in fact, it had not been purchased when the will was made, the mortgage debt was still, under the will of Mrs. Calhoun, a legacy of personal property, and would be spoken of properly, in the will of Mrs. Clemson, as a legacy to which she was entitled under the will of her mother. Moreover, by the terms of that will, the investment in the Fort Hill property was still to be considered as personal property.

Mrs. Clemson's distributive share in her sister's estate was, at the time Mrs. Clemson made her will, of small value, as she ultimately received from it, at most, only \$601.94. Her share in her brother's estate was at that time also small, amounting only to \$120.49, although, in fact, she received \$150. This was all the property which she had, or supposed she had, when she made her will, and all that she intended to dispose of.

The rents which had accumulated on the Fort Hill property before it was sold under the decree of foreclosure did not belong to Mrs. Clemson, but belonged to the estate of Andrew P. Calhoun, the mortgage debtor; and when they were received by Mr. Clemson in part payment of the debt they were to be held by him as trustee of Mrs. Clemson under the will and codicil of Mrs. Calhoun.

Putting ourselves in the position occupied by Mrs. Clemson when she made her will, as we are authorized to do, in view of the circumstances then existing, in order to discover from that standpoint what she intended (*Blake v. Hawkins*, 98 U. S. 815, 824 [25: 189, 141]; *Postlethwaite's Appeal*, 68 Pa. 477, 480; *McCall v. McCall*, 4 Rich. Eq. 448, 455; *Scaife v. Thomson*, 15 S. C. 837, 857; *Clark v. Clark*, 19 S. C. 845, 848, 849), we are of opinion that the will of Mrs. Clemson was intended by her to be, and was, a full execution of the power. She was entitled to bequests and legacies under the will and codicil of Mrs. Calhoun, which they spoke of as "property," and which Mrs. Clemson was authorized to dispose of as she pleased. It was lawful for her to execute such power in favor of her husband. The interest to which the power applied was at the time personal property, and was a legacy or bequest. Her will refers to the fact that she is entitled to legacies under the will of her mother, and to a distributive share in the estates of her

sister and her brother. This is the property which she believed she had; this is what she really had; and this is what she intended to dispose of by her will. The will, therefore, in referring to the legacies to which she is entitled under the will of her mother, refers expressly to the subject matter of the power. The second article of the codicil to the mother's will, after bequeathing to Mrs. Clemson, for life, the three-fourths interest in the bond-and-mortgage debt, gives her the power "to dispose of this bequest," thus applying that word to the remainder which the daughter took no interest in, but merely a power to dispose of; and Mrs. Clemson, in using the word "legacies," must have intended to include the interest in remainder, which her mother had called a "bequest."

As to the legacy of the three-fourths interest for life in the bond-and-mortgage debt, she had only a power of appointment. Her property in it had only that extent; but it had that extent; and to that extent she regarded it as her property, which consisted of the right to the use of it for her life and of the power of disposing of it by her will. The statement that, notwithstanding her coverture, she had "full testamentary power to dispose of the same," refers to the fact that, although she was a married woman, she had power to dispose of the same by a will, such power being given to her by the will of her mother. The expression has the same meaning as if it had read "full power to dispose of the same by will."

This power so to dispose of the subject of the power created by the will of her mother she possessed fully, without the aid of the provision of the Constitution and legislation of South Carolina enabling married women to dispose of their own property by will, because without a statute of that kind married women could always execute powers of appointment. The provision of the Constitution and Statute might have been necessary to authorize her to dispose by will of her distributive shares of the estates of her sister and her brother; but with her power to dispose of such shares by her will we are not here concerned. By the Constitution, adopted in 1868, and the legislation in pursuance thereof, Mrs. Clemson had as full legal capacity to make a will as if she were a *feme sole*, and she needed no other power to enable her to do so. Her mother died in 1866, and the power conferred by that will and codicil upon Mrs. Clemson was conferred upon her as a married woman, and was afterwards exercised by her as a married woman.

We then come to the following language in the will: "I will, devise and bequeath the entire property and estate to which I am now in any wise entitled and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee simple." Outside of her interest in the bond and mortgage on the property in question, to which she was entitled as a legacy under the will of her mother, she had practically no property, her interest in her brother's and sister's estates being of such small value. Unless, therefore, by referring to legacies under the

will of her mother, she refers to the interest in the bond and mortgage, all that she could refer to as having come to her under the will of her mother would be, at most, the oil portrait of her grandmother. It cannot be reasonably supposed that that is the proper construction of the will. As for the interest or income she had derived during her life from the bond-and-mortgage property, the moment it was received it became her property; and it could not properly be regarded as covered by the expression of legacies to which she was entitled under the will of her mother.

The question of the execution of a power is very fully discussed by Mr. Justice Story in *Blagge v. Miles*, 1 Story, 426. The rule laid down in that case is that, if the donee of the power intends to execute it, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative; that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation, but if it be doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power; and that it is not necessary, however, that the intention to execute the power should appear by express terms or recitals in the instrument, but it is sufficient that it appears by words, acts or deeds demonstrating the intention. Judge Story states, as the result of the English authorities, that three classes of cases have been held to be sufficient demonstrations of an intended execution of a power: (1) where there has been some reference in the will, or other instrument, to the power; (2) or a reference to the property, which is the subject on which it is to be executed; (3) or where the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity; in other words, it would have no operation, except as an execution of the power. The rule thus stated was referred to with approval by this court in *Blake v. Hawkins*, 98 U. S. 315, 326 [25: 189, 141], and in *Warner v. Connecticut Mutual Life Ins. Co.*, 109 U. S. 357, 366 [27: 962, 965]; by the Court of Appeals of New York, in *White v. Hicks*, 88 N. Y. 383, 392; and by the Supreme Court of Illinois, in *Prink v. Eggleston*, 92 Ill. 515, 538, 539, 547. See also *Meeker v. Bretnall*, 38 N. J. Eq. 845.

Nor is the rule different under the decisions of the courts of South Carolina. *Hopkins v. Mazyck*, Rich. Eq. Cas. 263; *Porcher v. Daniel*, 12 Rich. Eq. 349; *Boyd v. Satterwhite*, 10 S. C. 45; *Bilderback v. Boyce*, 14 S. C. 528; *Moody v. Tedder*, 16 S. C. 557.

The counsel for the appellant relies with great confidence on the case of *Bilderback v. Boyce*, *supra*, where real estate was devised by a father to trustees, to permit his son to take the income for life, with remainder to such persons as the son by his will might appoint, and, in default of appointment, to the children of the son. The son by his will

gave, devised and bequeathed "all the rest and residue of my estate, whatever and wherever," to persons named, but did not mention the power or the trust property. He had real estate in his own right. The court held that there was no execution of the power, on the ground that the will disposed in general terms of the whole estate of the donee of the power, without any reference in terms to the power or the property, and that the donee's own property satisfied the terms of the will. The land to which the power related was not mentioned in the will, nor was the power referred to, and the terms of the will were satisfied by the property which the son left, without including that as to which the power existed. But the court cites with approval the case of *Blagge v. Miles*, *supra*, and quotes the passage from it before referred to, and takes as its guide, as the result of all the American authorities, the principle that "the intention to execute must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation."

In the subsequent case of *Moody v. Tedder*, *supra*, one Griggs, by his will, devised and bequeathed to his wife, for life, all his property, both real and personal, empowering her to use and dispose of so much of it as might be necessary for her comfortable support and maintenance, in such style and manner as she might see fit, and gave whatever portion might be remaining of the property after the death of his wife to the wife of one Tedder. The widow of Griggs, for a consideration, conveyed to Tedder all her "interest and life estate" in the "property left to me for life" by the will of Griggs. It was held that the widow of Griggs, as life tenant, had an absolute power of disposing of the property, and that the conveyance to Tedder carried not only the life estate but also the power of disposal, and must be referred to the power which the widow possessed, whether it purported to be an execution of the power or not. The view of the court was that, as the words of the conveyance were "all my interest and life estate," and as Mrs. Griggs had, besides the life estate, no other interest in the property, and as express reference was made to the property as to which the power existed, by describing it as "property left to me for life" by the will of Griggs, her deed must be considered as conveying all her rights in the estate, including her power of disposal, although the conveyance made no reference in terms to such power. The court said that while it was true that the word "interest" was not the technical term to express the idea of a power, it was broad enough, in its ordinary acceptation, to cover it, and that the conveyance was intended to include such power. The opinion added that the question of the execution of a power was one of intention, and it then cited the case of *Bilderback v. Boyce*, *supra*, as establishing the principle, that "if the devisee of the power intends to execute it, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative," although "the intention to

execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation."

In the present case, the will of Mrs. Clemson recites that she is entitled to legacies under the will of her mother. It refers to bequests left to her for life, with the power of disposition. It thus refers to the power and also to the property which is the subject of the power, namely, the legacies left to her in her mother's will. Furthermore, the statement in the will of Mrs. Clemson that she has full testamentary power to dispose of those legacies is, in view of the fact that the will of her mother does give her the power to dispose of those legacies as she pleases, an express and direct reference to such power, because, under the Constitution and Statute of South Carolina, in force at the time Mrs. Clemson made her will, she could have disposed by will of any other property which she had, without the aid of any special power to do so. Her will then states that she wills, devises and bequeaths to her husband, absolutely and in fee simple, "the entire property and estate to which I am now in any wise entitled, and which I may hereafter acquire, of whatever the same may consist." She does not here say "my property and estate," but the language she uses is adequate to include not only what was her own in fee simple and in full right, but also all that in which she was interested, or over which she had any control. The words "in any wise entitled" are sufficient to cover not only property which she held in her own full right, but also property which she held in a limited right under her mother's will. The word "property" was the very word used by her mother in describing, in her will and codicil, the estate and interest which she had given to Mrs. Clemson. Thus, in clause 20 of the will of Mrs. Calhoun, which gives to Mrs. Clemson for life a share in the residue of the estate, she speaks of "the property" given to Mrs. Clemson in that clause and in the second clause of the will, the latter clause containing only a devise and bequest to Mrs. Clemson for life of certain real estate and personal property. Therefore, Mrs. Clemson, in using the words "the entire property and estate to which I am now in any wise entitled," must be regarded as referring to that in respect to which she had the power of disposition by the will of her mother. Otherwise, we have the case of a reference to legacies left to Mrs. Clemson under her mother's will, and to her power of disposing of them, which is meaningless unless the language of the devise and bequest which follows covers the property in regard to which she had such power of disposition. At the time of her death, in September, 1875, she had received all that she was entitled to receive from the estates of her sister and her brother, and there was nothing then left except the property which had come to her under her mother's will, namely, the interest in the bond and mortgage and the portrait of her grandmother.

The decree of the Circuit Court was right, and it is affirmed.

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HENRY W. KINGSBURY, *Appt.*,

v.

SIMON B. BUCKNER ET AL.

(See S. C. Reporter's ed. 650-688.)

Decree against a minor, how may be attacked—second appeal—or bill of review, effect of—decree absolute—infant, when bound by decree—subsequent suit to set aside decree—service unnecessary on infant defendant in cross-suit, where subject matter is same as in the original suit—who may institute suit in behalf of infant—bond for costs—authority to sue—authority of guardian ad litem—waiver of bond—simulated case—fraud and collusion—Illinois law—competent witness—notice of commission—rehearing.

1. In Illinois, a decree against a minor is subject to attack, by an original bill, upon the ground of error apparent upon the record, want of jurisdiction or fraud.
2. Where a decree of the inferior court was rendered in conformity with the mandate of the Supreme Court of Illinois, it is beyond the control of the latter court when questioned upon a second appeal in the same case.
3. The same principle applies where a party, instead of prosecuting a second appeal, attempts by a bill of review, or by a new bill in the nature of a bill of review, to reach errors apparent upon the face of the record.
4. By the practice in chancery in Illinois, a decree against an infant is absolute in the first instance.
5. Where an infant, by his *prochein amy*, prosecuted an appeal to the Supreme Court of Illinois from the original decree rendered in a suit brought by him, and appeared by guardian *ad litem* to an appeal in the cross-suit, he is as much bound by the action of that court, in respect to mere errors of law, not involving jurisdiction, as if he had been an adult when the appeal was taken.
6. In a subsequent suit brought by the infant to set aside such decree and to declare it void as to him, no inquiry can be made in respect to errors of law apparent on the record, that do not involve jurisdiction of the original suit brought by the plaintiff when an infant.
7. Where an infant complainant in an original suit is a defendant in a cross-bill, he is in court, by his original bill, and process is not required upon a cross-bill against him in the same suit, when the matter in respect to which the plaintiffs in the cross-bill sought relief was embraced by the original bill.
8. When the subject matter of the original bill filed by the infant was the title and ownership of property conveyed by a deed, under which the plaintiff claimed title, and the allegations of the cross-bill related to that property and demanded that the trust created by the deed be declared and ownership established under the trust, although the cross-bill alleged additional facts, the subject matter of the cross-bill was germane to that of the original bill.

NOTE.—Bill of review; nature of; when may be brought; who may maintain; time within which to be brought; what it should contain. See note to Bank of U. S. v. Ritchie, 8: 890.

When may be brought, and for what. See note to Shelton v. Van Kleeck, 27: 269.

2. In such case, it was not essential to the jurisdiction of the court that there should have been service of process, actual or constructive, upon the cross-bill against the infant.
10. A cross-bill is proper whenever the defendants, or any or either of them, have equities arising out of the subject matter of the original suit, which entitle them to affirmative relief, which they cannot obtain in that suit.
11. Where the infant is so young as to be incapable of making a selection of a person to represent him, the court, in favor of infants, will permit any person to institute suit in his behalf, exercising, however, discretion to prevent any abuse of that right.
12. The right to bring the suit does not depend upon the execution of a bond for costs, although, according to the letter of the statute, the next friend may be required to give such a bond.
13. It is not necessary to the jurisdiction of the court that the next friend should exhibit with the bill evidence of special authority to bring it as next friend. His own affidavit that he is the next friend of the infant is sufficient.
14. The rule that a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of the infant, does not prevent a guardian *ad litem* or *prochein amy* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved.
15. A consent by the next friend or guardian *ad litem* that a case be heard in a particular division of the Supreme Court of Illinois did not prejudice the substantial rights of the infant, although, in the absence of consent, the supreme court, sitting in one division, cannot take cognizance of a case from another division.
16. The waiver by the infant's guardian *ad litem* and next friend of a bond by the opposite party upon his appeal—the latter having waived an appeal bond on his part—did not affect the jurisdiction of the court.
17. If the original and cross-bills were not a genuine case, but were contrived, and the proceedings were conducted for the purpose of depriving an infant of his estate, without bringing attention to the real merits of his claim to the property in dispute, the decree in such case would not constitute an obstacle in the way of giving relief to the infant.
18. That the attention of the court was not specially called in the former suit to the points now made against the theory of a trust advanced in behalf of the opposite party does not show fraud or collusion. The absence from the opinion of that court of any reference to it does not prove that the guardian *ad litem* and next friend failed to make the point, or that he purposely avoided allusion to it.
19. By the laws of Illinois in force when the deposition in this case was taken, a husband was competent to testify for or against his wife in cases where the litigation was concerning the separate property of the wife.
20. One was a competent witness, who had no interest adverse to either party, whose interest in the property was recognized by all the parties. The fact that she was a party to the suit did not, of itself, disqualify her as a witness.
21. The statutory provision requiring ten days' notice for the suing out of a commission to take depositions might be waived by the guardian *ad litem* or next friend without the imputation upon him of fraud or collusion, nor are fraud and collusion to be imputed to him because he did not, after his appointment, file cross-interrogatories, when

cross-interrogatories were filed by another party and were of the most searching character.

22. The mere failure of the guardian *ad litem* and next friend to apply for a rehearing does not raise any presumption of infidelity to his trust. [No. 176.]

Argued Jan. 8, 9, 1890. Decided April 7, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois dismissing, for want of equity, a suit brought to declare certain proceedings in the courts of Illinois erroneous, fraudulent and void as to plaintiff and to restore certain real estate to him. *Affirmed.*

The facts are stated in the opinion.

Messrs. Lyman Trumbull and John P. Wilson, for appellant:

A minor may file a bill to impeach a decree procured by fraud, or for error appearing upon the face of the decree.

Lloyd v. Malone, 23 Ill. 43; *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Hess v. Voss*, 52 Ill. 478; *Lloyd v. Kirkwood*, 112 Ill. 829; *Story*, Eq. Pl. § 427; *Gooch v. Green*, 102 Ill. 510; *Wright v. Miller*, 1 Sandf. Ch. 120.

The demurrers admit the fraud, collusion and falsification of the record as charged, and should have been overruled.

The original suit of Henry W. Kingsbury, an infant seven years of age, commenced by Corydon Beckwith, as his next friend, was instituted without authority of said infant, without filing the bond required by the statute, and gave the court no jurisdiction to pass upon his rights.

Rev. Stat. 1845, chap. 47, § 18; *Lathers v. Fish*, 4 Lans. 213; *Gray v. Larrimore*, 4 Savvy. 688.

The cross-bill of Buckner and wife was, in fact, an original bill. It was not germane to the original suit, and the circuit court had no jurisdiction of the same without the service of process upon the minor. The appointment of Beckwith guardian *ad litem* of the minor, who had no notice of the cross-suit, on motion of the complainants therein, was error, and did not give the circuit court jurisdiction to divest the minor of his real estate.

Campbell v. Campbell, 68 Ill. 462; *McDermoid v. Russell*, 41 Ill. 490; *Hickenbotham v. Blackledge*, 54 Ill. 816; *Wright v. Miller*, 1 Sandf. Ch. 128; *Walker v. Hallett*, 1 Ala. 379; *Graham v. Sublett*, 6 J. J. Marsh. 45; *Providence Rubber Co. v. Goodyear*, 76 U. S. 9 Wall. 809 (19: 589).

The Supreme Court of Illinois in the Central Grand Division had no jurisdiction of the appeal from the decree of the Circuit Court of Cook County, except by consent of parties.

Const. 1870, art. 6, § 8; *Starr & Curtis' Stat.* 181; *People v. Vermilion County*, 40 Ill. 125; *Owens v. McKeth*, 10 Ill. 79; *Gosforth v. Adams*, 11 Ill. 52.

Neither an infant, nor his guardian *ad litem*, could by consent confer jurisdiction on a court which would not otherwise have it.

Rhoads v. Rhoads, 43 Ill. 289; *Enos v. Cappe*, 12 Ill. 255; *Bank of U. S. v. Ritchie*, 83 U. S. 8 Pet. 128 (8: 891); *Fischer v. Fischer*, 54 Ill. 281; 1 Dan. Ch. Pr. *170, and notes; *Wright v. Miller*, 1 Sandf. Ch. 108.

It was not competent for the guardian *ad litem* to waive the giving of an appeal bond by the cross-complainants on their appeal to the supreme court, and, even if it were in the power of the guardian *ad litem* to waive it, the supreme court had no jurisdiction to entertain the appeal without such bond.

Rev. Stat. 1845, chap. 88, § 47; Gross' Stat. 1871, p. 516; *Simpson v. Alexander*, 10 Ill. 260; *Chicago, P. & S. W. R. Co. v. Trustees of Marseilles*, 104 Ill. 91; *United States v. Curry*, 47 U. S. 6 How. 106 (12: 368); *The Lucy v. United States*, 75 U. S. 8 Wall. 309 (19: 394); *Washington County v. Durant*, 74 U. S. 7 Wall. 694 (19: 164); *Villabatos v. United States*, 47 U. S. 6 How. 81 (12: 352); *Lewis v. Shear*, 98 Ill. 121; *Page v. People*, 99 Ill. 418; *Protection L. Ins. Co. v. Foote*, 79 Ill. 361.

The decisions of the Supreme Court of Illinois in assumed appeals cannot be set up in bar or be used as evidence against the appellant in this case, when it is made to appear that the supreme court did not have jurisdiction of said appeals.

Harris v. Hardeman, 55 U. S. 14 How. 387 (14: 445); *Borden v. Fitch*, 15 Johns. 141; *Hollingsworth v. Barbour*, 29 U. S. 4 Pet. 467 (7: 922).

It was error for the guardian *ad litem* to waive any of the rights of the minor, or to allow the introduction of illegal and incompetent evidence in support of the cross-bill, without objection.

Cartwright v. Wise, 14 Ill. 417; *Fischer v. Fischer*, 54 Ill. 231.

The testimony of Simon Buckner and Jane C. Kingsbury, parties to the cross-bill, and interested in the result of the suit, and upon which the supreme court based its decision, was incompetent, and it was the duty of the guardian *ad litem* to have objected to the same.

Laws 1867, 188, § 2; Gross' Stat. 1871, 274; *Reeves v. Herr*, 59 Ill. 81.

The whole record shows that the rights of the minor were not presented to the court; that the decree against him upon the cross-bill was the result of negligence; that the entire proceedings in both the circuit and supreme courts were a contrived case, carried on by the waiver of the infant's rights, and are not binding upon the infant, because there was no earnest controversy.

Gaines v. Relf, 53 U. S. 12 How. 537, 539 (18: 1098, 1099); *Pacific Railroad of Mo. v. Missouri Pac. R. Co.* 111 U. S. 505 (28: 498).

Mr. W. C. Goudy, for appellees:

A bill to set aside a judgment of a court of last resort for errors apparent on the face of the record cannot be maintained in a lower court, and where it is also because of newly discovered evidence, the leave of the court rendering the judgment must first be obtained.

Southard v. Russell, 57 U. S. 16 How. 570 (14: 551); *Ricker v. Powell*, 100 U. S. 8 105 (25: 527); *Lube, Eq. Pl.* (Wheeler's ed.) 177; *Story, Eq. Pl.* (9th ed.) § 403; *Dennison v. Goehring*, 6 Pa. 402; *Haskell v. Racul*, 1 McCord, Ch. 29; *Brewer v. Bowman*, 8 J. J. Marsh. 492; *Rice v. Carey*, 4 Ga. 570; *Watkins v. Lawton*, 69 Ga. 672; *Blaight v.*

Mellroy, 4 T. B. Mon. (Ky.) 146; *McCall v. McCurdy*, 69 Ala. 71; 2 Barb. Ch. Pr. 92; *Mitt. Pl.* 88; *Coop. Pl.* 91; *Strader v. Byrd*, 7 Ohio, 184; *McCall v. Graham*, 1 Hen. & Mun. (Va.) 18; *Ryerson v. Eldred*, 18 Mich. 490; *Roberts v. Cooper*, 61 U. S. 20 How. 480 (15: 978); *Washington Bridge Co. v. Stewart*, 44 U. S. 8 How. 418 (11: 653).

The circuit court had jurisdiction of the subject matter of the cross-bill.

Story, Eq. Pl. §§ 889, 892; 2 Dan. Ch. Pr. 1, 548; *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339; *Nelson v. Dunn*, 15 Ala. 501; *Hurd v. Case*, 32 Ill. 49; *Jones v. Smith*, 14 Ill. 229; *Lloyd v. Kirkwood*, 112 Ill. 330.

The circuit court had jurisdiction of the person of the infant, and no process was necessary to bring him into court.

Rev. Stat. Ill. chap. 21, §§ 24-30; *Fleece v. Russell*, 13 Ill. 82; *Reed v. Kemp*, 16 Ill. 448; *Story, Eq. Pl.* § 404; *Watkins v. Lawton*, 69 Ga. 671.

The supreme court had jurisdiction of the first appeal, and the infant was bound by the conduct of his solicitor in the case.

Tillotson v. Hargrave, 8 Madd. 494; *Levy v. Levy*, 3 Madd. 245; *Wall v. Bushby*, 1 Bro. Ch. 484; 1 Dan. Ch. Pr. 74; *Ralston v. Lahee*, 8 Iowa, 27; *Dow v. Jewell*, 21 N. H. 486; *Mills v. Dennis*, 8 Johns. Ch. 363; *People v. Vermilion County*, 40 Ill. 125; *Owens v. McKeth*, 10 Ill. 79.

It is not competent for the court in this suit to consider errors as to the determination of facts, but only errors of law.

Griggs v. Gear, 8 Ill. 10; *Willamette Bridge Co. v. Hatch*, 125 U. S. 7 (31: 631); *Whiting v. United States Bank*, 38 U. S. 13 Pet. 6 (10: 38); *Kennedy v. Bank of Georgia*, 49 U. S. 8 How. 610 (12: 590); *Putnam v. Day*, 89 U. S. 23 Wall. 65, 66 (22: 766); *Buffington v. Harcey*, 95 U. S. 99 (24: 381); *Thompson v. Maxwell*, 95 U. S. 397 (24: 483); *Beard v. Burts*, 95 U. S. 434 (24: 485); *Shelton v. Van Kleeck*, 106 U. S. 534 (27: 270); *Nichols v. Stewart*, 111 U. S. 776 (28: 599).

Objections to depositions which go to their form, and objections to the incompetency of witnesses, must be made before trial, and cannot be allowed on the hearing.

1 Greenl. Ev. § 421; *Moshier v. Knox College*, 32 Ill. 102; *Kimball v. Cook*, 6 Ill. 424; *Prink v. McChung*, 9 Ill. 569; *Corgan v. Anderson*, 30 Ill. 95; *Lockwood v. Mills*, 39 Ill. 602; *Phy v. Clark*, 35 Ill. 377; *Swift v. Castle*, 23 Ill. 214.

None of the alleged errors are available to the appellant because he was a minor. An infant is as much bound by a decree as an adult.

Chambers, Ch. Jur. of Infants, 772, 795, 797, 799; *Enos v. Capps*, 15 Ill. 278; *Wadhams v. Gay*, 78 Ill. 424; *Hess v. Voss*, 52 Ill. 472; *Lloyd v. Kirkwood*, 112 Ill. 337; *McPherson, Infancy*, 886; *Herman, Res. Adj.* 179; *Freeman, Judgts.* §§ 151, 518; *Wall v. Bushby*, 1 Bro. Ch. 484; *Tillotson v. Hargrave*, 8 Madd. 494; *Levy v. Levy*, 3 Madd. 245; *Gregory v. Molenworth*, 8 Atk. 626; *Morison v. Morison*, 4 Myl. & Cr. 225; *Ralston v. Lahee*, 8 Iowa, 27; *Joyce v. McCaw*, 81 Cal. 278.

Infant complainants are always bound by a decree the same as adults.

Brook v. Hertford, 2 P. Wms. 519; *Hanna v. Spotts*, 5 B. Mon. 362; *Williamson v. Johnston*, 4 T. B. Mon. (Ky.) 253; *Jameson v. Moseley*, 4 T. B. Mon. (Ky.) 414; *McClay v. Norris*, 9 Ill. 383; *Brown v. Armistead*, 6 Rand. (Va.) 594.

Mr. Justice Harlan delivered the opinion of the court:

This suit involves the title to real estate of considerable value in the City of Chicago, of the possession of which the appellant, who was the plaintiff below, claims to have been deprived by certain proceedings in the courts of Illinois, to which Simon B. Buckner, his wife and others were parties. The relief sought is a decree declaring those proceedings to have been erroneous, fraudulent and void as to the plaintiff, and adjudging not only that such estate be restored to him, but that Buckner and wife be held as trustees *ex maleficio*, with liability to account for the income of the property.

The history of the plaintiff's claim to the property, as well as of the proceedings in the state courts, the integrity and legal effect of which are assailed in the present suit, must be given before examining the grounds on which he seeks a reversal of the decree.

Major Julius J. B. Kingsbury, of the United States army, died, intestate, on or about the 25th of June, 1856, seised of lots designated five and six in block thirty-five on the original map of the Town of Chicago, and also of that part of the east half of the northwest quarter of section nine in township thirty-nine north, of range fourteen east of the third principal meridian, which lies east of the North Branch of the Chicago River and south of the center of Ontario Street, in Cook County, excepting, however, a small portion of the last-named tract, previously conveyed by him to Buckner.

The intestate left surviving him his widow, Jane C. Kingsbury, and two children, Mrs. Buckner and Henry W. Kingsbury, the father of the appellant. These children were his only heirs-at-law.

By deed duly executed and acknowledged on the 15th of May, 1861, Buckner and wife, "in consideration of the sum of one dollar, and of the natural love and affection" of the grantors for the grantees, conveyed to Henry W. Kingsbury, the brother of Mrs. Buckner, and, at that time, a lieutenant in the United States army, one undivided half of the above lots five and six, and all their right, title and interest in the "Kingsbury tract," containing thirty-five acres, more or less, being the south half of what then remained of the northwest quarter of section nine, township thirty-nine, range fourteen, in Cook County, after deducting therefrom the Town of Wabansia, to have and to hold the same to the grantee, his heirs and assigns forever, the grantors covenanting that they would warrant the property conveyed. The deed recited that the other undivided half of the land and tenements formerly owned by Major Kingsbury belonged to the grantee as one of his heirs, and that the entire property was subject to the dower rights of his widow.

On the 25th of March, 1862, the plaintiff's

father executed an instrument which, upon proof that it was wholly in his handwriting and signed by him, was ordered by the Corporation Court of the City of Alexandria, Virginia, to be recorded as his last will and testament. And under an order of that court, passed May 10, 1870, Ambrose E. Burnside qualified as his executor. On the 11th of July, 1870, that writing, with the proof thereof, was presented by Burnside, as executor, to the County Court of Cook County, Illinois, for record; and by the latter court it was ordered "that the said will and proof thereof, certified as aforesaid, be recorded, and that the same be treated and considered as good and available in law in like manner as wills executed in this State."

The writing referred to is as follows:

"Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property:

"To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appraisal may be valued at that amount.

"To my sister, Mary J. Buckner, I leave as much of the Chicago property held in my name as shall amount to one third of the property in the City of Chicago, Illinois, held by my father, Julius J. B. Kingsbury, deceased.

"To my cousin, John J. D. Kingsbury, I leave my property at Waterbury, Conn., and in addition thereto five thousand dollars. I trust he will expend it in completing his education.

"The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the provisions of this will be so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars.

"As executors I name Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, Commissary Department, U. S. Army.

"Signed at Fortress Monroe, Va., March 25, 1862.

"Henry W. Kingsbury,
"First Lieutenant 5th Regiment Artillery,
"U. S. Army."

Lieutenant Kingsbury was killed at the battle of Antietam on the 17th of September, 1862.

On the 18th of July, 1870, the plaintiff herein, suing by Corydon Beckwith, his next friend, instituted an action in the Circuit Court of Cook County, sitting in equity, against Simon B. Buckner, Mrs. Buckner, Ambrose E. Burnside, Jane C. Kingsbury, John J. D. Kingsbury, Albert G. Lawrence and Eva Lawrence. The last-named defendant, as Eva Taylor, intermarried with Lieutenant Kingsbury on the 4th of December, 1861. The only child of that marriage was the plaintiff, who was born December 16, 1862, after the death of his father. His mother, subsequently, September 26, 1865, intermarried with Albert G. Lawrence.

It was alleged in that bill that the plaintiff's father died intestate, seised in fee simple of the estate conveyed by the above

deed of May 15, 1861, and that upon his death it passed to the plaintiff, subject only to the dower rights of his mother and grandmother, and to certain incumbrances outstanding against the property or some portions of it; and that by a decree rendered in a suit instituted in 1868 by Jane C. Kingsbury in the same court against Eva Lawrence, Albert G. Lawrence, himself, and one David J. Lake (who assumed to act as the plaintiff's guardian), John Woodbridge was appointed receiver of the entire income of the premises, accruing and to accrue, with power to lease and manage the property under the orders of the court, and with direction to pay out of such income to his grandmother, Jane C. Kingsbury, and to his mother, the sums to which they were respectively entitled; to provide for the maintenance and support of the plaintiff, and to pay the interest upon certain mortgages upon the property, as well as other expenses incident to its care and management.

Referring to the writing executed at Fortress Monroe, Virginia, on the 25th of March, 1862, the bill alleged that it was delivered to John McLean Taylor for safe-keeping; that neither at the time of his death, nor at any time thereafter, was his father an inhabitant or resident of Virginia, nor did he have any property in that State; that the Corporation Court of the City of Alexandria had no jurisdiction to admit said will to probate or record; that neither of the proceedings in that court, nor of those in the County Court of Cook County, Illinois, had Jane C. Kingsbury, Eva Lawrence, John McLean Taylor or himself any notice; that the plaintiff's father did not sign said paper in the presence of any attesting witness, nor was the same attested by any witness in his presence; that it was not executed with the requisite forms and solemnities to make the same available for the granting and conveying of the property therein mentioned, according to the laws of Connecticut, the place of his domicil, or of Maryland, where he died, or of the State in which any of his property was situated; that it was not entitled to probate in Illinois; that, nevertheless, Burnside, combining with the other defendants in that suit, alleged and pretended that it was a valid will for passing the title to property in Illinois, and said Jane C. Kingsbury, Mary J. Buckner, John J. D. Kingsbury and Eva Lawrence, named in said pretended will as devisees or legatees, claim under it, but without right, some interest in the said estate of the plaintiff.

The prayer for relief was that said instrument be declared invalid and of no legal force and effect as a last will and testament; that the proceedings relating to it in the County Court of Cook County be reversed and set aside, or declared to be null and void, as constituting a cloud upon plaintiff's title to the real estate hereinbefore described; that his right and title by inheritance to that estate as the posthumous son and only heir-at-law of the said Henry W. Kingsbury, deceased, be confirmed and established; that in the meantime Burnside, Buckner and wife and John J. D. Kingsbury be enjoined and

restrained from intermeddling with the said estate, or with the rents, issues or profits thereof, and from attempting in any way to obstruct or interfere with Woodbridge in the performance of his duties as receiver; and that on the final hearing of the cause the injunction be made perpetual.

On the 31st of October, 1870, Buckner and wife filed their joint and several answer to the bill. Answers were also filed by Jane C. Kingsbury, Burnside and John J. D. Kingsbury, which put in issue all the material allegations of the bill.

Buckner and wife also filed, October 31, 1870, a cross-bill against the plaintiff and their co-defendants, Eva Lawrence, Albert G. Lawrence and Jane C. Kingsbury, which, after setting out all the material averments, both of the bill and of their answer, alleged that the real estate of which Major Kingsbury died seised included all the lands described in the original bill; that while the legal title to the strip along the east branch of the North Branch of the Chicago River, seventy feet in width for the full length of the tract, was vested in Simon B. Buckner by deed of January 22, 1855, he had no beneficial interest therein, and Major Kingsbury was at his death its real owner; that the title to the real estate of which the latter died seised descended to and vested in Mrs. Buckner and her brother, subject to the widow's right of dower and to the incumbrances thereon; that the defendants were married when Major Kingsbury died, and in 1858 had issue to their marriage, a daughter, who was then living, by reason whereof defendant Simon B. Buckner became vested with a life estate as tenant by the curtesy initiate in the property vested in his wife; and that at the death of her father he, the defendant Buckner, had the full control and management of the real estate left by him, and retained such control until it was placed under the management of Ambrose E. Burnside some time in December, 1860.

In respect to the deed of May 15, 1861, by Buckner and wife to Lieutenant Kingsbury, the cross-bill showed that the value of the property covered by it was five hundred thousand dollars, and, except an undivided half of certain real estate of small value in Connecticut, was the only property held by Mrs. Buckner, her brother being the owner of the other undivided half of the property described in that deed; that said deed was executed without the knowledge of the grantee, who was ignorant of its existence until several weeks after its execution, when he was informed of the facts in the premises; that it was sent by Buckner to his agent in Chicago with directions to file it for record, which was done on the 17th of May, 1861, and that constituted the only delivery of it ever made to the grantee; and that it was made without any consideration, contract, arrangement, bargain or promise whatever, and was not acknowledged in accordance with the laws of Illinois.

The cross-bill also alleged that the sole purpose of the deed of 1861 was to vest the title of the property thereby conveyed in the grantee, as naked trustee, and not to make to

him a gift; that it was the intention of the cross-plaintiff Simon B. Buckner to waive all claim to it, to allow his wife the sole use and enjoyment thereof, and to place the control of it in her own family, but he claimed all his legal and equitable rights in the premises, and asked that the trust be enforced so as to enable him to carry his intention into effect, to which end he would assent to any decree conferring the sole control and benefit of the property upon his wife, her heirs and assigns; that in the month of December, 1860, the deceased and Simon B. Buckner for themselves, Jane C. Kingsbury and Mrs. Buckner, made an arrangement with Ambrose E. Burnside, then residing in Chicago, to take charge of and manage the property for all the parties; and that Lieutenant Kingsbury never exercised any acts of ownership over, or asserted any interest in, the property inconsistent with said trust, and, if he had lived, would have recognized the equitable and just claim of the cross-plaintiffs, and reconveyed the same upon request.

The cross-bill then referred to the will of March 25, 1862, and alleged that the only property in Chicago vested in the testator at that date was the real estate left by his father, which descended to him and his sister, Mrs. Buckner, and that the only conveyance ever made to him of property in that city, and the only property there held in his name for the use of any person, was that described in the deed of Buckner and wife of May 15, 1861; that prior to the making of that will the Chicago property had been used solely to receive the rents and profits, the testator, his mother and sister being treated as if each had been entitled to one third; that the testator, who was only twenty-three years of age, recently from West Point, without business experience, and unacquainted with the rules of law, and acting under the impression that Mrs. Buckner was the owner of only one third, made the provision in his will for Mrs. Buckner, with the purpose to declare said trust, and to restore to the control of his sister all the property described in the above deed; that therefore the will is a sufficient declaration in writing of the trust to take it out of the Statute of Frauds, if it was a trust within its provisions; and that said will was legally admitted to probate by the laws of Virginia, by a court having jurisdiction in such matters, and was certified and admitted to record in Illinois in conformity with its laws.

It further alleged: "And your orators further show that the said Henry W. Kingsbury, on the 23d day of October, 1861, wrote with his own hand a letter to his mother, Jane C. Kingsbury, and signed the same by his signature 'Henry,' in which, among other things, he wrote: 'I spent all the morning with Burnside, yesterday. He stated, as I told you, that Simon had made over all the Chicago property that was held in his name to me. A new power of attorney is therefore necessary from you and myself. We made one out. I signed it. Burnside will send it to you.' And they aver that the reference in said letter by the words 'as

I told you' was to a conversation between the said Henry W. Kingsbury and his mother, had in their last personal interview before the date of said letter, in which the said Henry W. Kingsbury expressly admitted that he held all the property of your orator, Mary K. Buckner, inherited from her father, in trust for a short time, and said that he would restore it all to her whenever she desired. And your orators show that the only delivery of said deed bearing date May 15, 1861, ever made, was the filing of the same for record by the said Simon B. Buckner, as hereinbefore set forth."

The relief asked in the cross-bill was: that the deed of May 15, 1861, be declared null and void as to Mrs. Buckner; that it be declared a deed of trust to the father of the plaintiff for the use and benefit of the grantors or one of them; that the plaintiff be adjudged to hold the property described in it as a trustee in like manner, and required to reconvey to the cross-plaintiffs or to one of them, as may be determined by the court; that an account be taken of the receipts and disbursements from and about the property by the defendants; that the dower rights of Jane C. Kingsbury and Eva Lawrence be ascertained and fixed, and partition made of said real estate, and the property owned by the cross-plaintiffs restored to them as they might be severally entitled thereto; and that they have such other and further relief as was just and equitable.

By an order made November 25, 1870, Corydon Beckwith—no service of process having been made upon the infant—was appointed guardian *ad litem* for Henry W. Kingsbury on the cross-bill. The infant, by him, filed an answer, which distinctly put in issue the material allegations of the cross-bill, and restated substantially all that was set out in the original bill. Answers to the cross-bill were also filed by Lawrence and wife. To these answers replications were filed by Buckner and wife.

On the 31st of December, 1870, the cause being heard, it was adjudged that both the original and cross suits be dismissed without prejudice. It was further ordered that the decree be entered as of the 24th of December, 1870. At the same time there was filed in the cause a certificate of all the evidence used on the final hearing in the circuit court.

Each party prosecuted an appeal. The case was heard in the Supreme Court of the State at its January Term, 1871, and, on the 5th of October, 1871, that court reversed the decree of the circuit court and remanded the cause with special directions as to the decree to be entered, and for further proceedings. *Kingsbury v. Burnside*, 58 Ill. 310, 337. The following extract from the opinion of the court shows the grounds as well as the extent of the reversal:

"The late Henry W. Kingsbury was, as this case shows, not only a trustee of the property for his sister, but he was an honest trustee. By the last act of his life, in this respect, he designed to, and did, admit the existence of the trust, and endeavored to execute it. Immediately after his death, his

widow, one of the defendants, in a letter to the mother of her deceased husband, recognized and admitted the trust, so far as she was concerned, in the most express terms, and seemed distressed at the suggestion of any obstacle to its immediate execution. Though her relations in life, and to the *cestui que trust*, became afterwards changed by another marriage, yet it is incredible that if she has been cognizant of the efforts which have been made to conceal the most important item of evidence of her former husband's relation to this vast property, and to wrest it from its proper channel, she can view them otherwise than with feelings of sorrow and regret. Her conduct has been the subject of severe criticism by counsel, but we are inclined to believe that she, like the unconscious infant whose name appears as plaintiff in the original bill, is but the involuntary instrument in the hands of designing men, who stand in no such relation to the memory of the deceased trustee as does Eva Lawrence.

"The trust being sufficiently manifested and proved by writings, signed by the party who was, by law, enabled to declare it, it must be executed.

"This conclusion renders unnecessary any discussion of the question, made by appellants in the cross-bill, as to the sufficiency of the acknowledgment of the deed by Mary J. Buckner, or of the question made by appellant in the original bill as to the execution and probate of the will; because, if properly executed and admitted to probate the will would be governed by the laws of this State, where the property is situated; and the posthumous birth of the infant Henry W. Kingsbury would, by those laws, operate as an abatement of all devises of property so situated. Gross' Statutes, p. 800, sec. 16, *Wills*. Besides, the testator was incapable of divesting the property, held in his name, for the use of Mary J. Buckner, by any devise he could make.

"The decree of the court below, dismissing both bills without prejudice, must therefore be reversed and the causes remanded, with directions to that court to dismiss the original bill absolutely, and to grant the relief prayed in the cross-bill, by a decree establishing the equitable title in Mary J. Buckner, to her proper share of the real estate described in the deed of May 15, 1861, declaring the trust, and requiring the proper conveyance of the legal title to her, divested of any life estate in her husband (he having renounced the same), and of all right of dower in Eva Lawrence; that an account be taken between said Mary J. Buckner and all other parties interested in the estate of Julius J. B. Kingsbury, deceased, according to the rules and practice of the court of chancery in such cases, and it be decreed accordingly."

The cause was redocketed in the Circuit Court of Cook County, and on the 18th of November, 1871, in pursuance of the special directions of the Supreme Court of Illinois in its mandate and opinion, the original bill was dismissed for want of equity. It was also ordered and adjudged, pursuant to such mandate and opinion, that the master in

chancery make, execute, acknowledge and deliver a deed conveying, for Henry W. Kingsbury, the infant defendant to the cross-bill, to Mrs. Buckner, the real estate and premises conveyed by the deed of May 15, 1861, divested of any life estate in her husband.

It was further ordered and adjudged, that partition be made between Henry W. Kingsbury and Mrs. Buckner, as tenants in common of the real estate inherited from Major Kingsbury (one undivided half of which was owned by each), the share of the lots or lands assigned to the former to be subject to the dower rights of Jane C. Kingsbury and Eva Lawrence, and the share assigned to Mrs. Buckner to be subject to the dower rights of Jane C. Kingsbury. It was further adjudged that Eva Lawrence be enjoined from asserting any claim for dower in the property assigned to Mrs. Buckner. The accounting between the parties to the cross-bill, and the costs, and the question in regard to the dower of Mrs. Kingsbury, were reserved for the further order of the court.

The commissioners appointed to make partition made their report on the 22d of January, 1872, and the same was confirmed, February 12, 1872, except as to that part of the premises known as the Spencer tract, in respect to which objections had been filed in behalf of Kingsbury by his guardian *ad litem*. Under writs of assistance issued in favor of Mrs. Buckner on the 29th of January, 1872, she was placed in possession of the property assigned and confirmed to her. On the 26th of March, 1872, the court sustained a motion for leave to the receiver to pay Mrs. Buckner one half of all moneys collected by him on policies of insurance. From that order the infant, by his guardian *ad litem*, prayed and was allowed an appeal to the Supreme Court of the State. It is stated that the exceptions filed for the infant to the reports were overruled on the 2d of August, 1872, and a decree entered confirming those parts of them to which exception had been taken, and declaring the parties vested with the title to the lands respectively set off and allotted to them. And from that decree the infant, by his guardian *ad litem*, prayed and was allowed an appeal.

The case was again carried to the Supreme Court of the State upon the infant's appeal, by his then guardian *ad litem* (a new one having been appointed), who assigned numerous errors in that court, among which were the following: that the court erred in rendering the decree of November 18, 1871; that it was rendered without proof against the infant, and was contrary to law, and that it was not in accordance with the mandate of the court, and was without jurisdiction in the Cook Circuit Court. The remaining assignments related, principally, to alleged errors in reference to the partition, the report of the commissioners, the distribution of insurance money and the apportionment of the incumbrances. Upon the hearing of this last appeal, the solicitor representing the infant and his guardian *ad litem* urged numerous objections to the proceedings in the circuit court, among which were these: that the circuit court had no jurisdiction

over the infant to render the decree of November 18, 1871, on the cross-bill of Buckner and wife; and that such decree was rendered without sufficient proof, was collusively obtained against the infant, and was manifestly unjust. In connection with these general objections the solicitor of the infant presented many specifications of fraud alleged to have been practiced by the former guardian *ad litem* of the infant in and about the proceedings culminating in the decree of November 18, 1871. Most of these specifications are again presented in the present suit, and will be hereafter examined.

At the September Term, 1872, of the Supreme Court of Illinois, the last decree was reversed mainly upon the ground that Mrs. Buckner had no interest in what was called the "Spencer tract." *Kingsbury v. Buckner*, 70 Ill. 514. In reference to the attempt made upon that appeal to re-open the questions decided on the first appeal, the court said:

"A labored argument has been made to prove the error of the former decision of the court, and it is charged that fraud and collusion were practiced, and incompetent testimony adduced, to obtain it. If this were true, we cannot determine questions so grave upon *ex parte* affidavits. If there have been fraud and collusion, the proper remedy would be in chancery, and then the parties assailed could have an opportunity of making a defense; or, if the decree is directed by the court of final resort, by an application for a rehearing.

"Upon the former hearing, after full argument, this court decided that Henry W. Kingsbury held the property conveyed by the deed from Mrs. Buckner and husband to him, as trustee; that the trust had been manifested by a writing, and that she had an equitable title to a share in the estate. The cause was remanded to ascertain her share, and not to determine the trust. The latter had been established by the declaration of this court. This appeal is prosecuted from the decree making partition, and can bring before us no other question, except questions incident to the order for partition. We cannot examine as to the merits of the original case, but only as to proceedings subsequent to the decision at the former hearing. . . . The trust relation between the parties was established by the former decision, and the court has not the power to reverse it."

A rehearing was granted, and at the September Term, 1873, of the Supreme Court of the State, the following opinion was delivered:

"**PER CURIAM:** A rehearing was ordered in this cause upon the present appeal, not for the purpose of reconsidering the case upon the merits, or to change, or, in any substantial sense, to modify our former decision, but to render the opinion of the court more explicit, and prevent misconception of its meaning. This seems demanded by the peculiar state of the record, which was inadvertently overlooked, and the language employed in the opinion, to which our attention has been called by the application for a rehearing.

"When the cause was before us upon a for-

mer occasion, the principal questions involved were definitely settled. The decree of the court below, dismissing both the original and cross bills, was reversed, and the cause remanded, with directions to grant the relief prayed by Mrs. Buckner's cross-bill. 58 Ill. 810. In pursuance of those directions, a decree was entered in the circuit court, November 18, 1871. This decree established the principal rights of the parties, and the court proceeded to carry them into effect, which involved the necessity of entering three subsequent decretal orders, and on August 2, 1872, another and final decree. This decree disposed of a controversy arising between the parties upon proceedings for partition, involving a claim by Mrs. Buckner to a share in what is called the 'Spencer tract,' as a part of her father's estate, and by that decree her claim was allowed, from which an appeal was taken on behalf of the infant, Henry W. Kingsbury, to this court. No appeal was taken from the decree of November 18, 1871, but appeals were taken from some of the decretal orders intervening that and the final decree of August 2, 1872.

"Upon these appeals the whole record was brought to this court, and errors assigned, questioning the propriety of the decree of November 18, 1871, entered in conformity with the directions of this court, some of the intervening orders, and the final decree of August 2, 1872. The questions raised and attempted to be raised were all carefully considered, and the conclusion arrived at was, that no error could be assigned upon the first decree, entered in pursuance of the directions of this court; that the points made upon the intervening orders were not well taken, but that the decree of August 2, 1872, was erroneous and ought to be reversed, for the reasons given in the opinion. These views, however, are not clearly announced in the former opinion, and it follows also that the directions contained in the opinion which have no relation to the matters involved in the decree of August 2, 1872, are wholly inappropriate, and may be considered as withdrawn from the opinion.

"The judgment which we intended to enter was, that the several decrees and decretal orders antecedent to the final decree of August 2, 1872, and upon which error was assigned, be affirmed, but that the decree of August 2, 1872, concerning Mrs. Buckner's claim in the Spencer tract, be reversed, and the cause remanded for further proceedings in conformity with the former opinion, as herein explained and modified, and that each party pay half of the costs in this court."

It should be here stated that the present transcript does not contain the decree of August 2, 1872.

On the 7th of March, 1877, the death of Mrs. Buckner was suggested in the circuit court, and her daughter, Lily Buckner, was substituted in her place as a co-complainant in the cross-bill, and on the same day a decree was rendered in conformity with the opinion and judgment of the Supreme Court of the State, annulling so much of the deed executed by the master to Mrs. Buckner as

conveyed to her one undivided half of the Spencer tract, and directing a conveyance of that tract to the infant, Henry W. Kingsbury.

The present suit was brought in the Circuit Court of Cook County, Illinois, on the 11th day of August, 1878, for Henry W. Kingsbury, by Eva Lawrence, his next friend, against Simon B. Buckner, Mrs. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Ambrose E. Burnside and Corydon Beckwith. As already stated, its object was to obtain a decree declaring the proceedings, above referred to, to be erroneous, fraudulent and void as to him, and restoring him to the possession and ownership of the property embraced by the deed executed May 15, 1861, by Buckner and wife to his father. The bill is lengthy, setting forth substantially all the above steps in the suit in the state courts and going very much into detail in respect to the various grounds upon which he bases his claim to relief.

Shortly after this bill was filed, Beckwith, Buckner and wife and Burnside filed general demurrers. But no further steps were taken in the cause until April 16, 1877, when it was dismissed for want of prosecution. The order of dismissal was, however, set aside, and Buckner and Burnside, having obtained leave to withdraw their demurrers, filed May 17, 1877 (Mrs. Buckner having died), a plea in bar, based upon the bill, cross-bill, pleadings, proceedings and decrees in the former case. They also filed a joint and several answer. The cause was removed upon the petition of the plaintiff to the Circuit Court of the United States for the Northern District of Illinois, where, upon final hearing, and after replications were filed, in behalf of the infant, to both the plea and the answer of Buckner and wife, the suit was ordered to be abated as to Mrs. Buckner, the demurrers of Beckwith and Mrs. Kingsbury were sustained and the bill dismissed for want of equity. This is the decree which has been brought here for review.

The first proposition advanced by appellant is, that a decree against a minor is subject to attack, by an original bill, upon the ground of error apparent upon the record, want of jurisdiction or fraud. Such is the rule in Illinois, in one of whose courts this suit originated, and by one of whose courts the decree sought to be set aside was rendered. *Lloyd v. Malone*, 28 Ill. 43; *Kuchenbeiser v. Beckert*, 41 Ill. 172, 177; *Hess v. Voss*, 52 Ill. 472, 478; *Kingsbury v. Buckner*, 70 Ill. 514, 516; *Lloyd v. Kirkwood*, 112 Ill. 329, 337. In the case last cited, the Supreme Court of Illinois, after observing that there was considerable diversity of opinion as to whether a decree could be assailed by original bill for error merely, said: "In many of the States, however, including our own, a decree against an infant, like that against an adult, is absolute in the first instance, subject to the right to attack it by original bill, for either fraud or error merely; but, until so attacked, and set aside or reversed, on error or appeal, it is binding to the same extent as any other decree or judgment. This right to attack a decree by original bill may be exercised at any time before the infant

attains his majority, or at any time afterwards within the period in which he may, under the statute, prosecute a writ of error for the reversal of such decree."

Although the cases in Illinois concede the right, by original bill, to impeach a decree for fraud, and although this court has recognized that right as existing even after the decree has been affirmed by an appellate court (*Pacific R. Co. of Mo. v. Ketchum*, 101 U. S. 289, 296 [25: 932]; *Pacific R. of Mo. v. Missouri Pac. R. Co.* 111 U. S. 505, 519 [28: 498, 503]), none of the cases cited from either court sustain the proposition that a party, whether an infant or adult, against whom a decree is rendered by direction of the appellate court, can impeach it, by bill filed in the court of first instance, for errors apparent on the record, and which do not involve the jurisdiction of either court.

The decree which the appellant seeks to have set aside was rendered in conformity with the mandate of the Supreme Court of Illinois, requiring that the original bill in the first suit be dismissed and that a decree be entered upon the cross-bill, adjudging the property in question to belong to Mrs. Buckner, and not to him. It is the one which the Supreme Court of the State held, in *Kingsbury v. Buckner*, 70 Ill. 516, 517, was beyond even its own control when questioned upon a second appeal in the same case. And this is in accordance with the settled doctrines of this court. In *Roberts v. Cooper*, 61 U. S. 20 How. 467, 481 [15: 969] (cited in 70 Ill. 517), this court said: "It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation." So, in *Durant v. Essex Co.*, 101 U. S. 555, 556 [25: 961], it is said: "On a mandate from this court affirming a decree, the circuit court can only record our order and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established.

The result of the appeal to us was an affirmance of what had been done below. After the appeal had been taken, the power of the court below over its own decree was gone. All it could do after that was to obey our mandate when it was sent down. We affirmed its decree and ordered execution. We might have ordered a modification so as to declare that the dismissal should be without prejudice. We did not do so. The circuit court had no power after that to do what we might have done and did not do." See also *Browder v. McArthur*, 20 U. S. 7 Wheat. 58 [5: 397]; *Tyler v. Maguire*, 84 U. S. 17 Wall. 253, 284 [21: 576, 584]; *The Lady Pike*, 96 U. S. 461, 462 [24: 672]; *Stewart v. Salomon*, 97 U. S. 361 [24: 1044]; *Humphrey v. Baker*, 103 U. S. 736, 737 [26: 456]. It is obvious

that the same principle must apply where a party, instead of prosecuting a second appeal, attempts by a bill of review, or by a new bill in the nature of a bill of review, to reach errors apparent upon the face of the record. In *Southard v. Russell*, 57 U. S. 16 How. 547, 570 [14: 1052, 1053]—cited with approval in *Kingsbury v. Buckner*, 70 Ill. 514, 516—it was said: "As already stated, the decree sought to be set aside by this bill of review in the court below was entered in pursuance of the mandate of this court, on an appeal in the original suit. It is therefore the decree of this court, and not that primarily entered by the court below, that is sought to be interfered with. The better opinion is, that a bill of review will not lie at all for errors of law alleged on the face of the decree, after the judgment of the appellate court. These may be corrected by a direct application to that court, which would amend, as matter of course, any error of the kind that might have occurred in entering the decree. Nor will a bill of review lie in the case of newly-discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords, in England, and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in chancery suits."

Among the cases cited in *Southard v. Russell* was that of *Brewer v. Bowman*, 8 J. J. Marsh. 492, in which the court, after observing that the remedy by bill of review for errors apparent upon the record was analogous to that of a writ of error, said: "Hence, an affirmance in this court upon writ of error would bar a bill of review for any error which might exist in the record, but which was not assigned nor inquired into by this court. It follows that a reversal by this court, upon a writ of error (and we perceive no reason why a reversal upon an appeal should not have the same effect) with direction how to render the decree, and the rendition of the decree by the circuit court in pursuance of the mandate of this, would equally bar an attempt by bill of review to inquire into errors which lie on the record, but which were not noticed by this court. . . . The decree rendered by the circuit court conformed to the opinion of this court. All attempts, therefore, to reach any error apparent upon the face of the record, prior to the decision of this court, come too late." See also *United States v. Knight*, 66 U. S. 1 Black, 488, 489 [17: 80]; *Kimberly v. Arms*, 40 Fed. Rep. 548; Story, Eq. Pl. § 408; *Cleveland v. Quilty*, 128 Mass. 579; *McCall v. Graham*, 1 Hen. & Mun. 13; *Campbell v. Price*, 3 Munf. 228; *Campbell v. Campbell*, 22 Gratt. 674; *Jewett v. Dringer*, 31 J. N. Eq. 586, 590; *Rice v. Carey*, 4 Ga. 558, 570; *Watkins v. Lavton*, 69 Ga. 672, 675; *Ryerson v. Eldred*, 18 Mich. 490; 2 Barb. Ch. Pr. (2d Rev. ed.) 92.

It has been suggested that the rule is different in the case of infants, and that the

right of the infant *Kingsbury* to file an original bill to set aside the decree of November 18, 1861, for errors apparent on the record, was not affected by the fact that such decree was entered pursuant to the mandate of the Supreme Court of Illinois. In this view we do not concur. By the practice in chancery in Illinois, a decree against an infant is absolute in the first instance, and no day is given to show cause after he becomes of age; and instead thereof the infant *Kingsbury* had five years after reaching full age within which to prosecute an appeal from the decree of December 31, 1870, dismissing his bill in the original suit. Rev. Stat. Ill. 1845, p. 421, § 53; Rev. Stat. 1874, p. 785; *Enos v. Capps*, 15 Ill. 277; *Barnes v. Hazleton*, 50 Ill. 429, 432; *Wadhams v. Gay*, 78 Ill. 424; *Hess v. Voss*, 52 Ill. 472; *Lloyd v. Kirkwood*, 112 Ill. 837. But action in his behalf need not have been deferred for so long a time. It was competent for him during his minority, by his *prochein amy*, to carry that decree to the highest court of the State for re-examination, or file in the court rendering it an original bill to have it set aside for error apparent on the record. In *McClay v. Norris*, 9 Ill. 370, 383, the court, after observing that whatever may have been the practice elsewhere the right of an infant to prosecute a writ of error was not to be doubted in Illinois, said: "If an infant sues out a writ of error, and a decree in this court is passed against him, such decree would be conclusive as well against him as it would have been had he attained full age, both under the provisions of the statute before recited and upon the principle that he is a plaintiff in error, and, as such, concluded by the judgment or decree." And in *Kuchenbeter v. Beckert*, 41 Ill. 172, 177, it was said: "It was urged that the trial was had and the decree executed and carried into effect so long since that it should not now be disturbed. This would be unquestionably true, had the parties all been adults when the decree was rendered or had the period elapsed which bars a writ of error after the minor becomes of age. But under our practice a minor defendant to a bill is entitled to his day in court, whether it is expressly reserved by the decree or not, and he may at any time during his minority, by his next friend or guardian, file an original bill to impeach a decree against him." *Lloyd v. Malone*, 23 Ill. 43; *Lloyd v. Kirkwood*, *ubi supra*; *Richmond v. Tayleur*, 1 P. Wms. 734; Chambers on the Property of Infants, 798. [The infant, by his *prochein amy*, having prosecuted an appeal to the Supreme Court of Illinois from the original decree rendered in the suit brought by him, and having appeared by guardian *ad litem* to the appeal of Buckner and wife, is as much bound by the action of that court, in respect to mere errors of law, not involving jurisdiction, as if he had been an adult when the appeal was taken.] In *Gregory v. Molencorth*, 8 Atk. 626, Lord Hardwicke said that "it is right to follow the rule of law, where it is held an infant is as much bound by a judgment in his own action, as if of full age; and this is general, unless gross laches, or fraud and collusion ap-

pear in the *prochein amy*, then the infant might open it by a new bill." So in *Lord Brook v. Lord Hertford*, 2 P. Wms. 518, 519: "An infant, when plaintiff, is as much bound and as little privileged as one of full age." See also *Brown v. Armistead*, 6 Rand. 594; *Jame-son v. Moseley*, 4 T. B. Mon. 414; *Hanna v. Spotts*, 5 B. Mon. 362.

It results that no inquiry can be made in this case in respect to errors of law apparent on the record, that do not involve jurisdiction of the original suit brought by the plaintiff when an infant.

But it is contended that the record shows upon its face a want of jurisdiction of the person of the infant and of the subject matter at the time the decree of November 18, 1871, was rendered. In *McDermid v. Russell*, 41 Ill. 489, 491, it was decided that when notice by publication against infant nonresident defendants in chancery was nugatory and void, the appointment of guardians *ad litem* for them, based upon such publication, "was also void, for they were not in court, amenable to any of its orders." To the same effect is *Campbell v. Campbell*, 68 Ill. 463, in which the court declared the 47th section of the old Chancery Statute of Illinois (Rev. Stat. Ill. 1845, chap. 21), so far as it authorized a decree against infant defendants, without service of process on them, to be unconstitutional. In *Chambers v. Jones*, 72 Ill. 275, 278, where the appearance of an infant defendant was entered by a guardian *ad litem*, appointed by the court to defend for her, it was said: "This did not give the court jurisdiction, and hence the whole proceedings were *coram non judice*. It is very clear no title passed to Jones by his purchase under the decree. The decree and sale were absolutely null and void, and could be attacked directly or collaterally by the heirs owning the fee. The court had no jurisdiction to pronounce a decree that would affect their interests, having no jurisdiction of their persons by service of process or otherwise." Upon the authority of these cases it is insisted that, as there was no service of process, actual or constructive, upon the infant Kingsbury, in the cross-suit of Buckner and wife, he was not in court in respect to the matters of that cross-suit, and consequently the decree against him on the cross-bill was void; and that if he could not be brought into the court of original jurisdiction on the cross-bill merely by the appearance of his guardian *ad litem*, he was not before the Supreme Court of Illinois upon the appeal prosecuted in his name. The defendants insist, upon the authority of cases in this court, that no question can be raised as to the jurisdiction of the Circuit Court of Cook County to pass the decree entered in conformity with the mandate of the Supreme Court of the State. *Skellern v. May*, 10 U. S. 6 Cranch, 267 [3: 220]; *McCormick v. Sullivant*, 28 U. S. 10 Wheat. 192 [6: 800]; *Ex parte Sory*, 87 U. S. 12 Pet. 389 [9: 1108]; *Washington Bridge Co. v. Stewart*, 44 U. S. 8 How. 418 [11: 658]; *Des Moines Nav. R. Co. v. Iowa Homestead Co.* 128 U. S. 552, 557 [31: 202]. But those were not cases in which the party against whom a decree was

rendered was not before the court. They do not sustain the proposition that a decree, entered in pursuance of the mandate of an appellate court, but which is void by reason of the party not being before that court, or before the court of original jurisdiction, may not be attacked by an original bill. It is therefore necessary to inquire whether the Circuit Court of Cook County had jurisdiction of the infant Kingsbury upon the cross-bill filed by Buckner and wife.

In respect to the plaintiff's contention that he could not have been brought into court as a defendant in the cross-suit, except by summons or publication upon the cross-bill, it may be said that in *Ballance v. Underhill*, 4 Ill. 453, 461, decided in 1842, it was held that the defendant in a cross-suit must be brought into court in the same manner as he would be in any other case. But in *Fleeco v. Russell*, 18 Ill. 82, the court, referring to the provisions of the Revised Statutes of 1845 (chap. 21, §§ 24 to 30 inclusive), relating to cross-bills, said: "Under these provisions of the statute, which have been passed since the decision in the case of *Ballance v. Underhill*, 4 Ill. 453, no process is necessary to bring in the parties to the original bill; but the cross-bill is to be regarded as an adjunct or part of the original suit, and the whole together as constituting but one case." The same principle was announced in *Reed v. Kemp*, 16 Ill. 445, 448. We are not referred to any case holding this principle to be inapplicable in the case of an infant complainant in an original suit, who is a defendant in a cross-bill. He is in court, by his original bill, and process is not required upon a cross-bill against him in the same suit. See also 1 Starr & Curtis' Ann. Stat. 408, §§ 80 to 85 inclusive; Public Laws Ill. 1871-72, p. 829.

But it is said that the subject matter of the original bill was simply the claim alleged to be asserted, in hostility to the plaintiff, under the will of his father, and that Mrs. Buckner's claim that the property conveyed by the deed of May 15, 1861, was held in trust for her, could not properly be made the subject of a cross-suit; that the jurisdiction, if any, acquired over the infant by the filing of the original bill did not extend to the new matter thus introduced by the cross-bill; and that therefore he was not before the court as to such new matter, by the appearance in his behalf of a guardian *ad litem*, without previous service of process, actual or constructive. This view cannot be sustained, for it is clear that the matter in respect to which the plaintiffs in the cross-bill sought relief was embraced by the original bill. The original bill asserted ownership by appellant, subject to certain incumbrances and rights of dower, of the entire real estate standing in his father's name at the time of his death, including that which Buckner and wife conveyed by the deed of May 15, 1861. It made distinct reference to that deed as the source of his father's title to the property here in question, and therefore as the foundation of his own claim; and the relief asked was not restricted to a decree simply declaring the alleged will of 1862 to be invalid.

But a decree was sought by which his right and title to the property claimed to be held in trust for Mrs. Buckner by her brother should be confirmed and established, and all the defendants, including her, perpetually enjoined from intermeddling with it, or with its rents, issues or profits. The subject matter of the original bill, so far as she was concerned, was the title and ownership of the property conveyed by the deed of May 15, 1861. The plaintiff claimed title under that deed, and by inheritance from his father. Mrs. Buckner claimed it under the same deed, but she averred that it was a trust deed. The allegations of the cross-bill related to that property, and, in answer to the plaintiff's demand that his title to it be confirmed, she demanded that the trust created by the deed of 1861 be declared, and her ownership established as against the plaintiff. It is true that the cross-bill alleged additional facts, but its subject matter was not the less, for that reason, germane to that of the original bill. Story, Eq. Pl. §§ 889, 892; 2 Dan. Ch. Pr. 1548; *Underhill v. Van Cortlandt*, 3 Johns. Ch. 339, 355; *Hurd v. Case*, 83 Ill. 45, 49.

In *Jones v. Smith*, 14 Ill. 229, the relief sought was a decree establishing the plaintiff's title to certain real estate purchased at an execution sale under various judgments, and which had been conveyed by the judgment debtor to his daughter. The debtor defended upon the ground that the judgments were fraudulently obtained, and that of such fraud the purchaser was cognizant when they were rendered. He filed a cross-bill to have the sales set aside, and satisfaction of the judgments entered. Upon the question whether a cross-bill was proper in such a case, the court said: "A cross-bill is proper whenever the defendants, or any or either of them, have equities arising out of the subject matter of the original suit, which entitle them to affirmative relief, which they cannot obtain in that suit. No fitter case could be imagined for a cross-bill than the one which is presented by these pleadings. . . . No doubt upon his answer, he [the defendant] was at liberty to prove the facts averred, but this would only defeat Smith's [the plaintiff's] claim to relief, while the same facts if established upon a cross-bill would entitle him to have satisfaction of the judgments actually entered; without this he might be put to the necessity of proving them repeatedly." In *Lloyd v. Kirkwood*, 113 Ill. 329, 336, in which the relief sought was a decree of partition, it was said that if the defendant, as a matter of law, was entitled to have the decree upon which the plaintiffs based their right to partition set aside, on a bill for that purpose, such right was an appropriate matter for a cross-bill to an original bill filed to enforce such partition. So, in the case before us, while Mrs. Buckner might, perhaps, have defeated the plaintiff's suit by proving, under her answer, the facts set out in the cross-bill, it was competent for her, in the same suit, to obtain such affirmative relief as was appropriate under proof that her brother did not become the absolute owner of the property by the con-

veyance of 1861, but was invested with the title in trust for her. It results that it was not essential to the jurisdiction of the Circuit Court of Cook County that there should have been service of process, actual or constructive, upon the cross-bill of Buckner and wife against the infant.

The jurisdiction of that court to entertain the original suit instituted July 18, 1870, is questioned upon the ground that it was commenced without authority of the infant, and because no bond for costs was filed by the guardian *ad litem*. This position is supposed to be justified by the following provisions of the Revised Statutes of Illinois: "Suits in chancery may be commenced and prosecuted by infants, either by guardian or next friend." Rev. Stat. 1845, chap. 21, § 4, title *Chancery*. "Minors may bring suits in all cases whatever, by any person that they may select as their next friend; and the person so selected shall file bond with the clerk of the circuit court, or justice of the peace before whom the suit may be brought, acknowledging himself bound for all the costs that may accrue and legally devolve upon such minor. And after bond shall have been so filed, said suit shall progress to final judgment and execution, as in other cases." Rev. Stat. 1845, chap. 47, § 18, title *Guardian and Ward*. Surely, these provisions are not to be interpreted to mean that no suit in the name of an infant, by next friend, can be entertained, unless such next friend is selected by the infant. Such a construction is inadmissible. It would prevent a suit being brought by next friend, where the infant was so young as to be incapable of making a selection of a person to represent him. The section first above quoted is only a recognition of the general rule that "the court, in favor of infants, will permit any person to institute suits in their behalf," exercising, however, a "very large discretion on the one hand, in order to facilitate the proper exercise of the right which is given to all persons to file a bill on behalf of infants, and on the other, to prevent any abuse of that right and any wanton expense to the prejudice of infants." 1 Dan. Ch. Pr. 69, 71; *Starten v. Bartholomew*, 6 Beav. 144; *Macpherson on the Law of Infants*, 864; *Chambers on the Property of Infants*, 757. In any view, the right to bring the suit does not depend upon the execution of a bond for costs, although, according to the letter of the statute, the next friend may be required to give such a bond before the suit proceeds to final judgment and execution. It is also said that there is nothing to show that Beckwith had any authority to sue as next friend, except that in his affidavit to the original bill he states that he is the next friend of the infant. It was not necessary to the jurisdiction of the court that he should exhibit with the bill evidence of special authority to bring it as next friend. It was in the power of the court, under whose eye he acted, at any time to inquire into his fitness to represent the interests of the infant, to remove him if he was a mere intermeddler, and to allow someone else to be substituted in his place. All the circumstances show that his institution of the original suit as

next friend was with the knowledge and assent of the infant's mother and guardian. It is impossible to believe that he moved in the matter without the approval of those nearest to the infant. There is no ground to say that he proceeded without authority.

There is still another question of jurisdiction to be considered. By the Constitution of Illinois "appeals and writs of error may be taken to the supreme court held in the grand division in which the case is decided, or, by consent of the parties, to any other grand division." Ill. Const. 1870, art. 6, §§ 2, 5, 8. The County of Cook is in the Northern Grand Division, and, unless the parties consent, cases from that county, which may be taken to the supreme court, must go to the court sitting in that grand division. The record discloses the fact that upon the entry, in the Circuit Court of Cook County, of the decree of December, 1870, dismissing both the original and cross bills without prejudice, an order was made showing that the plaintiff by his next friend, Beckwith, prayed and was allowed an appeal to the supreme court, a bond, upon his part, being waived by the other parties; that the plaintiffs in the cross-bill prayed and were allowed an appeal, a bond on their part being waived; and that the parties, in open court, agreed that "such appeals may be prosecuted to and the record filed in the Central Grand Division at the next term, and that one record may be used for both appeals." Now, it is contended that the Supreme Court of the State, sitting in the Central Grand Division, could not, except by consent, entertain jurisdiction of those appeals, and that the next friend and guardian *ad litem* was incapable, in law, of giving such consent. It is undoubtedly the rule in Illinois, as elsewhere, that a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of the infant. The court, whose duty it is to protect the interests of the infant, should see to it that they are not bargained away by those assuming, or appointed, to represent him. But this rule does not prevent a guardian *ad litem* or *prochein amy* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved. There is but one Supreme Court of Illinois, although for the convenience of litigants it sits in different places in that State, and, unless the consent of parties is given, can take cognizance, when holding its session in a particular grand division, only of cases arising in such division. But it is the same court that sits in the respective divisions, and a consent by the next friend or guardian *ad litem* that a case be heard in a particular division could not possibly prejudice the substantial rights of the infant. It is true that the consent of the plaintiff's next friend and guardian *ad litem*, that the case should go to the Central Grand Division, brought it to a more speedy hearing than it would otherwise have had, if such consent had not been given. But certainly it was not to the interest of the plaintiff that the final determination of his case should be delayed. The cases cited by coun-

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sel—*Owens v. McKee*, 10 Ill. 79; *Gosforth v. Adams*, 11 Ill. 52, and *People v. Vermilion County*, 40 Ill. 125—do not establish any different principle. They decide nothing more than that, in the absence of consent, the supreme court, sitting in one grand division, cannot take cognizance of a case from another grand division.

It is further contended that the Supreme Court of Illinois could not entertain the appeal from the decree dismissing the cross-bill of Buckner and wife without an appeal bond being executed by them, and that it was not competent for Beckwith to waive the giving of such bond. In support of this position counsel cite *Chicago, P. & S. W. R. Co. v. Marcellus*, 104 Ill. 91, and *Lewis v. Shear*, 98 Ill. 121. In the first of those cases the party appealing had not filed a transcript of the record in the supreme court within the required time, nor taken any steps whatever to bring the case before the court for consideration. A motion to dismiss the appeal having been made, it was held that a mere waiver by the appellee of an appeal bond did not operate to perfect the appeal for any purpose. The court said: "There is no appeal here for us to act upon—nothing to dismiss. The case will be stricken from the docket." In the other case cited, which was an action of replevin, the question was whether the record showed the requisite amount involved to give the supreme court jurisdiction. As it did not, the appeal was dismissed, the court observing that it could not take jurisdiction of a case from the appellate court unless the record showed, in some manner, that it was one of which it could take cognizance. Neither case is an authority for the proposition that an appeal bond is essential to the jurisdiction of the Supreme Court of the State where the appeal is allowed and a transcript of the record is filed in due time. A mere failure to execute the bond within due time may be ground for dismissing an appeal, but does not deprive the court of the right to proceed to a determination of the appeal. So here, the waiver by the infant's guardian *ad litem* and next friend of a bond by Buckner and wife upon their appeal—the latter having waived an appeal bond on his part—did not affect the jurisdiction of the court. And such is the rule of practice in the Supreme Court of the United States. *Edmonson v. Bloomshire*, 74 U. S. 7 Wall. 806, 811 [19: 91]; *Richardson v. Green*, 180 U. S. 104, 114 [32: 872, 874]; *Evans v. State Nat. Bank*, 184 U. S. 880 [38: 917]. The cases cited by counsel from the latter court do not announce any different rule.

We come to consider whether the record discloses any ground for holding that the decree of November 13, 1871, was obtained by fraud, as distinguished from mere error, or by collusion with the guardian *ad litem*. In considering this question we have not overlooked the fact that there were replications in the present suit to both the plea and the answer of Buckner and wife, although the final decree below inadvertently states that no replication to the answer was filed. The general contention, in behalf of the

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plaintiff, is that the original and cross bills were not a genuine case, but were contrived, and the proceedings in the state court were conducted throughout, for the purpose of depriving an infant of his estate, without bringing attention to the real merits of his claim to the property in dispute. Of course, if the record disclosed a case of that character, the decree complained of would not constitute an obstacle in the way of giving relief to the plaintiff. What are the grounds upon which the charge of fraud and collusion is based?

It may be observed that no claim is made of newly discovered evidence, and that all the facts now relied upon to show fraud and collusion were disclosed by the record before the Supreme Court of the State, upon the first appeal, when the merits of Mrs. Buckner's claim to the property were examined. No effort has been made to prove any state of case different from that disclosed in the original and cross suit. The issue as to fraud must be determined entirely by the record of the proceedings in the state court, and by such inferences as may be justly drawn therefrom; for no evidence, apart from that record, was introduced.

It is said that the intention of the court was not specially called to the various points now made against the theory of a trust advanced in behalf of Mrs. Buckner. That fact, if established, would not necessarily show fraud or collusion. But it does not appear what points were made in argument upon the first appeal to the Supreme Court of the State. Certainly, the errors assigned by the next friend in behalf of the infant were broad enough to cover every objection now raised against the right of Mrs. Buckner to the property. Those errors were, the dismissal of the original bill, the refusal to grant the relief asked by the plaintiff and the admission of incompetent evidence against him. Under such an assignment of errors, it was competent for the *prochein amy* to contend, as one of the plaintiff's counsel insists he should have contended, that "the object of making the deed of May 15, 1861, was to leave the Buckners free to take sides in the civil war against the United States without jeopardizing this large estate in the City of Chicago;" and that a party making a deed for such a purpose was in no better position, in a court of equity, than one who makes a deed to defraud his creditors. For aught appearing in the record, this view was pressed upon the Supreme Court of the State. The absence from the opinion of that court of any reference to it does not prove that the guardian *ad litem* and next friend failed to make the point, or that he purposely avoided allusion to it. If, in considering so grave a charge as that of fraud, we should indulge in conjecture as to what controlled the mind of the state court, the inference might be fairly drawn that, as this point arose out of the evidence, it was passed without notice, because the court regarded it as not sustained by the proof, or as one that ought not to control the decision of the case.

The depositions of Simon B. Buckner and

Jane C. Kingsbury were taken in the suit brought by the infant in 1870, upon interrogatories by the plaintiffs in the cross-suit, and cross-interrogatories by Mr. Lawrence. It is contended that these persons were incompetent, by the laws of Illinois, to testify in support of the cross-bill, and that the guardian *ad litem* failed to object upon that ground to their depositions. This charge of collusion fails altogether if they were not incompetent as witnesses. By the first section of a Statute of Illinois, passed February 19, 1867, and which was in force when their depositions were taken, it was provided that "no person shall be disqualified as a witness in any civil action, suit or proceeding," except in certain specified cases, "by reason of his or her interest in the event thereof, as a party or otherwise, or by reason of his or her conviction of any crime, but such interest or conviction may be shown for the purpose of affecting the credibility of such witness." The second section provides that "no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as . . . heir . . . of any deceased person, . . . unless when called as a witness by such adverse party so suing or defending," except in certain cases that have no application here. The fifth section of the same Act provides that "no husband or wife shall, by virtue of section one of this Act, be rendered competent to testify for or against each other, . . . except in cases where the wife would, if unmarried, be plaintiff or defendant, . . . and except, also, in cases where the litigation shall be concerning the separate property of the wife; . . . in all which cases the husband and wife may testify for or against each other, in the same manner as other parties may under the provisions of this Act." Pub. Laws Ill. 1867, p. 188.

It is clear from these statutory provisions that Buckner was not incompetent, by reason of his relation of husband, to testify in support of his wife's claim to the property, because if Mrs. Buckner had been unmarried she would have been a defendant in the original suit, and the plaintiff in the cross-suit, and also because that suit concerned her separate property. In the cross-bill he joined with his wife in asking that the trust intended to be created by the deed of 1861 be enforced, and gave his assent to any decree that would place the property under her sole control and preserve it for her benefit. This was regarded by the Supreme Court of the State as a renunciation by him of even a life estate, and the decree of 1871 proceeded upon that ground. Nor was he incompetent by reason of the inhibition contained in the second section of the Act, because, although a formal party to the cross-suit, he was not directly interested in the event thereof, and was not, in the sense of the Statute, a party adverse to the heir of his deceased brother-in-law. The only party adverse to the heir, in respect to the issues made by the cross-suit, was Mrs. Buckner. She could not have tes-

tified on her own motion, or in her own behalf, unless called by the opposite party. But, looking at the policy and language of those enactments, we perceive no reason why Buckner was not competent as a witness, in support of his wife's suit, under the first section of the Act. We are also of opinion that Mrs. Kingsbury was a competent witness. She had no interest adverse either to appellant or to Mrs. Buckner. Her interest in the property was recognized by all the parties. No decree could have affected her rights. The fact that she was a party to the suit did not, of itself, disqualify her as a witness.

There are other facts in connection with the depositions of Buckner and Mrs. Kingsbury, which are relied upon to establish the charge of fraud and collusion upon the part of the guardian *ad litem*. They are these: He was not appointed guardian *ad litem* in the cross-suit until November 25, 1870, and yet he appears from the record to have assumed the position of guardian *ad litem* before that date, by assenting in writing, under date of November 22, 1870, that a *dedimus potestatem* might be sued out, on the 30th of November, to take the deposition of Buckner, thereby waiving the benefit of a notice of ten days given by the statute in such cases; and he failed to file cross-interrogatories to Buckner and Mrs. Kingsbury. These facts contain nothing of substance, when taken in connection with other circumstances. It may be that he did not, in fact, sign the above writing until after his appointment as guardian *ad litem*, and that he signed it without observing its date. Be that as it may, five days intervened between his appointment as guardian *ad litem* and the time named for suing out the commission to take Buckner's deposition. The statutory provision requiring ten days' notice for the suing out of a commission to take depositions is one for the benefit of the party against whom the depositions are to be read, and might be waived. The waiver of full notice, in respect to Buckner's deposition, was first signed by the attorney of Lawrence and wife, the latter being the mother and guardian of the infant. It was equally competent for the guardian *ad litem* or next friend to join in the waiver, unless it be assumed, as we are unwilling to do, that his fidelity is to be measured by his capacity and willingness to delay litigation, when there is nothing to be thereby accomplished. Nor are fraud and collusion to be imputed to Beckwith because he did not, after his appointment by the court, file cross-interrogatories to Buckner and Mrs. Kingsbury. Cross-interrogatories were filed by his partner in behalf of Mrs. Lawrence, and were of the most searching character. They were prefaced with formal objections, upon the ground of immateriality and incompetency, to more than twenty of the interrogatories relating to the deed of May 15, 1861, to the circumstances under which it was executed, and to the alleged trust in favor of Mrs. Buckner. And, at the hearing, objections were made to the competency of the evidence contained in the depositions for the cross-plaintiffs, but the depositions were received

subject to all legal objections upon the ground of sufficiency, competency and relevancy. There is no suggestion that the cross-interrogatories which were filed did not cover the whole ground of dispute between the parties. It would have served no good purpose for the guardian *ad litem* to repeat them on behalf of the infant, for Mrs. Buckner was bound to support her claim by proof; and without filing cross-interrogatories the infant was entitled to avail himself of every fact to his advantage brought out by the cross-interrogatories upon the part of his mother.

Another badge of fraud is supposed to be found in the fact that the decree dismissing the bill and cross-bill, without prejudice, was, in fact, rendered December 31, 1870, and yet was entered as of December 24, 1870, without objection from the guardian *ad litem*. We assume that the object of all this was to enable the parties to get the case before the supreme court at its session commencing in January, 1871, and have it there determined at an early day. There is nothing in all this to show fraud or collusion. Of course, the guardian *ad litem*, by technical objections, could have postponed the hearing of the case in that court until September, 1871; but there is no circumstance disclosed by the record tending in any degree to show that the infant would have profited by such delay.

But it is said that the failure of the guardian *ad litem* to apply for a rehearing of the original appeal is evidence of bad faith upon his part. We cannot assent to any such view of his duty. The opinion of the state court shows that the legal questions presented by the appeal were carefully considered, and there is no ground to suppose that its conclusion would have been modified if a rehearing had been granted. Be this as it may, we cannot agree that the mere failure of the guardian *ad litem* and next friend to apply for a rehearing raised any presumption of infidelity to his trust.

Some stress is laid upon the fact that Beckwith met this suit by demurrers to the bill, and did not file an answer. This does not show fraud or collusion. There was no need of making him a defendant. No relief was prayed against him. He was neither a necessary nor proper party to the relief asked. If he preferred to terminate the suit as to himself by a demurrer, it was his privilege to pursue that course.

In respect to the charge that the case was presented to the Supreme Court of the State upon a falsified or changed record, it is only necessary to say that there is no foundation for it in the record before us.

Without noticing other matters discussed by counsel, which we do not deem of importance, we are of opinion that the plaintiff has failed to show that the decree of November 13, 1871, or any decree subsequent to that date, was, in any degree, the result of fraud or collusion.

The decree is affirmed.

Mr. Chief Justice Fuller took no part in the consideration or decision of this case.

EZEKIEL GILES ET AL., *Plffs. in Err.*,

v.

SAMUEL W. LITTLE ET AL.

(See S. C. Reporter's ed. 645-650.)

Construction of a will—disregard by state court of opinion of this court—federal question—review of state judgments.

1. The question of the true construction of a will depends wholly upon general rules of law and upon the local statutes, and in no degree upon the Constitution, laws or treaties of the United States.
2. The disregard by the state court of the opinion of this court, upon the question in a former suit, does not give this court jurisdiction to review the judgment of the state court in this case.
3. If the state court had refused to give due effect to a final judgment of any court of the United States in a case between the same parties, a federal question would have been presented, which might have been brought to this court for review.
4. In order to give this court jurisdiction to review a judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be one of the plaintiff in error, and not of a third person only.

[No. 1884.]

Argued March 17, 1890. Decided April 7, 1890.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment affirming a judgment of the District Court for Lancaster County in that State in an action for the construction of a will and to cancel certain deeds and to quiet plaintiffs' title. *Dismissed.*

This case was removed into the circuit court of the United States, which entered a decree for the defendants. On appeal to this court, that decree was reversed and the case ordered to be remanded to the state court. 118 U. S. 596 [30: 269].

Statement by Mr. Justice Gray:

This was a petition to quiet title, filed January 27, 1883, in the District Court for Lancaster County in the State of Nebraska, by Little and more than seventy others against Giles, Burr and Wheeler, and the children of Jacob Dawson.

The petition alleged that Jacob Dawson on June 15, 1869, being seized of certain described real estate in that county, made his last will as follows:

"After all my lawful debts are paid and discharged, the residue of my real and personal property I bequeath and dispose of as follows, to wit: To my beloved wife, Edith J. Dawson, I give and bequeath all my real estate and personal of which I may die seized, the same to remain and to be hers, with full power, right and authority to dispose of same as to her shall seem meet and proper, so long as she remains my widow, upon the express condition that if she shall marry again then it is my will that all of the estate here bequeathed, or whatever may

remain, shall go to my surviving children, share and share alike; and in case any of my children shall have deceased, leaving issue, then the issue so left shall receive the share to which said child would be entitled. I likewise constitute and appoint my said wife, Edith J., to be executrix of my last will and testament."

The petition further alleged that Jacob Dawson died a week afterwards, and his will was duly admitted to probate, and letters testamentary were issued to Mrs. Dawson; that in order to pay his debts and maintain herself and children, and to make advances to the oldest son, she was obliged to sell a large portion of the real estate, and accordingly, under the power conferred on her by the will, executed warranty deeds thereof, under which the plaintiffs severally became seized of certain lots described; that on November 15, 1879, she married again; that the defendants conspired together to cloud the plaintiffs' title and to extort money from them, and, in pursuance of the conspiracy, procured deeds of the whole land to be executed by Dawson's children to Burr and Wheeler, and by them to Giles, a citizen of Iowa, for nominal considerations, and to enable suits to be brought in the courts of the United States; and pretended that Mrs. Dawson took by the will an estate for life only, terminable by her marriage; and commenced vexatious suits, and threatened to commence others, against the plaintiffs.

The petition prayed for an injunction, a canceling of the deeds to Burr and Wheeler and to Giles, a decree quieting the plaintiffs' title and establishing it against all the defendants, and for further relief.

Burr and Wheeler and some of Dawson's children disclaimed all interest in the property; the other children and Giles filed an answer, denying the allegations of the petition, and alleging that the title had vested in Giles; and Giles filed a petition for the removal of the case into the circuit court of the United States, upon the ground that he was a citizen of Iowa and the plaintiffs citizens of Nebraska and other States, and that the controversies between him and each of the plaintiffs were severable.

The case was thereupon removed into the circuit court of the United States; and that court denied a motion to remand it to the state court, and afterwards, upon a hearing on pleadings and proofs, entered a decree for the defendants. On appeal to this court that decree was reversed, and the case ordered to be remanded to the state court, upon the ground that the controversies between Giles and the plaintiffs were not severable, and that the deed to Giles was collusively made for the purpose of giving jurisdiction to the courts of the United States. 118 U. S. 596 [30: 269]. On February 28, 1887, pursuant to the mandate of this court, the circuit court ordered the case to be remanded to the state court.

The defendants then, by leave of that court, filed an amended and supplemental answer, alleging, among other things, the following:

First. A decision of this court on appeal in an action brought in the circuit court of

NOTE.—As to interpretation of wills; intention of testator to govern,—see note to *Pray v. Belt*, 7: 309.

the United States by Giles against Little, holding that by the terms of the will Mrs. Dawson took only an estate for life, determinable upon her marriage, and no power to convey any greater estate than she had herself.

Second. Judgments recovered in the circuit court of the United States on July 8, 1887, against some of these plaintiffs in actions of ejectment brought January 5, 1887, against them by one Miles, to whom Giles in December, 1886, had executed a warranty deed of some of the lots.

A general replication was filed, and a trial was had before the court without a jury, at which, among other things, the defendants put in evidence records of the judgments recovered by Miles against some of these plaintiffs in the circuit court of the United States; and also a record of the proceedings in the action brought in that court by Giles against Little, by which that action appeared to have been an action of ejectment brought August 28, 1880, for the lot now claimed by Little, in which the circuit court sustained a demurrer to the petition and rendered judgment for the defendant, according to the opinion of the circuit judge, reported in 2 McCrary, 871; its judgment was reversed by this court on writ of error on December 12, 1881, and the case remanded for further proceedings; and after further proceedings, the petition, on December 9, 1885, was dismissed, on motion of Giles, without prejudice to a subsequent action.

The report of that case in this court in 104 U. S. 291 [26: 745], was also offered in evidence by the defendants at the trial of the present case, and excluded.

The state court held that by the will of Jacob Dawson Mrs. Dawson took a title in fee simple so long as she should remain his widow, with full power to sell and convey the same in fee during widowhood; and entered judgment for the plaintiffs in accordance with the prayer of their petition. That judgment was affirmed by the Supreme Court of Nebraska. 25 Neb. 818.

The defendants sued out this writ of error, and assigned for error that the state courts did not give full faith and credit to the judgments recovered by Miles against some of the plaintiffs in the circuit court, and disregarded the decision of this court in 104 U. S. 291 [26: 745].

Mr. J. M. Woolworth for plaintiffs in error.

Messrs. T. M. Marquett, N. S. Harwood and **John H. Ames** for defendants in error.

Mr. Justice Gray delivered the opinion of the court:

The real question in controversy between the parties is of the extent of the estate and power which Mrs. Dawson took under the will of her husband. In *Giles v. Little*, 104 U. S. 291 [26: 745], this court held that she took only an estate for life, determinable by her marrying again, and no power to convey a greater estate than she had herself. In the case at bar, the Supreme Court of Nebraska, declining to follow that decision, and basing

its judgment largely upon the statutes of the State, held that she took an estate in fee determinable upon her marriage, with power during her widowhood at her discretion to convey in fee any part of the land, and that the devise over in case of her marrying again passed to the children only what remained unconveyed. *Little v. Giles*, 25 Neb. 818.

The question of the true construction of the will in this respect depends wholly upon general rules of law and upon the local statutes, and in no degree upon the Constitution, laws or treaties of the United States; and the disregard by the state court of the opinion of this court upon the question in a former suit does not give this court jurisdiction to review the judgment of the state court in this case. *Leather Manufacturers Bank v. Cooper*, 120 U. S. 778 [80: 816]; *San Francisco v. Scott*, 111 U. S. 768 [28: 598]; *San Francisco v. Itell*, 133 U. S. 65 [33: 570].

If the state court had refused to give due effect to a final judgment of any court of the United States in a case between the same parties, a federal question would have been presented, which might have been brought to this court for review. *Dupasseur v. Rochereau*, 88 U. S. 21 Wall. 180 [22: 588]; *Crescent City Live Stock Co. v. Butchers Union Slaughter-House Co.* 120 U. S. 141 [80: 614]. But this record presents no such state of things.

The case of *Giles v. Little*, 104 U. S. 291 [26: 745], was indeed between one of the present defendants and one of the present plaintiffs, and concerned the title to a lot of land now claimed by the latter; but the judgment of this court only reversed a judgment of the circuit court of the United States sustaining a demurrer to the petition, and remanded the case to that court for further proceedings, and (as appears by the record given in evidence at the trial of the case at bar) the petition was afterwards, and before final judgment, dismissed on the motion of the plaintiff, without prejudice to a new action; so that nothing was finally adjudged in that case, even as between the parties to it. *Bucher v. Cheahire R. Co.* 125 U. S. 555, 578, 579 [31: 795, 797].

The ground most relied on in favor of a reversal of the judgment of the state court is its refusal to give effect to the judgments obtained in the circuit court of the United States against some of the present plaintiffs by Miles, a grantee of the present defendants. It is argued that the judgments in favor of Miles conclusively showed that some of these plaintiffs had no title, and that, as all these plaintiffs claimed under one title in the present suit, the judgment below in their favor must be reversed as to all of them.

As the present defendants did not claim under Miles, and were not parties to his suits, it is difficult to see how judgments in those suits could have any effect as evidence for or against them, by way of estoppel or otherwise.

But it is certain that they neither had nor claimed any interest in the title acquired by Miles under those judgments. It is well settled that, in order to give this court jurisdiction to review a judgment of a state court

against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be one of the plaintiff in error, and not of a third person only. *Owings v. Norwood*, 9 U. S. 5 Cranch, 844 [8: 120]; *Montgomery v. Hernandez*, 25 U. S. 12 Wheat. 129, 133 [6: 575, 577]; *Henderson v. Tennessee*, 51 U. S. 10 How. 311 [18: 484]; *Hale v. Gainey*, 68 U. S. 23 How. 144, 160 [16: 264, 269]; *Long v. Converse*, 91 U. S. 105 [23: 238]. The title set up by the defendants being that of a third person, in which they have no interest, the writ of error is dismissed for want of jurisdiction.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LEAVENWORTH, Appt.,

v.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY ET AL.

(See S. C. Reporter's ed. 638-710.)

Forfeiture of consolidation of railroad companies, may be enforced by the State, but not by a private person—certified copy of agreement of consolidation, when conclusive evidence—consolidation of certain railroad companies valid—appeal, or bill of review, proper remedy for error—collusion between companies, or fraud, not shown—omission to make defense—laches.

1. Under the Missouri Act of 1870 authorizing the consolidation of two or more railroad companies, the filing with the secretary of state of a resolution accepting the provisions of the Act, passed by a majority vote of the stockholders of each consolidating company, is a matter between the State and the corporations; the State may enforce the forfeiture if the consolidation is void for failure to file such acceptance, but a private person cannot.
2. A certified copy from the secretary of state's office of the agreement for consolidation is conclusive evidence of the consummation of the consolidation in suits between the consolidated company and individuals or other corporations.
3. The consolidation of August, 1871, between the Chicago and Southwestern Railway Company and the Atchison Branch of the Chicago and Southwestern Railway Company was valid, and the corporation thus formed succeeded to the rights, property and obligations of the Chicago and Southwestern Railway Company, created by the consolidation of September, 1868, of the Chicago and Southwestern Railway Company chartered in Iowa and a company also of the same name chartered in Missouri; and it was the proper party to be sued and to represent all the interests of all the stockholders in all the corporations of which it was composed.

NOTE.—As to fraud and undue influence in avoidance of deed or will, see note to *Harding v. Handy*, 6: 429.

As to fraud or illegal consideration; how far will avoid contract,—see note to *Armstrong v. Toler*, 6: 468.

As to cancellation of a deed or a contract in equity for fraud, concealment or misrepresentation, see note to *Neblett v. Macfarland*, 23: 471.

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4. Where a court has jurisdiction of the case and of the parties and of the subject matter, for any mere error in its decision the proper remedy is by appeal, or by bill of review in the same court.

5. The facts that some of the trustees in a deed of trust or mortgage given by a railroad company were directors or stockholders in a railroad company which procured the foreclosure of the mortgage, and that one person was the president of both companies, and that a majority of the directors of both companies were the same persons, and that a majority of the stock of the mortgagor company was in the hands of the president of the other company, and that the attorney who appeared for the mortgagor company had previously been employed by the other company, and the attorneys who brought the foreclosure suit were afterwards attorneys of the latter company, and one of the attorneys of that company, in the foreclosure suit, was a director in the mortgagor company, are not sufficient, in the absence of actual fraud, to render the foreclosure void.

6. Where the proper place to have made a defense was in the foreclosure suit and ample opportunity was had there for such defense, the court in a suit afterwards brought to declare the foreclosure sale void is not bound to give effect to such defense.

7. Courts of equity do not sit to restore opportunities or renew possibilities which have been permitted to pass by the neglect, the ignorance or even the want of means of those to whom they were once presented.

[No. 251.]

Argued April 3, 1890. Decided April 14, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Missouri dismissing a suit to set aside a consolidation between railroad companies and proceedings for foreclosure of a trust deed or mortgage and also the sale as fraudulent and void. *Affirmed.*

The facts are stated in the opinion.

Messrs. D. K. Tenney, S. S. Gregory and J. M. Flower, for appellant:

The complainant stockholder is entitled to bring and maintain this suit for the relief prayed.

Cook, Stock and Stockholders, § 645; *Atwood v. Merryweather*, L. R. 5 Eq. 464, note; *Dodge v. Woolsey*, 59 U. S. 18 How. 331 (15: 401); *Hawes v. Oakland*, 104 U. S. 450 (28: 827); *Tazewell County v. Farmers L. & T. Co.* 12 Fed. Rep. 752; *Heath v. Erie R. Co.* 8 Blatchf. 406; *Lafayette Co. v. Neely*, 21 Fed. Rep. 788; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 16 (26: 961, 963).

A suit to redeem a mortgage, by a person having a right to redeem but who was not made a party to a proceeding to foreclose the same, may be brought at any time within ten years from the time that possession is taken of the mortgaged premises by the purchaser

As to the sale of goods on credit to insolvent vendee; when sale is void,—see note to *Donaldson v. Farwell*, 23: 908.

Bill of review; nature of; when may be brought; who may maintain; time within which to be brought; what it should contain. See note to *Bank of U. S. v. Ritchie*, 8: 890; also note to *Shelton v. Van Kleeck*, 27: 209.

at the foreclosure sale, or those claiming under him.

Miner v. Beekman, 50 N. Y. 337; *Hubbell v. Sibley*, 50 N. Y. 468; *Knowlton v. Walker*, 13 Wis. 265; *Waldo v. Rice*, 14 Wis. 286; *Hunter v. Hunter*, 50 Mo. 445.

Where a corporation relies upon a grant of power from the Legislature for authority to do an act, it is restricted to the mode prescribed by the statute or charter for its exercise.

Angell & A. Corp. § 111; *Farmers Loan & Trust Co. v. Carroll*, 5 Barb. 618; *Burt v. Farrar*, 24 Barb. 519; *Lyons v. Orange, A. & M. R. Co.* 32 Md. 18; *Mokelumne Hill C. & M. Co. v. Woodbury*, 14 Cal. 424; *Peninsular R. Co. v. Tharp*, 28 Mich. 506; *Manafield, C. & L. M. R. Co. v. Drinker*, 30 Mich. 125; *St. Paul Div. No. 1, S. of T., v. Brown*, 9 Minn. 165; *Rogers v. Wells*, 44 Mich. 411; *Humphreys v. Mooney*, 5 Colo. 282; *Southgate v. Atlantic & P. R. Co.* 61 Mo. 95; *State v. Garrouste*, 67 Mo. 461; *Raleigh & G. R. Co. v. Reid*, 80 U. S. 13 Wall. 270 (20: 570).

When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.

Olney v. Pearce, 1 R. I. 292, and cases cited; *Riddle v. Bedford Co.* 7 Serg. & R. 392; *Neale v. Overseers of Poor*, 5 Watts, 538.

A new suit will be sustained where the rights of innocent parties have not intervened, to set aside and annul a former judgment or decree and open the case for a new and fair hearing and for proper relief, where by some fraud, practiced directly upon the party seeking relief against the judgment or decree, or by reason of trust relations, that party has been prevented from presenting his rights or case to the court.

United States v. Throckmorton, 98 U. S. 61 (25: 93); *Pacific R. Co. v. Missouri Pac. R. Co.* 111 U. S. 505 (28: 498).

By reason of the trust relations between the Rock Island and Southwestern Companies, aside from proof of any actual fraud or damage, the foreclosure decree is no bar to the accounting and relief sought by the bill of complaint.

Davoue v. Flanning, 2 Johns. Ch. 252; *Keech v. Sandford*, 2 Eq. Cas. Abr. 741; *Ex parte Bennett*, 10 Ves. Jr. 885; *Munro v. Allaire*, 2 Calnes, Cas. 183; *Michoud v. Girod*, 45 U. S. 4 How. 508 (11: 1076); *Koehler v. Black River Falls Iron Co.* 67 U. S. 2 Black, 715 (17: 339); *Drury v. Cross*, 74 U. S. 7 Wall. 299 (19: 40); *Marsh v. Whitmore*, 88 U. S. 21 Wall. 178, 183, 184 (22: 482, 485); *Jackson v. Ludeling*, 88 U. S. 21 Wall. 616 (22: 492); *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587 (23: 329); *Wardell v. Union Pac. R. Co.* 103 U. S. 651 (26: 509); *Thomas v. Brownville, Ft. K. & P. R. Co.* 109 U. S. 522 (27: 1018); *Allen v. Gillette*, 127 U. S. 589 (32: 271); *Benson v. Heathorn*, 1 Young & C. Ch. 326; *Aberdeen R. Co. v. Blakie*, 1 Macq. H. L. Cas. 461; *Lydney Co. v. Bird*, 55 L. T. N. S. 558; *Hoyle v. Plattsburgh & M. R. Co.* 64 N. Y. 814; *Metropolitan E. R. Co. v. Manhattan E. R. Co.* 11 Daly, 367; *Parker v. Nickerson*, 112 Mass. 195; *Union Pac. R. Co. v. Credit Mobilier*, 135 Mass. 367; *Parker v. Nickerson*, 137 Mass. 487; *Davis v. Rock Creek L. F. & M. Co.* 55 Cal. 359, 86 184 U. S.

Am. Rep. 40; *Pickett v. School Dist. No. 1*, 25 Wis. 551; *Sweeney v. Wheeling Grape Sugar & Ref. Co.* 30 W. Va. 443-451; *Raleigh v. Fitzpatrick*, 43 N. J. Eq. 501-519; *Flint & P. M. R. Co. v. Devoey*, 14 Mich. 477-488; *Booth v. Robinson*, 55 Md. 419; *Hallam v. Indianola Hotel Co.* 56 Iowa, 178, 181; *Gilman O. R. Co. v. Kelly*, 77 Ill. 426; *Mitchell v. Reed*, 61 N. Y. 123; *Davis v. Hamlin*, 108 Ill. 39; *Forrer v. Forrer*, 29 Gratt. 184; *Nelson v. Hayner*, 66 Ill. 487; *Jackson v. Ludeling*, 88 U. S. 21 Wall. 616-634 (22: 492, 499); *Johnson v. Waters*, 111 U. S. 640-669 (28: 547); *Arrowsmith v. Gleason*, 129 U. S. 86 (32: 630); *Wallace v. Long Island R. Co.* 12 Hun, 460; *Pearson v. Concord R. Co.* 18 Am. & Eng. R. R. Cas. 102; *Goodin v. Cincinnati & W. Canal Co.* 18 Ohio St. 169.

A material omission of such acts as are declared to be necessary steps in the process of incorporation will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the fact of incorporation can properly be called in question.

Morawetz, Priv. Corp. § 81; *Mokelumne Hill C. & M. Co. v. Woodbury*, 14 Cal. 424; *Lord v. Essex Bldg. Assn.* 87 Md. 320; *First Nat. Bank v. Davies*, 43 Iowa, 424; *State v. Real Estate Bank*, 5 Ark. 595; *Seaboard T. Co. v. Outler*, 6 Vt. 815; *Holmes v. Gilliland*, 41 Barb. 568; *Hurt v. Salisbury*, 55 Mo. 310; *Unity Ins. Co. v. Cram*, 43 N. H. 636; *Digelow v. Gregory*, 78 Ill. 197; *Stowe v. Flagg*, 73 Ill. 397; *Pearce v. Madison & I. R. Co.* 62 U. S. 21 How. 441 (16: 184); *Douthitt v. Stinson*, 68 Mo. 268; *St. Paul Div. No. 1, S. of T., v. Brown*, 9 Minn. 165; *Rogers v. Wells*, 44 Mich. 411; *Humphreys v. Mooney*, 5 Colo. 282; *Doyle v. Misner*, 42 Mich. 332; *Peninsular R. Co. v. Tharp*, 28 Mich. 506; *Manafield, C. & L. M. R. Co. v. Drinker*, 30 Mich. 125; *Union Horse Shoe Works v. Lewis*, 1 Abb. U. S. 518.

If the Statute of Limitations would not constitute a bar if this action had been brought at law, laches will not avail in equity.

Cholmondeley v. Clinton, 2 Jac. & W. 152; *Bond v. Hopkins*, 1 Sch. & Lef. 429; *Hosenden v. Annealey*, 2 Sch. & Lef. 636-657; *Medlicott v. O'Donel*, 1 Ball & B. 164; *Rogers v. Brown*, 61 Mo. 187.

Messrs. Thos. F. Witherow and M. A. Low, for appellees:

The alleged informality in the creation of the consolidated company cannot be considered in this case.

Federal courts have no jurisdiction to inquire into or adjudicate as to the validity of the creation of a corporation under the laws of a State.

Angell & A. Corp. §§ 777, 778; *Heard v. Talbot*, 7 Gray, 115-120; *Commonwealth v. Union Ins. Co.* 5 Mass. 230; *Atty-Gen. v. Tudor Ice Co.* 104 Mass. 239; *Dimpfel v. Ohio & M. R. Co.* 9 Biss. 127 affirmed 110 U. S. 209 (28: 121); *Taylor v. Alabama R. Co.* 13 Fed. Rep. 154; *Clearwater v. Meredith*, 68 U. S. 1 Wall. 25 (17: 604); *Williamson v. Kokomo Bldg. & L. F. Assn.* 39 Ind. 339; *State v. Woodward*, 89 Ind. 110; *Osborn v. People*, 103 Ill. 224; *St. Louis Gas Light Co. v. St. Louis*, 11 Mo. App. 56; *Smith v. Clark Coun-*

ty, 54 Mo. 58-81; *Central A. & M. Assn. v. Alabama Gold L. Ins. Co.* 70 Ala. 120.

No court, state or federal, will, in a collateral proceeding, inquire into the validity of the proceedings by which a *de facto* corporation was created.

Methodist E. U. Church v. Pickett, 19 N. Y. 482; *Williamson v. Kokomo Bldg. & L. F. Assn.* 89 Ind. 289; *Hackensack Water Co. v. DeKay*, 86 N. J. Eq. 548; *St. Louis v. Shields*, 62 Mo. 247; *Briggs v. Cape Cod Ship Canal Co.* 137 Mass. 72; *Smith v. Sheeley*, 79 U. S. 12 Wall. 858, 861 (20: 480); *Thompson v. Candor*, 60 Ill. 247; *Rice v. Rock Island & A. R. Co.* 21 Ill. 95; *Com. v. Union Fire Ins. Co.* 5 Mass. 280; *Boston Glass Mfg. Co. v. Langdon*, 24 Pick. 49; *Folger v. Columbian Ins. Co.* 99 Mass. 267, 274; *Rice v. Commonwealth Nat. Bank*, 126 Mass. 300; *Baker v. Backus*, 83 Ill. 111; *Land v. Coffman*, 50 Mo. 248; *Martindale v. Kansas City, St. J. & C. B. R. Co.* 60 Mo. 510; *Turbell v. Page*, 24 Ill. 47.

A court of chancery has no jurisdiction to determine the regularity of the creation of a corporation which exists *de facto*. Of that question the courts of law have exclusive jurisdiction.

Rea v. Carmarthen, 2 Burr. 869; *National Docks R. Co. v. Central R. Co.* 82 N. J. Eq. 755; *State v. Merchants Ins. & Trust Co.* 8 Humph. 235, 252; *Atty-Gen. v. Utica Ins. Co.* 15 Johns. 858; *Neall v. Hill*, 16 Cal. 150; *Gaylord v. Fort Wayne, M. & C. R. Co.* 6 Biss. 286; *Re N. Y. Elevated R. Co.* 70 N. Y. 326; *Kinealy v. St. Louis, K. & N. R. Co.* 69 Mo. 658; *Atchison, T. & S. F. R. Co. v. Wilson*, 85 Kan. 175; *Terhune v. Midland R. Co.* 88 N. J. Eq. 423; *Flumers & Millers Bank v. Detroit & M. R. Co.* 17 Wis. 373, 378; *Rea v. Pasmore*, 8 T. R. 199.

If the court has no jurisdiction to inquire into the regularity of the proceedings by which the consolidation was made the complainant's bill must be regarded as a bill of review.

This suit was not brought in the forum in which the original decree was involved. Some parties to the decree are not parties to the bill; it makes no allegations of specific frauds, and contains no explanations of the delay which preceded its filing.

Whiting v. Bank of U. S. 88 U. S. 13 Pet. 12 (10: 35); *Bank of U. S. v. White*, 88 U. S. 8 Pet. 267 (8: 940); *Vanmeter v. Vanmeter*, 8 Gratt. 148; *Davous v. Fanning*, 4 Johns. Ch. 202; *Story*, Eq. Pl. § 426, and *note*.

A court will not set aside a decree, between the original parties thereto, on the ground of fraud, unless the fraud is extrinsic to the matter tried on the first hearing, as well as to all matters which might have been tried on such hearing.

United States v. Throckmorton, 98 U. S. 68 (25: 96); *Green v. Green*, 2 Gray, 361; *Southard v. Russell*, 57 U. S. 16 How. 570 (14: 1062).

A bill of review cannot be filed after the lapse of the term within which an appeal can be taken.

Kennedy v. Bank of Georgia, 49 U. S. 8 How. 609 (12: 1218); *Thomas v. Harvie*, 23 U. S. 10 Wheat. 150 (6: 288); *Whiting v. Bank of U. S.* 88 U. S. 13 Pet. 13 (10: 36).

The relations of the parties, without more, did not avoid the effect of the decree as a conclusive adjudication. It matters not what the relations of the parties were; if the complainant has not been injured it is not entitled to relief.

Sahlgard v. Kennedy, 1 McCrary, 291; *Barrow v. Hunton*, 99 U. S. 82 (25: 408); *Greene v. Greene*, 2 Gray, 361.

No trust or fiduciary relation existed between the Rock Island and the Southwestern Companies which disabled the first-named Company from demanding the foreclosure of the first mortgage of the last-named company, or becoming the purchaser of the mortgaged property at the foreclosure sale.

Alexander v. Williams, 14 Mo. App. 18; *Booth v. Robinson*, 55 Md. 421; *United Railway Stock Co. v. Atlantic & G. W. R. Co.* 34 Ohio St. 450; *Adams Mining Co. v. Senter*, 26 Mich. 77; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587 (28: 339); *Kitchen v. St. Louis, K. O. & N. R. Co.* 69 Mo. 224; *St. Louis v. Alexander*, 23 Mo. 488; *Omaha Hotel Co. v. Wade*, 97 U. S. 20 (24: 918).

The County of Leavenworth is barred by the Statute of Limitations and by its own laches.

Lord v. Morris, 18 Cal. 482; *Pilcher v. Flinn*, 80 Ind. 202; *Hunter v. Hunter*, 50 Mo. 445; *Norton v. Meader*, 4 Sawy. 608; *Wells v. Halpin*, 59 Mo. 92; *Arnold v. Scott*, 2 Mo. 14; *Smith v. Newby*, 18 Mo. 159; *Foley v. Jones*, 52 Mo. 64; *Wood v. Carpenter*, 101 U. S. 135, 143 (25: 807, 809); *Morgan v. Hamlet*, 118 U. S. 449 (28: 1043); *Samples v. City Bank*, 1 Woods, 528; *Leffingwell v. Warren*, 67 U. S. 2 Black, 603 (17: 262); *Kennedy v. Green*, 3 Myl. & K. 719; *Culver v. Third Nat. Bank*, 64 Ill. 528; *Dove v. Naper*, 91 Ill. 46; *Martin v. Smith*, 1 Dill. 98; *Reisse v. Olarenback*, 61 Mo. 310; *Smith v. Clay*, Amb. 645; *Badger v. Badger*, 69 U. S. 2 Wall. 87 (17: 836); *Marsh v. Whitmore*, 88 U. S. 21 Wall. 178 (22: 483); *Harwood v. Cincinnati & C. A. R. Co.* 84 U. S. 17 Wall. 79 (21: 558).

When the property is subject to contingencies, or is speculative in its nature, more prompt action is required.

Hayward v. Eliot Nat. Bank, 96 U. S. 611, 617 (24: 855, 858); 2 Story, Eq. Jur. § 1520; *May v. Memphis B. R. Co.* 48 Ga. 114; *Kerr*, Fraud and Mistake (Bump's ed.) 302; *Bliss v. Pritchard*, 67 Mo. 181, 187; *Landrum v. Union Bank*, 63 Mo. 56; *Harwood v. Cincinnati & C. A. R. Co.* 84 U. S. 17 Wall. 80 (21: 558); *Gregory v. Patchett*, 33 Beav. 595; *Chapman v. Mad River L. E. R. Co.* 6 Ohio St. 119; *Zabriskie v. Cleveland, C. & C. R. Co.* 64 U. S. 23 How. 397 (16: 497); *Watt's App.* 78 Pa. 370; *Eaken v. St. Louis, K. C. & N. R. Co.* 3 Cent. L. J. 655; *Kent v. Quicksilver Min. Co.* 78 N. Y. 159; *Peabody v. Flint*, 6 Allen, 52; *Pacific Twp. v. Seifert*, 79 Mo. 210; *Graham v. Birkenhead, L. & C. J. R. Co.* 2 Macn. & G. 146; *Great Western R. Co. v. Oxford, W. & W. R. Co.* 3 DeG. M. & G. 344.

No excuse is shown for the long delay in bringing this suit. The reason therefor should be specifically pleaded.

Marsh v. Whitmore, 88 U. S. 21 Wall. 184 (22: 485); *Badger v. Badger*, 69 U. S. 2 Wall. 95 (17: 838); *McQuiddy v. Ware*, 87 U. S. 20

Wall. 19 (22: 312); *Harwood v. Cincinnati & C. A. R. Co.* 84 U. S. 17 Wall. 81 (21: 558); *Lansdale v. Smith*, 106 U. S. 891 (27: 219); *Bliss v. Pritchard*, 67 Mo. 181; *New Albany v. Burke*, 78 U. S. 11 Wall. 96 (20: 155); *Wood v. Carpenter*, 101 U. S. 148 (25: 809); *Case of Broderick's Will*, 88 U. S. 21 Wall. 508 (23: 599).

Mr. Justice Blatchford delivered the opinion of the court:

The bill in this case was filed in the Circuit Court of the United States for the Western District of Missouri, on the 25th of September, 1883, by The Board of County Commissioners of the County of Leavenworth, a municipal corporation of the State of Kansas, on behalf of itself and of all other stockholders of The Chicago and Southwestern Railway Company, chartered in Missouri, against The Chicago, Rock Island and Pacific Railway Company, an Illinois corporation, The Chicago and Southwestern Railway Company in Iowa, The Chicago and Southwestern Railway Company (consolidated), The Iowa Southern and Missouri Northern Railroad Company, the last-named three companies being Iowa corporations, The Chicago and Southwestern Railway Company, a Missouri corporation, David Dows and Frederick S. Winston, citizens of New York, and Calvin F. Burnes, a citizen of Missouri. The plaintiff sues as the owner of \$800,000 out of \$8,000,000 of the capital stock of The Platte City and Fort Des Moines Railroad Company, a Missouri corporation, which stock it originally subscribed for and paid for at par. The circuit court, held by *Mr. Justice Miller*, on a final hearing on pleadings and proofs, dismissed the bill (25 Fed. Rep. 219), and the plaintiff has appealed.

The following are the material facts of the case, in the view we take of it, substantially as they are set forth in the opinion of *Mr. Justice Miller*, delivered in the circuit court: The Platte City and Fort Des Moines Railroad Company was created for the purpose of constructing and operating a railroad to commence at a point on the Missouri River opposite or nearly opposite the City of Leavenworth, Kansas, and run thence northeasterly to a point on the state line between Missouri and Iowa in the direction of Fort Des Moines. The name of the company was afterwards lawfully changed to the Leavenworth and Des Moines Railway Company and later to the Chicago and Southwestern Railroad Company. Such changes, however, were merely of name and without prejudice to the rights of stockholders in such original company. This company was also authorized by law to build a branch road from some point on the main line to a point on the north line of Missouri in the direction of Ottumwa, Iowa.

On the 12th of May, 1869, a corporation was duly formed under the general laws of Iowa and called the Chicago and Southwestern Railway Company in Iowa, for the purpose of building and operating a railroad from Washington, in Iowa, southwesterly, to meet the road of said Chicago and Southwestern Railway Company, chartered in Mis-

souri, at the state line between Iowa and Missouri. The capital stock of this Iowa corporation was fixed in the articles of incorporation at \$8,000,000, and it was provided in said articles "that in the event of the consolidation of this corporation with the Chicago and Southwestern Railway in Missouri, the company in which the two companies may be consolidated shall have the power to subject the said corporation to such amount of indebtedness or liability as the board of directors may deem necessary, not exceeding, however, six million of dollars."

On the 25th of September, 1869, these two companies adopted articles of consolidation and became one company under the name The Chicago and Southwestern Railway Company, for the purpose of building a railroad from some point on the Washington branch of the Chicago, Rock Island and Pacific Railroad, in the State of Iowa, to the Missouri River, in the State of Missouri, at a point on the Missouri River opposite or nearly opposite the City of Leavenworth, in the State of Kansas. In the proceedings which resulted in this act of consolidation the County of Leavenworth, as one of the stockholders in the Chicago and Southwestern Railway Company of Missouri, was represented by its duly appointed agent, who gave his assent to the consolidation.

On the 1st of October, 1869, six days after this consolidation, the new company entered into a contract with the Chicago, Rock Island and Pacific Railroad Company, whereby it agreed to issue its bonds to the amount of \$5,000,000, payable thirty years after date, bearing interest at the rate of seven per cent per annum, for which coupons were to be attached to the bonds, the whole to be secured by a mortgage on its entire line of road to the Missouri River.

In consideration that the proceeds of those bonds should be placed in the hands of the Rock Island Company, and certain advantages be secured to that Company by the contract, in the way of connection and running arrangements between the two companies and their roads, the Rock Island Company agreed to indorse those bonds, and out of the proceeds of their sale to pay the interest on all of them, until the new road was constructed and turned over to the Southwestern Company.

In pursuance of this agreement the Southwestern Company issued its bonds to the amount of \$5,000,000, and placed them in the possession of the Rock Island Company; and on the 6th of October, 1869, made and delivered to the defendants Dows, Winston and Burnes a deed of trust upon their entire line of road from the Missouri River, in Missouri, to a point on the Washington Branch of the Chicago, Rock Island and Pacific Railroad in Iowa, to secure the payment of the bonds and interest, as agreed. The Rock Island Company indorsed the bonds and sold them in open market, or paid them, with its guaranty on them, to the contractors who built the road.

On the 16th of August, 1871, articles of consolidation were signed between the Chicago and Southwestern Railway Company of

the States of Missouri and Iowa and another company organized under the laws of the State of Missouri, by the name of the Atchison Branch of the Chicago and Southwestern Railway Company, which was authorized to construct a road from a point on the east bank of the Missouri River opposite the City of Atchison, in the State of Kansas, by the most practicable route, to a junction with the Chicago and Southwestern Railway. These articles of consolidation were duly filed in the office of the secretary of state of the State of Missouri according to the law of that State. The validity of that consolidation is assailed by the plaintiff on the ground that it is void by reason of a failure to conform to the laws of Missouri.

The original bill prays for the appointment of a receiver to take possession of the railroad operated by the Chicago, Rock Island and Pacific Railway Company extending from Washington in Iowa to the Missouri River, and for a decree declaring the articles of consolidation between the Chicago and Southwestern Railway Company, chartered in Missouri, and the Chicago and Southwestern Railway Company in Iowa, to be void; that those companies and the stockholders of each be remitted to their rights as existing before such attempted consolidation; that the \$5,000,000 of bonds and their coupons, and the trust deed securing them, be decreed to be void as a lien upon the road; that the trust deed be canceled by the trustees, as a cloud upon the title; that all payments of interest made on those bonds by the Rock Island Company or for such consolidated company, on any account whatever, be adjudged to have been voluntary and unauthorized; that it be declared that no right of action ever existed for the reimbursement thereof; that the proceedings for the foreclosure, hereinafter mentioned, of the trust deed, be decreed to have been and to be collusive, fictitious and fraudulent; that the decree therein, the sale thereunder, the personal judgment against the consolidated company and all other proceedings had under such decree be held to be fraudulent and void; that the organization of the Iowa Southern and Missouri Northern Railroad Company, hereinafter mentioned, the consolidation of the last-named company with the Chicago, Rock Island and Pacific Railway Company and all acts done by either in execution or confirmation thereof, be adjudged to be void; that an accounting be had between the plaintiff and the Southwestern Railway Company, chartered in Missouri, on the one part, and the other defendants charged as trustees, on the other part, as to all proceedings had by either, involving the receipt or lawful disbursement of money, in which the plaintiff or the Chicago and Southwestern Railway Company, chartered in Missouri, had or have any interest, as well as for the use and occupation of the road and franchises of the latter company; that the true balance be ascertained, and the parties from whom and to whom payable; that, if the balance should be found due to the plaintiff or to the latter company, a decree be given for its recovery against the party indebted, and, if

the balance be found against the plaintiff or that company, the plaintiff or it be decreed to pay the same, which the plaintiff offers to do; that the line of railroad running from the Missouri River, opposite or nearly opposite the City of Leavenworth, in Kansas, by way of Cameron, to the state line between Iowa and Missouri, be decreed to belong to the Chicago and Southwestern Railway Company, chartered in Missouri; that the same be delivered up to that company, free and discharged of all liens; and that that company and the plaintiff be re-established in all the rights, properties and franchises of that line of railroad; and for general relief.

The Chicago, Rock Island and Pacific Railway Company answered the bill, and Dows and Winston, trustees, also answered it, those answers being filed on the 5th of March, 1888. On the 30th of March, 1888, the plaintiff filed exceptions to the first answer, and on the 2d of April, 1888, exceptions to the second answer. These exceptions were heard by the court, held by *Judges* McCrary and Krekel, and were overruled. The opinion of the court, delivered by *Judge* McCrary, is reported in 18 Fed. Rep. 209. The conclusion of the court was, that the articles of consolidation between the Chicago and Southwestern Railway Company in Missouri and the Iowa corporation of the same name, having been entered into on the 25th of September, 1869, and the bill not having been filed until the 25th of September, 1882, and a case of concealed fraud not being shown, the defenses of laches and of a bar under the Statute of Limitations of Missouri, set up in the answers, must be sustained.

On the 16th of February, 1884, the plaintiff filed an amended bill, with substantially the same prayers as those of the original bill.

To resume the history of the road, it was completed after several years, and the money with which this was done was mainly raised by the sale of the bonds of the Southwestern Company, indorsed by the Rock Island Company, and the Rock Island Company paid the interest on the bonds, as it had assumed to do. The possession of the road, as it became fit for use, was taken by the Rock Island Company, so that, when it was completed from one end to the other, it was in the possession and use of that Company and so remained for two or three years afterwards. The Rock Island Company says, in its answer, that it paid the interest on the bonds out of the sale of the bonds themselves, according to the contract, until the road was finished, and after that paid it out of its own money, by reason of its obligation as guarantor or indorser of the bonds. After interest had thus accrued and been paid in this latter mode to the amount of \$1,000,000, according to its statement, it made application to the trustees in the deed of trust for a foreclosure under the provisions of that deed, on account of the default of the Southwestern Company in paying such interest. The trustees accordingly brought such a suit in the Circuit Court of the United States for the District of Iowa, where a decree was rendered. A sale of the Southwestern Road was made to a corporation organized under the laws of Iowa

for its purchase. Under that sale a deed was made to that company by the Chicago and Southwestern Railway Company, by order of the court, and the deed and sale were confirmed. To that suit of foreclosure the Chicago and Southwestern Railway Company and the Chicago, Rock Island and Pacific Railway Company and others were made defendants, and the two companies appeared by counsel.

After the second consolidation, in which the Atchison branch came into the Southwestern Company, that company issued bonds to raise money for the construction of this Atchison branch, and a mortgage or deed of trust was made to secure the payment of those bonds, which was a first mortgage on the Atchison branch and a second mortgage on the remainder of the consolidated company's road. The trustees in that mortgage were made defendants in the foreclosure suit, and the holders of the bonds so secured were afterwards, on motion, admitted to defend for their interest in the suit.

After the sale of the road under the decree, and its purchase by the new organization, which was called the Iowa Southern and Missouri Northern Railroad Company, that company entered into a consolidation with the Chicago, Rock Island and Pacific Company, which consolidation included other roads, or pieces of roads, built under the auspices of the Rock Island Company, all of which were now consolidated under the name of the Chicago, Rock Island and Pacific Railway Company, which is the principal defendant in this suit.

This suit of the County of Leavenworth is founded on the proposition that the attempted consolidation of the Chicago and Southwestern Company with the Atchison Branch Company is utterly void, and that, as the real Southwestern Company, which issued the bonds and made the mortgage on which the foreclosure suit and sale were based, was never served with process or appeared in that suit, that decree and foreclosure sale are also void. As the real Southwestern Company, which gave this mortgage, refuses to take any steps to assert its rights, the County of Leavenworth, as one of its stockholders, comes forward, on behalf of itself and other stockholders, to do so, and prays that the decree and sale under the proceedings in the Iowa circuit court be set aside and held for naught, as well as the pretended second consolidation. Should this second consolidation be held valid, then it asks that the sale of the road under that decree, and the decree itself, be set aside and held for naught, on the ground of fraud and abuse of trust by the Rock Island Company.

The first question considered by the circuit court was, whether the consolidation with the Atchison branch was so void that no company formed by such consolidation had an existence making it capable of doing any business, and especially of being a defendant in the suit to foreclose the mortgage for \$5,000,000. The court said: "It is obvious that if this second consolidated company was not the legal owner of the Chicago and Southwestern Railroad, and was not liable

for the bonds and mortgage, then no company was before the court which foreclosed that mortgage, which had any interest in the road, or was under any obligation to defend the suit. As we have already stated that the first consolidated company was not before that court at all, nor represented in the proceedings, except as it was a part of the second consolidated company, it would therefore follow that the foreclosure proceedings are void as to the real Chicago and Southwestern Company; the sale of its road is void, and the consolidation with the Chicago and Rock Island, as transferring the ownership of that road, is ineffectual; and the real Southwestern Company, under the first consolidation, is still in existence, is the legal owner of the road and has a right to pay the overdue interest on its bonds, and to take possession of it."

The consolidation took place in Missouri under an Act of that State approved March 24, 1870 (Laws of 25th General Assembly, adjourned session, p. 89), the first section of which is as follows: "Section 1. Any two or more railroad companies in this State, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the State, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of the stockholders regularly called for the purpose, or by the approval, in writing, of the persons or parties holding and representing a majority of such stock. A certified copy of such articles of agreement, with the corporate name to be assumed by the new company, shall be filed with the secretary of state, when the consolidation shall be considered duly consummated, and a certified copy from the office of the secretary of state shall be deemed conclusive evidence thereof. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company under such corporate name as may have been adopted; *provided, however,* That the foregoing provisions of this section shall not be construed to authorize the consolidation of any railroad companies or roads, except when by such consolidation a continuous line of road is secured running in the whole or in the main in the same general direction; *and provided,* It shall not be lawful for said roads to consolidate in the whole or in part, when by so

doing it will deprive the public of the benefit of competition between said roads. And in case any such railroad companies shall consolidate or attempt to consolidate their roads contrary to the provisions of this Act, such consolidation shall be void, and any person or party aggrieved, whether stockholders or not, may bring action against them in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case and power to restrain by injunction or otherwise. And in case any railroad in this State shall hereafter intersect any such consolidated road, said road or roads shall have the right to run their freight cars without breaking bulk upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads on fair and reasonable terms, and the same may be enforced by appropriate legislation. Before any railroad companies shall consolidate their roads, under the provisions of this Act, they shall each file with the secretary of state a resolution accepting the provisions thereof, to be signed by their respective presidents and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each at a meeting of the stockholders thereof, to be called for the purpose of considering the same."

The circuit court, after quoting this section of the Statute, proceeds to say: "A certified copy of the articles of agreement under which the consolidation was effected, with the corporate name of the new company, was duly filed with the secretary of state, as this law requires. But there is no evidence in this record of the filing with the secretary of state, by each of the companies so consolidated, of a resolution accepting the provisions of the Act, passed by a majority of the stockholders, at a meeting of stockholders called for the purpose of considering the same, nor is there any evidence of such meeting of the stockholders of the companies separately, except such as may be implied from the certified copy of the articles of agreement of consolidation duly filed in the secretary's office. Is the absence of any evidence of these meetings and of the passage of the resolutions to accept the provisions of the Act by the respective companies fatal to the creation of the new consolidated company, when all other requirements of the Statute shall have been complied with? It will be observed that this is the last provision in the Statute, though the thing ordered to be done is one of the first steps required in the process. It is also a provision which may well be held to be directory, and designed to secure evidence that each of the companies intending to consolidate recognize the Statute as the sole authority for such consolidation, and their obligation to be governed by its provisions. If the other essential provisions of the Act were complied with, it does not necessarily follow that the whole proceeding would be void for a failure to comply with this direction of the Act. It is argued, however, that by the express language of the Statute it is declared that, 'in case any such

railroad companies shall consolidate or attempt to consolidate their roads contrary to the provisions of this Act, such consolidation shall be void, and any person or party aggrieved, whether stockholders or not, may bring action against them in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case and power to restrain by injunction or otherwise.' This sentence does not come after but before the provision concerning the resolution accepting the law under which consolidation is made. In the orderly succession of ideas, this concerning the accepting the provisions of the Statute was not in the mind of the draftsman when the provision making the consolidation void was penned. On the other hand, the limitation that the companies which are authorized to consolidate are only those whose roads when united 'will form in the whole or in the main one continuous line of railroad,' and that this authority 'shall not be construed to authorize the consolidation of any railroad companies or roads, except when by such consolidation a continuous line of road is secured, running in the whole or in the main in the same general direction,' and 'it shall not be lawful for said roads to consolidate in the whole or in part, when by doing so it will deprive the public of the benefit of competition between said roads,' immediately precedes the declaration that any attempt to consolidate contrary to the provisions of the Act shall be void. It is the consolidation of such roads as do not form when so consolidated one continuous line, but may be made up of parallel and competing lines, which is forbidden and declared to be void. The language of the remedy prescribed by the Statute indicates that it is for the violation of this principle that it is given. The court of the county in which the road lies or through which it passes, not that where the company has its organization or offices, shall have jurisdiction, and the remedy shall be to restrain the company by injunction or otherwise. It is the continuity or parallelism of the roads, the benefit of competition by roads between the same points, which is to be secured. And it is clear that the Legislature was not so much interested about the companies and their amalgamation into one company as they were that rival roads and competing roads should not be consolidated and brought under the same control. I doubt very much whether the Legislature intended to declare that even for a violation of this principle, much less of any of the other mere details of the mode of accomplishing this consolidation, it should be absolutely void, void *ab initio*, void anywhere and under all circumstances, but only, as the word 'void' is so often used in legislation and in written agreements, that it should be voidable; that if on investigation the roads were of that character which the Statute forbids to be consolidated, the proper court could so declare and annul and avoid the consolidation. This is the more reasonable, as the parallelism or competing character of the two roads, if it were disputed, could only be satisfactorily ascertained by a judicial investigation, and it could not be

permitted that any man who wished to do so could assume for himself that the consolidation was void and act accordingly. Without the aid of the Statute, if the Legislature or the governor or the attorney-general of the State believed the roads were not such as the law permitted to be consolidated, they could, by the institution of proper proceedings in a court of justice, have the act of consolidation annulled, if they were correct in their views. This Statute confers the right on any person aggrieved by such improper consolidation to have relief by application to the proper court, which would not otherwise exist.

"In regard to the acceptance of the provisions of the Consolidation Act to be filed with the secretary of state, this is eminently a matter between the State and the corporations whose rights are affected, and if, on a failure to file such acceptance, the consolidation is to become void, it is the privilege of the State to enforce the forfeiture or annulment, and not of every private person who shows an injustice or injury done to himself. But if this was more doubtful than it is, it appears to me that the proposition here insisted on is concluded by this language of the Act: 'A certified copy of such articles of agreement [for consolidation], with the corporate name to be assumed by the new company, shall be filed with the secretary of state, when the consolidation shall be considered duly consummated, and a certified copy from the office of the secretary of state shall be deemed conclusive evidence thereof.' This certified copy from the secretary's office is to be considered evidence of something. Let us consider what and its effect as evidence. 1. Of what is it to be a copy? Of the articles of agreement for consolidation made by the companies to be consolidated; not of all the requirements of the Statute, preliminary or otherwise. 2. What shall it prove? That thereafter the consolidation shall be considered duly consummated. There is no ambiguity in this. It shall be evidence that the consolidation has been perfected, and has resulted in the creation of a new corporation, whose name is to be found in this certified copy. 3. What is the effect of this evidence? The Statute says it shall be conclusive. It is not necessary here to hold that, in a direct proceeding on the part of the State to have a declaration of the nullity of such a consolidation, no evidence can be received to impeach the validity of the original act of consolidation. It is my opinion that in such case the certified copy from the secretary's office would not be conclusive, but *prima facie*, evidence.

"But what is meant and what is reasonable is, that when a corporation so organized comes into a court of justice, either as plaintiff or defendant in a contest with individuals or other corporations in regard to any matter affecting its rights, its powers, its authority to make contracts, to sue or to be sued, the production of the paper mentioned shall end all inquiry into its existence as a corporation, with such powers as the law confers on it. It would be burdensome in the extreme, a hardship altogether unnecessary to any proper purpose, to require of a corporation doing an immense business to prove, in every contro-

versy it may have growing out of that business, that all the steps which the law directs for the consolidation proceedings have been strictly complied with. The hardship would be as great on those who sue it for violated duty of contract, or otherwise, to be required to prove in the same manner the existence of the corporation which they bring into court.

"The question of the existence of this corporation arises incidentally in this effort of the County of Leavenworth to assert the rights of another company, and, though the bill prays that the consolidation be held void, it is not the State which makes this request or institutes or controls this proceeding, nor is the proceeding itself of the character of a direct suit for the purpose of procuring such a decree, which would bind the company in any other case.

"I am of the opinion that the consolidation of August, 1871, was valid, and that this corporation thus formed succeeded to the rights, the property and the obligations of the Chicago and Southwestern Company created by the consolidation of September, 1869, and that it was the proper party to be sued and to represent all the interests of all the stockholders in all the corporations of which it was composed, including the County of Leavenworth as one of these stockholders."

We have carefully considered the views urged on the part of the appellant, in regard to the propositions thus laid down by the circuit court, and are of opinion that those propositions are sound; and it is sufficient for us to express our concurrence in them, without adding more.

The circuit court, in its opinion, next discusses the question of the validity of the proceedings in the Circuit Court of the United States for the District of Iowa, under which the road of the Southwestern Company was sold, and afterwards became a part of the new system of consolidated roads held by the Rock Island Company, and says: "The matter is much simplified by the fact that that court had jurisdiction of the case, jurisdiction of the parties plaintiff and defendant, of all the necessary parties to the relief sought and of the subject matter of the suit. For any mere error of that court in its decision on matters of law or fact, the proper remedy was by appeal, and one of the parties did as to its own interest take such appeal to the Supreme Court of the United States, which affirmed the decree. Another remedy was by bill of review asking the same court to reconsider and reverse or modify its decree on the same or on newly discovered evidence. This course has not been adopted, and it admits of very serious doubt whether any proceeding can be sustained in any other court the purpose of which is to set aside the decree of that court in the matter, of which it had jurisdiction. I know of no reason why the suit to have a decree declaring null and void the foreclosure proceedings of that court, by reason of any fraud in its procurement, whether it be legal fraud implied from the relations of the parties, or actual fraud practiced in the progress of the case, should not have been

brought in the court where these proceedings were had.

"Considering, however, the jurisdiction of this court—the Circuit Court for the Western District of Missouri—to grant some form of relief inconsistent with the binding efficacy of the decrees of the Circuit Court for the District of Iowa, let us inquire on what grounds the efficacy of those decrees is denied. Although in the more enlarged use of the word it may be said the grounds are all founded on fraud, they present in reality two distinct propositions, namely:

"(1) That such were the relations of the trustees in the mortgage to the Chicago, Rock Island and Pacific Company, at whose instance the mortgage was foreclosed, and the relations of those trustees and the governing officers of the Rock Island Company to the debtor, the Southwestern Company, and the relations of the officers of both these companies to each other and to both of these companies, that there could be no just and rightful foreclosure as between these parties, and that the action of the trustees in the mortgage deed and of the Rock Island Company, as moved by its officers, in promoting the foreclosure, was a violation of the trust reposed in all these parties, for the breach of which the whole proceeding must be held void."

By a statement in the brief of the counsel for the appellant, showing the shares of the stock and the stockholders of the Chicago and Southwestern Railway Company, as voted at the meetings of the stockholders from 1869 to 1876 inclusive, and a list of its officers and directors during the same period, the following appears:

At the first meeting of the stockholders of the consolidated company, in 1869, there were present 10,896 shares, being those held in the original constituent companies. Of these shares, Leavenworth County voted 3,000, the East Leavenworth Improvement Association 5,000, four officers and directors of the Rock Island Company 10 each, and the remaining shares were held by various individuals in small amounts. Thirteen directors were elected at that meeting, of whom five were officers or directors of the Rock Island Railroad Company, one of such five being its general solicitor.

No meeting of the stockholders was held in 1870. In 1871, at the stockholders' meeting, 67,500 shares were voted, of which 25,000 were voted by such general solicitor, and 25,000 by another person connected with the Rock Island Company. Of the directory of thirteen persons, nine were officers or directors of the Rock Island Company. Two of the five officers of the road, namely, the treasurer and transfer-agent and the general solicitor, were connected with the Rock Island Company; and of the executive committee of five, three were officers of the latter Company.

At the stockholders' meeting in 1872, 88,719 shares were voted, of which 60,983 were voted by persons connected with the Rock Island Company; and on the day after such meeting 68,247 shares of the stock of the Southwestern Company were transferred to

the president of the Rock Island Company, who was also a director of the Southwestern Company. In 1872, nine out of the thirteen directors of the Southwestern Company, including the president and the treasurer, were representatives of the Rock Island Company, as were also three out of the five members of the executive committee.

In 1873, 77,284 shares were voted, of which 68,250 were voted by persons connected with the Rock Island Company, all of the shares so voted, except 1,505, being represented by the solicitor of the Rock Island Company. Of the board of directors of the Southwestern Company during 1872, nine of the thirteen were officers or directors or employes of the Rock Island Company.

At the stockholders' meeting in 1874, 74,628 shares were voted, of which all except 504 were voted by representatives of the Rock Island Company.

At the stockholders' meeting in 1875, 75,781 shares were voted, all of which were voted by representatives of the Rock Island Company.

At the stockholders' meeting in 1876, 76,788 shares were voted, all but 505 of which were voted by the general solicitor of the Rock Island Company, as proxy. At the subsequent meetings of the stockholders, held down to 1880, 68,246 shares were voted in the interest of the Rock Island Company. It does not appear by the records that there has been any meeting of the board of directors of the Southwestern Company, or any election of officers of the company other than directors, since 1876.

This state of things is summed up thus in the opinion of the circuit court: "It must be admitted that the case made is a very strong one. One of the trustees of the mortgage deed was a director in the Rock Island Company; both the others were stockholders in it. The president of the Rock Island Company was president of the Southwestern Company. A majority of the directors of the Southwestern Company were directors in the Rock Island Company. There was in the hands of the president of the Rock Island Company a majority of the stock of the Southwestern Company. The attorney who appeared and represented the Southwestern Company had been previously in the employ of the Rock Island Company, and the attorneys who brought the foreclosure suit in the name of the trustees were afterwards, in many matters, attorneys for the Rock Island Company, and one of the attorneys of the Rock Island Company in the foreclosure suit was at the time a director in the Southwestern Company."

On these facts the circuit court remarks as follows: "As regards the attorneys it can hardly be admitted as an impeachment of the attorney of the defendant, the Southwestern Company, that he had been or was afterwards an attorney of the Rock Island Company, nor will it be presumed that if he was even then in the employment of the Rock Island Company in other matters he did not or would not faithfully represent the Southwestern Company in this matter; and his character repels any such inference. Nor does the

fact that the attorney of the Rock Island Company was a director in the Southwestern Company, though the interest of the two companies might conflict, preclude him from acting as attorney for the former Company, and we see no reason why the men then and afterwards attorneys for the Rock Island Company should not represent the trustees in the mortgage, as there was no conflict of interest between the trustees and the Rock Island Company. In reference to the relations of the officers of the two companies to those companies and to each other, it is quite apparent, from the consolidation of the Iowa and the Missouri companies on the 26th of September, 1869, and the contract between this consolidated company and the Rock Island on the 1st day of October, that the purpose of the Rock Island Company, or of those who had its control, was to secure and retain a paramount influence in the directory of the Chicago and Southwestern; and in point of fact it cannot be doubted that it did obtain and exercise at times such control. While it is not necessary to consider that the purpose of this contract was to injure the Southwestern Company, but in the view of all the parties it was to advance the interest of both companies, it is certainly true that the primary object in the minds of those controlling the Rock Island Company was to make the other road a subsidiary and feeding road to its own line. This purpose was not necessarily a bad one, and was or might have been consistent with the best interests of both companies. The Rock Island Company paid a valuable consideration for this control and the other company received it. It indorsed the bonds of the Southwestern Company to the amount of \$5,000,000 and agreed to protect it against a foreclosure of the mortgage given to secure the payment of these bonds during the period of construction of the road. The burden of this obligation and its importance to the success of the undeveloped enterprises of the new company cannot be easily overrated. The road could not have been built without it. The money for the construction of the track and laying it with iron came almost exclusively from the sale of these bonds, and that the money was raised on them was due, not to the credit of the Southwestern Company or to the mortgage on a road barely begun, but to the indorsement of the Rock Island Company and the credit which that indorsement gave to the bonds. This credit and assumption of liability by the Rock Island Company enabled the Southwestern Company to build its road to completion. There was nothing, therefore, fraudulent or oppressive in that Company's seeking to retain such control of the road as would enable it to realize the consideration for which it assumed this obligation of \$5,000,000. Matters were in this condition when the road was completed, but the Southwestern Company had no means of equipping its road with rolling stock and meeting other necessary outlays. The Rock Island Company furnished this, and used the road under an arrangement for lease, never, perhaps, fully consummated. But at the end of two or three years, in which it

kept an account of receipts and expenditures, it was found that the Southwestern Company was indebted over a million of dollars for repairs and construction of the road, and had defaulted in payment of the interest on its bonds to an amount nearly equal, the coupons for which had been paid by the Rock Island Company as indorser, and were held by it. That Company determined then to assert the right which its contract gave to have the mortgage foreclosed to satisfy the interest which it had paid on the bonds it had indorsed. Unless there was some injustice in the manner in which it had managed the road or kept its accounts, I see no defect in its right to insist on the foreclosure. If the Rock Island Company had a right to insist on this foreclosure, it was the duty of the trustees in the deed of trust to bring the suit for that purpose. I am unable to see anything in the fact that some of the same men were found to be trustees in this deed and directors in the Rock Island Company, and that directors in the Southwestern Company were also directors in the Rock Island Company, which should block the course of justice, paralyze the power of the court and deprive the creditor corporation of all remedy for the enforcement of its lien. If it could be shown that the Southwestern Company did not owe this interest, or that the Rock Island Company had in its hands the means of the Southwestern Company to meet this obligation, and that by reason of collusion between those who controlled both companies this fact was suppressed or concealed, it would present a strong case for relief. But this would be actual fraud, and one not necessarily growing out of the influence of the Rock Island directory over that of the Southwestern. Notwithstanding this commingling of officers, the corporations were distinct corporations. They had a right to make contracts with each other in their corporate capacities, and they could sue and be sued by each other in regard to these contracts; and the question is not, Could they do these things? but, Have the relations of the parties—the trust relations, if indeed such existed—been abused to the serious injury of the Southwestern Company? In regard to the legal right of the Rock Island Company to have the mortgage foreclosed in satisfaction of the sum paid by it for interest after the completion of the road, it seems to me there can be no reasonable doubt."

The counsel for the appellant, in his brief, after urging the propositions that the plaintiff is entitled to bring and maintain this suit for the relief prayed, contends that, by reason of the trust relations existing between the Rock Island and the Southwestern Companies, quite aside from any proof of actual fraud or damage, the decree of foreclosure is no bar to the accounting and relief sought by the bill in this case. To support this proposition the cases are cited of *Davoue v. Fanning*, 2 Johns. Ch. 252; *Michoud v. Girod*, 45 U. S. 4 How. 503 [11: 1076]; *Koehler v. Black River Falls Iron Co.* 67 U. S. 2 Black, 715 [17: 339]; *Drury v. Cross*, 74 U. S. 7 Wall. 299 [19: 40]; *Marsh v. Whitmore*, 88 U. S. 21 Wall. 178, 188, 184 [22: 482, 485]; *Jackson v. Ludeling*, 88 U. S. 21 Wall. 616 [22:

492]; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587 [23: 329]; *Wardell v. Union Pac. R. Co.*, 108 U. S. 651 [26: 509]; *Thomas v. Brownsville, Ft. K. & P. R. Co.*, 109 U. S. 522 [27: 1018]; *Allen v. Gillette*, 127 U. S. 589 [32: 271]; *Benson v. Heathorn*, 1 Younge & C. Ch. 326; *Aberdeen R. Co. v. Blakie*, 1 Macq. H. L. Cas. 461; *Lydney Co. v. Bird*, 55 L. T. N. S. 558; *Hoyle v. Plattsburgh & Montreal R. Co.*, 54 N. Y. 314, and other cases.

But, notwithstanding the general principle laid down in the cases cited, we concur in the views thus taken of the present case by the circuit court, and place our decision as to this branch of it on the same grounds.

The next proposition considered by the circuit court is as to whether there was any actual fraud perpetrated in the progress of the foreclosure suit, to the prejudice of the present plaintiff.

On that question, the circuit court says, in its opinion: "The principal ground of complaint under this head is, that the Rock Island Company, being in actual possession and use of the road on which the mortgage was a lien, should have used its revenue first to pay the interest and have postponed the repairs and construction to that purpose. The proper place to have made this defense was in the foreclosure suit. Though it may be said that the Southwestern Company made no such defense because it was in the control of the Rock Island Company directory, which is plausible if not sound, it is to be observed that this suit was in the court for more than a year; that it is hardly possible that the authorities of the County of Leavenworth did not know of its pendency and who were the directors in its own company, and if it had at any time appeared in that court and sought to make the defense it now sets up it would have been permitted to do so. Such defense, including also the correctness of the accounts of the Rock Island Company, was made by a Mr. Mueller, representative of the bondholders under the second mortgage made to obtain money to build the Atchison branch. On his motion he was made defendant and permitted to file a cross-bill. The claim of the Rock Island Company for the interest paid by it as indorser, its claim for expenditures in repairs and construction, and the correctness of its accounts and its appropriation of the receipts from the Southwestern Road, were all assailed by him in a cross-bill and referred to a master, before whom his counsel appeared and to whose report he excepted. This report was confirmed and became the basis of the decree as to the amount due the Rock Island Company under the mortgage, and of a personal judgment for repairs and construction. From this decree Mueller took an appeal to the Supreme Court of the United States, where the decree was affirmed. But I must add that even now, after all the proofs taken in the present case, I do not see that if the County of Leavenworth had been a party to that suit, or if the counsel for the Southwestern Company had been ever so anxious to prevent a foreclosure, what defense he could have successfully presented, or how he could have diminished the amount which the court found to

be due from that company on the mortgage. The case is one not uncommon of a road completed which in its first years did not earn enough money to pay its running expenses, its necessary repairs and the interest on its bonded debt. Such roads have often been sold out under foreclosure proceedings, and passing into other hands have become successful and profitable enterprises. The original owners see then, when it is too late, that they permitted a valuable property to pass from them which they would gladly reclaim. But courts of equity do not sit to restore opportunities or renew possibilities which have been permitted to pass by the neglect, the ignorance or even the want of means of those to whom they were once presented. It follows from these views, without reference to many other matters presented for consideration, that the plaintiff is not entitled to the relief it asks or to any relief founded on this bill. It must therefore be dismissed, and it is so ordered."

On the question thus considered the counsel for the appellant cites the cases of *United States v. Throckmorton*, 98 U. S. 61 [25: 93], and *Pacific Railroad of Mo. v. Missouri Pacific R. Co.*, 111 U. S. 505 [28: 498]. But we concur in the views of the circuit court, and are of opinion that it is not shown that the decree in the foreclosure suit was procured by fraud or collusion. It would serve no good purpose to examine in detail the testimony bearing on this subject.

These conclusions make it unnecessary to consider the defenses of the Statute of Limitations and of laches, as urged by the appellees.

The decree of the Circuit Court is affirmed.

Mr. Chief Justice Fuller and Mr. Justice Brewer did not sit in this case or take any part in its decision.

GEORGE L. RICH, *Pff. in Err.*,

v.

THE TOWN OF MENTZ.

(See S. C. Reporter's ed. 632-643.)

Town bonds in New York—sufficiency of petition—necessary averments as to taxpayers—insufficient adjudication—record must show statutory authority pursued—effect of state decisions.

1. A petition of taxpayers of a town in New York to the county judge, under chap. 907 of 1860, as amended by chap. 923 of 1871 of Laws of New York, is not sufficient to authorize the county

NOTE.—Municipal bonds as affected by change in the ruling of the highest court of a State, or by change in the Constitution. See note to *Mitchell v. Burlington*, 18: 350.

As to negotiability of railroad bonds, see note to *White v. Vermont & M. R. Co.* 18: 221.

As to suits on coupons detached from bonds, see note to *Kenosha v. Lamson*, 19: 725.

As to overdue coupons; rights of holders of; effect of, on bonds to which they are attached,—see note to *Texas v. White*, 19: 830.

As to mandamus to compel city, town or county to

judge to take jurisdiction and render an adjudication authorizing the town to issue its bonds in aid of a railroad company, which only alleges that the petitioners "are a majority of the taxpayers" and represent "a majority of the taxable property" therein.

2. The petition should state in substance, that the taxpayers petitioning were a majority of taxpayers of the town, who were taxed or assessed for property, not including those taxed for dogs or highway tax only.
3. The adjudication of the county judge was not sufficient to authorize the town to create and issue its bonds pursuant to said Laws of New York which only adjudged that the petitioners represent a majority of the taxpayers and of the taxable property of said town.
4. It was essential, in order to confer authority upon the town to create and issue its bonds, under said Laws of 1869 and 1871, that the adjudication or judgment of the county judge should declare, in substance, that the quorum of taxpayers who desired that the town should create and issue its bonds, was one exclusive of taxpayers who were assessed or taxed for dogs or highway tax only.
5. Where a majority of the taxpayers of a town are authorized by statute to incur the property of all, in aid of a railroad or other corporation, the record must show that the statutory authority has been pursued.
6. Upon questions of this character, when arising here, the decisions of the highest judicial tribunal

of a State are entitled to great and ordinarily decisive weight.

[No. 229.]

Argued March 25, 1890. Decided April 14, 1890.

IN ERROR to the Circuit Court of the United States for the Northern District of New York to review a judgment for defendant in an action against the Town of Mentz to recover interest coupons of bonds alleged to have been issued by the Town in aid of the Cayuga Northern Railroad Company upon questions certified to the court on division in opinion.

Affirmed.

Reported below, 18 Fed. Rep. 52, 19 Fed. Rep. 725.

Statement by Mr. Chief Justice Fuller:

This is an action brought by George L. Rich in the Circuit Court of the United States for the Northern District of New York, against the Town of Mentz, to recover the amount of sixty interest coupons attached to certain bonds held by him, and alleged to have been issued by the Town on July 15, 1872, in aid of the Cayuga Northern Railroad Company.

The cause was tried by the circuit and district judges, a jury being duly waived, and the court made its special findings as follows:

"I. On the 18th day of July, 1872, there

levy tax to pay bonds or interest on bonds, see note to Davenport v. U. S. 19: 704.

Recitals in negotiable bonds or securities, as evidence of the fact recited and as an estoppel. See note to Mercer County v. Hackett, 17: 543.

As to municipal bonds; reference to statute in,—see note to Ogden v. Davies County, 28: 238.

As to municipal bonds issued in aid of railroad, see note to Bernards Twp. v. Morrison, ante, p. 728.

Municipal bonds; negotiability and rights of holders.

Where the supervisor and town clerk, being named by statute as the officers to sign bonds, and the corporate authorities in issuing them decided and so certified in the bonds that the conditions prescribed by popular vote had been complied with, the town is estopped as against a bona fide holder from asserting the contrary. *Oregon v. Jennings*, 119 U. S. 74 (30: 823).

A recital in municipal bonds that they are issued "under and pursuant to law" does not estop the corporation from asserting the contrary. *Katzenberger v. Aberdeen*, 121 U. S. 172 (30: 911).

One who sues upon negotiable bonds of a township, containing no statement of the purpose for which they were issued, and no recital which can bind the town by way of estoppel, must allege and prove authority to issue them. *Hopper v. Covington*, 118 U. S. 148 (30: 190).

The rights of a holder of county bonds are fixed by laws in force at the date of issue. *U. S. v. Judges of Scotland County*, 33 Fed. Rep. 714.

Where bonds which are invalid are transferred to a bona fide purchaser who compels the municipality to pay them, a cause of action accrues to the municipality against the transferor who fraudulently procured their issue. *Farnham v. Benedict*, 9 Cent. Rep. 557, 107 N. Y. 159; *Plainview v. Winona & St. P. R. Co.* 36 Minn. 505.

An unauthorized issue of municipal railroad-aid bonds, subsequently ratified by the Legislature, will be held valid in the federal courts, although state decisions have been made to the contrary. *Dows v. Elmwood*, 34 Fed. Rep. 114.

Railroad bonds are not negotiable notes, within 184 U. S.

Mass. Pub. Stat., chap. 77, sec. 9, and are not entitled to grace. *Chaffee v. Middlesex E. Co.* 6 New Eng. Rep. 59, 148 Mass. 224.

Interest warrants payable to bearer, detached from the bonds with which issued, are not negotiable notes, within the above Statute. *Id.*

Bonds issued as a subscription to a railroad, made under a statute which is void, are void, no matter into whose hands they may come. *People v. Hamill* (Ill.) 15 West. Rep. 162; *Plainview v. Winona & St. P. R. Co.* 36 Minn. 505.

A purchaser of negotiable county bonds is not chargeable with constructive notice of a pending suit to test their validity. *Hill v. Scotland County*, 34 Fed. Rep. 208.

The invalidity of the original bonds does not invalidate town bonds issued under Laws 1880, chap. 146, to replace them. *Hills v. Peekskill Sav. Bank*, 48 Hun. 180, 11 N. Y. S. R. 597.

A purchaser from a bona fide holder of such bonds, with notice of a pending suit to test their validity, in which they were adjudged void, can recover thereon against the county. *Hill v. Scotland County*, 34 Fed. Rep. 208.

Municipal railroad bonds are not enforceable by one having knowledge of the fraudulent organization of the railroad company, and who paid no value for them. *Farnham v. Benedict*, 9 Cent. Rep. 557, 107 N. Y. 159.

The fact that no interest had ever been paid upon state bonds, and that it had run unpaid for ten years, furnishes presumptive evidence to a purchaser at auction sale that they were dishonored. *Trask v. Jacksonville, P. & M. R. Co.* 124 U. S. 515 (31: 521).

A purchaser of bonds with knowledge of their illegal issue acquires no title thereto which he can enforce as a bona fide holder. *Trask v. Jacksonville, P. & M. R. Co.* 124 U. S. 515 (31: 521).

Where bonds are held void in a suit between a purchaser and the town, the purchaser is not subrogated to the right of the railroad company to enforce collection of the appropriation voted by the town. *Etna L. Ins. Co. v. Middleport*, 124 U. S. 594 (31: 597).

was filed in the clerk's office of the County of Cayuga, N. Y., the judgment of the county judge of said county, with the petition of certain taxpayers, of which the following are copies:

"County of Cayuga, N. Y.
 "In the matter of the application }
 of the taxpayers of the Town of } Petition.
 Mentz, Cayuga County, N. Y. }
 "To the Honorable the County Judge of the
 County of Cayuga, N. Y.

"The petition of the subscribers hereto respectfully shows: That they are a majority of the taxpayers of the Town of Mentz, in the County of Cayuga, and State of New York, whose names appear upon the last preceding assessment-roll or tax-list of said Town of Mentz, as owning or representing a majority of the taxable property in the corporate limits of the said Town of Mentz; that they are such a majority of taxpayers, and are taxed or assessed for, or represent, such a majority of taxable property; that they desire that said Town shall create and issue its bonds to the amount of thirty thousand dollars (\$30,000), which said amount does not exceed twenty per centum of the whole amount of taxable property, as shown by said assessment-roll or list, and invest the same, or the proceeds thereof, in the stock of the Cayuga Northern Railroad Company, which is a railroad company in the State of New York.

"And your petitioners pray your honor to cause to be published the proper notice, to take proof of the facts set forth in this petition; and that such proceedings may be had thereon as are authorized and prescribed by the statutes of the State of New York, in such case made and provided.

"Dated April 20, A. D. 1872.

"(Signed by) A. M. Green,
 and 224 other names, and verified by
 Green on the 28th day of May, 1872.

"County of Cayuga, N. Y.
 "In the matter of the ap- }
 plication of the taxpayers } Order of County
 of the Town of Mentz, } Judge.
 Cayuga County, N. Y.

"On the petition herein bearing date the 20th day of April, A. D. 1872, and on motion of H. V. Howland, attorney for said petitioners, it is ordered that a notice be forthwith published in the Auburn Daily Advertiser, a newspaper published in the said County of Cayuga, directed to whom it may concern, and setting forth that on the 8th day of June, A. D. 1872, at 10 o'clock in the forenoon of that day, I, William E. Hughitt, county judge of the County of Cayuga, in the State of New York, will proceed to take proof of the facts set forth in said petition, as to the number of taxpayers joining in said petition, and as to the amount of taxable property represented by them; and that such proof will be taken at the grand jury room, in the court-house in the City of Auburn, in said County of Cayuga, N. Y.

"Dated this 28th day of May, in the year of our Lord 1872.

"W. E. Hughitt,

"Cayuga County Judge."

"(Indorsed: 'Filed May 28, 1872.')

"(Then follows the usual affidavit of the printers of said newspaper, showing due publication of the notice of hearing.)

"County of Cayuga.

"In the matter of the applica- }
 tion of the taxpayers of the } Judgment.
 Town of Mentz. }

"Upon the filing the petition herein and order made thereon, with a copy of the notice to take proof of the facts set forth in said petition, and the affidavit of publication of the said notice in the manner required by law, and by the order made in this proceeding as aforesaid, together with the testimony taken therein; and it appearing to the satisfaction of the court that the whole number of taxpayers in the Town of Mentz, Cayuga County and State of New York, whose names appear upon the last assessment-roll or tax-list for the year 1871, is 484, and that of this number 225 have signed the said petition, being more than one half of said taxpayers; and it further appearing that the total valuation of the taxable property of the said Town of Mentz upon the said assessment-roll or tax-list is five hundred and forty thousand six hundred and forty-five dollars, and that the valuation of the property of the petitioners as represented upon the said roll or tax-list is \$812,350, being thirty-one thousand and twenty-eight dollars in excess of one half of the total valuation of the taxable property of said Town of Mentz.

"Now on motion of H. V. Howland, attorney for said petitioners, it is adjudged, decreed and determined that the said petitioners do represent a majority of the taxpayers of said Town of Mentz as shown by the last preceding tax-list or assessment-roll, that is to say, the said tax-list or assessment-roll for the year 1871, and do represent a majority of the taxable property upon said tax-list or assessment-roll.

"And it is hereby ordered, that William A. Halsey, E. B. Somers and J. H. Wethey, three freeholders, residents and taxpayers within the corporate limits of the said Town of Mentz, be, and they hereby are, appointed commissioners for the period of five years next ensuing, and until others are appointed by a county judge of this county, or other competent authority, to cause or execute in due form of law, with all reasonable dispatch, bonds of the said Town of Mentz, of the amount of \$100 each, to the amount of thirty thousand dollars, and to issue or sell the same, or dispose of the same and invest the same or the proceeds thereof in, and to subscribe in the name of the said Town of Mentz, to the stock of "The Cayuga Northern Railroad Company" to the amount of \$30,000; and that the said commissioners and each of them shall have all the powers and be subject to the same duties and liabilities, imposed and prescribed in and by the Act of the Legislature of the State of New York entitled "An Act to Amend an Act to Authorize the Formation of Railroad Companies and to Regulate the Same," passed April 2d, 1850 (and all other Acts pertaining to that subject) "so as to Permit Municipal Corporations to Aid in the Construction of Railroads," passed

May 18, 1869, and the several Acts amendatory thereof and supplementary thereto.

"And it is further adjudged and ordered, that notice of the final determination herein as aforesaid be forthwith published in the Auburn Daily Advertiser, a newspaper published in the said County of Cayuga, once in each week for three weeks.

"Dated July 17, 1872.

"W. E. Hughitt,

"Cayuga County Judge."

"(Indorsed: 'Filed July 17, 1872.')

"(Due proofs were made of publication of the foregoing determination.)

"II. The Cayuga Northern Railroad Company was duly incorporated under the General Statutes of the State, on the 22d of April, 1872.

"III. The persons named in said adjudication of the county judge aforesaid, qualified as commissioners under the Statute and subscribed, in behalf of said Town of Mentz, for 800 shares of the capital stock of said company, of the par value of \$100 per share, and paid therefor by the issue to said company of thirty Town-of-Mentz bonds of \$1,000 each, in form as set out in the complaint, with coupons attached in the usual form, providing for the payment of interest semi-annually, January and July; principal payable July 15, 1902.

"The coupons were all in the following form:

"\$35.00.

"The Town of Mentz, County of Cayuga, will pay the bearer hereof at the Fourth National Bank of New York, in the City of New York, on the 15th day of July, 1876, the sum of thirty-five dollars, for six months' interest then due on bond No. 7.

"\$35.00. W. A. Halsey, Commissioner."

"IV. Prior to the commencement of this action the plaintiff became a purchaser of the five bonds and attached coupons which are described in the declaration in this action, from one Deming, who had theretofore purchased the same for cash, and without notice of any infirmity, the plaintiff being a resident citizen of the State of Iowa.

"V. Plaintiff produced said five bonds, with twelve coupons, each \$35, cut from each, in all sixty coupons, which with the interest to the day of trial amounted to \$2,886.25.

"VI. That no part of said railroad has ever been built; but the Town of Mentz raised the money by tax, according to said Statute, and has paid the coupons of the entire issue, which fell due January 15, 1873; the Town has never paid any other coupons, and said commissioners have retained, and now hold, the usual certificates of stock in the said railroad company, 800 shares, received by them at the time of the delivery of said bonds to the railroad company.

"VII. All the proofs were taken subject to defendant's objection, that the county judge acquired no jurisdiction under the original petition; and also that the judgment of the county judge was insufficient.

"And defendant insisted upon the aforesaid objection, and prayed for a dismissal of the complaint with costs."

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The form of the bonds, of which plaintiff held five, numbered 21, 22, 23, 24 and 25, with their coupons, was thus set out in the complaint:

"No. 21. United States of America, \$1,000.
State of New York, Town of Mentz,
County of Cayuga.

"Issued by virtue of an Act of the Legislature of the State of New York, entitled, 'An Act to Amend an Act Entitled an Act to Authorize the Formation of Railroad Corporations, and to Regulate the Same, Passed April 2, 1850, so as to Permit Municipal Corporations to Aid in the Construction of Railroads, Passed May 18, 1869.'

"This Act authorizes the Town of Mentz, in the County of Cayuga, to subscribe to the stock of 'The Cayuga Northern Railroad Co.,' and to issue town bonds in payment therefor. The whole amount of the bonds to be issued in pursuance of said Act is \$80,000.

"Know all men by these presents, that we, the undersigned commissioners under the above-entitled Acts, for the Town of Mentz, in the County of Cayuga and State of New York, upon the faith and credit and in behalf of said Town, for value received promise to pay to the bearer the sum of one thousand dollars on the 1st day of July in the year one thousand nine hundred and two (1902) at the Fourth National Bank of New York in the City of New York, with interest at seven per cent per annum, from and after the 15th day of July, 1872, payable semi-annually upon the 15th days of July and January in each year at the same place, on the presentation and surrender of the coupons for such interest hereto annexed.

"In witness whereof we have hereunto set our hands and seals and have caused the coupons hereto annexed to be signed by W. A. Halsey, one of our number, this 15th day of July in the year one thousand eight hundred and seventy-two.

"E. B. Somers, [L. s.]
"W. A. Halsey, [L. s.]
"J. H. Wethey. [L. s.]"

The judges of the court being divided in opinion as to the sufficiency of the petition, and of the adjudication and judgment of the county judge, judgment was ordered for the defendant in accordance with the opinion of the circuit judge, and the following questions, upon which the division of opinion arose, were certified to this court:

"First. Was the petition of certain taxpayers of the Town of Mentz, which was presented to the county judge of Cayuga County, in the State of New York, on the 28th day of May, 1872, and a copy of which is set forth in the finding and decision of the court, sufficient in the form and substance of its recital, to authorize the said county judge to take jurisdiction and proceed to render an adjudication pursuant to chapter 907 of the Laws of New York of 1869, as amended by chapter 925 of the Laws of New York of 1871?

"Second. Was it essential in order to confer jurisdiction upon said county judge, to adjudicate pursuant to section 2 of chapter

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907 of the Laws of 1869, as amended by section 2 of chapter 925 of the Laws of 1871, that the petition should state, among other things, in substance, that the taxpayers petitioning were a majority of taxpayers of the Town of Mentz, who were taxed or assessed for property, not including those taxed for dogs or highway tax only?

"Third. Was the adjudication of the county judge of Cayuga County, made on the 17th day of July, 1872, a copy of which is set forth in the findings and decision of the court, sufficient to authorize the defendant to create and issue its bonds pursuant to chapter 907 of the Laws of New York of 1869, as amended by chapter 925 of the Laws of New York of 1871?

"Fourth. Was it essential in order to confer authority upon the defendant to create and issue its bonds under said Laws of 1869 and 1871, that the adjudication or judgment of the county judge should declare, in substance, that the quorum of taxpayers who desired that the defendant should create and issue its bonds, was one exclusive of taxpayers who were assessed or taxed for dogs or highway tax only?"

The opinion of the circuit judge is reported in 19 Fed. Rep. 725, and of the district judge in 18 Fed. Rep. 52.

Mr. James R. Cox, for plaintiff in error: It was evidently not intended by the Legislature that the county judge's judgment should be liable to collateral attacks.

Munson v. Lyons, 12 Blatchf. 539; *Lyons v. Munson*, 99 U. S. 684 (25: 451); *Syracuse Sav. Bank v. Seneca Falls*, 86 N. Y. 321.

In the original Act of 1869, the word "such" clearly refers to the last tax-list and representation of property, and cannot be made to refer to any class of non-taxpayers.

Stephenson v. Short, 93 N. Y. 439; *People v. Port Jervis*, 1 Cent. Rep. 506, 100 N. Y. 284; *Tingus v. Port Chester*, 2 Cent. Rep. 163, 101 N. Y. 299; *Hills v. Peekskill Sav. Bank*, 2 Cent. Rep. 463, 101 N. Y. 491; *Mentz v. Cook*, 11 Cent. Rep. 319, 108 N. Y. 509; *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 181.

The office of the petition is merely to authorize inquiry into the facts.

Craig v. Andes, 93 N. Y. 421.

After judgment, when attacked collaterally, and where it is obvious that the proofs taken must have covered the alleged defect, no court ever holds the judgment bad.

Thayer v. Marsh, 75 N. Y. 342; 1 Greenl. Ev. § 584, and cases cited; *Sheldon v. Wright*, 5 N. Y. 497; *Betts v. Bagley*, 12 Pick. 582; *Taylor v. Williams*, 20 Johns. 21; *Cunningham v. Bucklin*, 8 Cow. 187; *Orleans v. Platt*, 99 U. S. 676 (25: 404); *Lyons v. Munson*, 99 U. S. 684 (25: 451); *Meteger v. Attica & A. R. Co.* 79 N. Y. 171; *Coudrey v. Canadea*, 16 Fed. Rep. 532.

The New York Court of Appeals gives a very different construction to such a statute.

People v. Port Jervis, 1 Cent. Rep. 506, 100 N. Y. 284; *Tingus v. Port Chester*, 2 Cent. Rep. 163, 101 N. Y. 298; *Douglass v. Pike County*, 101 U. S. 688 (25: 972).

Mr. F. D. Wright, for defendant in error:

The petition was insufficient to confer jurisdiction on the county judge.

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People v. Smith, 55 N. Y. 135; *People v. Spencer*, 55 N. Y. 1; *Wellsborough v. New York & C. E. Co.* 76 N. Y. 132; *Meteger v. Attica & A. R. Co.* 79 N. Y. 172; *Wilson v. Canadea*, 15 Hun, 218; *Mentz v. Cook*, 11 Cent. Rep. 319, 108 N. Y. 504; *Cagwin v. Hancock*, 84 N. Y. 532; *People v. Hulburt*, 46 N. Y. 110, 113.

The petition must set forth that the petitioners are a majority of that class who alone are competent to petition.

Wilson v. Canadea, 15 Hun, 218.

Where bonds recite that they are issued under a certain Act, they cannot be supported as issued under a different Act.

Gilson v. Dayton, 123 U. S. 59 (31: 74).

A recital in municipal bonds does not extend to matters of law.

Lake County v. Graham, 180 U. S. 674 (32: 1065).

Mr. Chief Justice Fuller delivered the opinion of the court:

Where a majority of the taxpayers of a town are authorized by statute to incur the property of all, in aid of a railroad or other corporation, the record must show that the statutory authority has been pursued. *Coudrey v. Canadea*, 16 Fed. Rep. 532, and cases cited.

Section 1 of chapter 907 of the Laws of New York of 1869 (Laws 1869, vol. 2, p. 2303) was as follows:

"Whenever a majority of the taxpayers of any municipal corporation in this State, whose names appear upon the last preceding tax-list or assessment-roll of said corporation as owning or representing a majority of the taxable property in the corporate limits of such corporation, shall make application to the county judge of the county in which such corporation is situated, by petition verified by one of the petitioners, setting forth that they are such a majority of taxpayers and represent such a majority of taxable property, and that they desire that such municipal corporation shall create and issue its bonds to an amount named in such petition," etc.

That section was so amended by section one of chapter 925 of the Laws of New York of 1871 (Laws 1871, vol. 2, p. 2115) as to read:

"Whenever a majority of the taxpayers of any municipal corporation in this State who are taxed or assessed for property, not including those taxed for dogs or highway tax only, upon the last preceding assessment-roll or tax-list of said corporation, and who are assessed or taxed, or represent a majority of the taxable property, upon said last assessment-roll or tax-list, shall make application to the county judge of the county in which such municipal corporation is situated, by petition, verified by one of the petitioners, setting forth that they are such majority of taxpayers, and are taxed or assessed for or represent such majority of taxable property, and that they desire, etc., etc. . . . The words 'municipal corporation' when used in this Act shall be construed to mean any city, town or incorporated village in this State, and the word 'taxpayer' shall mean any corporation or person assessed or taxed for prop-

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erty, either individually or as agent, trustee, guardian, executor or administrator, or who shall have been intended to have been thus taxed, and shall have paid or are liable to pay the tax as hereinbefore provided, or the owner of any nonresident lands taxed as such, not including those taxed for dogs or highway tax only; and the words 'tax-list or assessment-roll' when used in this Act shall mean the tax-list or assessment-roll of said municipal corporation last completed before the first presentation of such petition to the judge."

The bonds in controversy expressly recite that they are issued under the Act of 1869, and the petition and adjudication almost literally followed the language of that Act, although section 1 of chapter 925 of the Laws of 1871 had been substituted for section 1 of chapter 907 of the Act of 1869, before the proceeding was had. The result is that the petition did not sufficiently conform to the Statute of 1871 to call for the exercise of judicial judgment on the part of the county judge, and the adjudication was equally defective. The Act of 1871 defined the class of persons who were authorized to petition, as a majority of the taxpayers "who are taxed or assessed for property, not including those taxed for dogs or highway tax only, upon the last preceding assessment-roll or tax-list of said corporation, and who are assessed or taxed, or represent a majority of the taxable property, upon said last assessment-roll or tax-list." The statement of the jurisdictional facts in the petition required the averment that the petitioners were a majority of such taxpayers as were defined in the Act. This must appear affirmatively on the face of the petition. The Act expressly provides that the petition shall set forth that the petitioners are "such majority of taxpayers, and are taxed or assessed for or represent such majority of taxable property." The word "taxpayers" would not exclude those "taxed for dogs or highway tax only," and the petition must show that the petitioners are a majority, exclusive of the latter class. And this the petition here does not do, nor does the judgment of the county judge. It is provided by the Act of 1871, as it had been by that of 1869, that it shall be the duty of the county judge, at the time and place named in the notice given as prescribed, to proceed and take proof as to the allegations in said petition, and if it shall appear satisfactorily to him that the petitioners, and such other taxpayers as may then join in the application, do represent a majority of the taxpayers and a majority of the taxable property, he shall render judgment accordingly, which, being entered of record in the office of the clerk of the county, shall have the same force and effect as other judgments in courts of record in the State, subject to review by certiorari; and it is forcibly argued that the judgment of the county judge is not open to collateral attack. But this assumes that the jurisdiction of the county judge has been properly invoked, and has no application where that is not the case. Proof as to the allegations of this petition may have been taken, but such

proof did not necessarily involve an inquiry into whether a part of the petitioning taxpayers were such because of the payment of highway taxes or taxes on dogs, and, as we have said, the judgment does not in terms show that such were not included. So that if the county judge had been charged with the ascertainment of the jurisdictional facts, the proceedings do not show that those facts were ascertained.

The fourth section of the Act of 1871 contains, among other things, this provision: "On review, persons taxed for dogs or highway tax only shall not be counted as taxpayers, unless that claim was made before the county judge." If this means, as counsel for plaintiff in error insists, that the objection when urged on review shall not prevail unless it had been taken before the county judge, it does not weaken but confirms the view that the verified petition must state that those who sign it are not taxpayers on dogs and for highways merely. The circuit judge, in his opinion in this case, correctly observes:

"It is insisted that, because the amended Act of 1871 defines the term 'taxpayer,' 'when used in this Act,' to mean such taxpayers as are not assessed for dogs or highway tax only, it is not necessary to comply with the explicit language of the Act as to the form and substance of the petition. The petition is the basis and groundwork of the whole bonding proceeding. When the amended Act was passed many of these proceedings had been set aside by the courts of this State because of defects of form in the petition; and it was the well-settled law of the state courts that any such defect was jurisdictional and rendered the whole proceeding futile. Speaking of the Act of 1869, the court of appeals said in *People v. Smith*, 45 N. Y. 772: 'The authority conferred by the Act must be exercised in strict conformity to, and by a rigid compliance with, the letter and spirit of the Statute.' The first section of the amended Act provides, in language as explicit as could be employed, that the petition, verified by one of the petitioners, shall set forth that the petitioners are a majority of taxpayers of the town who are taxed or assessed for property, 'not including those taxed for dogs or highway tax only.' It subsequently provides that the word 'taxpayer,' 'when used in this Act,' shall mean 'any corporation or person assessed or taxed for property, . . . not including those taxed for dogs or highway tax only.' Section 2 makes it the duty of the county judge 'to proceed and take proof as to the said allegations in the petition;' and if he finds that the requisite majority of taxpayers have consented, he shall so adjudge. If there were no express provision requiring it to appear in the petition that the taxpayers who apply are a majority of the designated class, the petition would doubtless be sufficient if it alleged that they were a majority of the taxpayers of the town; and, in this view, there was no need of amending the Act of 1869 in this behalf. If the argument for the plaintiff is sound this explicit provision is meaningless. It is not to be assumed that the Legis-

lature did not mean anything by the language which they so carefully employed. It is not difficult to apprehend what the Legislature meant by defining the word 'taxpayer.' It occurs several times in the Act. It was defined for convenience, in order to avoid repetition of description whenever the word was used in the Act, and in order that there should be no room for doubt what kind of a taxpayer was meant whenever the word was used."

These views are in accordance with repeated adjudications of the Court of Appeals of the State of New York in construing this Statute; and upon questions of this character, when arising as here, the decisions of the highest judicial tribunal of a State are entitled to great and ordinarily decisive weight. *Meriweather v. Muhlenburg County Court*, 120 U. S. 854, 357 [80: 653, 654]; *Claiborne County v. Brooks*, 111 U. S. 400, 410 [28: 470, 474]. In *Ments v. Cook*, 108 N. Y. 504, 509 [11 Cent. Rep. 819], the court says: "The petition was presented after the Amendment of 1871 to the Act of 1869, and was defective in not averring that the petitioners were a majority of the taxpayers of the Town of Mentz, excluding those taxed for dogs or highway tax only. The fatal character of the defect has been so adjudged in this court as to end further discussion. *People v. Smith*, 55 N. Y. 185; *Wellsborough v. New York & C. R. Co.* 76 N. Y. 182; *Metzger v. Attica & A. R. Co.* 79 N. Y. 171. Our attention has heretofore been drawn (*Hills v. Peekskill Sav. Bank*, 101 N. Y. 490 [2 Cent. Rep. 463]), to the definition of the word 'taxpayers,' given in section 1 of the Act of 1871, and to the fact that such definition and its effect had never been directly passed upon by this court. The argument advanced is that the word 'taxpayers,' as used in the Act, is declared to mean taxpayers exclusive of those taxed for dogs or highway tax only, and that it is illogical to deny to the word, when used in a petition under the Act, the meaning ascribed to it by the Act itself. The suggestion is by no means conclusive, and admits of a satisfactory answer. The definition was given to avoid useless repetition, and is confined to its use in the Act itself. The petition is required to be verified, and to show on its face the consent of the requisite majority, and is not satisfied by an ambiguous oath, true in one sense and not true in another."

As on the face of these proceedings there was an entire want of power to issue the bonds, no reference to the doctrine of estoppel need be made. We answer the first and third questions in the negative, and the second and fourth in the affirmative.

The judgment is affirmed.

UNITED STATES, *Plff.*,

JOSEPH W. LACHER.

(See S. C. Reporter's ed. 624-632.)

Ambiguity in a statute—resort to prior statute—punctuation—intent governs construction of penal statute—secs. 5467 and 3891, Rev. Stat.
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—embezzlement of letters and their contents—offenses—question on division in opinion improperly stated.

1. If there be any ambiguity in a section of the United States Revised Statutes, resort may be had to the original statute from which the section was taken, to ascertain what, if any, change of phraseology there is, and whether such change should be construed as changing the law.
2. For the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required.
3. Though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature.
4. Two classes of offenses were intended to be created by section 5467, U. S. Rev. Stat., one relating to the embezzlement of letters, etc., and the other to stealing the contents.
5. Sections 3891 and 5467, U. S. Rev. Stat., are to be considered together, and the offenses of secreting, embossing or destroying mail matter, not containing articles of value, are punishable under the one, and containing such articles under the other.
6. The embezzlement by a person employed in a department of the postal service of a letter intended to be conveyed by mail and containing an article of value, which came into the possession of such person, is made an offense against the United States by sec. 5467, U. S. Rev. Stat., and the penalty is prescribed for such embezzlement by said section.
7. A question certified in a form disapproved of by this court, will not be answered: such as the question, "Whether an offense against the United States, under sec. 5467, Rev. Stat., is charged in either the 1st or 3d count of the indictment."

[No. 654.]

Argued April 23, 1888. Reargument ordered May 14, 1888. Submitted March 28, 1890. Decided April 14, 1890.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of New York, on motions for new trials and in arrest of judgments, after a conviction of defendant, an employé in the New York Post-Office, for embezzling a letter containing an article of value, on an indictment under sec. 5467 of the Revised Statutes.

The facts are stated in the opinion.

Mr. Wm. A. Maury, Assistant Atty. Gen., for plaintiff:

If a doubt arises as to the meaning of a provision of the Revised Statutes, resort may be had to the original statute from which such provision was taken for the purpose of ascertaining that meaning, the presumption being in favor of the continuance in the Revision of the law as it stood before the Revision went into effect.

U. S. v. Bowen, 100 U. S. 508, 513 (25: 631, 632); *U. S. v. Hirsch*, 100 U. S. 33 (25: 539); *Myer v. Western Car Co.* 102 U. S. 1, 11 (26: 59, 60); *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642 (29: 755); *Cambria Iron Co. v. Ashburn*, 118 U. S. 57 (30: 61); *Deffebach v. Hauke*, 115 U. S. 402 (29: 426); *Taylor v. Delancy*, 2 Cal. Cas. 143; *Parramore v. Taylor*, 184 U. S.

11 Gratt. 220; *U. S. v. Pelletreau*, 14 Blatchf. 126.

If it be perfectly clear from the contents that the apparent grammatical construction cannot be the true one, then that which upon the whole is the true meaning shall prevail in spite of the grammatical construction of a particular part of it.

Waugh v. Middleton, 8 Exch. 352; Wilberforce, Statutes, 113, 114; Hardcastle, Statutes, 28, 29.

This court will never declare an Act of Congress unconstitutional on doubtful premises, and it has been astute to find reasons to avoid ascribing to Congress the intention to override a treaty (*Cheong Heong v. U. S.* 112 U. S. 536 (28: 770), or to put a fetter on a power lodged in the executive by the Constitution.

Blake v. U. S. 103 U. S. 227 (26: 462).

It is in a high degree disparaging to Congress to say that it had no purpose to make punishable, by section 5467, the grave offenses of secreting, embezzling and destroying letters containing articles of value. If it had no such purpose, why did it define those offenses? To suppose that Congress, while pretending to remedy such an evil, intended to pass an Act which by its own express words was to be rendered wholly ineffective under any possible circumstances, is to suppose Congress to be capable of deliberate folly, if not of fraud upon the public.

U. S. v. Stern, 5 Blatchf. 512.

The inartificial manner in which many of our statutes are framed, the inaptness of expressions frequently used, and the want of perspicuity and precision not unfrequently met with, often require the court to look less at the letter or words of the statute than at the context, the subject matter, the consequences and effects, and the reason and spirit of the law, in endeavoring to arrive at the will of the law-giver.

Stradling v. Morgan, 1 Plowd. 199; *Elyton v. Studd*, 2 Plowd. 468; *Mason v. Rogers*, 4 Litt. (Ky.) 877, and cases cited, 1 U. S. Dig. 484; *Thompson v. State*, 20 Ala. 62; *Turner v. State*, 40 Ala. 21; *Worrell v. State*, 12 Ala. 732; *Ruther v. Harris*, L. R. 1 Exch. Div. 97; *Reg. v. Hulme*, L. R. 5 Q. B. 877; *Worth v. Peck*, 7 Pa. 268; *State v. King*, 44 Mo. 283.

Where the alternative lies between either supplying words by implication or adopting a construction which deprives certain existing words of all meaning, it is usual to supply the words.

Re Wainwright, 1 Phill. Ch. 258; *Townsend v. Deacon*, 3 Exch. 706; *Garby v. Harris*, 7 Exch. 591; *Huzham v. Wheeler*, 3 Hurl. & C. 76; *Reg. v. Dowling*, 8 El. & Bl. 606.

A statute ought to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.

Reg. v. Bishop of Oxford, L. R. 4 Q. B. Div. 261; *Com. v. Alger*, 7 Cush. 89; Wilberforce, Stat. 118; *Blamford v. Blamford*, 8 Bulst. 108; *Goodall's Case*, 5 Coke, 95 b; Broom, Leg. Max. 523; Dwaris, Stat. 635.

Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the Legislature.

U. S. v. Willberger, 18 U. S. 5 Wheat. 76 (5: 124 U. S.

87); *American Fur Co. v. U. S.* 27 U. S. 2 Pet. 358 (7: 450); *U. S. v. Morris*, 39 U. S. 14 Pet. 464 (10: 543); *Randolph v. State*, 9 Tex. 523.

If words of a statute may be rejected altogether (*U. S. v. Stern*, 5 Blatchf. 512; *Silver v. Ladd*, 74 U. S. 7 Wall. 219 (19: 188); *Reiche v. Smythe*, 80 U. S. 13 Wall. 162 (20: 566); *Ruckmaboye v. Lulloobhoy Mottichund*, 8 Moore, P. C. 424), it is not going any farther to allow words to be supplied.

When the intent calls for the presence of certain omitted words, such words are virtually written.

Gwynne v. Burnell, 7 Clark & F. 607.

Almost every word in a language has many different meanings, and no one can tell what a given word in a writing signifies without a knowledge of the context in which that word occurs.

McCulloch v. Maryland, 17 U. S. 4 Wheat. 413 (4: 579); *U. S. v. Pelletreau*, 14 Blatchf. 126; *U. S. v. Jenther*, 13 Blatchf. 835; *U. S. v. Falkenhainer*, 21 Fed. Rep. 624.

U. S. v. Long, 10 Fed. Rep. 879, cannot stand against the cases referred to in support of the opposite view, to which may be added *U. S. v. Baugh*, 1 Fed. Rep. 784.

Mr. Benjamin Barker, Jr., for defendant:

No penalty is prescribed for any offense under section 5467, Rev. Stat., except for that of stealing or taking out of a letter its valuable contents by an employé in the postal service.

U. S. v. Long, 10 Fed. Rep. 879.

The etymology of the language of section 8891, Rev. Stat., sustains the defendant's position; "although" is the synonym for "notwithstanding," and is used to bring the adversative proposition into the greater prominence.

Webster's Dict.; Ogilvie's New Imperial Dict.; Soule, English Synonyms.

The language used by Congress in the sections under consideration must be deemed to be the legislative declaration of the statute law on the subjects which they embraced, and when its meaning is plain the courts cannot look to the statutes which have been revised to see if Congress erred in this revision.

U. S. v. Bowen, 100 U. S. 513 (25: 632); *Victor v. Arthur*, 104 U. S. 498 (26: 633).

The doctrine is fundamental in English and American law that there can be no constructive offenses; that before a man can be punished his case must be plainly and unmistakably within the statute, and if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused.

U. S. v. Morris, 39 U. S. 14 Pet. 464 (10: 543); *U. S. v. Willberger*, 18 U. S. 5 Wheat. 76 (5: 87); *U. S. v. Sheldon*, 15 U. S. 2 Wheat. 119 (4: 199); 1 Bishop, Crim. Law, §§ 184, 145.

Mr. Chief Justice Fuller delivered the opinion of the court:

The defendant, an employé in the post-office at New York, was found guilty of embezzling a letter containing an article of value on an indictment under section 5467 of the Revised Statutes. A hearing on motions for new trial and in arrest of judgment before the circuit judge of the Second Circuit and the

district judge, holding the court, resulted in a division of opinion upon the following questions, which were certified to this court:

"1. Whether an offense against the United States under section 5467, Revised Statutes, is charged in either the first or the third count of the indictment?"

"2. Whether the embezzlement by a person employed in a department of the postal service of a letter intended to be conveyed by mail and containing an article of value, which shall have come into the possession of such person, is made an offense against the United States by § 5467 of the Revised Statutes of the United States, and whether any penalty is prescribed for such embezzlement by said section?"

Section 5467 is as follows:

"Any person employed in any department of the postal service who shall secrete, embezzle or destroy any letter, packet, bag or mail of letters intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail carrier, mail messenger, route agent, letter-carrier or other person employed in any department of the postal service, or forwarded through or delivered from any post-office or branch post-office established by authority of the Postmaster-General, and which shall contain any note, bond, draft, check, warrant, revenue stamp, postage stamp, stamped envelope, postal card, money order, certificate of stock or other pecuniary obligation or security of the government, or of any officer or fiscal agent thereof, of any description whatever; any bank-note, bank post-bill, bill of exchange or note of assignment of stock in the funds; any letter of attorney for receiving annuities or dividends, selling stock in the funds or collecting the interest thereof; any letter of credit, note, bond, warrant, draft, bill, promissory note, covenant, contract or agreement whatsoever, for or relating to the payment of money, or the delivery of any article of value, or the performance of any act, matter or thing; any receipt, release, acquittance or discharge of or from any debt, covenant or demand, or any part thereof; any copy of the record of any judgment or decree in any court of law or chancery or any execution which may have issued thereon; any copy of any other record, or any other article of value, or writing representing the same; any such person who shall steal or take any of the things aforesaid out of any letter, packet, bag or mail of letters which shall have come into his possession, either in the regular course of his official duties or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punishable by imprisonment at hard labor for not less than one year nor more than five years."

It is argued that no indictment can be sustained under this section against a post-office employé for secreting, embezzling or destroying any letter, packet, bag or mail of letters intended to be conveyed by mail, etc.,

containing any of the articles named, or any other article of value, and that the only offense punishable under the section is that of stealing or taking any of the things aforesaid "out of any letter, packet, bag or mail of letters." As secreting, embezzling or destroying letters, etc., containing articles of value, are plainly grave offenses, and are described in the section with particularity, the intention to impose a penalty on their commission cannot reasonably be denied, and although the apparent grammatical construction might be otherwise, the true meaning, if clearly ascertained, ought to prevail. If there be any ambiguity in section 5467, inasmuch as it is a section of the Revised Statutes, which are merely a compilation of the statutes of the United States, revised, simplified, arranged and consolidated, resort may be had to the original Statute from which this section was taken, to ascertain what, if any, change of phraseology there is and whether such change should be construed as changing the law. *United States v. Bowen*, 100 U. S. 508, 518 [25: 631, 632]; *United States v. Hirsch*, 100 U. S. 33 [25: 539]; *Myer v. Western Car Co.* 102 U. S. 1, 11 [26: 59, 60]. And it is said that this is especially so where the Act authorizing the revision directs marginal references, as is the case here. 19 Stat. chap. 82, § 2, p. 268; Endlich on Int. Statutes, § 51. Accordingly, we find that this section took the place of section 279 of the Act of June 8, 1872 (17 Stat. 818), which reads as follows:

"That any person employed in any department of the postal service who shall secrete, embezzle or destroy any letter, packet, bag or mail of letters intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail-carrier, mail-messenger, route-agent, letter-carrier or other person employed in any department of the postal service, or forwarded through or delivered from any post-office or branch post-office established by authority of the Postmaster-General, and which shall contain any note, bond, draft, check, warrant, revenue-stamp, postage-stamp, stamped envelope, postal card, money-order, certificate of stock or other pecuniary obligation or security of the government, or of any officer or fiscal agent thereof, of any description whatever; any bank-note, bank post-bill, bill of exchange or note of assignment of stock in the funds; any letter of attorney for receiving annuities or dividends, selling stock in the funds or collecting the interest thereof; any letter of credit, note, bond, warrant, draft, bill, promissory note, covenant, contract or agreement, whatsoever, for or relating to the payment of money, or the delivery of any article of value, or the performance of any act, matter or thing; any receipt, release, acquittance or discharge of or from any debt, covenant or demand, or any part thereof; any copy of the record of any judgment or decree in any court of law or chancery, or any execution which may have issued thereon; any copy of any other record, or any other article of value, or writing represent-

ing the same; any such person who shall steal or take any of the things aforesaid out of any letter, packet, bag or mail of letters which shall have come into his possession, either in the regular course of his official duties, or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, every such person shall, on conviction thereof, for every such offense, be imprisoned at hard labor not less than one nor more than five years."

The words at the close of the section, "every such person shall on conviction thereof, for every such offense, be imprisoned," are omitted in the revised section, and the question is whether that change works the change in the law contended for. It will be perceived that if the word "or," or the word "and," were supplied before the words "any such person who shall steal," etc., as having been omitted by way of ellipsis, a course often pursued, the objection would have nothing to rest on. But we do not think the supplying of any word is necessary. If the comma after the word "directed," in the third line from the close of the section as it appears in the Revised Statutes, be treated as a semicolon, the result is the same, and obviates any uncertainty in the matter. For the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required. *Hammock v. Farmers Loan & Trust Co.* 105 U. S. 77, 84 [26: 1111, 1118]; *United States v. Isham*, 84 U. S. 17 Wall. 496 [21: 728].

As contended on behalf of the defendant, there can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute. But though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature. *United States v. Wittberger*, 18 U. S. 5 Wheat. 76 [5: 37]; *United States v. Morris*, 89 U. S. 14 Pet. 464 [10: 548]; *American Fur Co. v. United States*, 27 U. S. 2 Pet. 358, 367 [7: 450, 453].

"It appears to me," said Mr. Justice Story, in *United States v. Winn*, 8 Sumn. 209, 211, "that the proper course, in all these cases, is to search out and follow the true intent of the Legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature."

To the same effect is the statement of Mr. Sedgwick, in his work on Statutory and Constitutional Law (2d ed.) 282: "The rule that statutes of this class are to be construed strictly is far from being a rigid or unbending one; or rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and,

on the other, equally refusing, by any mere verbal nicety, forced construction or equitable interpretation, to exonerate parties plainly within their scope."

This passage is quoted by Baron Bramwell, in *Atty. Gen. v. Sillem*, 2 Hurl. & C. 532, as one "in which good sense, force and propriety of language are equally conspicuous; and which is amply borne out by the authorities, English and American, which he cites." *Foley v. Fletcher*, 28 L. J. N. S. Exch. 106; *Nicholson v. Fields*, 31 L. J. N. S. Exch. 233; *Hardcastle on Statutory Law*, p. 251.

And the reason for the less rigorous application of the rule is well given in Maxwell on the Interpretation of Statutes (2d ed.) p. 818, thus:

"The rule which requires that penal and some other statutes shall be construed strictly was more rigorously applied in former times, when the number of capital offenses was one hundred and sixty or more; when it was still punishable with death to cut down a cherry-tree in an orchard, or to be seen for a month in the company of gipsies. But it has lost much of its force and importance in recent times, since it has become more and more generally recognized that the paramount duty of the judicial interpreter is to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning, and to promote its object. It was founded, however, on the tenderness of the law for the rights of individuals, and on the sound principle that it is for the Legislature, not the court, to define a crime and ordain its punishment."

We entertain no doubt that two classes of offenses were intended to be created by section 5467, one relating to the embezzlement of letters, etc., and the other to stealing the contents, and that this conclusion is not reached in violation of any rule of construction applicable to penal statutes.

But it is said that the offense of embezzling a letter is covered by section 3891 of the Revised Statutes, and that of abstracting its valuable contents by section 5467, and hence the latter was intended to be confined to stealing the contents and should not be held to embrace secreting, embezzling or destroying the letter, which might contain nothing of value.

Section 3891 is as follows:

"Any person employed in any department of the postal service, who shall unlawfully detain, delay or open any letter, packet, bag or mail of letters intrusted to him, or which has come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail-carrier, mail-messenger, route-agent, letter-carrier or other person employed in any department of the postal service, or forwarded through or delivered from any post-office or branch post-office established by authority of the Postmaster-General, or who shall secrete, embezzle or destroy any such letter, packet, bag or mail of letters, although it does not contain any security for or assurance relating to money

or other thing of value, shall be punishable by a fine of not more than five hundred dollars, or by imprisonment for not more than one year, or by both."

This section is based on section 146 of the Act of June 8, 1872 (17 Stat. 802), which reads thus:

"That any person employed in any department of the postal service, who shall unlawfully detain, delay or open any letter, packet, bag or mail of letters intrusted to him, or which shall have come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail-carrier, mail-messenger, route-agent, letter-carrier or other person employed in any department of the postal service, or forwarded through or delivered from any post-office or branch post-office established by authority of the Postmaster-General; any such person who shall secrete, embezzle or destroy any such letter, packet, bag or mail of letters, as aforesaid, which shall not contain any security for or assurance relating to money or other thing of value, every such person shall, on conviction thereof, for every such offense, forfeit and pay a penalty of not exceeding five hundred dollars, or be imprisoned not more than one year, or both, at the discretion of the court."

The contention is that the embezzlement of a letter is punishable only under section 8891, whether it does or does not contain a thing of value; that if it does the offender is not liable under section 5467, unless he steals it; and that this is a reasonable and just construction, as the letter may have been taken without intention to abstract the article, and indeed without suspicion of the contents until the interior is explored. And it is urged that as section 146 of the Act of June 8, 1872, expressly provided a penalty for the embezzlement of a letter, "which shall not contain" anything of value, and its substitute, section 8891, uses the language, "although it does not contain" anything of value, the latter section has been thereby broadened so as to punish the offense whether

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the letter contains an article of value or not. This view would require us to hold that the intention was to do away with the long-observed distinction between embezzling letters containing valuable matter and those which do not, and to absolve the culprit from liability for all the consequences of his unlawful act, notwithstanding the offenses of secreting, embezzling or destroying letters of the first class are carefully defined. If section 8891 covers the embezzlement of all letters and mail matter, no reason for the larger part of section 5467 can be perceived. The construction contended for is inadmissible.

We concur with counsel for the government, that as sections 146 and 279 of the Act of June 8, 1872, are to be considered together, so are sections 8891 and 5467, and that the offenses of secreting, embezzling or destroying mail matter not containing articles of value are punishable under the one, and containing such articles under the other. We are unable to find any sound reason for the conclusion that Congress intended to substitute for "imprisonment at hard labor for not less than one year nor more than five years," the penalty denounced by section 279 and carried into section 5467, in respect to the embezzlement of mail matter containing articles of value, "a fine of not more than five hundred dollars, or by imprisonment for not more than one year, or by both," the punishment for embezzling mail matter not containing such articles.

Similar views as to section 5467 were expressed by Judge Benedict in *United States v. Pelletreau*, 14 Blatchf. 126, and *United States v. Jenther*, 18 Blatchf. 835; and by Judge Brewer as to section 5469, in *United States v. Falkenhainer*, 21 Fed. Rep. 624. *Contra, United States v. Long*, 10 Fed. Rep. 879.

The first question certified is in a form frequently disapproved of. *Dublin Trop. v. Milford Sav. Inst.* 128 U. S. 510, 514 [82: 533, 534]; *United States v. Northway*, 120 U. S. 827 [80: 664]; *United States v. Hall*, 181 U. S. 50 [88: 97]. The second question is answered in the affirmative and it will be so certified.

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APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1889.

ORDER.

Ordered that subdivision 4 of Rule 28 of this Court is amended so as to read as follows :

4. In cases in admiralty, damages and interest may be allowed if specially directed by the Court.

(Promulgated March 10, 1890.)

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1889.

ORDER.

Ordered that Rule 32 of the Rules of this Court is stricken out and the following is promulgated as Rule 32 :

32.

WRITS, OF ERROR AND APPEALS UNDER THE ACT OF FEBRUARY 25, 1889, CHAPTER 236.

Cases brought to this Court by writ of error or appeal, under the Act of February 25, 1889, Chapter 236, where the final judgment or decree rendered by the Circuit Court does not exceed the sum of five thousand dollars, will be advanced on motion, and heard under the rules prescribed by Rule 6 in regard to motions to dismiss writs of error and appeals.

(Promulgated March 10, 1890.)

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1889.

ORDER.

There having been an Associate Justice of this Court appointed since the commencement of this term: *It is ordered*, That the following allotment be made of the Chief Justice and Associate Justices of said Court among the Circuits, agreeably to the Act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, HORACE GRAY, Associate Justice.
For the Second Circuit, SAMUEL BLATCHFORD, Associate Justice.
For the Third Circuit, JOSEPH P. BRADLEY, Associate Justice.
For the Fourth Circuit, MELVILLE W. FULLER, Chief Justice.
For the Fifth Circuit, LUCIUS Q. C. LAMAR, Associate Justice.
For the Sixth Circuit, DAVID J. BREWER, Associate Justice.
For the Seventh Circuit, JOHN M. HARLAN, Associate Justice.
For the Eighth Circuit, SAMUEL F. MILLER, Associate Justice.
For the Ninth Circuit, STEPHEN J. FIELD, Associate Justice.
(Promulgated March 10, 1890.)

APPENDIX IV.

ADDRESS

IN

COMMEMORATION OF THE INAUGURATION OF

GEORGE WASHINGTON

AS

FIRST PRESIDENT OF THE UNITED STATES,

DELIVERED BEFORE THE

TWO HOUSES OF CONGRESS,

DECEMBER 11, 1889,

BY

MELVILLE WESTON FULLER, LL. D.,

CHIEF JUSTICE OF THE UNITED STATES.

MR. PRESIDENT, MR. SPEAKER, AND GENTLEMEN OF THE SENATE AND HOUSE OF REPRESENTATIVES:

By the terms of that section of the Act of Congress under which we have assembled in further commemoration of the historic event of the inauguration of the first President of the United States, George Washington, the 80th of April, A. D. 1889, was declared a national holiday, and in the noble city where that event took place its centennial anniversary has been celebrated with a magnificence of speech and song, of multitudinous assembly, and of naval, military and civic display, accompanied by every manifestation of deep love of country, of profound devotion to its institutions and of intense appreciation of the virtues and services of that illustrious man, whose assumption of the chief magistracy gave the assurance of the successful setting in motion of the new government.

Nothing on the occasion of that celebration could be more full of encouragement and hope than the testimony so overwhelmingly given that Washington still remained first in the hearts of his countrymen, and that the example afforded by his career was still cherished as furnishing that guide of public conduct which had kept and would keep the nation upon the path of glory for itself and of happiness for its people.

The majestic story of that life—whether told in the pages of Marshall or Sparks, of Irving or Bancroft, or through the eloquent utterances of Ames or Webster, or Everett or Winthrop,

or the matchless poetry of Lowell or the verse of Byron—never grows old.

We love to hear again what the great Frederick and Napoleon, what Erskine and Fox and Brougham and Talleyrand and Fontanes and Guizot said of him, and how crape enshrouded the standards of France, and the flags upon the victorious ships of England fell fluttering to half-mast at the tidings of his death.

The passage of the century has not in the slightest degree impaired the irresistible charm; and whatever doubts or fears assail us in the turmoil of our impetuous national life, that story comes to console and to strengthen, like the shadow of a great rock in a weary land.

Washington had become first in war, not so much by reason of victories over the enemy, though he had won such, or of success in strategy, though that had been his, as of the triumphs of a constancy which no reverse, no hardship, no incompetency, no treachery could shake or overcome.

And because the people comprehended the greatness of their leader and recognized in him an entire absence of personal ambition, an absolute obedience to convictions of duty, an unaffected love of country, of themselves and of mankind, he had become first in the hearts of his countrymen.

Because thus first, he was to become first in peace, by bringing to the charge of the practical working of the system he had participated in creating, on behalf of the people whose independence he had achieved, the same serene judgment, the same sagacity, the same patience,

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the same sense of duty, the same far-sighted comprehension of the end to be attained, that had marked his career from its beginning.

From the time he assumed command, he had given up all idea of accommodation, and believed that there was no middle ground between subjugation and complete independence, and that independence the independence of a nation.

He had demanded national action in respect of the army; he had urged, but a few weeks after Bunker Hill, the creation of a federal court with jurisdiction co-extensive with the Colonies; he had during the war repeatedly pressed home his deep conviction of the indispensability of a strong central government, and particularly at its close, in his circular to the governors of the States and his farewell to his comrades. He had advocated the promotion of commercial intercourse with the rising world of the west, so that its people might be bound to those of the seaboard by a chain that could never be broken. Appreciating the vital importance of territorial influences to the political life of a commonwealth, he had approved the cessions by the landed States, none more significant than that by his own, and had made the profound suggestion—which was acted on—of a line of conduct proper to be observed for the government of the citizens of America in their settlement of the western country which involved the assertion of the sovereign right of eminent domain. He had advised the commissioners of Virginia and Maryland, in consultation at Mount Vernon in relation to the navigation of the Potomac, to recommend a uniform currency and a uniform system of commercial regulations, and this led to the calling of the conference of commissioners of the thirteen States. At the proper moment he had thrown his immense personal influence in favor of the convention and secured the ratification of the Constitution.

It remained for him to crown his labors by demonstrating in their administration the value of the institutions whose establishment had been so long the object of his desire.

"It is already beyond doubt," wrote Count Moustier, in June, 1789, "that in spite of the asserted beauty of the plan which has been adopted, it would have been necessary to renounce its introduction if the same man who presided over its formation had not been placed at the head of the enterprise. The extreme confidence in his patriotism, his integrity and his intelligence forms to-day its principal support."

There were obvious difficulties surrounding the first President. Eleven States had ratified, but the assent of some had been secured only after strenuous exertion, considerable delay, and upon close votes.

So slowly did the new government get under way that the first Wednesday of March, the day designated for the Senate and House to assemble, came and went, and it was not until the first of April that the House obtained a quorum, and not until the 6th that the electoral vote was counted in joint convention.

An opposition so intense and bitter as that which had existed to the adoption of the Constitution could not readily die out, and the antagonisms which lay at its base were as old as human nature.

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Jealousies existed between the smaller and the larger, between the agricultural and the commercial States, and these were rendered the keener by the rivalries of personal ambition.

Those who admired the theories of the French philosophical school and those who preferred the British model could not readily harmonize their differences, while the enthusiastic believers in the capacity of man for self-government denounced the more conservative for doubting the extent of the reliance which could be placed upon it.

The fear of arbitrary power took particular form in reference to the presidential office, which had been fashioned in view of the personal government of George the Third, rather than on the type of monarchy of the English system as it was in principle, and as it is in fact.

And this fear was indulged notwithstanding the frequency of elections, since no restriction as to re-eligibility was imposed upon the incumbent.

But no fear, no jealousy, could be entertained of him who had indignantly repelled the suggestion of the bestowal of kingly power; who had unsheathed the sword with reluctance and laid it down with joy; who had never sought official position, but accepted public office as a public trust, in deference to so unanimous a demand for his services as to convince him of their necessity; whose patriotism embraced the whole country, the future grandeur of which his prescience foresaw.

Nevertheless, while there could be no personal opposition to the unanimous choice of the people, and while his availability at the crisis was one of those providential blessings which, in other instances, he had so often insisted had been bestowed upon the nation, the fact remained that the situation was full of trial and danger, and demanded the application of the highest order of statesmanship.

Nor are we left to conjecture Washington's feelings in this regard.

Indeed, it may be said that at every period of his public life, though he possessed the talent for silence and did his work generally with closed lips, yet it is always possible to gather from his remarkable letters the line of his thought upon current affairs, and his inmost hopes, fears and aspirations as to the public weal.

Take for illustration that, in which, on the 9th of January, 1790, little more than eight months after his inauguration, he says:—

"The establishment of our new government seemed to be the last great experiment for promoting human happiness by a reasonable compact in civil society. It was to be, in the first instance, in a considerable degree a government of accommodation as well as a government of laws. Much was to be done by prudence, much by conciliation, much by firmness. Few, who are not philosophical spectators, can realize the difficult and delicate part which a man in my situation had to act. All see and most admire the glare which hovers round the external happiness of elevated office. To me there is nothing in it beyond the lustre which may be reflected from its connection with a power of promoting human felicity. In our progress towards political happiness my station is new, and, if I may use the expression, I

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walk on untrodden ground. There is scarcely an action the motive of which may not be subject to a double interpretation. There is scarcely any part of my conduct which may not hereafter be drawn into precedent. If, after all my honorable and faithful endeavors to advance the felicity of my country and mankind, I may indulge a hope that my labors have not been altogether without success, it will be the only compensation I can receive in the closing scenes of life."

Here he admits with a certain suppressed sadness that he realizes that private life has ceased to exist for him, and that from his previous participation in public affairs, the exalted character of the new office and the fact that he is the first to fill it, his every act and word thereafter may be referred to in guidance or control of others, and as bearing upon the nature of the government of which he was the head. It is borne in upon him that in this instance, in a greater degree than ever before, his conduct is to become an historical example. Questions of etiquette, questions pertaining to his daily life, unimportant in themselves, cease to be so under the new conditions, and this interruption of the domestic tenor of his way, to which he was of choice and ardently attached, finds no compensation in the gratification of a morbid hunger and thirst for applause, whether of the few or of the many.

But in the consciousness of having contributed to the advancement of the felicity of his country and of mankind lies the true reward for these renewed labors.

The promotion of human happiness was the key-note of the century within which Washington's life was comprised.

It was the century of Franklin and Turgot; of Montesquieu and Voltaire and Rousseau; of Frederick the Great and Joseph the Second; of Pitt and Fox and Burke and Grattan; of Burns and Cowper and Gray; of Goethe and Kant; of Priestly and Hume and Adam Smith; of Wesley and Whitefield and Howard, as well as of the long line of statesmen and soldiers, and voyagers over every sea; of poets and artists and essayists and encyclopedists and romancers, which adorned it.

It was the century of men like Condorcet, who, outlawed and condemned by a revolutionary tribunal, the outcome of popular excesses, calmly sat down, in hiding, to compose his work upon the progress of the human mind.

It was a century instinct with the recognition of the human soul in every human being, and alive with aspirations for universal brotherhood.

With this general longing for the elevation of mankind Washington sympathized, and in expressing a hearty desire for the rooting out of slavery considered this not only essential to the perpetuation of the Union, but desirable on the score of human dignity. Nevertheless, with the calm reason in reference to government, of the race from which he sprang, he regarded the promotion of human happiness as to be best secured by a reasonable compact in civil society, and that established by the Federal Constitution as the last great experiment to that end.

Washington and his colleagues were familiar

with prior forms of government and their operation, and with the speculations of the writers upon that subject. They were conversant with the course of the Revolution of 1688, the then triumph of public opinion, and the literature of that period. They accepted the thesis of Locke, that, as the true end of government is the mutual preservation of the lives, liberties and estates of the people, a government which invades these rights is guilty of a breach of trust, and can lawfully be set aside; and they were persuaded of the soundness of the views of Montesquieu, that the distribution of powers is necessary to political liberty, which can only exist when power is not abused, and in order that power may not be abused it must be so distributed that power shall check power.

It is only necessary to consult the pages of *The Federalist*—that incomparable work on the principles of free government—to understand the acquaintance of American statesmen with preceding governmental systems, ancient and modern, and to comprehend that the Constitution was the result, not of a desire for novelty, but of the effort to gather the fruit of that growth which, having its roots in the past, could yield in the present and give promise for the future.

The colonists possessed practically a common nationality, and took by inheritance certain fundamental ideas upon the development of which their growth had proceeded. Self-government by local subdivisions, a legislative body of two houses, an executive head, a distinctive judiciary, constituted the governmental methods.

Magna Charta, the Petition and Declaration of Rights, the Habeas Corpus Act, the Act of Settlement, all the muniments of English liberty, were theirs, and the New England Confederation of 1648, the schemes of union of 1754 and 1765, the revolutionary Congress, the Articles of Confederation, the colonial charters and constitutions furnished a vast treasury of experience upon which they drew.

Their work in relation to what had gone before was in truth but in maintenance of that continuity of which Hooker speaks: "We were then alive in our predecessors and they in their successors do live still." They did not seek to build upon the ruins of older institutions, but to develop from them a nobler, broader and more lasting structure; and in effecting this upon so vast a scale and under conditions so widely different from the past, the immortal instrument was indeed the product of consummate statesmanship.

Of the future greatness of the new nation Washington had no doubt. He saw, as if face to face, that continental domain which glimmered to others as through a glass darkly.

The great west was no sealed book to him, and no one knew better than he that no foreign power could long control the flow of the Father of Waters to the Gulf.

He is said to have lacked imagination, and if the exhilaration of the poet, the mystic or the seer is meant, this may be true.

His mind was not given to indulgence in dreams of ideal commonwealths like the republic of Plato or of Cicero, the City of God of Augustine, or the Utopia of Sir Thomas

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More, but it grasped the mighty fact of the empire of the future, and acted in obedience to the heavenly vision.

But the question was, Could that empire be realized and controlled by the people within its vast boundaries in the exercise of self-government?

Could the conception of a central government, operating directly upon citizens, who at the same time were subject to the jurisdiction of their several States, be carried into practical working operation so as to reconcile imperial sway with local independence?

Would a scheme work which was partly national and partly federal, and which aimed at unity as well as union?

And could the rule of the majority be subjected with binding force to such restraints through a system by representation, that of a republic rather than that of a pure democracy, that the violence of faction could not operate in the long run to defeat a common government by the many, throughout so immense an area?

Could the restraints essential to the preservation of society, the equilibrium between progress and order, be so guarded as to allow of that sober second thought which would secure their observance, and thus the liberty and happiness of the people and the enduring progress of humanity?

While the general genius of the government was thoroughly permeated with the ideas of freedom in obedience, yet time was needed to commend the form in which it was for the future to exert itself.

Hence administration in the first instance required accommodation as well as adherence to the letter, and prudence and conciliation as well as firmness.

The Cabinet of the first President illustrates his sense of the nature of the exigency.

All its members were friends and supporters of the Constitution, but possessed of widely different views as to the scope of its powers and the probabilities of its successful operation in the shape it then bore.

Between Jefferson and Hamilton there seemed to be a great gulf fixed, yet a common patriotism bridged it, and a common purpose enabled them for these critical years to act together. And this was rendered possible by the fact that the leadership of Washington afforded a common ground upon which every lover of a united country could stand. And as the first four years were nearing their close, Hamilton and Jefferson severally urged Washington to consent to remain at the helm for four years longer, that the government might acquire additional firmness and strength before being subjected to the strain of the contention of parties.

Undoubtedly Hamilton desired this also, because of nearer coincidence of thought on some questions involving serious difference of opinion, but both concurred in urging it upon the ground that the confidence of the whole Union was centered in Washington, and his being at the helm would be more than an answer to every argument which could be used to alarm and lead the people in any quarter into violence or secession.

Appointments to the supreme bench involved less reason for accommodation, but equal prudence and sagacity.

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The great part which that tribunal was to play in the development of our institutions was yet to come, but the importance of that branch of the government to which was committed the ultimate interpretation of the Constitution was appreciated by Washington, who characterized it as the keystone of the political fabric.

To the headship of the court, Washington called the pure and great-minded Jay of New York, and associated with him John Rutledge of South Carolina, who, from the Stamp-Act Congress of 1765, had borne a conspicuous part in the history of the country and of his State; James Wilson of Pennsylvania, who, like Rutledge, had been prominent in the Continental Congress and in the federal convention, a signer of the Declaration of Independence, and one of the most forcible, acute and learned debaters on behalf of the Constitution, as the records of the federal and his state conventions show; Cushing, chief justice of Massachusetts, experienced in judicial station, and the only person holding office under the Crown who adhered to his country in the Revolution; Harrison of Maryland, Washington's well-known secretary; Blair of Virginia, a judge of its court of appeals, and one of Washington's fellow-members in the convention; and in place of Rutledge and Harrison, who preferred the highest judicial positions in their own States, Thomas Johnson of Maryland and James Iredell of North Carolina.

It will be perceived that the distribution was made with tact, and the selections with consummate wisdom.

The part the appointees had taken in the cause of the country, and especially in laying the foundations of the political edifice, their eminent qualifications and recognized integrity, commended the court to the confidence of the people, and gave assurance that this great department would be so administered as to effectuate the purposes for which it had been created.

As to appointments generally, he did not recognize the rule of party rewards for party work, although, when party opposition became clearly defined, he wrote Pickering that to "bring a man into any office of consequence knowingly, whose political tenets are adverse to the measures which the general government is pursuing," would be, in his opinion, "a sort of political suicide." To integrity and capacity, as qualifications for high civil office, he added that of "marked eminence before the country, not only as the more likely to be serviceable, but because the public will more readily trust them." As in appointments, so in the conduct of affairs, prudence, conciliation and accommodation carried the experiment successfully along, while firmness in essentials was equally present, as when, at a later day, the suppression of the whiskey rebellion and the maintenance of neutrality in the war between France and England gave information at home that there existed a central government strong enough to suppress domestic insurrection, and abroad, that a new and self-reliant power had been born into the family of nations.

The course taken in all matters, whether great or small, was the result of careful consideration and the exercise of deliberate judgment as to the effect of what was done, or forbore to be done, upon the success of the new-

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ly constructed fabric. Thus, the regulation of official behavior was deemed a matter of such consequence, that Adams, Jay, Hamilton and Madison were consulted upon it, for although republican simplicity had been substituted for monarchy and titles, and was held inconsistent with concession of superiority by reason of occupancy of official station, yet the transition could not be violently made, and the people were, in any event, entitled to expect their agents to sustain with dignity the high positions to which they had been called.

During the entire presidency of Washington, upon the details of which it is impracticable here to dwell, time for solidification was the dominant thought. The infant giant could defend himself even in his cradle; but to become the Colossus of Washington's hopes, the gristle must have opportunity to harden.

After more than seven years of devotion to the interests committed to his charge and intense watchfulness over the adjustment and working of the machinery of the new system, having determined upon his own retirement, thereby practically assigning a limit to the period during which the office could with propriety be occupied by his successors, still regarding the problem as not solved, and still anxiously desiring to contribute to the last to the welfare of the constant object of his veneration and love, he gives to his countrymen in the farewell of "an old and affectionate friend," the results of his observations and of his reflections on the operation of the great scheme he had assisted in creating and had so far commended to the people by his administration of its provisions.

Punctilious as he was in official observances, and dear as his home and his own State were to him, this address was one that rose above home, and State, and official place, that brought him near, not simply to the people to whom it was immediately directed, but to that great coming multitude whom no man could number, and towards which he felt the pathetic attachment of a noble and prophetic soul. And so he dates it, not from Mount Vernon nor from his official residence, but from the "United States."

Hamilton, Madison and Jay had, in the series of essays in advocacy of the Constitution, largely aided in bringing about its ratification, and displayed wonderful comprehensiveness of view, depth of wisdom and sagacity of reflection in their treatment of the topics involved. Throughout Washington's administration they had to the utmost assisted in the successful carrying on of the government, in the Cabinet, in Congress, upon the bench, or in diplomatic station, and to them, as tried and true friends and men of a statesmanship as broad as the country, Washington turned at one time and another for advice in the preparation of these closing words.

Notwithstanding that innate modesty which had always induced a certain real diffidence in assuming station, he was conscious of his position as founder of the state; he felt that every utterance in this closing benediction would be cherished by coming generations as disinterested advice, based on experience and knowledge and illuminated by the sincerest affection, and he invited the careful scrutiny of his friends that it might "be handed to the public in an

honest, unaffected, simple garb." But the work was his own, as all his work was. The virtue went out of him, even when he used the hand of another.

If we turn to this remarkable document and compare the line of conduct therein recommended with the course of events during the century—the advice given with the results of experience—we are amazed at the wonderful sagacity and precision with which it lays down the general principles through whose application the safety and prosperity of the republic have been secured. To cherish the public credit and promote religion, morality and education were obvious recommendations. Economy in public expense, vigorous exertion to discharge debt unavoidably occasioned, acquiescence in necessary taxation, and candid construction of governmental action in the selection of its proper objects, were all parts of the first of these. The increase of net ordinary expenditures from three millions to two hundred and sixty-eight millions of dollars, and of net ordinary receipts from four and one-half to three hundred and eighty millions of dollars, renders the practice of economy, as contradistinguished from wastefulness, as commendable to-day as then, but it must be a judicious economy; for, as Washington said, timely disbursements frequently prevent much larger.

The extinction of the public debt at one time, and the marvelous reduction, within a quarter of a century of its creation, of a later public debt of more than twenty-five hundred millions of dollars, demonstrate practical adherence to the rule laid down. It is true that the great material prosperity which has attended our growth has enabled us to meet an enormous burden of taxation with comparative ease, but it is nevertheless also true that the general judgment has never wavered upon the question of the sacred observance of plighted faith; and if at any moment the removal of the bars designed to imprison the powerful giant of a paper currency seemed to imperil the preservation of the public honor, the sturdy common sense of the people has checked through their representatives the dangerous tendency before it has gone too far.

Education was one of the two hooks (the other was local self-government) upon which the continuance of republican government was considered as absolutely hanging.

The action of the Continental Congress in respect to the western territory was next in importance to that on independence and union. Apart from its political significance we recall the familiar fact that one section out of every township was reserved under the Ordinances of 1785 and 1787 for the maintenance of schools, because religion, morality and knowledge were considered essential to good government and the happiness of mankind. The one section has been made two, and many millions of acres have been granted for the endowment of universities, of normal, scientific and mining schools, and institutions for the benefit of agriculture and the mechanic arts, including from three hundred and fifty to four hundred and fifty thousand acres for educational and charitable institutions, to each of the new States recently admitted, by an Act appropriately passed into law on the birthday of Washington. A

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thousand universities, colleges and institutions of learning, twelve millions of children attending two hundred thousand public schools, with three hundred and sixty thousand teachers, at an expenditure of one hundred and twenty-five millions and with property worth two hundred millions, and sixty-two million dollars in private benefactions for education in the decade of the last census, testify that the importance of education is not under-estimated in a country whose institutions are dependent upon the intelligence of the people.

Washington insists that national morality cannot prevail in exclusion of religious principle, though the influence of refined education on minds of a peculiar structure may have induced an opposite conclusion.

History accords with this view. Plutarch said, "You may travel over the world and you may find cities without walls, without king, without mint, without theatre or gymnasium, but you will never find a city without God, without prayer, without oracle, without sacrifice;" and the eighteen centuries since his day confirm the truth of his words.

"Take from me," said Bismarck, "my faith in a divine order which has destined this German nation for something good and great, and you take from me my fatherland."

Washington declares that "the mere politician, equally with the pious man, ought to respect and cherish religion and morality as the firmest props of the duties of men and citizens." He did not mean that the value of trust and faith has no relation to the reality of the objects of that trust and faith, nor that those to whom he referred should indulge in religious observances as mere mummeries to deceive, while smiling among themselves, as Cicero with his fellow-augurs, nor that faith should be betrayed by accommodation to superstition, as in the action of the town clerk of Ephesus, but he demanded that they should recognize in fact the indispensability of these supports of political prosperity.

And here again the answer of the century's watchman tells that the night is passing.

Crime, drunkenness, pauperism have steadily decreased in proportion as population has increased, philanthropic agencies have multiplied, moral sensitiveness has become keener, and higher standards of personal and official conduct have come to be required, while at the same time the statistics of religious progress exhibit wonderful and most gratifying results.

Washington had never permitted his public action to be influenced by personal affection or personal hostility, and in urging the avoidance of political connections or personal alliances with any portion of the foreign world, he characteristically condemned indulgence in an inveterate antipathy towards particular nations and a passionate attachment for others, while observing good faith and justice towards all.

No reason existed for becoming implicated in the ordinary vicissitudes of the politics of Europe, or the ordinary combinations and collisions of her friendships or enmities. Intervention meant war, not arbitration; the assumption of obligation meant force, not words. No field was to be opened here for foreign intrigues, and no necessity created here for standing

armies and the domination of the civil by the military authority.

So scrupulous was Washington's abstinence from the slightest appearance of interference, that, notwithstanding his tender friendship for La Fayette, he would not make official application for his release from Olmutz. So absolute was his conviction that this country must not become a make-weight in Europe's balances of power, that he sternly held it to neutrality under circumstances which would have rendered it impossible for any other man to do so. Such has been the policy unchangeably pursued, but it has not required the concealment of our sympathy with all who have wished to put American institutional ideas into practical operation, or our confidence in their ultimate prevalence. Nor has the rule prevented the republic from the declaration that it should take its own course in case of the interference by other nations with the primary interests of America.

In the lapse of years international relations have been constantly assuming larger importance with the growth of the country and the world and the increasing nearness of intercommunication. We are justified in claiming that the delicate and difficult function of government involved has been from the first discharged in so admirable a manner that the solution of the grave questions of the future may be awaited without anxiety.

It is matter of congratulation that the first year of our second century witnesses the representatives of the three Americas engaged in the effort to increase the facilities of commercial intercourse, "consulting the natural course of things, diffusing and diversifying by gentle means the streams of intercourse, but forcing nothing," success in which must knit closer the ties of fraternal friendship, and bring the peoples of the two American continents into harmonious control of the hemisphere.

The course of events has equally shown the profound wisdom of the propositions of the Farewell Address bearing directly on the form of government delineated in the Federal Constitution.

First of these is the necessity of the preservation of the distribution of powers, and of resistance to any encroachment by one department upon another.

The executive power was vested in the President, but he had a voting power in the right to veto, and the power of initiation as to treaties, which became binding with the advice and consent of the Senate.

The interposition of the latter was also permitted by the requisition of assent in the confirmation of appointments, and it could sit in judgment on the President if articles of impeachment were presented. In some particulars, therefore, the two departments approached each other in the exercise of functions appropriate to each.

This made it all the more important that there should be no invasion of the one by the other. No effort to diminish the executive authority or to interfere with the exercise of its legitimate discretion has commanded the support of the public voice, and impeachment has not been considered a proper resort to reconcile differences of judgment, however serious.

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The right to initiate and to pass laws having been lodged in Congress, the balance of power was actually there reposed, and the danger of encroachment would naturally present itself from that quarter.

And here the federal judiciary was interposed as a coördinate department, with power to determine when the limitations of the fundamental law were transgressed. Without an exact precedent, the creation of a tribunal possessed of that power was the natural result of the existence of a written constitution; for to leave to the instrumentalities by which governmental power is exercised the determination of boundaries upon it, would dispense with them altogether.

In England the executive and legislative powers are practically vested in Parliament and exercised by the Cabinet, which amounts to a committee of the Commons, acting with the additional power which secret agreement on a given course imparts. The constitution is what Parliament makes it, and the judicial tribunals only interpret and apply the action of that body, being necessarily destitute of the power to hold such action void by reference to any higher law than its own enactments.

Not so with us. Every Act of Congress, every Act of the State Legislatures, every part of the Constitution of any State, if repugnant to the Constitution of the United States, is void, and to be so treated. The supreme court by the decision of cases in which such Acts or provisions are drawn in question, and in the exercise of judicial functions, renders the Constitution in reality as well as in name the supreme law of the land.

Its judgments command the assent of Congress and the Executive, the States and the people, alike, and it is this unique arbitrament that has challenged the admiration of the world.

The court cannot be abolished by Congress, but the number of its judges may be increased, or diminished on the occurrence of vacancies, and so, while its jurisdiction cannot be impaired, the exercise of it may be curtailed.

Nevertheless, no legislation to control it in any way has ever been approved by definite public opinion, and the tribunal remains in the complete discharge of the vital and important functions it was created to perform.

Scrupulously abstaining from the decision of strictly political questions and from the performance of other than judicial duties; never grasping an ungranted jurisdiction and never shrinking from the exercise of that conferred upon it, it commands the reverence of a law-abiding people.

Again, Washington urges not only that his countrymen shall steadily discountenance irregular opposition to the acknowledged authority of the government, and resist with care the spirit of innovation upon its principles, but shall oppose any change in the system except by amendment in the mode provided, particularly warning them, as fearful of objection to the pressure of the government, that the energy of the scheme must not be impaired, as vigor is not only required to manage the common interests throughout so extensive a country, but is necessary to protect liberty itself.

In no part of the Constitution was greater sagacity displayed than in the provision for its

amendment. No State, without its consent, could be deprived of its equal suffrage in the Senate, but otherwise (with an exception now immaterial) the instrument might be amended upon the concurrence of two thirds of both Houses, and the ratification of the Legislatures or conventions of three fourths of the several States, or through a federal convention when applied for by the Legislatures of two thirds of the States, and upon like ratification.

It was designed that the ultimate sovereignty thus reposed should not be called into play, except through this slow and deliberate process, which would give time for mere hypothesis and opinion to exhaust themselves, and the conclusion reached to be the result of gravity of thought and judgment, and of the concurrence of substantially every part of the country.

The first ten Amendments hardly come within the application of the principle, as they were in substance requested by many of the States at the time of ratification. In the Pennsylvania convention, James Wilson declared that the subject of a bill of rights was not mentioned in the constitutional convention until within three days of its adjournment, and even then no direct motion upon the subject was offered; and that such a bill was entirely unnecessary in a government having none but enumerated powers; but Jefferson urged from Paris that a bill of rights was "what the people are entitled to against every government on earth, general or particular," and that one ought to be added, "providing clearly and without the aid of sophism, for freedom of religion, freedom of the press, protection against standing armies, restriction of monopolies, the eternal and unremitting force of the habeas corpus laws and trials by jury in all matters of fact triable by the laws of the land, and not by the laws of nations." This view prevailed, but in order that the affirmance of certain rights might not disparage others or lead to implications in favor of the possession of other powers, it was added that the enumeration of certain rights should not be construed to deny or disparage others retained by the people, and that the powers not delegated were reserved.

Congress, in the preamble to these Amendments, and Washington, in his inaugural, commend their adoption out of regard for the public harmony and a reverence for the characteristic rights of freemen.

The Eleventh inhibited the extension by construction, in the particular named, of the federal judicial power, and the Twelfth related to matters of detail in the election of President and Vice-President. No one of the twelve was in restraint of state action.

Sixty years elapsed before the ratification of the Thirteenth, Fourteenth and Fifteenth Amendments. These definitely disposed of the subject of slavery, that Serbonian bog 'twixt the extreme views of the two schools of political thought dividing the country—views which, except for the existence of that institution, might never have been pushed to an extreme, but might have continued peacefully to operate in the production of a golden mean between the absorption of power by the central and its diffusion among the local governments. And by the Fourteenth an additional guaranty was furnished against the arbitrary exercise by the

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States of the powers of government, unrestrained by the established principles of private rights and distributive justice.

Undoubtedly the effect of these later Amendments was to increase the power of Congress, but there was no revolutionary change. It is as true of the existing government, as it was of the proposed government, that it must stand or fall with the state governments.

Added provisions for the protection of personal rights involved to that extent additional powers, but the essential elements of the structure remained unchanged.

In other words, while certain obstructions to its working have been removed the clock-work has not been thrown out of gear, but the pendulum continues to swing through its appointed arc and the vast machinery to move noiselessly and easily to and fro, marking the orderly progress of a great people in the achievement of happiness by the exercise of self-government.

But while direct alterations have been few, the fundamental law has been developed in the evolution of national growth, as Washington, indeed, anticipated. "Time and habit," said he, "are at least as necessary to fix the true character of government as of other human institutions;" and "experience is the surest standard by which to fix the real tendency of the existing constitution of a country."

In this he applies the language of Hume, and speaks in the spirit of the observation of Bacon, that "rightly is truth called the daughter of time, not of authority."

Time, habit, experience, legislation, usage may have assisted in expanding the Constitution in the quiet, imperceptible manner in which nature adapts itself to new conditions, though remaining still the same.

Yet its chief growth is to be found in the interpretation of its provisions by the tribunal upon which that delicate and responsible duty was imposed. And in that view what "a debt immense of endless gratitude" is owed to those luminous decisions of John Marshall, which placed the principles of the Constitution upon an impregnable basis and rendered an experimental system permanent.

Renowned and venerable name! It was he who liberated the spirit which lived within the Constitution—the mind infused "through every member of the mighty mass"—so that it might "pervade, sustain and actuate the whole."

The fact that the conclusions reached by the court and set forth by the persuasive and logical reasoning of the great chief justice did not at that moment move in the direction of public opinion, but finally met with the entire approval of the matured judgment of the people, furnishes an impressive illustration of the working of our system of government.

Doubtless, in many instances, the Constitution has been subjected to strains which have tested its elasticity without breaking the texture, but the watchfulness of party has aided to keep the balance true, absolute infraction has been deprecated or denied, and a law-loving and law-abiding people has welcomed the rebound which restored the rigid outline and even tenor of its way.

The departing statesman dwells with insistence, on the grounds both of interest and sen-

sibility, upon the paramount importance of the Union and of that unity of government which makes of those who live under it one people and one nation, and will, he hopes, induce all its citizens, whether by birth or choice, to glory in the name "American."

Here, the ideal which influenced his conduct may be read between the lines—the ideal of a powerful and harmonious people, possessed of freedom because capable of self-restraint, and working out the destinies of an ocean-bound republic, whose example should be a message of glad tidings to all the earth.

And the realization of that ideal involved a patriotism not based upon the dictates of interest, but springing from devotion of the heart, and pride in the object of that devotion.

What Washington desired, as Lodge's fine biography makes entirely clear, was, that the people should become saturated with the principles of national unity and love of country, should possess an "American character," should never forget that they were "Americans." Hence he opposed education abroad, lest our youth might contract principles unfriendly to republican government; and discouraged immigration, except of those who, by "an intermixture with our people," could themselves, or their descendants, "get assimilated to our customs, measures and laws; in a word, soon become one people."

To be an American was to be part and parcel of American ideas, institutions, prosperity and progress. It was to be like-minded with the patriotic leaders who have served the cause of their native or adopted land, from Washington to Lincoln. It was to be convinced of the virtues of republican government as the bulwark of the true and genuine liberties of mankind, which would ultimately transmute suffering through ignorance into happiness through light.

Who would not glory in the name American, when it carries with it such illustrative types as Washington, and Franklin, and Samuel Adams, and Jefferson, and such a type as Lincoln, whose very faults were American, as were the virtues of his sad and heroic soul?

As the lust for domination is in perpetual conflict with the longing to be free, so the tendency to concentration struggles perpetually with the tendency to diffuse.

It is in the maintenance of the equilibrium that the largest liberty consistent with the greatest progress has been found. And this is as true between the States and the federal government as between the individual and the State.

But while the play of the two forces is a natural one, the gravitation is to the centre, with human nature as it is.

The passage of the century, with the vast material development of the country, has brought this strikingly home to us in the increased importance of the federal government in prestige and power as compared with that of the state governments in the time of Washington. Position on the supreme bench or cabinet place might still be declined for personal reasons, but not because of preference for the headship of a state government, or of a state tribunal, and no punctilio would cause the governor of to-day to hesitate upon a

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question of official etiquette when the President visits a state capital.

Rapidity and ease of communication by railroad, telegraph and post; the handling of the vast income and expenditure of the federal treasury, and the knitting together of the innumerable ties of family, social and business relations, have created a solidarity which demands, in the regulation of commerce, the management of financial affairs and the like, the interposition of federal authority. The national banking system, the Interstate Commerce Commission, the Agricultural Department, the Labor and Educational Bureau, the National Board of Health, indicate the drift toward the exertion of the national will, a natural and perhaps inevitable result of that unity which formed the object of Washington's desire.

But what he wished was solidarity without centralization in destruction of local regulation, for it must not be assumed that he did not realize the vital importance of the preservation of local self-government through the States. To realize its great destiny the country must oppose externally a consolidated front and contain within itself a single people only; but popular government must be preserved, and the doubt was whether a common government of the popular form could embrace so large a sphere.

Hence the earnestness with which Washington invoked the spirit of essential unity through pride and affection to move upon the face of the waters. When the new political world had fairly taken form and substance other considerations would resume their due importance. He was profoundly disturbed by the apprehension that different portions of the population might become, through contradictory interests, in effect rival peoples, and the Union be destroyed by the contention for mastery between them. His sagacious mind perceived the danger arising from the social and economic condition produced by an institution with which the framers of the Constitution had found themselves unable to deal, and he deprecated an appeal to the last reason of kings in preservation of one government over our whole domain.

Yet that appeal was fortunately so long delayed that when it came the civil war determined the perpetuity and indissolubility of the Union, without the loss of distinct and individual existence or of the right of self-government by the States.

This conflict demonstrated that no part of the country was destitute of that old fighting spirit, which rouses at the invocation of force through arms, and which long years of prosperity could not weaken or destroy, and, at the same time, that gigantic armies drawn from the ranks of a citizen soldiery, however skilled they may become in the arts of war, on the cessation of hostilities at once resumed the normal cultivation of the arts of peace.

And from an apparent invasion of the carefully constructed scheme to secure popular government, popular government has obtained a wider scope and renewed power, and from an apparent industrial overthrow has come an unexampled industrial development. "Out of

the eater came forth meat, and out of the strong came forth sweetness."

The waste of war is always rapidly replaced, and in its effect on institutions time may repair its injuries without weakening its benefits.

Is it possible to conceive of a more searching test of the wisdom and lasting quality of our form of government than that applied by the civil war? Is it possible to conceive of a more convincing demonstration than the reconciliation which has followed the conclusion of the struggle, and the complete reinstatement of the system in harmonious operation over the entire national domain? No conquered provinces perpetuated personal animosities and by the fact of their existence, through despotic rule over part, changed the government over all. On the contrary, the States, vital parts of the system, and in whose annihilation the system perishes, resumed the relations temporarily suspended, and the continuance of local self-government on its accustomed course prevented the old connection from carrying with it the bitterness of enforced change. It was the triumph of the machinery that its practical working so speedily assumed its normal movement, substantially uninjured by the convulsion that had shaken it.

And as the wheels within the wheels revolve, the aspiration finds a response in every heart: "Come from the four winds, O breath, and breathe upon these slain that they may live"—live with their reunited brethren, one in the hand of God.

Finally, the country is warned against the baleful effects of the spirit of party as the worst enemy of governments of the popular form.

Franklin wrote that all great affairs are carried on by parties, but that as soon as a party has gained its general point each member becomes intent upon his particular interest; that few in public affairs act from a mere view of the good of their country, and fewer still with a view to the good of mankind. But these observations would, in the light of the history of our country, be regarded as too sweeping, although they suggest grounds for the objection of Washington to the domination of party spirit.

Parties based on different opinions as to the principles on which the government is to be conducted must necessarily exist. To them we look for that activity in the advocacy of opposing views; that watchfulness over the assertion of authority; that keen debate as to the course most conducive to well being, essential to the successful growth of popular institutions. That voice of the people which, when duly given and properly ascertained, directs the action of the state, is largely brought to declare itself through the instrumentality of party. It is this which corrects that general apathy rightly regarded by De Tocqueville as a serious menace to popular government because conducive to its complete surrender to the domination of its agents if they will but relieve responsibility and gratify desire. But if the spirit of party is so extreme that party itself becomes a despotism, or, if government itself becomes nothing but organized party, then the danger apprehended by Washington is upon us.

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With the increase of population and wealth and power; with the spoils of office dependent upon the elections; with vast interests affected by legislation, as in the care and disposition of public property, the raising of public revenue, the grant or regulation of corporate powers and monopolistic combinations, the danger is that corruption, always insidious, always aggressive and always dangerous to popular government, will control party machinery to effect its ends, tempt public men into accepting favors at its hands by taking office purchased by its influence, and flourish in rank luxuriance under the shelter of a system which confounds the honest and the patriotic with the cunning and the profligate. An intelligent public opinion ceases to exist when it cannot assert itself, and great measures and great principles are lost when elections degenerate into the mere registration of the decrees of selfishness and greed.

Whenever party spirit becomes so intense as to compass such results it will have reached the height denounced by Washington, and will realize in the action it dictates the terrible definition of despotic government, "When the savages wish to eat fruit they cut down a tree and pluck the fruit."

However difficult it may be to fully appreciate the influence of great men upon the cause of civilization, it is impossible to overestimate that of Washington, thus exerted through precept, as well as by example. In the general recognition of to-day of the effect of that which he did, that which he said, that which he was, upon the public conscience, is found the justification of the confident claim that popular government under the form prescribed by the fundamental law has ceased to be an experiment. Neither foreign wars, nor attacks upon either of the coördinate departments, nor the irritation of a disputed national election, nor territorial aggrandizement, nor the addition of realm after realm to the empire of States, nor sectional controversies, nor the destruction of a great economical, social and political institution, nor the shock of arms in internecine conflict, have impaired the structure of the government or subverted the orderly rule of the people.

But the deliverance vouchsafed in time of tribulation is as earnestly to be sought in time of prosperity, when material acquisition may deaden the spiritual sense and impede the progress of human elevation.

In the growth of population; in the expansion of commerce, manufactures and the useful arts; in progress in scientific discovery and invention; in the accumulation of wealth, in material advancement of every kind, the century has indeed been marvelous. Steam, electricity, gas, telegraphy, photography, have multiplied the instrumentalities for the exercise of human power. Science, philosophy, literature and art have moved forward along the lines of prior achievement. But wants have multiplied as civilization has advanced, and with multiplied wants and the increased freedom of the individual have come the antagonisms inevitably incident to inequality of condition, even though there is widely extended improvement upon the whole, and often because of it, and added to them the more serious

discontents arising from the existence, notwithstanding the immense results of stimulated production, of privation and distress.

The Declaration asserted political equality and the possession of the inalienable rights of life, liberty and the pursuit of happiness, and the future of the individual was assumed to be secured in securing through government that equality and those rights.

In spite of the violent overthrow of institutions in the French Revolution, that great convulsion carried within it the same salutary principles, while a quickening outburst of spiritual energy marked the commencement of the industrial development of England, and all Europe glowed with the fires of sympathy with the wretched and oppressed.

Throughout the hundred years thus introduced, aspiration for the elevation of humanity has not diminished in intensity, and hope of the general attainment of a more exalted plane has gained new strength in the effort to remove or mitigate the ills which have oppressed mankind. The enhanced valuation of human life, the abolition of slavery, the increase of benevolent and charitable institutions, the large public appropriations and private benefactions to the cause of education, the wide diffusion of intelligence, perceptible growth in religion, morality and fraternal kindness, encourage the effort and give solid ground for the hope. And since the protection and regulation of the rights of individuals, as between themselves and as between them and the community, ultimately come to express the will of the latter, it is not unreasonable to contend that the perfectibility of man is bound up in the preservation of republican institutions.

Where the pressure upon the masses has been intense, the drift has been toward increased interference by the state in the attempt to alleviate inequality of condition. So long as that interference is enabling and protective only to enable, and individual effort is not so circumscribed as to destroy the self-reliance of the people, they move onward with accelerated speed in intellectual and moral as well as material progress; but where man allows his beliefs, his family, his property, his labor, each of his acts, to be subjected to the omnipotence of the state, or is unmindful of the fact that it is the duty of the people to support the government and not of the government to support the people, such a surrender of independence involves the cessation of such progress in its largest sense.

The statement that popular outbreaks were often as beneficial in the political world as storms in the physical was defended upon the ground that, although evils, they were productive of good by preventing the degeneracy of government and nourishing that general attention to public affairs, the absence of which would be tantamount to the abdication of self-government.

But while the rights to life, to use one's faculties in all lawful ways, and to acquire and enjoy property, are morally fundamental rights antecedent to constitutions, which do not create, but secure and protect them, yet it is within the power of the state to promote the health, peace, morals, education and good order of the people by legislation to that end, and to regu-

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late the use of property in which the public has such an interest as to be entitled to assert control. In this wide field of regulation by law, and in the reformation of laws which are found to promote inequality, as well as in the patient efforts of mutual forbearance which the education of conflict produces, the direction of the rule of the people is steadily towards an amelioration not to be found in the dead level of despotism, nor in the destruction of society proposed by the anarchist.

It is but little more than thirty years since the well-known prophecy was uttered, that with the increase of population and the taking up of the public lands, our institutions then being really put to the test, either some Cæsar or Napoleon would seize the reins of government, or our republic would be plundered and laid waste as the Roman Empire had been, but by Huns and Vandals engendered within our own country and by our own institutions.

The brilliant essayist did not comprehend the character of our fundamental law, the securities carefully devised to prevent facility in changing it, and the provisions which inhibit the subversion of individual freedom, the impairment of the obligation of contracts and the confiscation of property, nor realize the practical operation of a governmental scheme intended to secure that sober second thought which alone constitutes public opinion in this country, and which makes of government by the people a government strong enough, in the language of the address, to "withstand the enterprises of faction, to confine each member of the society within the limits prescribed by the laws, and to maintain all in the secure and tranquil enjoyment of the rights of person and property," without which "liberty is little else than a name."

Undoubtedly to this people, who from four have become seventy millions in the passage of their first century, to reach by the close of the second, perhaps, seven hundred millions, with resources which can feed and clothe and render happy more than twice that number, the solution of grave problems is committed.

How shall the evils of municipal government, the poverty, the vice, engendered by the disproportionate growth of urban populations, be dealt with as that growth continues? How shall immigration be regulated so that precious institutions may not be threatened by too large an influx of those lacking in assimilative power and inclination? How shall the full measure of duty towards that other race, to which in

God's providence this country has been so long a home, be discharged so that participation in common blessings and in the exercise of common rights may lead to and rest upon equal education and intelligence? How shall monopoly be checked, and the pressure of accumulation yield to that equitable distribution, which shall "undo excess, and each man have enough?" How shall the individual be held to the recognition of his responsibility for government, and to meet the demand of public obligations? How shall corruption in private and public life be eradicated?

These and like questions must be answered, and they will be by the nation of Washington, which in the exercise of the sagacity and prudence and self-control born of free institutions, and the cultivation of the humanities of Christian civilization, will hallow the name American, by making it the synonym of the highest sense of duty, the highest morality, the highest patriotism, and so become more powerful and more noble than the powerful and noble Roman nation, which stood for centuries the embodiment of law and order and government, but fell when the gods of the fireside fled from hearthstones whose sanctity had been invaded, and its citizens lost the sense of duty in indulgence in pleasure.

And so the new century may be entered upon in the spirit of optimism, the natural result, perhaps, of a self-confidence which has lost nothing in substance by experience, though it has gained in the moderation of its impetuosity; yet an optimism essential to the accomplishment of great ends, not blind to perils, but bold in the fearlessness of a faith whose very consciousness of the limitations of the present asserts the attainability of the untravelled world of a still grander future.

No ship can sail forever over summer seas. The storms that it has weathered test and demonstrate its ability to survive the storms to come, but storms there must be until there shall be no more sea.

But as amid the tempests in which our ship of state was launched, and in the times succeeding, so in the times to come, with every exigency constellations of illustrious men will rise upon the angry skies, to control the whirlwind and dispel the clouds by their potent influences, while from the "clear upper sky" the steady light of the great planet marks out the course the vessel must pursue, and sits shining on the sails as it comes grandly into the haven where it would be.

APPENDIX V.

In Memoriam.

ORLOW W. CHAPMAN,

DIED JANUARY 19, 1890.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

MONDAY, January 20, 1890.

MR. ATTORNEY-GENERAL addressed the court as follows:

MAY IT PLEASE THE COURT: A decree of nature, as distressing as it was unexpected, makes it my duty to announce to the court the death of the Solicitor-General of the United States. In the Sabbath quiet of yesterday morning, after an illness, painful, but until near the end not believed to be fatal, Orlow W. Chapman rested forever from earthly duty and earthly suffering.

The shock and the grief of this event are today, I am sure, too fresh and strong upon all of us to admit of fitting words of eulogy upon the character of this eminent lawyer and good man. Let that grateful duty await some future occasion.

My mission (this morning is only to make

this sad announcement, and to ask the court to take such action as may be due to the memory of our loved associate and now departed brother.

THE CHIEF JUSTICE responded as follows:

The court receives the melancholy intelligence of the death of the Solicitor-General with profound regret.

There is a case now under argument and near its conclusion in which the counsel engaged are from a distant State. We feel compelled, therefore, to continue our session until the argument of that case is closed, but will then adjourn as a deserved mark of respect to the memory of the lamented deceased, and also in order to enable the members of the court to attend his funeral in a body.

APPENDIX VI.

CENTENNIAL CELEBRATION
OF THE ORGANIZATION OF THE
FEDERAL JUDICIARY,

HELD AT
NEW YORK,
FEBRUARY 4, 1890.

Under the auspices and pursuant to arrangement of the Bar Association of the State of New York, assisted by the Bar Association of the City of New York and the American Bar Association, the hundredth anniversary of the first session of the Supreme Court of the United States was celebrated on the fourth day of February, 1890, first, by commemorative literary exercises in the morning at the Metropolitan Opera House in New York City; and, second, by a banquet at the Lenox Lyceum in the evening of the same day. From the large committees of the several Bar Associations, sub-committees were appointed to carry out details as follows:

- Executive Committee.
- Committee on Finance.
- Committee on Invitations.
- Committee on Commemorative Exercises.
- Sub-Committee on Transportation.
- Committee on Entertainments and Receptions.
- Sub-Committee on Reception and Entertainment of Invited Guests.
- Sub-Committee on Toasts.
- Sub-Committee on Banquet.

I. Commemorative literary exercises at the Metropolitan Opera House.

Among other things said and done, and as most eminently appropriate to be reproduced here, may be considered the following

REMARKS OF MR. CHIEF JUSTICE
FULLER.

Mr. Chairman:

I rise to express to the New York State Bar Association and to those who have co-operated with it, on behalf of the Supreme Court of the United States, the appreciation of its members of the admirable manner in which the centennial anniversary of the organization of the Judicial Department of the general government is being celebrated, and their sense of the cordial hospitality with which they have been welcomed to the metropolitan city, where the first session of the court was held. Their acknowledgments are due for the terms in which that

welcome has been extended during these exercises, and for the discriminating and eloquent addresses in historical and biographical review of the court, and in exposition of its powers, the ends which it secures, and the vital functions which it exercises in the masterly constitutional scheme devised to perpetuate popular government—addresses worthy of the eminent men who have pronounced them, leaders in that great fraternity whence the membership of courts is derived, and upon whose assistance and support all courts rely.

But it is not for me, while tendering these acknowledgments, to enter upon these comprehensive reflections suggested by the occasion, and which should find expression on our part. That grateful duty appropriately devolves upon one of those veteran jurists, the fruitful labors of whose many years have imparted imperishable fame to the tribunal and themselves. Three of them, still shining in use, find work of noble note may yet be done in the cause to which their lives have been dedicated; while another, the recipient of the liveliest attachment on the part of his brethren and of the people he has served so well, maintains, in his well-earned retirement, a never-ceasing interest in the exalted administration of justice.

And I deem it a peculiar felicity that at a celebration conducted under the auspices of the bar of the State of New York—that bar which has given to the Supreme Bench a Jay, a Livingston, a Thompson, a Nelson and a Hunt, and whose Blatchford continues most worthily to adorn it—I am enabled to introduce, as the representative of the court, a member of the same bar, who has reflected so much credit upon its training in more than thirty years of distinguished judicial service, Mr. Justice Field of California.

ADDRESS OF MR. JUSTICE FIELD.

Mr. President and Gentlemen:

As the Chief Justice of the United States has been pleased to refer to my former connection with the bar of this State and city, I beg to say that I still claim, with pride, membership there, and trust that the claim will be allowed. Although I remained in this city but a few years,

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swept away by the current which set, in 1849, for the Eldorado of the West, dreaming that I might perhaps in some way aid in laying the foundations of that great Commonwealth, which everyone saw was to arise on the Pacific, I carried with me, and still retain, pleasant recollections of the learned bar of that period, and of its great lawyers, to whom I looked up with admiration: George Wood, George Griffin, Daniel Lord, Francis B. Cutting, Benjamin F. Butler, John Duer, Charles O'Connor, James W. Gerard, James T. Brady and others—names never spoken of throughout our land without profound respect. In my subsequent life, in the varied experiences with which it has been marked, and with the extended acquaintance I have had with the legal profession, I have always regarded them as among the ablest and most learned of great advocates.

The Chief Justice, in behalf of himself and his associates, has expressed in fitting terms their high appreciation of the courtesy extended to them by the Association of the Bar of the State of New York, the remembrance of which they will carry through life. He has also expressed the pleasure which they have felt, in common with all here present, in listening to the addresses made upon the organization of the Supreme Court, and its place in the constitutional system of the United States, and upon the lives and careers of the justices who, by their expositions of the Constitution and their maintenance of its principles, have shed lustre upon that tribunal. But far beyond these eloquent discourses, and beyond the power of expression in words, is the eulogium presented by this vast assembly,—composed of great lawyers, eminent judges, and men distinguished in different departments of life for their honorable public services,—gathered from all parts of our country, to celebrate the centennial anniversary of the court's organization, and to listen to the story of its labors during the hundred years of its existence—an assembly presided over by one who has held the high office of President of the United States.

In every age and with every people there have been celebrations for triumphs in war—for battles won on land and on sea—and for triumphs of peace, such as the opening of new avenues of commerce, the discovery of new fields of industry and prosperity, the construction of stately temples and monuments, or grand edifices for the arts and sciences, and for the still nobler institutions of charity.

But never until now has there been in any country a celebration like this, to commemorate the establishment of a judicial tribunal as a coördinate and permanent branch of its government. The unobtrusive labors of such a department, the simplicity of its proceedings, unaccompanied by pomp or retinue, and the small number of persons composing it, have caused it to escape rather than to attract popular attention and applause.

This celebration had its inspiration in a profound reverence for the Constitution of the United States as the sure and only means of preserving the Union, with its inestimable blessings, and the conviction that this tribunal has materially contributed to its just appreciation and to a ready obedience to its authority.

For that Constitution the deepest reverence may well be entertained. Its adoption was essential to that dual government by which alone free institutions can be maintained in a country so widely extended as ours, embracing every variety of climate; furnishing different products, supporting different industries, and having in different sections people of different habits and pursuits, and in many cases of different religious faiths.

Of this complex government—of its origin and operation—I may be pardoned if I say a few words, before speaking of its Judicial Department and of the peculiar functions which distinguish it from the judicial departments of all other countries, and before speaking of the necessity of legislation, that its tribunal of last resort may be as useful in the future as we believe it has been in the past.

Experience has shown that in a country of great territorial extent and varied interests, peace and lasting prosperity can exist with a civilized people only when local affairs are controlled by local authority, and, at the same time, there are lodged in the general government of the country such sovereign powers as will enable it to regulate the intercourse of its people with foreign nations and between the several communities, protect them in all their rights in such intercourse, defend the country against invasion and domestic violence, and maintain the supremacy of the laws throughout its whole domain. This principle the framers of the Constitution acted upon in establishing the government of the Union, by leaving unimpaired the power of the States to control all matters of local interest, and creating a new government of sovereign powers for matters of general and national concern. They thus succeeded in reconciling local self-government—or home-rule, as it is termed—with the exercise of national sovereignty for national purposes. Under this dual government each State may pursue the policy best suited to its people and resources, though unlike that of another State. And yet there can be no violent conflicts so long as the central government exercises its rightful power, and secures them against foreign invasion and internal violence, and extends to the citizens of each State protection in the others. The adaptation of this form of government for a far more extended territory than that existing at its adoption, has been demonstrated by the addition to the Union of new States with interests and resources in many respects essentially different from those of the original States, but which, from experience of its benefits and their instinctive yearning for nationality, have formed a like attachment to the Constitution.

The prosperity which has followed this distribution of governmental powers not only attests the wisdom of the framers of the Constitution, but transcends even their highest expectations. In the history of no people—ancient or modern—has anything been known at all comparable with the progress of this country since that time in the development of its resources, in the addition to its material wealth, in its application of science to works of public utility, in the increase of its population and in the general contentment and happi-

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ness of its people. The predictions of the most enthusiastic as to its growth and prosperity never equalled the stupendous reality.

The Constitution of the United States, which, in ordaining this complex government, has been productive of such vast results, was the outgrowth of institutions and doctrines inherited from our ancestors and applied under the new conditions of our country. A distinguished English statesman has designated it as the most wonderful product struck off at a given time by the brain and purpose of man; but this designation is only true as to the character of the instrument. Though it received definite form from the labors of the convention of 1787, it was, in its division of governmental powers into three departments, and in its guaranties of private rights, the product of centuries of experience in the government of England. It had its roots deep in the past, as all enduring institutions have. The colonists brought with them the great principles of civil liberty, which had been established there after many a conflict with the Crown, and which were proclaimed in *Magna Charta* and in the *Declaration of Rights*. Our country was in this respect the heir of all the ages. Not a blow was struck for liberty in the Old World that did not wake an echo in the forests of the New. Every vantage ground gained there on its behalf was courageously and stubbornly held here. Thus liberty, with all its priceless blessings, passed from country to country, from hemisphere to hemisphere, and from generation to generation. Claiming this inheritance, the Continental Congress, assembled in 1774 to provide measures to resist the encroachments of the British Crown, declared that the inhabitants of the Colonies were entitled, "by the immutable laws of nature, the principles of the English Constitution and their several charters, to all the rights, privileges and immunities of free and natural-born subjects within the realm of England." And when a subsequent Congress, in 1776, declared the independence of the Colonies, it proclaimed that the rights of man to life, to liberty and to the pursuit of happiness—having then risen to a just appreciation of their true source—were held by him, not as a boon from king or parliament, or as the grant of any charter, but as the endowment of his Creator; also, that to secure these rights—not to grant them—governments are instituted among men, deriving their just powers from the consent of the governed. The different communities, which, by the separation from the mother country, had ceased to be colonies and had become States, when framing new constitutions to conform to their new conditions, inserted guaranties for the protection of these rights, with other provisions required for the government of free commonwealths.

It was foreseen, however, by members of the Continental Congress and by thoughtful patriots throughout the country, that when the independence of the Colonies was recognized by the mother country, as sooner or later it must be, they would be at once surrounded by difficulties and dangers, threatening their peace and even their existence as independent communities. It was plain to them that, without some common protecting power, disputes from conflicting interests and rivalries, incident to

all neighboring states, would arise between them, which would inevitably lead to armed conflicts and invite the interference of foreign powers, ending in their conquest and subjection; and that all that was gained by the experience of centuries and by the Revolution on behalf of the rights of man and free government would be lost.

To provide against these apprehended dangers, a federation or league between the States was proposed as a measure of common defense and protection. Articles of Confederation were accordingly framed and submitted to the Legislatures of the States, and finally adopted in 1781.

But, as we all know, these articles provided no mode of carrying into effect the measures of the Confederation, or even the treaties made by it. They established no tribunal to construe its enactments and enforce their provisions. Its power was simply that of recommendation to the States, its framers appearing to have believed that the States had only to know what was necessary, in the judgment of Congress, for the general welfare, to provide adequate means for its accomplishment. A government which could only enforce its enactments upon the approval of thirteen distinct sovereignties necessarily contained within itself the seeds of its dissolution; it could not give the general protection needed. Having no power to exact obedience or to punish for disobedience to its advisory ordinances, its recommendations were disregarded not only by States but by individuals.

But though the government of the Confederation failed to accomplish the purpose of its creation, its experience was of inestimable value; it made clear to the whole country what was essential in a general government in order to give the needed security and protection, and thus prepared the way for the adoption of the Constitution of the United States. So out of the necessities of the times, to preserve whatever of freedom had been gained in the past,—gained after years of bitter experience, both in the mother country and in our own,—and to secure its full fruition in the future, that instrument was framed and adopted. By it the great defects of the Confederation were avoided, and a government created with ample powers to give to the States and to all their inhabitants the needed security—a government taking exclusive charge of our foreign relations, representing the people of all the States in that respect as one nation, with power to declare war, make peace, negotiate treaties and form alliances, and at the same time securing a republican government to each State and freedom of intercourse between the States, equality of privileges and immunities to citizens of each State in the several States, uniformity of commercial regulations, a common currency, a standard of weights and measures, one postal system, and such other matters as concerned all the States and their people.

By the union of the States, which had its origin in the necessities of the war of the Revolution, which was declared in the Articles of Confederation to be perpetual, but which was rendered perfect only under the Constitution, the political body known as the United States was created and took its place in the family of

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nations. With that union the States became, in their relations to foreign countries and their citizens or subjects, one nation, and their people became one people, with a government designed to be perpetual. A dissolution of the Union would, indeed, remit the States to their original position of separate communities, and the United States ceasing to be a political body would pass from the family of nations. But such a possibility was never considered by the framers of the Constitution; no provisions are found within it contemplating such a result. As aptly stated by *Chief Justice Chase*, "the Constitution in all its provisions looks to an indestructible Union composed of indestructible States." Its government was clothed with the means to give effect to all its measures, which none have been able during the century of its existence successfully to resist. In the late civil war its strength was subjected to the severest test. But notwithstanding the immense forces wielded by the Confederate States, the extent of territory they controlled, and the vast numbers which recognized their authority, the government of the Union never for one hour renounced its claim to supreme authority over the whole country, and to the allegiance of every citizen thereof. And when the contest ended—a contest which was the most tremendous and awful civil war known in history, though made resplendent with unprecedented acts of heroic courage on both sides—the armies of the Confederate States were scattered, and their whole government overthrown. Whilst the fiery courage and the martial spirit of their people extorted our admiration,—we are all of the same warrior race,—their attempts to break the Union only disclosed the immovable solidity of its foundations and the massive strength of its superstructure. It was the dash of the tempestuous waves against the eternal rock. And now, in all its wide domain, in respect to every right secured by the Constitution, no citizen of the Republic is beyond its power or so humble as to be beneath its protection. We can now confidently look forward to the time when the country will embrace hundreds of millions of people, and are justified in believing that the States will be united then, as now, by kindred sentiments, and common pride in the greatness and the glory of the country. We have an abiding faith that when we shall have surpassed—as we are destined to do—in the vastness of our empire, as in the civilization and wealth of our people, ancient Rome in her greatest days, we shall continue to be, for all national purposes, as now, one nation, one people, one power.

The crowning defect in the government under the Articles of Confederation was the absence of any judicial power; it had no tribunal to expound and enforce its laws.

In no one particular was the difference between that government and the one which superseded it more marked than in its Judicial Department. The Constitution declares not only in what courts the judicial power of the United States shall be vested, but to what subjects it shall extend. It is vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish, and it extends not only to all cases affecting ambassadors, other public ministers

and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign states, citizens or subjects; but also to all cases in law and equity arising under the Constitution, the laws of the United States and treaties made under their authority. Cases are considered as arising under the Constitution, laws and treaties of the United States, whenever any question respecting that Constitution and those laws or treaties is presented in such form that the judicial power can act upon it—that is to say, when a right or claim is asserted for the maintenance of which a construction of that Constitution, or of a law or a treaty of the United States, is required.

No government is suited to a free people where a judicial department does not exist with power to decide all judicial questions arising upon its constitution and laws.

The Judicial Department established under the Constitution is thus co-extensive; it reaches to every judicial question which arises under the Constitution, treaties and laws of the United States. It has devolved upon it, when such a question arises, beyond the ordinary functions of a judicial department under a single, as distinguished from a dual, government, the duty of determining whether the delegation of powers to Congress on the one hand, or the reservation of powers to the States on the other, is passed by either, and thus of preventing jarring conflicts. And in two particulars it is distinguished from the judicial department of any other country; one, in that it can summon before it the States of the Union, and adjust controversies between them, going even to the extent of determining disputes as to their boundaries, rights of soil and jurisdiction; the other, in that it can determine the validity or invalidity of an Act of Congress or of the States, when the validity of either is assailed in litigation before it.

Controversies between different states of the world respecting their boundaries, rights of soil and jurisdiction have been the fruitful source of irritation between their people, and not unfrequently of bloody conflicts. The history of many of the principalities of Germany in the fifteenth century is a history of desolating wars over disputed boundaries. The license, disorders and crimes usually attendant upon border warfare were the cause of widespread misery, until the establishment under Maximilian of an imperial chamber for the settlement of such controversies, which brought out of chaos order and tranquillity in the German Empire.

Between the States in this country, under the Articles of Confederation, there were also numerous conflicts as to boundaries and consequent rights of soil and jurisdiction. They existed between Pennsylvania and Virginia; between Massachusetts and New Hampshire, and between Virginia and New Jersey. By the judicial article of the Constitution all such controversies are withdrawn from the arbitra-

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ment of war to the arbitrament of law. Thus, for the first time in the history of the world is the spectacle presented of a provision embodied in the fundamental law of a country, that controversies between States—still clothed for purposes of internal government with the powers of independent communities—shall be submitted to the peaceful and orderly modes of judicial procedure for settlement—controversies which *Lord Chancellor Hardwicke*, in the case of *Penn v. Lord Baltimore*, said were worthy the judicature of a Roman Senate rather than of a single judge.

The practical application of the power of the Supreme Court in this particular has been fruitful of happy results. In 1837 it settled a disputed boundary between Rhode Island and Massachusetts; in 1849 it brought to an adjustment the disputed line between Missouri and Iowa; and, in 1870, it settled the controversy between Virginia and West Virginia as to jurisdiction over two counties within the asserted boundaries of the latter. Certainly no provision of the Constitution can be mentioned, more honorable to the country or more expressive of its Christian civilization, than the one which provides that controversies of this character shall be thus peacefully settled. In determining them, the court is surrounded by no imperial guard, by no bands of janissaries; it has with it only the moral judgment and the invisible power of the people. Should the necessity arise that invisible power would soon develop into a visible and irresistible force.

The power of the court to pass upon the conformity with the Constitution of an Act of Congress, or of a State, and thus to declare its validity or invalidity, or limit its application, follows from the nature of the Constitution itself, as the supreme law of the land,—the separation of the three departments of government into legislative, executive and judicial—the order of the Constitution—each independent in its sphere, and the specific restraints upon the exercise of legislative powers contained in that instrument. In all other countries, except perhaps Canada under the government of the Dominion, the judgment of the legislature as to the compatibility of a law passed by it with the constitution of the country has been considered as superior to the judgment of the courts. But under the Constitution of the United States, the Supreme Court is independent of other departments in all judicial matters, and the compatibility between the Constitution and a statute, whether of Congress or of a State, is a judicial and not a political question, and therefore is to be determined by the court whenever a litigant asserts a right or claim under the disputed Act for judicial decision.

This power of that court is sometimes characterized by foreign writers and jurists as a unique provision of a disturbing and dangerous character, tending to defeat the popular will as expressed by the legislature. In thus characterizing it they look at the power as one that may be exercised by way of supervision over the general legislation of Congress, determining the validity of an enactment in advance of its being contested. But a declaration of the unconstitutionality of an Act of Congress or of the States cannot be made in that way

by the Judicial Department. The unconstitutionality of an Act cannot be pronounced except as required for the determination of contested litigation. No such authority as supposed would be tolerated in this country. It would make the Supreme Court a third house of Congress, and its conclusions would be subject to all the infirmities of general legislation.

The limitations upon legislative power, arising from the nature of the Constitution and its specific restraints in favor of private rights, cannot be disregarded without conceding that the legislature can change at will the form of our government from one of limited to one of unlimited powers. Whenever, therefore, any court, called upon to construe an enactment of Congress or of a State, the validity of which is assailed, finds its provisions inconsistent with the Constitution, it must give effect to the latter, because it is the fundamental law of the whole people, and, as such, superior to any law of Congress or any law of a State. Otherwise the limitations upon legislative power expressed in the Constitution or implied by it must be considered as vain attempts to control a power which is in its nature uncontrollable.

This unique power, as it is termed, is therefore not only not a disturbing or dangerous force, but is a necessary consequence of our form of government. Its exercise is necessary to keep the administration of the government, both of the United States and of the States, in all their branches, within the limits assigned to them by the Constitution of the United States, and thus secure justice to the people against the unrestrained legislative will of either—the reign of law against the sway of arbitrary power.

As to the decisions of the Supreme Court respecting the constitutionality of Acts of Congress or of the States, they have, as a general rule, been recognized as furthering the great purposes of the Constitution,—as where, in *Gibbons v. Ogden*, the court declared the freedom of the navigable waters of New York to all vessels, against a claim of an exclusive right to navigate them by steam vessels under a grant of the State to particular individuals;—or where, as in *Dartmouth College v. Woodward*, the court enforced the prohibition of the Constitution against the impairment by the Legislature of a State of the obligation of a contract, declaring void an Act of New Hampshire which altered the character of the college in essential particulars, and holding that the charter granted to the trustees of the college was a contract within the meaning of the Constitution and protected by it, and that the college was a private charitable institution—not under the control of the Legislature;—or where, as in *Brown v. Maryland*, the court declared that commerce with foreign nations could not, under a law of the State, be burdened with a tax upon goods imported, before they were broken in bulk, though the tax was imposed in the form of a license to sell;—or where, as in *Weston v. Charleston*, the court declared that the bonds and securities of the United States could not be subjected to taxation by the States, and thus the credit of the United States be impaired;—or where, as in *McCulloch v. Maryland*, and *Osborn v. Bank of the United States*, the court denied the authority of the

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States, by taxation or otherwise, to impede, burden, or in any manner control the means or measures adopted by the government for the execution of its powers;—or where, as in *Hall v. DeCuir*, *The Wabash Railway Co. v. Illinois*, *The Philadelphia and Southern Steamship Co. v. Pennsylvania*, and other cases determined in the last quarter of a century, the court has removed barriers to interstate and foreign commerce interposed by state legislation.

And so, in the great majority of cases in which the validity of an Act of Congress or of a State has been called in question, its decisions have been in the same direction, to uphold and carry out the provisions of the Constitution. In some instances the court, in the exercise of its powers in this respect, may have made mistakes. The judges would be more than human if this were not so. They have never claimed infallibility; they have often differed among themselves. All they have ever asserted is, that they have striven to the utmost of their abilities to be right, and to perform the functions with which they are clothed to the advancement of justice and the good of the country.

In respect to their liability to err in their conclusions this may be said—that in addition to the desire which must be ascribed to them to be just—the conditions under which they perform their duties, the publicity of their proceedings, the discussions before them, and the public attention which is drawn to all decisions of general interest, tend to prevent any grave departure from the purposes of the Constitution. And, further, there is this corrective of error in every such departure; it will not fit harmoniously with other rulings; it will collide with them, and thus compel explanations and qualifications until the error is eliminated. Like all other error it is bound to die; truth alone is immortal, and in the end will assert its rightful supremacy.

And now, with its history in the century past, what is needed, that the Supreme Court of the United States should sustain its character and be as useful in the century to come? I answer, as a matter of the first consideration, that it should not be overborne with work, and by that I mean it should have some relief from the immense burden now cast upon it. This can only be done by legislative action, and in determining what measures shall be adopted for that purpose Congress will undoubtedly receive with favor suggestions from the bar associations of the country. The justices already do all in their power, for each one examines every case and passes his individual judgment upon it. No case in the Supreme Court is ever referred to any one justice, or to several of the justices, to decide and report to the others. Every suitor, however humble, is entitled to and receives the judgment of every justice upon his case.

In considering this matter it must be borne in mind that, in addition to the great increase in the number of admiralty and maritime cases, from the enlarged commerce on the seas, and on the navigable waters of the United States, and in the number of patent cases, from the multitude of inventions brought forth by the genius of our people, calling for judicial determination, even to the extent of occupying

a large portion of the time of the court, many causes, which did not exist upon its organization or during the first quarter of the century, have added enormously to its business. Thus by the new agencies of steam and electricity in the movement of machinery and transmission of intelligence, creating railways and steamboats, telegraphs and telephones, and adding almost without number to establishments for the manufacture of fabrics, transactions are carried on to an infinitely greater extent than before between different States, leading to innumerable controversies between their citizens, which have found their way to that tribunal for decision. More than one half of the business before it for years has arisen from such controversies.

The facility with which corporations can now be formed has also increased its business far beyond what it was in the early part of the century. Nearly all enterprises requiring for their successful prosecution large investments of capital are conducted by corporations. They, in fact, embrace every branch of industry, and the wealth that they hold in the United States equals in value four fifths of the entire property of the country. They carry on business with the citizens of every State as well as with foreign nations, and the litigation arising out of their transactions is enormous, giving rise to every possible question to which the jurisdiction of the federal courts extends.

The numerous grants of the public domain, embracing hundreds of millions of acres, in aid of the construction of railways; also for common schools, for public buildings and institutions of learning, have produced a great variety of questions of much intricacy and difficulty. The discovery of mines of the precious metals, in our new possessions on the Pacific Coast, and the modes adopted for their development, have added many more. The legislation required by the exigencies of the civil war, and following it, and the Constitutional Amendments which were designed to give further security to personal rights, have brought before the court questions of the greatest interest and importance, calling for the most earnest and laborious consideration. Indeed, the cases which have come before this court, springing from causes which did not exist during the first quarter of the century, exceed, in the magnitude of the property interests involved, and in the importance of the public questions presented, all cases brought within the same period before any court of Christendom.

Whilst the Constitutional Amendments have not changed the structure of our dual form of government, but are additions to the previous Amendments, and are to be considered in connection with them and the original Constitution as one instrument, they have removed from existence an institution which was felt by wise statesmen to be inconsistent with the great declarations of right upon which our government is founded; and they have vastly enlarged the subjects of federal jurisdiction. The Amendment declaring that neither slavery nor involuntary servitude, except as a punishment for crime, shall exist in the United States or any place subject to their jurisdiction, not only has done away with the slavery of the black

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man, as it then existed, but interdicts forever the slavery of any man, and not only slavery, but involuntary servitude—that is, surfrage, vassalage, villeinage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. As has often been said, it was intended to make everyone born in this country a free man and to give him a right to pursue the ordinary vocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. The right to labor as he may think proper without injury to others is an element of that freedom which is his birthright.

The Amendment declaring that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws, has proclaimed that equality before the law shall forever be the governing rule of all the States of the Union, which every person however humble may invoke for his protection. In enforcing these provisions, or considering the laws adopted for their enforcement, or laws which are supposed to be in conflict with them, difficult and far-reaching questions are presented at every term for decision.

Up to the middle of the present century the calendar of the court did not average one hundred and forty cases a term, and never amounted at any one term to three hundred cases; the calendar of the present term exceeds fifteen hundred. In view of the condition of the court—its crowded docket—the multitude of questions constantly brought before it of the greatest and most extended influence—surely it has a right to call upon the country to give it assurance and relief. Something must be done in that direction and should be done speedily to prevent the delays to suitors now existing. To delay justice is as pernicious as to deny it. One of the most precious articles of Magna Charta was that in which the King declared that he would not deny nor delay to any man justice or right. And assuredly what the barons of England wrung from their monarch, the people of the United States will not refuse to any suitor for justice in their tribunals.

Furthermore, I hardly need say that, to retain the respect and confidence conceded in the past, the court, whilst cautiously abstaining from assuming powers granted by the Constitution to other departments of the government, must unhesitatingly and to the best of its ability enforce, as heretofore, not only all the limitations of the Constitution upon the federal and state governments, but also all the guaranties it contains of the private rights of the citizen, both of person and of property. As population and wealth increase; as the inequalities in the conditions of men become more and more marked and disturbing; as the enormous aggregation of wealth possessed by some corporations excites uneasiness lest their power should become dominating in the legislation of the country, and thus encroach upon the rights or crush out the business of individuals of small means; as population in some quarters presses upon the means of subsistence, and angry menaces against order find vent in

loud denunciations,—it becomes more and more the imperative duty of the court to enforce with a firm hand all the guaranties of the Constitution. Every decision weakening their restraining power is a blow to the peace of society and to its progress and improvement. It should never be forgotten that protection to property and to persons cannot be separated. Where property is insecure, the rights of persons are unsafe. Protection to the one goes with protection to the other; and there can be neither prosperity nor progress where either is uncertain.

That the Justices of the Supreme Court must possess the ability and learning required by the duties of their office, and a character for purity and integrity beyond reproach, need not be said. But it is not sufficient for the performance of his judicial duty that a judge should act honestly in all that he does. He must be ready to act in all cases presented for his judicial determination with absolute fearlessness. Timidity, hesitation and cowardice in any public officer excite and deserve only contempt, but infinitely more in a judge than in any other, because he is appointed to discharge a public trust of the most sacred character. To decide against his conviction of the law or judgment as to the evidence, whether moved by prejudice, or passion, or the clamor of the crowd, is to assent to a robbery as infamous in morals and as deserving of punishment as that of the highwayman or the burglar; and to hesitate or refuse to act when duty calls is hardly less the subject of just reproach. If he is influenced by apprehensions that his character will be attacked, or his motives impugned, or that his judgment will be attributed to the influence of particular classes, cliques or associations, rather than to his own convictions of the law, he will fall lamentably in his high office.

To the intelligent and learned bar of the country the judges must look for their most effective and substantial support. Its members appreciate more than any other class the difficulties and labors and responsibilities of the judicial office; and whilst the most severe and unsparing of critics, they are in the end the most just in their judgments. If they entertain for the judges respect and confidence, if they accord to them learning, integrity and courage, the general public will not be slow in accepting their appreciation as the true estimate of the judges' character. Sustained by this professional and public confidence, the Supreme Court may hope to still further strengthen the hearts of all in love, admiration and reverence for the Constitution of the United States—the noblest inheritance ever possessed by a free people.

II. At the banquet at the Lenox Lyceum was delivered the following

ADDRESS OF MR. JUSTICE HARLAN,

IN RESPONSE TO THE TOAST, "THE SUPREME COURT OF THE UNITED STATES."

Mr. President:

The toast you have read suggests many reflections of interest. But when an attempt is made to give shape to them, in my own mind, the fact confronts me that every line of

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thought most appropriate to this occasion has been covered by addresses delivered, in another place, by distinguished members of the bar, and by an eminent jurist responding on behalf of the Supreme Court of the United States. They have left nothing to be added respecting the organization, the history, the *personnel* or the jurisdiction of that tribunal. It is well that those addresses are to be preserved in permanent form for the delight and instruction of all that are to come after us; especially those who, as judges and lawyers, will be connected with the administration of justice. I name the lawyers with the bench, because upon them, equally with the judges, rests the responsibility for an intelligent determination of causes in the courts, whether relating to public or to private rights. As the bench is recruited from the bar, it must always be that as are the lawyers in any given period, so, in the main, are the courts before which they appear. Upon the integrity, learning and courage of the bar largely depends the welfare of the country of which they are citizens; for, of all members of society, the lawyers are best qualified by education and training to devise the methods necessary to protect the rights of the people against the aggressions of power. But they are also, in the best sense, ministers of justice. It is not true, as a famous lawyer once said, that an advocate, in the discharge of his duty, must know only his client. He owes a duty to the court of which he is an officer, and to the community of which he is a member. Above all, he owes a duty to his own conscience. He misconceives his high calling if he fails to recognize the fact that fidelity to the court is not inconsistent with truth and honor, or with a fearless discharge of duty to his client. It need scarcely be said in this presence that the American Bar have met all the demands that the most scrupulous integrity has exacted from gentlemen in their position.

In the addresses to-day much was said of the Supreme Court of the United States that was gratifying as well to those now members of that tribunal as to all who take pride in its history. But, Mr. President, whatever of honor has come to that court for the manner in which it has discharged the momentous trust committed to it by the Constitution must be shared by the bar of America. "Justice, sir," (I use the words of Daniel Webster), "is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself, in name and fame and character, with that which is and must be as durable as the frame of human society." The Temple of Justice which has been reared in this fair land is largely the work of our lawyers. If there be security for life, liberty and property, it is because the lawyers of America have not been unmindful of their obligations as ministers of justice. Search the history of every State in

the Union, and it will be found that they have been foremost in all movements having for their object the maintenance of the law against violence and anarchy; the preservation of the just rights both of the government and of the people.

I read recently a brief speech by Mr. Gladstone, at a banquet given many years ago in honor of the great French advocate, Berryer. He had visited the south of Europe, and witnessed there much cruel oppression of the people. The executive power, he said, not only had broken the law, but had established in its place a system of arbitrary will. He found, to use his own words, that the audacity of tyranny, which had put down chambers and municipalities and extinguished the press, had not been able to do one thing—to silence the bar. He, himself, heard lawyers in courts of justice, undismayed by the presence of soldiers, and in defiance of despotic power, defend the cause of the accused with a fearlessness that could not have been surpassed. He was moved, on that occasion, to say of the English Bar, what may be truly said of the American Bar, that its members are inseparable from our national life, from the security of our national institutions.

It has been said of some of the judgments of the Supreme Court of the United States that they are not excelled by any ever delivered in the judicial tribunals of any country. Candor, however, requires the concession that their preparation was preceded by arguments at its bar of which may be said, what *Mr. Justice* Buller observed of certain judgments of *Lord Mansfield*, that they were of such transcendent power that those who heard them were lost in admiration "at the strength and stretch of the human understanding."

Mr. President, I am unwilling to pass from this subject without saying what it is but just to say, that the bar of this imperial State has furnished its quota,—aye more than its quota,—to the army of great lawyers and advocates, who, by their learning, eloquence and labors, have aided the courts of the Union, as well as those of the States, in placing our constitutional system upon foundations which, it is hoped, are to endure for ages. Not to speak of the living, and not to name all the dead who have done honor to the legal profession in this State, I may mention Alexander Hamilton, "formed for all parts, in all alike he shined, variously great," William H. Seward, John C. Spencer, Thomas Addis Emmet, John Wells, George Wood, Joshua A. Spencer, Benjamin F. Butler, Daniel Lord, John Duer, James T. Brady, Ogden Hoffman, Charles O'Connor and Roscoe Conkling. Gentlemen of the bar of New York, you have in these and other great names upon the roll of lawyers and advocates given to the country by your State, an inheritance beyond all price.

But, sir, while the Supreme Court of the United States is indebted to the bar of the country for its invaluable aid in the administration of justice, it is still more indebted to the highest courts of the several States, and to the Circuit and Districts Courts of the Union. Many distinguished members of those courts—judges whose learning and integrity are everywhere recognized—have honored this occasion

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by their presence. But it is a most felicitous circumstance that we have with us the full bench of the New York Court of Appeals, of whose bar we are guests upon this occasion. Who can adequately estimate, who can overstate the influence for good upon American jurisprudence which has been exerted by the learned judgments delivered by those who have graced the bench of this proud State? Kent, Livingston, Thompson, Spencer, Jones, Nelson, Oakley, Savage, Walworth, Marcy, Bronson, Denio and Selden, not to mention others, will be remembered as long as the science of law has votaries. If what they wrote were obliterated altogether from our judicial history, a void would be left in American jurisprudence that could not be filled. Indeed, the history of American law could not well be written without referring to the judgments and writings of those eminent jurists.

And here it is appropriate to say that the duty of expounding the Constitution of the United States has not devolved alone upon the courts of the Union. From the organization of our government to the present time that duty has been shared by the courts of the States. Congress has taken care to provide that the original jurisdiction of the courts of the Union of suits at law and in equity arising under the Constitution and laws of the United States, or under treaties with foreign countries, shall be concurrent with that of the courts of the several States. This feature of our judicial system has had much to do with creating and perpetuating the feeling that the government of the United States is not a foreign government, but a government of the people of all the States, ordained by them to accomplish objects pertaining to the whole country, which could not be efficiently achieved by any government except one deriving its authority from all the people.

As we stand to-night in this commercial metropolis, where the government created by the Constitution was organized, and where the supreme judicial tribunal of the Union held its first session, it is pleasant to remember that all along its pathway that court has had the cordial coöperation and support of the highest court of this, the most powerful of all the States. The Supreme Court of the United States, and the highest court of New York, have not always reached the same conclusions upon questions of general law, nor have they always agreed as to the interpretation of the Constitution of the United States. But, despite these differences, expressed with due regard to the dignity and authority of each tribunal, they have stood together in maintaining these vital principles enunciated by the Supreme Court of the United States:

That while the preservation of the States, with authority to deal with matters not committed to national control, is fundamental in the American constitutional system, the Union cannot exist without a government for the whole;

That the Constitution of the United States was made for the whole people of the Union, and is equally binding upon all the courts and all the citizens;

That the general government, though limited as to its objects, is yet supreme with respect to

those objects, is the government of all, its powers are delegated by all, it represents all, and acts for all; and,

That America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete, to all these objects it is competent.

Mr. President, a few words more. The members of the Supreme Court of the United States will return to their post of duty with grateful thanks for the opportunity given them to participate in these Centennial exercises. It has been good for us to be here. You have given us, gentlemen, renewed reason to think that the court of which we are members is regarded with affection and confidence by the bar of the country, and that as long as it shall be equal to the tremendous responsibilities imposed upon it, that affection and confidence will not be withdrawn.

We have met here to celebrate the organization of that court, in this city, one hundred years ago—a tribunal fitly declared to be the living voice of the Constitution. Within that period the progress of the nation in all that involves the material prosperity and the moral elevation of the people, has exceeded the most sanguine expectations of those who laid the foundations of our government. But its progress in the knowledge of the principles upon which that government rests, and must continue to rest, if it is to accomplish the beneficent ends for which it was created, is not less marvelous. It was once thought by statesmen whose patriotism is not to be doubted, that the power committed to the courts of the Union, especially to the Supreme Court of the United States, would ultimately destroy the independence, within their respective spheres, of the coördinate departments of the national government, and even endanger the existence and authority of the state governments. But the experience of a century, full of startling political and social changes, has shown not only that those apprehensions were groundless, but that the Father of our Country was right when he declared, in a letter to the first Chief Justice of the United States, that the Judicial Department was the keystone of our political fabric. Time has grandly vindicated that declaration. All now admit that the fathers did not err when they made provision, in the fundamental law, for "one Supreme Court," with authority to determine, for the whole country, the true meaning and scope of that law. The American people, after the lapse of a century, have a firm conviction that the elimination of that court from our constitutional system would be the destruction of the government itself, upon which depends the success of the experiment of free institutions resting upon the consent of the governed. That those institutions, which have answered "the true ends of government beyond all precedent in human history," may be preserved in their integrity; that our country may, under all circumstances, be an object of supreme affection by those enjoying the blessings of our republican government; and that the court whose organization you have assembled to commemorate may, in its membership as well as in its judgments, always meet the just expectations

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of the people,—is the earnest wish of those to whom you have, on this occasion, done so much honor.

The foregoing seem to embody all that is of special interest for preservation in these Reports. The organization of the Court, with biographical sketches, may be found in Vol. 1, Indexed Digest of United States Supreme Court Reports.

GENERAL INDEX.

TO THE

FOUR VOLUMES CONTAINED IN THIS BOOK,

131, 132, 133, 134.

OCTOBER TERM, 1889.

ACCESSION AND CONFUSION OF GOODS.

Confusion of property does not destroy the equity to follow misapplied property, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. *Peters v. Bain*, 696

ACTION OR SUIT. See also MORTGAGE, 7; STATE.

1. No final decree can be rendered affecting the parties to a contract sued on, without making them all parties to the suit. *Gregory v. Stetson*, 792

2. The contract of a purchaser to pay a mortgage, contained in the mortgagor's deed to him, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee. The mortgagee cannot sue at law; but in equity he may avail himself of the right of the mortgagor against the purchaser. *Keller v. Ashford*, 667

3. Failure to pay third parties certain debts assumed as the consideration of a contract gives the promisee a right of action without proof that he himself had made the payment, where the liability is fixed. *Mills v. Allen*, 717

4. An evicted grantee in Louisiana, who is condemned in judgment to pay the rents and revenues of the property, may, before satisfying such judgment, maintain a suit in equity against his guarantor to protect him against his adjudged liability to pay. *New Orleans v. Christmas*, 99

5. In equity all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs or defendants, so that there may be a complete decree which shall bind them all. *Gregory v. Stetson*, 792; *Christian v. Atlantic & N. C. R. Co.*, 589

6. Persons made parties defendant, who disclaim all interest in the suit and against whom no relief is sought, are unnecessary parties. *Delaware County v. Diebold Safe & L. Co.* 674

7. If a defendant not only had notice of an assignment of a cause of action to the plaintiff, but consented to that assignment, there would be a new and direct promise from the defend-

ant to the plaintiff, and the assignors would not be necessary parties to the cause of action. *Id.*

8. Objection to nonjoinder of parties defendant does not go to the jurisdiction of the court. *Id.*

9. While grantees would be proper parties to a suit by the true owner against a grantor with warranty, still, where the objection of want of parties was not specially made, and as it would be a hardship to begin a suit again, the suit will not be dismissed on that ground. *New Orleans v. Christmas*, 99

10. Dividends due to a State cannot be seized upon and appropriated to the payment of its bonds, nor can stock held and owned by the State be so sold and transferred, through the medium of a suit in equity, without making the State a party to the suit. *Christian v. Atlantic & N. C. R. Co.*, 589

11. The proceedings conformed to the Act of March 8, 1875, as to bringing in an absent defendant, where, before the final decree was rendered, such defendant had been served with a copy of the several orders requiring him to appear and plead, answer, or demur to the original and supplemental bills and to the cross-bill, and was in default with respect to each order. *Mellen v. Moline Malleable Iron Works*, 178

12. If a sale of property was irregular, by reason of its being ordered and made before a defendant was directed to appear and plead, answer, or demur, that does not affect the jurisdiction of the court to render a final decree in respect to his interest in the property. *Id.*

ADMIRALTY.

1. A libel in admiralty *in personam* may be maintained against a corporation by attachment of its goods in a district not within the State in which it was incorporated. *Re Louisville Underwriters*, 991

2. In courts of admiralty, a libel *in personam* may be maintained for any cause within their jurisdiction, wherever a monition can be served upon the libelee, or an attachment made of any personal property or credits of his. *Id.*

3. The provision in the Act of Congress of March 8, 1887, chap. 373, § 1, that no civil

ADULTERY—APPEAL AND ERROR, I. b.

suit shall be brought before a circuit or district court against any person in any other district than that whereof he is an inhabitant, has no application to causes of admiralty and maritime jurisdiction. *Re Louisville Underwriters*, 991

ADULTERY. See CRIMINAL LAW; DEPOSITIONS.

ADVERSE POSSESSION.

1. Where the rightful owner is in the actual occupancy of a part of his tract, he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession. *Deputron v. Young*, 928

2. Where the possession is mixed, the legal seisin is according to the legal title, and there can be no constructive possession in one who does not have the legal title, even if that might exist if he had actual possession of a part and no one had possession of the remainder. *Id.*

3. A tax deed, though void upon its face, is sufficient color of title, in Nebraska, to support an adverse possession to the property. *Id.*

4. When a deed founded on a sale for taxes is introduced in support of the bar of possession under the Statute of Limitations, it is of no avail if it appears upon its face and by its own terms to be absolutely void. Such a deed cannot create color of title which will bring the case within such statute. *Redfield v. Parks*, 827

ALIENS.

1. Citizens of France can take land in the District of Columbia by descent from citizens of the United States. *De Geofroy v. Riggs*, 642

2. During the continuance of the treaty of 1800 between France and this country, citizens of France could take property in the District of Columbia by inheritance from citizens of the United States. *Id.*

ALLUVION. See WATERS AND WATERCOURSES, 4, 5.

ANIMALS. See also PUBLIC LANDS, 18, 14.

In this country, in the progress of its settlement, the principle that a man was bound to keep his cattle confined within his own grounds, or else he would be liable for their trespasses upon the unenclosed grounds of his neighbors, was never adopted or recognized as the law of the country, except as it might refer to animals known to be dangerous. *Buford v. Houtz*, 618

APPEAL AND ERROR.

I. JURISDICTION.

- a. *Of Appellate Courts Generally.*
- b. *Finality of Decisions.*
- c. *Of Supreme Court of United States.*
 1. *Over State Courts; Federal Questions.*
 2. *Over Federal, District, and Territorial Courts.*

II. TRANSFER OF CAUSE.

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IV. OBJECTIONS AND EXCEPTIONS.

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- a. *In General.*
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- c. *Questions Not Raised Below.*
- d. *Review of Findings of Court.*
- e. *What Errors will Warrant Reversal.*

VII. JUDGMENT AND REHEARING.

I. JURISDICTION.

a. *Of Appellate Courts Generally.*

1. Consent does not confer jurisdiction of the subject matter. *Little v. Bowers*, 1016

2. A proceeding involving the original probate of a last will and testament is not strictly a proceeding in equity, and may be brought to the United States Supreme Court upon writ of error. *Ormsby v. Webb*, 806

3. A suit to enforce a mechanics' lien in Idaho Territory is a suit in equity, and cannot be taken up by writ of error. *Idaho & O. Land Imp. Co. v. Bradbury*, 433

4. Suits in equity in the territorial courts, and actions in which the trial was not by jury, can be reviewed by the United States Supreme Court only by appeal, and not by writ of error. *Id.*

5. An action at law is not transformed into an equity cause for the purpose of appeal, because one of the defenses is an equitable one, where judgment is rendered for defendant on demurrer not only to that but to other legal defenses also. *Brown v. Rank*, 340

b. *Finality of Decisions.*

6. In a proceeding to set aside a sale by a trustee as fraudulent and to remove the trustee, an order denying the relief asked is an order involving the merits of the proceeding. *Kenaday v. Edwards*, 853

7. Where an order taking the bill as confessed by one defendant, and directing that the cause be proceeded in thenceforth *ex parte* as to him, was entered before the decree was made sustaining the demurrer of the other defendant and dismissing the bill as against him, that decree is final as to him, and one from which the plaintiff can appeal. *Stewart v. Masterson*, 114

8. A decree which grants an injunction, and orders an accounting, while the account remains to be taken is not appealable. *Keystone Manufacturing & Iron Co. v. Martin*, 275

9. In an action for an injunction and an accounting, and for the payment to plaintiff of what shall be found due to him on such accounting, a decree which merely enjoins the defendant and orders an accounting before a referee is not a final one, and is not appealable. Nor does it make any difference that the decree dismisses the cross-complaint of the defendant. That was not a separate suit. *Winters v. Ethell*, 339

10. An order in the Supreme Court of the District of Columbia at special term, admitting a will to probate and record, is a final judg-

181, 182, 183, 184 U. S.

ment reviewable by the general term. *Ormsby v. Webb*, 805

11. A proceeding in the Supreme Court of the District of Columbia involving the validity, as a last will and testament, of an instrument offered for probate, and its admission to probate, is a "case" the final judgment in which can be reviewed in the United States Supreme Court when the value of the matter in dispute is sufficient. *Id.*

12. A writ of error will not lie, since the Act of 1887, to review a decree of the circuit court remanding the cause to the state court, although remanded prior to that Act. *Chicago, B. & Q. R. Co. v. Gray*, 212

13. Orders of the circuit court remanding cases to the state court are not final judgments or decrees from which an appeal will lie to the Supreme Court of the United States. *Richmond & D. R. Co. v. Thouron*, 871

14. An order of the circuit court reviving a suit in the name of the executor of the plaintiff, on a bill of revivor, after decree therein, and ordering that the executor have the full benefit, rights, and protection of the decree, and full power to enforce the same against the defendants, is such a final decree as can be brought to the Supreme Court of the United States for review. *Terry v. Sharon*, 94

c. Of Supreme Court of United States.

1. Over State Courts; Federal Questions.

15. To give the Supreme Court of the United States jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. *Blount v. Walker*, 1086

16. The Supreme Court of the United States has no jurisdiction to review a judgment of the highest court of a State, unless a federal question has been, either in express terms or by necessary effect, decided by that court against the plaintiff in error. *San Francisco City & County v. Itell*, 570

17. Where the supreme court of a State decides a federal question in rendering a judgment, and also decides against the plaintiff in error on an independent ground not involving a federal question and broad enough to maintain the judgment, the writ of error from the Supreme Court of the United States will be dismissed without considering the federal question, although it may have been erroneously decided. *Hopkins v. McLure*, 660; *Hale v. Akers*, 442

18. In order to give the Supreme Court of the United States jurisdiction to review a judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be one of the plaintiff in error, and not of a third person only. *Giles v. Little*, 1062; *Manning v. French*, 582

19. The decision that a defendant was not liable in damages, because in concurring in the order complained of he acted in his judicial

capacity, in itself involved no federal question. *Manning v. French*, 582

20. Where the highest court of a State did not decide any question against the plaintiff in error, except the issue whether a former judgment was a bar to the action, that was a question of general law only, in no wise depending upon the Constitution, treaties, or statutes of the United States. *San Francisco City & County v. Itell*, 570

21. Where the contention of the plaintiffs in error, that they are entitled to an award rendered by the French and American Claims Commission, is founded upon the French treaty of 1880, the decision of the Supreme Court of Louisiana against the rights thus asserted by them presents a question for the jurisdiction of the Supreme Court of the United States. *Burthe v. Denis*, 768

22. The objection to a tax, that it is taking property without due process of law, and denies to the taxpayers the equal protection of the laws, raises a question under the Constitution of the United States. *Bell's Gap R. Co. v. Pennsylvania*, 892

23. The Supreme Court of the United States has jurisdiction to review a state judgment, where the case presents the question whether a certain state statute to which that judgment gave effect impaired the obligation of a contract arising out of a subscription by plaintiff in error to the stock of an insurance company created by the laws of Missouri. *Hill v. Merchants Mut. Ins. Co.*, 994

24. Where it is claimed that a state law impairs a contract contained in the charter of a corporation, exempting the corporation from taxation, and an action has been brought in a state court by it to restrain the collection of taxes illegally imposed, and a decision of the state court is against the exemption claimed, the Supreme Court of the United States has jurisdiction to re-examine such decision. *Yazoo & M. V. R. Co. v. Thomas*, 802; *Yazoo & M. V. R. Co. v. Board of Levee Comrs.*, 808

25. Where a state court decided that a state law taxing telegraph companies authorized and imposed a tax upon receipts derived by them from messages from or to other States, and sustained a state tax thereon under such law, the Supreme Court of the United States has jurisdiction to review such decision. *Western U. Teleg. Co. v. Seay*, 409

2. Over Federal, District, and Territorial Courts.

26. Where the defendant below sues out the writ of error, the matter in dispute is the judgment rendered against him. *Pacific Exp. Co. v. Malin*, 204

27. The sum in dispute at the time of the rendition of the judgment or decree appealed from, including any interest then accrued, is the test of appellate jurisdiction, although the verdict is for a less sum. *Keller v. Ashford*, 667; *Quebec Steamship Co. v. Merchant*, 656

28. On an appeal from a decree allowing compensation to a receiver and his counsel, the allowance to his counsel is to be added to the allowance of the receiver in determining the jurisdictional amount necessary to an appeal

to the United States Supreme Court. *Stuart v. Boulware*, 568

29. The value of the specific property which is in litigation must determine the jurisdiction of the Supreme Court of the United States. The value of a trust estate, the ownership of which is involved, is the value of the matter in dispute for the purposes of an appeal by the trustee. *Kenaday v. Edwards*, 858

80. Distinct decrees against distinct parties on distinct causes of action, or on a single cause of action in which there are distinct liabilities, cannot be joined to give the Supreme Court of the United States jurisdiction on appeal. *Wheeler v. Cloyd*, 1008

81. Where the amount of bonds at par value, held by any one of the respective appellants owning them, is not sufficient to give jurisdiction to review the decree below so far as it affects him, the appeal will be dismissed as to him. *McMurray v. Moran*, 814

82. Where a foreclosure has been had on different tracts of land claimed by different owners, and it was decreed that each owner, a defendant, could redeem the land by paying the amount his tract sold for within a year or be foreclosed, and no tract sold for as much as \$5,000, several defendants cannot join in an appeal to the Supreme Court of the United States, and consolidate the several amounts awarded against them, and therefore give the court jurisdiction. *Wheeler v. Cloyd*, 1008

83. Where one prosecuted a suit as a creditor, claiming more than \$5,000 of a fund as applicable to a large amount of debts owned by him, that is a sufficient amount to give the United States Supreme Court jurisdiction. *Stuart v. Boulware*, 568

84. In an action to restrain the enforcement of a tax, where the decree of a circuit court enjoined the collection of less than \$5,000 of the tax, the United States Supreme Court has no jurisdiction, although the bill alleged that certain United States bonds should also be exempted from taxation, but no attempt was made to obtain any relief on this ground, and the controversy in respect to the bonds was settled by the payment of the taxes thereon, and they were not a matter in dispute at the time of the decree. *Warren v. Toledo First Nat. Bank*, 201

85. Under the Act of Congress of Feb. 25, 1879, a final judgment or decree of the Supreme Court of the District of Columbia, in any case where the matter in dispute, exclusive of costs, exceeds the value of \$2,500, may be re-examined in the Supreme Court of the United States upon writ of error or appeal. *Keller v. Ashford*, 687

86. The Act of Congress of March 3, 1885, changing the jurisdictional sum in appeals from the Supreme Court of the District of Columbia from \$2,500 to \$5,000, only provides for appeals or writs of error thereafter allowed, and does not cut off appeals taken before the passage of the Act. *Id.*

87. The Supreme Court of the United States has jurisdiction to re-examine judgments of circuit and district courts rendered under the Act of March 3, 1887 (24 Stat. at L. 505), although the matter in dispute does not exceed

the sum or value of \$5,000, exclusive of costs. *United States v. Davis*, 93

88. Under the Act of March 3, 1887, the district and circuit courts may exercise concurrent jurisdiction with the Court of Claims in respect to suits against the United States, as therein provided; and the right of appeal from their judgments therein reserved to the government is the same as that reserved in the statutes relating to the Court of Claims. *Id.*

89. As a right of appeal could be exercised by the United States in the instance of any judgment of the Court of Claims adverse to the United States, it follows that the same right can be exercised by the United States in any case of the prosecution of a claim in the district or circuit courts of the United States, under the Act of March 3, 1887 (24 Stat. at L. 505). *Id.*

40. U. S. Rev. Stat. § 707, authorizes an appeal to the Supreme Court of the United States, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States; and as the appeal by the United States in this case is from a judgment of \$18,889.21 in favor of the claimant, it is competent for the claimant, as he also has taken an appeal from that judgment, to avail himself of anything in the case which properly shows that that judgment was not for too large a sum. And the fact that the items for the disallowance of which the claimant appealed do not amount to over \$3,000 does not take away such right. *United States v. Mosby*, 625

41. The United States Supreme Court has jurisdiction to review a judgment of the Supreme Court of Utah, involving the question of authority exercised under the United States, within the meaning of the Act of March 3, 1885 (23 Stat. 448), such as an authority exercised by the governor in the appointment of an auditor of public accounts in the place of one who had been elected as such officer. *Clayton v. Utah, Dickson*, 455

II. TRANSFER OF CAUSE.

42. A writ of error to a judgment recovered by a State, in which the State is necessarily the defendant in error, is not a suit commenced or prosecuted against a State. *Hans v. Louisiana*, 842

43. A written release by a trustee of all errors had or committed in and concerning a decree, and releasing and waiving his right as such trustee to appeal from the decree in an action to foreclose a mortgage made by a railroad company to secure its bonds, in which such trustee was a party defendant as being a trustee in a second mortgage given by the company,—binds all the bondholders represented by him as such trustee. *Ellwell v. Foadick*, 998

44. A second appeal may be taken if the first one fails by delay in filing the record. *Evans v. State Nat. Bank*, 917

45. The jurisdiction of the Supreme Court of the United States does not depend upon a citation being issued, where an appeal was allowed, an appeal bond executed, and the record duly filed; but the court will not hear the cause until the parties are brought into court by citation. *Mendenhall v. Hall*, 1012

APPEAL AND ERROR, III., IV.

46. Under the Act of Washington Territory of Nov. 23, 1888, notice of appeal may be given in open court or at chambers, and must be entered on the journal of the court; and no notice to the opposite party need be given, before application is made to the judge, of the intention of the party to give notice of appeal. *Re Parker*, 128

47. The proceeding as to notice of appeal may be taken at the chambers of the judge, where he can conveniently attend to business, and not necessarily within the territorial limits of his district. *Id.*

48. Neither the signing of the citation nor the approval of the bond is necessary to the jurisdiction of the Supreme Court of the United States, but it is essential that the record be filed during the term at which the appeal is returnable. *Evans v. State Nat. Bank*, 917

49. Where the record is not filed at the term succeeding the allowance of the appeal, the appeal ceases to have any operation or effect. *Small v. Northern P. R. Co.* 1006

50. A decree of the circuit court cannot be reviewed on appeal by the United States Supreme Court, unless the appeal is taken within two years after the entry of such decree, although taken within two years from the time the decree took full effect. *Radford v. Folsom*, 208

51. Where a second appeal is taken by its allowance by the circuit court within two years, it is operative if the second is filed during the succeeding term. *Evans v. State Nat. Bank*, 917

52. The waiver, by the infant's guardian *ad litem* and next friend, of a bond by the opposite party upon his appeal,—the latter having waived an appeal bond on his part,—did not affect the jurisdiction of the court. *Kingsbury v. Buckner*, 1047

53. Where the appeal was taken in open court, and no citation was necessary, and the record has been duly filed, appellant may be allowed on the hearing to file a bond *nunc pro tunc*. *Shepherd v. Pepper*, 706

54. An appeal from a decree granting, refusing, or dissolving an injunction does not disturb its operative effect. *Knox County v. Harshman*, 249

55. When an injunction has been dissolved, it cannot be revived except by a new exercise of judicial power; and no appeal by the dissatisfied party can, of itself, revive it. *A fortiori*, the mere prosecution of an appeal cannot operate as an injunction, where none has been granted. *Id.*

56. Where a bill in equity has been filed to enjoin the execution of a writ of mandamus issued upon a judgment at law, the supersedeure of process on the decree dismissing the bill cannot supersede process on the judgment at law, notwithstanding a bill to impeach a judgment is regarded as an auxiliary or dependent, and not as an original, bill. *Id.*

III. RECORD AND CASE IN APPELLATE COURT.

57. The petition for a writ of error forms no part of the record. *Manning v. French*, 582

58. Where a motion to dismiss for want of the clerk's signature to the authentication of a record is made after it is too late to take a new appeal or writ of error, the court may allow the certificate of authentication to be perfected by adding the signature of the clerk. *Idaho & O. Land Imp. Co. v. Bradbury*, 438

59. Where a cause was removed from the state court into the circuit court of the United States, upon the ground of diverse citizenship of the parties, and was tried and judgment was rendered therein in the latter court, and it is brought by writ of error to the Supreme Court of the United States, if it appear from the record that the citizenship of the parties at the commencement of the action and at the time the petition for removal was filed was not sufficiently shown, and that therefore the jurisdiction of the state court was never divested,—this defect cannot be cured by amendment. *Jackson v. Allen*, 249

60. A statement of facts by the parties, or a finding of facts by the circuit court, is strictly analogous to a special verdict, and, in order to present any question on writ of error, must state the ultimate facts of the case, presenting questions of law only. *Raimond v. Terrebonne*, 309

61. The statement in a judgment affirming a refusal to grant a new trial for the third time because of a statute allowing only two new trials on the facts, that "the court adjudges that there is no evidence to support the verdict of the jury," indicates simply the opinion of the court that the jury ought not to have found the verdict that they did, and that the judgment of the court below, refusing to grant a new trial upon the facts, would have been reversed but for the existence of the statute which made it error to award it. *Louisville & N. R. Co. v. Woodson*, 1082

62. An agreement that the parties may refer to and rely upon all the grounds of action or defense to be found in the voluminous records of two equity cases in other courts, including the pleadings and evidence and orders and decrees therein, cannot take the place of a special verdict of a jury or special finding of facts by the court, so as to enable the Supreme Court of the United States to determine the questions of law thereon arising. *Glenn v. Fant*, 969

63. Assignments of error in findings of fact amount in substance to the same thing as the alleged error in finding as a matter of law that the findings of fact stated could lawfully be made from the evidence admitted and considered. *Hathaway v. Cambridge First Nat. Bank*, 1004

64. By the practice in Washington Territory, law causes cannot be reviewed on appeal without an assignment of errors, but equity cases may be. *Brown v. Rank*, 840

65. If the case is not docketed and dismissed by appellee, the appellant is in time if the record be filed during the return term. *Evans v. State Nat. Bank*, 917

IV. OBJECTIONS AND EXCEPTIONS.

66. A general exception to the whole charge will not avail a plaintiff in error, where the charge contains distinct propositions and any

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one of them is free from objection. *Anthony v. Louisville & N. R. Co.* 801

67. While exceptions may be reduced to form and signed after the trial, they must appear affirmatively to have been taken before the jury withdrew from the bar. *Pacific Exp. Co. v. Malin*, 450

V. PRELIMINARY MOTIONS AND ORDERS.

68. A case may be reversed on stipulation. *Arbuckle v. Quigley*, 218

69. Where there is color for a motion to dismiss, the case may be disposed of upon a motion to affirm. *Louisville & N. R. Co. v. Woodson*, 1082

70. Where the state court does not seem to have expressly passed upon a federal question, although it was clearly in the record, there is color for making a motion to dismiss in the Supreme Court of the United States. *Bell's Gap R. Co. v. Pennsylvania*, 892

71. A case from the Supreme Court of the District of Columbia will be dismissed if the matter in dispute does not exceed \$5,000, and does not involve any federal question. *District of Columbia v. Brewer*, 218

72. Motion by an intervening petitioner in the suit, whose appeal was dismissed, to have refunded to him \$450 deposited by order of the court with the clerk, for two printed copies of the record,—granted to the extent of \$200. *Washburn v. Green*, 516

73. When there is no actual controversy involving real and substantial rights, between the parties to the record, the case will be dismissed. *Little v. Bowers*, 1016

74. The fact that there is no controversy between parties to the record may be shown at any time before the decision of the case. *Id.*

75. The Supreme Court of the United States is compelled, as all courts are, to receive evidence *dehors* the record affecting the proceedings in a case before them on error or appeal,—such as the death or transfer of the interest of one of the parties. A release of errors may be filed as a bar to the writ. *Ethell v. Foadick*, 998

76. On motion to dismiss a writ of error brought to review a judgment granting a peremptory writ of mandamus commanding the officers of a city to levy a tax to pay a judgment against it, with which motion is united a motion to affirm the judgment, the Supreme Court of the United States will affirm the judgment if the reasons for taking the writ of error are frivolous and if it was taken for delay only, notwithstanding the court has jurisdiction. *Chanute v. Trader*, 845

77. Motion to dismiss an appeal on the ground that the decree from which the appeal was taken is not a final decree, and that no notice of the appeal was given or any citation issued,—granted. *Wall v. District of Columbia*, 211

78. Where an appeal has been dismissed, pursuant to United States Supreme Court Rule 15, § 1, the decree of dismissal may, on cause shown, be rescinded upon the proper representatives of the deceased party being made parties to the suit, and their appearance being

entered under the rule. *Randolph v. Quidneck Co.* 208

VI. HEARING AND DETERMINATION.

a. In General.

79. This court cannot assume that the ruling of the court below sustaining an objection to a model as evidence was incorrect, where this court has no copy or description of the model, and the witness who produced it in the court below did not swear to its correctness or that it would illustrate the subject. *Patrick v. Graham*, 480

80. An appeal brings into the United States Supreme Court not only the final decree, but one sustaining a demurrer and plea of one defendant and dismissing the suit as to him. It was not necessary to take an appeal from the latter order until after the whole case was determined in the court below. *Mendenhall v. Hall*, 1012

81. An appeal to the General Term of the Supreme Court of the District of Columbia from a final order of probate made in the special term, based upon the finding of a jury upon issues tried by them, brings into review before the general term and the Supreme Court of the United States all the questions of law that are properly presented by the bill of exceptions taken at the trial. *Ormsby v. Webb*, 805

82. On the mere review of the order reviving a suit and appointing a new party to conduct it on the part of the plaintiff, the Supreme Court of the United States will not go back and decide upon the whole question which was passed upon by the circuit court in the original decree. *Terry v. Sharon*, 94

83. Defendant cannot allege as error the admission of evidence introduced by himself. *McGillin v. Bennett*, 422

84. A plaintiff who has no right to property is not injured by a decree which fails to take it from defendant, although fraudulently acquired by the latter. *Case v. Kelly*, 513

85. Although the court below erred in directing a verdict for plaintiff by reason of the claim having been barred by the Statute of Limitations, yet the judgment will not be reversed if the defendant has not prosecuted a writ of error. *Cleary v. Ellis Foundry Co.* 473

86. The Supreme Court of the United States has appellate jurisdiction to determine whether the circuit court had original jurisdiction. *Whittemore v. Amoskeag Nat. Bank*, 1002

87. Although the defendant may not be allowed on appeal to question the want of testimony or the insufficiency or amount of the evidence on a decree *pro confesso*, he is not precluded from contesting the sufficiency of the bill, or from insisting that the averments contained in it do not justify the decree. *Ohio C. R. Co. v. Central Trust Co.* 561

88. Where there is neither a bill of exceptions presented for the review of a judgment of the Supreme Court of the District of Columbia, nor any findings of facts, nor any case stated analogous to a special verdict, stating the ultimate facts and presenting questions of

law only, the Supreme Court of the United States cannot review the same. *Glenn v. Pant*, 969

b. *Discretionary and Interlocutory Matters.*

89. Like all questions of costs in courts of equity, allowances to receivers are largely discretionary, and the action of the court below is, upon appeal, treated as presumptively correct. *Stuart v. Bouhuare*, 568

90. The granting or denial of a change of venue, like the granting or refusing of a new trial, is a matter within the discretion of the court, not ordinarily reviewable by the Supreme Court of the United States on writ of error. *Kennon v. Gilmer*, 110

91. The refusal to grant a change of venue on the mere affidavit of defendant's agent as to the state of public opinion in the county involves matters of fact and discretion, and is not a ruling upon a mere question of law. *Id.*

92. Overruling a motion for a new trial is a matter of discretion, and not a subject of exception, according to the practice of the courts of the United States. *Missouri P. R. Co. v. Chicago & A. R. Co.*, 809

93. The refusal of the circuit court to grant a rehearing is not open to consideration in the United States Supreme Court. *Boesch v. Gräff*, 787

c. *Questions Not Raised Below.*

94. Where the subject matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal, it comes too late, even though, if taken *in limine*, it might have been worthy of attention. *Brown v. Lake Superior Iron Co.*, 1021

95. The incompetency of a foreign corporation to own property in a Territory, without having complied with the provisions of the territorial law in that respect, cannot be considered in the Supreme Court of the United States, unless set up in the pleadings in the court below. *Dahl v. Montana Copper Co.*, 825

96. Where the objections to a petition amount simply to asserting that the ground of action was imperfectly and inaccurately stated, and whatever defects, imperfections, or omissions there may have been, if not obviated by the subsequent pleadings, were cured by the verdict,—which must be assumed to have proceeded upon proof of the facts which justified it,—the objections will be disregarded. *Palmer v. Arthur*, 87

97. Where a national bank, when sued in a state court in a county other than that in which the bank is located, appears in a suit and makes its defense and goes to trial upon the merits, without claiming its privilege of being sued only in the county in which it is located, it waives such privilege, and cannot claim it for the first time in an appellate court. *Charlotte First Nat. Bank v. Morgan*, 282

d. *Review of Findings of Court.*

98. Where a case was tried by the circuit court without a jury, by agreement of the parties, but there is no allegation that the stipula-

tion was in writing, as required by the statute, no error in the rulings of the court at the trial can be examined by the Supreme Court of the United States; it can only inquire whether the declaration was sufficient to sustain the judgment. *Spalding v. Manasse*, 86

99. The refusal of the court to find immaterial or incidental facts amounting only to evidence bearing on the ultimate facts found is not a proper subject of review. *Hathaway v. Cambridge First Nat. Bank*, 1004

100. Errors in the findings of fact by the court are not subject to revision by the Supreme Court of the United States, if there was any evidence upon which such findings could be made. *Id.*

101. Where the finding of the district court upon a mere question of fact was affirmed by the circuit court, on appeal the United States Supreme Court will not reverse such finding, unless the error is clear. *Dravo v. Fabel*, 421

102. No judgment or decree of the highest court of a Territory can be reviewed by the Supreme Court of the United States in matter of fact, but only in matter of law. *Sturr v. Beck*, 761

103. If the whole evidence is recited in the statement of the case, this court can consider it only for the purpose of passing upon the exceptions taken to the admission or rejection of parts of it, and not for the purpose of deciding whether the whole evidence supports the findings of the court. *Idaho & O. Land Imp. Co. v. Bradbury*, 488

e. *What Errors will Warrant Reversal.*

104. Testimony which is immaterial, and which could have done no harm, is not ground for reversal. *Klein v. Hoffheimer*, 378

105. Where, in the charge to the jury, there was no material error to the injury of the party excepting, the court will not consider whether the language used in the charge was technically accurate. *Henderson Bridge Co. v. McGrath*, 984

106. The refusal of the court to give certain instructions is not error where the same instructions were substantially given, though in different language. *Patrick v. Graham*, 480

107. Where the circuit court had no jurisdiction in a case, but dismissed the bill upon another ground, the decree was reversed, with a direction to dismiss the bill for want of jurisdiction. *Whittemore v. Amoskeag Nat. Bank*, 1002

108. Where the court entered an absolute judgment for a lesser sum than that awarded by the jury, instead of ordering that a judgment for that sum should be entered if the plaintiff elected to remit the rest of the damages, and that if he did not so remit there should be a new trial of the whole case,—each party is prejudiced, and either is entitled to have the judgment reversed. *Kennon v. Gilmer*, 110

VII. JUDGMENT AND REHEARING.

109. A judgment will be affirmed, with costs, when the court is equally divided. *Bauer v. Texas & P. R. Co.*, 309

110. Where it is apparent that the writ of

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error could only have been sued out for purposes of delay, the judgment will be affirmed, with 10 per cent damages, interest, and costs. *Palmer v. Arthur*, 87

111. Where it appears to the United States Supreme Court that the case is one which is not removable, and of which the circuit court should not have taken jurisdiction, it is the duty of that court to reverse any judgment given below and remand the cause, with costs against the party who wrongfully invoked the jurisdiction of the circuit court. *Graves v. Corbin*, 463

112. Where a decree of the inferior court was rendered in conformity with the mandate of the Supreme Court of Illinois, it is beyond the control of the latter court when questioned upon a second appeal in the same case. *Kingsbury v. Buckner*, 1047

118. Leave to file a motion for rehearing after the close of the term at which judgment was rendered, and upon the same reasons once overruled, will not be given. *Williams v. Conger*, 201

ARMY AND NAVY. See also WAR.

1. The Act of Congress of July 15, 1870 (16 Stat. 815), is a grant of a general power to the President to reduce the number of officers of the army by selecting the best and mustering out the residue. *Street v. United States*, 681

2. The power of the President to muster out supernumerary officers that might remain after Jan. 1, 1879, was not limited to those who were such at the close of that day, but could be exercised as to an officer placed on that list on the day following. *Id.*

3. Proceedings initiated against an officer of the army, under the Act of Congress of July 15, 1870, § 11, could be abandoned and the officer mustered out, under § 12, without an adjudication of unfitness. *Id.*

4. The term of office of a midshipman in the United States navy is not a term for life. *Crenshaw v. United States*, 825

5. An officer of the navy appointed for a definite time or during good behavior has no vested interest or contract right in his office, of which Congress cannot deprive him. *Id.*

6. A cadet of the Naval Academy, while taking a two years' course afloat as a part of the academic course, remains a member of the Academy, and is not a graduate. *Id.*

7. The Naval Appropriation Act of Congress of 1882, changing the name of appointees of the Naval Academy and modifying the scope of their duties, but not undertaking to name the incumbent of any office, is not invalid as assuming the power of appointment which belongs to the Executive. *Id.*

ASSIGNMENT.

1. An assignment of a patent absolute in form conveys the legal title, which is not defeated by a subsequent conditional contract that, if the payments are not made, the title is to return to the assignor, particularly where the payments are made in full. *Boesch v. Gräff*, 787
1116

2. It is against public policy to permit municipal corporations, in the administration of their affairs relating to the construction of public works, to be embarrassed by subcontracts between their contractors and third persons, to which they have never assented. *Delaware County v. Diebold Safe & Lock Co.* 674

3. A partial assignment of a contract to construct a jail for a county and furnish materials therefor, at a gross sum,—that is to say, an assignment of the furnishing and putting in place the iron work of the jail,—is not binding on the county without its assent. *Id.*

4. When rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract. *Id.*

ASSUMPSIT. See also DURESS, 2-6.

1. At common law the person who receives the rent and profits is the only person who is to respond for them. *New Orleans v. Christmas*, 99

2. An action founded on an implied obligation to reimburse plaintiff for defendant's breach of duty imposed by statute, and the required performance of that duty by the plaintiff in consequence, is an action of assumpsit. *Metropolitan R. Co. v. District of Columbia*, 281

3. Where money is paid to another under the influence of a mistake,—that is, upon the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue,—and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back. *United States v. Barlow*, 346

4. A mere mistake in the estimate of the value of an uncertain and speculative subject is not sufficient to authorize the recovery of money paid upon the erroneous estimate. *Id.*

5. Where an allowance for expediting the mail service over a new route was made upon fraudulent representations, the money paid therefor may be recovered, although the fraud was not participated in or countenanced by the officers of the department who acted in the matter. *Id.*

6. Where allowance was made to contractors for expedited mail service, upon a clear mistake of fact as to what additional men and animals were required for such service, and the money was paid in ignorance of the fact that no additional number had been employed in that service, the United States may recover the moneys paid on such allowance. *Id.*

7. Where a party pays an illegal demand, with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, unless to release his person or property from detention, or to prevent an immediate seizure of his

person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party, at the time of making the payment, files a written protest, does not make the payment voluntary. *Little v. Bowers*, 101
See also DURESS.

ATTORNEY-GENERAL. See also DISTRICT ATTORNEY, 2.

The supervisory power given to the attorney-general by U. S. Rev. Stat. § 368, does not include the power of reviewing the discretion of a judge in making allowances, or of altering his orders and decrees therein. *United States v. Waters*, 594

BANKER. See INTERNAL REVENUE, 1-3.

BANKRUPTCY. See also LIMITATION OF ACTIONS, 12.

1. An adjudication of the bankruptcy of a firm and of the members in whose name the firm was doing business, in a bankrupt proceeding affecting them alone, to which a special partner was not a party, does not estop a copartnership creditor from setting up the liability of such special partner imposed upon him by the statute for noncompliance with its provisions. *Abendroth v. Van Dolsen*, 57

2. The pendency of proceedings in bankruptcy against a firm is not a good plea in abatement in an action against a special partner of the firm against whom the proceedings are not taken; the latter therefore is not entitled to a stay of proceedings in the action, which the statute gives for the protection of the bankrupt. *Id.*

3. A discharge in bankruptcy does not release any person liable for the same debt with the bankrupt, either as partner, joint contractor, surety, or otherwise. *Id.*

4. Where an assignee in bankruptcy sold land recovered by him as the property of the bankrupt, and deeded the same to the purchaser, and put him in possession, those having liens on the land, not having been made parties to the proceedings in the bankruptcy court, or proved their claims there, may afterwards foreclose their liens in the state court, making the bankrupt, his assignee in bankruptcy, and the purchaser, parties defendant. *Adams v. Conner*, 623

BANKS AND BANKING. See also BILLS AND NOTES, 2; CHECKS; PAYMENT, 1; TAXES, 2, 4, 5.

1. A banker who is, to his own knowledge, hopelessly insolvent, cannot honestly continue his business and receive the money of his customers; and, although having no actual intent to cheat and defraud a particular customer, he will be held to have intended the inevitable consequence of his act, which is to cheat and defraud all persons whose money he receives and whom he fails to pay before he is compelled to stop business. *St. Louis & S. F. R. Co. v. Johnston*, 683

2. An acceptance of a deposit of drafts by a bank irretrievably insolvent constitutes such a

fraud as entitles the depositor to reclaim his drafts or their proceeds. *Id.*

3. A deposit ticket made by the assistant cashier of a bank for the use of the officers of the bank, and not seen or assented to by the depositor, does not change the terms of the deposit as between the bank and the depositor. *Armstrong v. American Exch. Nat. Bank*, 747

4. A bank receiving a certificate of deposit is bound to honor the checks of the person named therein drawn on the fund, and cannot refuse to pay them on the ground that such person intends to make an improper use of the money, such as to pay a gambling debt. *Id.*

5. A letter of advice, or statement, written by the cashier of one bank to another bank, stating that a person therein named has deposited with the former bank a sum of money, therein stated, to the credit of the latter bank for the use of another, is a certificate of deposit. *Id.*

6. A bank to whose credit moneys were stated to be deposited, by receiving the certificate of deposit and applying it to the use of the person directed therein, became an innocent purchaser for value of the certificate, and the bank writing it became indebted in its amount to the bank receiving it. *Id.*

7. The exemption of national banks from suits in state courts elsewhere than in the county or city in which such banks are located was prescribed for the convenience of such banks, and is a privilege which they can waive. *Charlotte First Nat. Bank v. Morgan*, 282

8. The proviso of § 4 of the Act of July 12, 1882, refers only to suits by or against national banks brought after the passage of that Act, and does not apply to a suit brought before its passage. *Id.*

9. Where stock of a national bank was lawfully created, and the defendant subscribed for shares and paid for them, and received his certificate, he became a stockholder, and when the bank went into liquidation he became liable, under U. S. Rev. Stat. § 5151, to pay an amount equal to the stock so held by him for debts of the bank. *Aspinwall v. Butler*, 779

10. U. S. Rev. Stat. § 5142, is not violated by an issue of the exact amount of stock that was paid in; it was intended to prevent what is called watering of stock. *Id.*

11. Where the directors of a national bank passed a resolution to increase its stock, giving its stockholders the right to take the new stock to an amount equal to that then held by them, the fact that some of the new stock is not taken is not sufficient ground for a particular stockholder to repudiate his new stock taken by him and withdraw the amount paid therefor, and to exempt him as a shareholder from statutory liability to creditors. *Id.*

12. A shareholder of a national bank cannot transfer his shares when the corporation is failing, or manipulate a release therefrom, so as to escape his individual liability for its debts; but the existence of this liability does not prevent assignors from a lawful disposition of their property for the benefit of their creditors. *Peters v. Bain*, 696

13. The record of transfers of stock upon

BIGAMY—BONDS.

the books of a bank was sufficient, as between the assignee and the bank, to work a change of ownership without new certificates. *Keyser v. Hitz*, 581

14. A married woman is not exempted, by reason of her coverture, from the liability imposed by Congress upon shareholders in national banks. *Id.*

15. If a married woman became aware of transfers of bank stock to her after they were made, and thereafter received the dividends, she became a shareholder and liable for the debts of the bank, as fully as if the transfers had been made originally with her knowledge and consent. *Id.*

16. The intent with which a husband caused transfers of stock of a bank to be made to his wife is wholly immaterial, even if the object was to conceal his property from creditors. If she became the owner of the stock, she would be liable to be assessed as a shareholder. *Id.*

17. After the passage of the Act of 1876, savings banks organized in the District of Columbia under an Act of Congress, and having a capital stock paid up in whole or in part, were entitled to become national banking associations, in the mode and subject to the conditions prescribed by U. S. Rev. Stat. § 5154. *Id.*

18. An agreement made by the president of a national bank, after the bank went into liquidation, to continue its guarantee upon certain notes, is not binding upon the stockholders. *Schrader v. Manufacturers Nat. Bank*, 564

19. The power of the president or other officer of a national bank to bind it by transactions after it is put into liquidation is that resulting from his duty, which consists in the collection and reduction to money of the assets of the bank, and the payment of creditors equally and ratably, so far as the assets prove sufficient. *Id.*

20. The individual liability of the stockholders of national banks, as imposed by and expressed in the statute, is for all the contracts, debts, and engagements of such bank, but is restricted to such contracts, debts, and engagements as have been duly contracted in the ordinary course of its business. *Id.*

21. Payment of creditors in liquidating the affairs of a national bank may be made in the bills receivable and other assets of the bank *in specie*, and the title to such paper may be transferred by the president or cashier by an indorsement suitable to the purpose, in the name of the bank, but such indorsement and use of the name of the bank is in liquidation and merely for the purpose of transferring title. *Id.*

22. Creditors who made settlements after a national bank was put into liquidation, and received from the president in that settlement paper of the bank, or the individual notes of the president himself, indorsed or guaranteed in the name of the bank, are not such creditors of the bank as can subject the stockholders to individual liability. *Id.*

BIGAMY.

1. Bigamy and polygamy are crimes by the laws of all civilized and Christian countries, 1118

and the First Amendment to the Constitution, that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, cannot be invoked as a protection against legislation for their punishment. *Davis v. Beason*, 637

2. The statute of Congress of March 22, 1882, in reference to bigamy, does not restrict the legislation of the Territories over kindred offenses, or over the means of their ascertainment and prevention. *Id.*

BILLS AND NOTES. See also CONTRACTS, 20; PAYMENT, 2, 3.

1. A draft drawn in Ohio upon a bank in New York, and payable in New York, is a foreign bill of exchange. *Armstrong v. American Exch. Nat. Bank*, 747

2. Where a draft is deposited with a bank by the holder, and the bank places the draft to the depositor's credit as cash, and pays his checks drawn on it, the bank becomes the owner of the draft for value. *Id.*

3. In a suit on a bill of exchange by the payee against the drawer, want of consideration from the purchaser of the bill cannot be shown, if the payee is a *bona fide* holder for value, the purchaser not being the drawer's agent in delivering the bill to the payee. *Id.*

4. The fact that a draft is payable to the order of a bank is not notice to the bank that the holder is not its purchaser or remitter, so as to prevent it from being a *bona fide* holder. *Id.*

5. Whenever negotiable paper has passed into the hands of a party, unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity. *Scotland County v. Hill*, 261

BONA FIDE PURCHASERS. See BONDS, 22, 23.

BONDS. See also COUNTIES, 6; EXECUTION, 1; GARNISHMENT, 2; INTEREST, 4; MORTGAGE, 3; TAXES, 3.

1. Bonds given to raise necessary funds to complete a railroad, which are secured by mortgage, are negotiable instruments, and in the hands of purchasers cannot be impeached for any neglect of the company issuing them to pay the demands of other creditors. *Fogg v. Blair*, 721

2. The power of a town to subscribe for stock does not of itself include the power to issue bonds of the town in payment of it. *Hill v. Memphis*, 887

3. A municipality has no power to issue its negotiable bonds in aid of a railroad, except by legislative permission. *Young v. Clarendon Twp.*, 356

4. The Missouri Act of Feb. 9, 1857, to incorporate the Alexandria & Bloomfield Railroad Company, gives no authority to any town of the State to issue bonds for stock subscribed by it. *Hill v. Memphis*, 887

5. Where bonds were not signed by an officer who was in office when they were signed, but by a person who was in office on the ante-dated day on which they bore date, and who

BONDS.

was, when he signed them, a private citizen, they are not valid. *Coler v. Cleburne*, 146

6. Where the statute provides that it shall be the duty of the mayor, whenever any bonds are issued, to forward them to the comptroller of public accounts of the State for registry, the comptroller can receive them lawfully for registry only from such mayor. *Id.*

7. Where the statute provides that the bonds of a city shall be signed by the mayor, they must be signed by the person who is mayor of the city when they are signed, and not by any other person; and the city council cannot authorize them to be signed by another person. *Id.*

8. Where it is, by statute, made the duty of the mayor, and not that of any other person, at the time of forwarding bonds to the comptroller for registration, to furnish him with the statement specified in the statute, no other person than such mayor can furnish the comptroller with such statement. *Id.*

9. Bonds of a town in Michigan, delivered to the state treasurer under the Michigan Act of March 22, 1869, as trustee for the town and for the railroad company for which they were issued, which were never indorsed and delivered by him to the company as required by said Act, never became operative. *Young v. Clarendon Twp.* 356

10. The Constitution of the State controls the construction of the Missouri Act of March 24, 1868, and the General Railroad Law, § 17, and prevents the issue of any bonds by a town of the State without the previous assent of two thirds of its voters, expressed at an election, general or special, called for that purpose. *Hill v. Memphis*, 887

11. Where a majority of the taxpayers of a town are authorized by statute to incur the property of all in aid of a railroad or other corporation, the record must show that the statutory authority has been pursued. *Rich v. Mentz*, 1074

12. It was essential, in order to confer authority upon a town to create and issue its bonds, under the New York Laws of 1869 and 1871, that the adjudication or judgment of the county judge should declare, in substance, that the quorum of taxpayers who desired that the town should create and issue its bonds was one exclusive of taxpayers who were assessed or taxed for dogs or highway tax only. *Id.*

13. A petition of taxpayers of a town in New York to the county judge, under N. Y. Laws 1869, chap. 907, as amended by N. Y. Laws 1871, chap. 925, which only alleges that the petitioners "are a majority of the taxpayers" and represent "a majority of the taxable property" therein, is not sufficient to authorize the county judge to take jurisdiction and render an adjudication authorizing the town to issue its bonds in aid of a railroad company. The petition should state, in substance, that the taxpayers petitioning were a majority of taxpayers of the town who were taxed or assessed for property, not including those taxed for dogs or highway tax only. *Id.*

14. Where commissioners to issue town bonds were duly appointed, the issue of bonds was no larger than authorized by statute, and

a paper purporting to contain the consent of the requisite number of taxpayers, duly certified, was filed with the county clerk, the defenses that the consent roll did not in fact contain the requisite number of taxpayers, and that the verifying affidavit was false, and that the commissioners did not borrow money on the bonds, but disposed of them without consideration, are unavailing against *bona fide* holders. *Bernards Twp. v. Morrison*, 728

15. When both the legislative and executive departments of a State give notice to the world that a county within the territorial limits of the State has been duly organized and exists with full power of contracting, a purchaser can in open market safely purchase the securities of such county, so far as any question about the validity of the municipal organization is concerned. *Comanche County v. Lewis*, 604

16. The recital in the bond of a county, which shows a compliance in all substantial respects with the statute giving authority to issue the bonds, makes the bond valid in the hands of a *bona fide* holder. *Id.*

17. The official certificate of the auditor of Kansas that county bonds had been regularly and legally issued, that the signatures were genuine, and that the bonds had been duly registered in his office in accordance with the Act of the Legislature of March 2, 1872, estops the county. *Id.*

18. Recitals in county bonds that they are issued, under authority of a certain Act authorizing them, for construction of bridges, are sufficient although the particular bridge for the building of which the bonds were to be issued is not specified. *Id.*

19. Even *bona fide* purchasers of municipal bonds must take the risk of the official character of those who execute them. *Coler v. Cleburne*, 146

20. The ownership of the coupons of county bonds by any prior holder, under such circumstances as would protect that holder against any defense by the county, entitles a subsequent purchaser to recover, even if he, when afterwards purchasing them, had knowledge of a suit involving their validity. *Scotland County v. Hill*, 261

21. Purchasers of negotiable securities are not chargeable with constructive notice of the pendency of a suit affecting their title and validity, but those who buy such securities from litigating parties, with actual notice of the suit, do so at their peril, and must abide the result the same as the parties from whom they got their title. *Id.*

22. Bondholders may be deemed holders for value, although they took the bonds in payment of, or as security for, pre-existing debts. *McMurray v. Moran*, 814

23. If holders of bonds paid value for them without actual notice of the restriction by a contract upon authority to issue them, they will be deemed *bona fide* holders for value, unaffected by the agreement. *Id.*

24. Judgment upon coupons of bonds of Jackson County, Missouri, issued on behalf of Van Buren Township to the Lexington, Lake,

& Gulf Railroad Company, rendered in favor of plaintiff for the amount of the coupons,—affirmed by operation of law, the court being divided. *Jackson County v. New York Ninth Nat. Bank*, 207

BOUNDARIES. See also WATERS AND WATERCOURSES, 5.

1. Meander lines are run in surveying public lands bordering upon navigable rivers, not as boundaries of the tract, but to ascertain the quantity of the land subject to sale; and the watercourse, and not the meander line as actually run on the land, is the boundary. *Jeffers v. East Omaha Land Co.* 872

2. Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary; and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed side line, and conveys all accretion thereto. *Id.*

BROKERS. See CONTRACTS, 21.

CARRIERS. See also CONSTITUTIONAL LAW, 8-10.

1. Where a contract to carry the plaintiff as a passenger by a railroad company was an express one signed by the plaintiff and the company's agent, and was contained in a ticket for a passage to the place of destination and back, the plaintiff, having assented to the contract by accepting and signing it, was bound by the conditions expressed in it, whether he did or did not read them or know what they were. *Boylan v. Hot Springs R. Co.* 290

2. Where an unstamped ticket gave a passenger no right to a return passage, and he refused to pay the usual fare upon a demand by the conductor, as there was no contract in force between him and the company to carry him back, there could be no breach of the contract; and an action of assumpsit cannot be maintained to recover damages for plaintiff's expulsion from the company's train. *Id.*

3. Where, by the express conditions of the plaintiff's contract, he had no right to a return passage under his ticket, unless it bore the signature and stamp of the company's agent at the end of the route, no agent or employé of the company was authorized to alter or waive any condition of the contract, and therefore the action of a baggage-master in punching the ticket and checking plaintiff's baggage, and that of a gateman in admitting him to the return train, could not bind the company to carry him, or estop it to deny his right to be carried. *Id.*

4. The power to regulate a carrier's rates is not a power to destroy, and limitation is not the equivalent of confiscation. *Chicago, M. & St. P. R. Co. v. Minnesota, Minn. R. R. & W. Co.* 970

5. The question of the reasonableness of a rate of charge for transportation by a railroad company is eminently a question for judicial investigation, requiring due process of law for its determination. *Id.*

6. The grant of power by a charter, to the

directors of a railroad company, to make needful rules and regulations touching the rates of toll and the manner of collecting the same, does not deprive the State of its general authority itself to regulate the rates of toll to be collected by the company. *Id.*

7. A judgment against a railroad company for the value of a trunk and the jewelry contained therein, checked to a traveling agent or drummer, but belonging to his principal, and destroyed by fire through the company's negligence,—affirmed by reason of a divided court, the judgment being in favor of an insurer of the property to whom the claim for the loss was assigned. *Louisville, C. & L. R. Co. v. Switzerland M. Ins. Co.* 204

CASES CERTIFIED.

1. The question certified to the Supreme Court of the United States upon a difference of opinion between the judges of the circuit court must be a distinct point or proposition of law, clearly stated, so that it can be definitely answered without regard to the other issues of law or fact in the case. *United States v. Perrin*, 88; *United States v. Reilly*, 75; *United States v. Hall*, 97

2. A question certified in a form disapproved of by the Supreme Court of the United States will not be answered; such as the question whether an offense against the United States, under U. S. Rev. Stat. § 5467, is charged in either the first or third count of the indictment. *United States v. Lacher*, 1080

3. It never was designed that because a case is a troublesome one, or is a new one, and because the judges trying the case may not be perfectly satisfied as regards all the points raised in the course of the trial, the whole matter should be referred to the United States Supreme Court for its decision, in advance of a regular trial. *United States v. Perrin*, 88

4. In cases which come to the Supreme Court of the United States for review it is only an appellate court, except in the limited class of cases where it has original jurisdiction. *Id.*

CERTIFICATE OF DEPOSIT. See BANKS AND BANKING, 5.

CHECKS.

The holder of a bank check cannot sue the bank for refusing payment, without proof that it was accepted by the bank or charged against the drawer; but the depositor can sue for a breach of the contract to honor his checks. *St. Louis & S. F. R. Co. v. Johnston*, 688

CIVIL RIGHTS. See COMMERCE, 2.

CLAIMS.

1. The Act of March 3, 1887 (24 Stat. at L. 505), to provide for the bringing of suits against the government of the United States, does not authorize suits for equitable relief, by specific performance, to compel the issue and delivery of a patent for land. In the point of providing only for money decrees and money judgments the law is unchanged, merely being so extended as to include claims for money arising out of

CLOUD ON TITLE—CONFISCATION.

equitable and maritime, as well as legal, demands. *United States v. Jones*, 90; *United States v. Drew*, 93

2. Public officers, upon the question of their compensation and the payment of money into the treasury, are not bound, in order to save their rights, to place themselves in antagonism to the accounting officers of the department, suffer themselves to be sued, and incur the odium, for the time, of being in default, but have the right to pay into the treasury the disputed moneys, and then seek the courts to adjust and determine their claims against their superior and sovereign. Such payment is not an estoppel against the claimant. *United States v. Mosby*, 625

3. The French and American Claims Commission possessed no authority to consider any claims against the government of either the United States or of France, except as held, both at the time of their presentation and of judgment thereon, by citizens of the other country. *Burthe v. Denis*, 768

4. A French citizen having a claim against the United States having died, the French and American Claims Commission could only allow, under the treaty of 1880, the proportion of the claim going to such of his heirs and legatees as are citizens of France; and such Commission having allowed a part of such claim, the whole sum allowed must be paid to such French heirs and legatees, and cannot be equally distributed to them and other heirs and legatees of the claimant who are citizens of the United States. *Id.*

CLOUD ON TITLE. See also COURTS, 21.

1. A person who has received a conveyance of the legal title to real estate from his debtor may institute other proceedings against that debtor in relation to the same property, to strengthen his title or establish his lien. *Bradley v. Clafin*, 867

2. Where tax deeds appear upon their face to be clouds upon the plaintiff's title, a bill in equity is the proper form of obtaining relief. *Gage v. Kaufman*, 725

COMMERCE. See also TAXES, 19.

1. There is a commerce wholly within the State, which is not subject to the constitutional provision, and a distinction between commerce among States and between the citizens of a single State, conducted between its lines. *Louisville, N. O. & T. R. Co. v. Mississippi*, 784

2. A state statute which requires railroads to provide separate accommodations for the white and colored races is within the power of the State, and is not a regulation of interstate commerce. *Id.*

COMMISSIONER.

1. A commissioner of the United States circuit court has no authority to administer an oath to a deputy United States surveyor, as to his services, and make a certificate thereto. *United States v. Reilly*, 75

2. The approval of a commissioner's ac-

count by a circuit court of the United States, under the Act of Feb. 22, 1875 (18 Stat. 333), is *prima facie* evidence of the correctness of the items of that account, and, in the absence of clear and unequivocal proof of mistake on the part of the court, is conclusive. *United States v. Jones*, 1007

3. A commissioner of the United States circuit court is entitled to the fee of \$5 a day for hearing and deciding motions upon bail and the sufficiency thereof, and for the continuance of cases before him. *Id.*

COMPROMISE AND SETTLEMENT.

1. A compromise made by a debtor firm with a creditor cannot be assailed on the ground that the agent of the firm in the compromise omitted to disclose the financial ability of a partner of the firm to pay the debts of the firm. *Cleveland v. Smith*, 884

2. A defendant having accepted a ditch made by plaintiff as completed, and used it, and made a settlement therefor, cannot, in an action to enforce a lien thereon for the sums due on such settlement, object that the ditch was made wider and deeper than agreed. *Idaho & O. Land Imp. Co. v. Bradbury*, 483

3. Where an insolvent firm, in consideration of a compromise with some of its creditors at 60 cents on a dollar, executed to them an agreement not to pay voluntarily to any creditor to exceed 60 cents on a dollar in settlement, a payment of more than 60 per cent—to wit, 80 per cent—to a creditor to settle a suit brought by him on a debt against the firm, in which there was no defense, which was about to be tried, and in which a judgment for the full amount would be recovered, and where the debt was secured by attachment,—was not a voluntary payment. *Cleveland v. Smith*, 884

COMPTROLLER OF CURRENCY.

A deputy comptroller of the currency may exercise the powers and discharge the duties attached to the office of comptroller during a vacancy of that office, or during the absence or inability of the comptroller. *Keyser v. Hits*, 581

CONFISCATION.

1. Nothing but the offender's life interest in the land is forfeited under the Confiscation Act of 1862. His power to dispose of the land was suspended by his disability as an offender against the United States. *Illinois C. R. Co. v. Bosworth*, 550

2. Where land of one who bore arms in the Confederate army, against the United States, in the late war, was, under the Confiscation Act of July 17, 1862, condemned and sold, he was, by the special pardon and by the Amnesty Proclamation of the President, restored to the control and power of distribution over the fee simple in reversion of the land expectant upon the termination of the confiscated estate therein. *Id.*

3. On being restored to all his rights by pardon, one who bore arms in the Confederate army against the United States was restored to

CONFLICT OF LAWS—CONTEMPT.

the residuary ownership of the land, subject to the usufruct of the purchaser under the confiscation proceedings; and a subsequent conveyance, by him and his wife, of all their right and title in and to said land, transferred the land as against his heirs. *Illinois C. R. Co. v. Bosworth*, 550

CONFLICT OF LAWS. See also INTERJUNCTION.

1. The disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *Arndt v. Griggs*, 918

2. The law of the State where the subject of a contract is situated, and where the contract was made and the suit to enforce it brought against a resident, governs in expounding and enforcing the contract and as to the rule of damages for a breach of it. *Mills v. Allen*, 717

CONFUSION. See ACCESSION AND CONFUSION OF GOODS.

CONSTITUTIONAL LAW. See also INTOXICATING LIQUORS, 1; NEW TRIAL, 8; TAXES, 1.

1. The first eight articles of the amendments to the Constitution of the United States have reference to powers exercised by the government of the United States, and not to those of the States. *Eilenbecker v. Plymouth County Dist. Ct.*, 801

2. The original United States Constitution, art. 3, § 2, cl. 3, that the trial of all crimes, except cases of impeachment, shall be by jury, does not apply to state courts. *Id.*

3. A statute changing the provisions as to persons sentenced to death, by providing for their solitary confinement until execution, makes an additional punishment which constitutes the statute an *ex post facto* law, so far as it relates to crimes previously committed. *Re Medley*, 935

4. Any law which is passed after the commission of the offense for which the party is being tried is an *ex post facto* law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed, or which alters the situation of the accused to his disadvantage. *Id.*

5. The new power of fixing any day and hour during a period of a week for the execution, given by an Act to the warden of the penitentiary, being a departure from the law as it existed before, and with its secrecy causing increased mental anxiety to the prisoner, amounts to an increase of punishment and renders the law *ex post facto* and void, so far as it relates to crimes committed before its passage. *Id.*

6. A bill in chancery is one of the recognized processes of law for re-examining a judgment and enjoining its execution, and is, in its form, due process of law. *Freeland v. Williams*, 198

7. A proceeding by which a fine and imprisonment are imposed upon parties for contempt in violating an injunction regularly issued in a

suit to which they were parties, without trial by jury, is due course of law, whether the contempt occurred in the course of a criminal proceeding or of a civil suit. *Eilenbecker v. Plymouth County Dist. Ct.*, 801

8. If a carrier is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of a judicial investigation, it is deprived of the use of its property, and, in effect, of the property itself, without due process of law and in violation of the Constitution of the United States. *Chicago, M. & St. P. R. Co. v. Minnesota, Minn. R. R. & W. Co.*, 970

9. Where no hearing is provided for, no summons or notice to a carrier, before a railroad commission has found what it is to find and declared what it is to declare as to rates to be charged, and no opportunity provided for the company to introduce witnesses before the commission, there is not the semblance of due process of law. *Id.*

10. A law which allows a railroad commission to establish rates for railroads which are final, without issue made or inquiry had as to their reasonableness, and forbids the courts to stay the hands of the commission if the rates established by it are unreasonable and unequal, conflicts with the Constitution of the United States, because it deprives the company of its right to a judicial investigation by due process of law, and substitutes therefor, as an absolute finality, the action of a railroad commission, which is not clothed with judicial functions and does not possess the machinery of a court of justice. *Id.*

11. The process of taxation does not require the same kind of notice as is required in a suit at law. It involves no violation of due process of law when it is executed according to customary forms and established usages. *Bell's Gap. R. Co. v. Pennsylvania*, 892

12. Commitment for failure to pay a tax, not resorted to until other means of collection have failed, and then only upon a showing of property possessed, not accessible to levy, but enabling the owner to pay if he chooses, is not in conflict with the constitutional provision as to due process of law. *Palmer v. McMahon*, 772

13. When the law provides for a mode of confirming or contesting assessment of taxes, with due notice to the person assessed, and for a review, the assessment does not deprive the owner of his property without due process of law. *Id.*

14. The intention of U. S. Const. art. 4, § 2, was to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of any State would be entitled to under the like circumstances; and this includes the right to institute actions. *Cole v. Cunningham*, 538

CONTEMPT. See also CONSTITUTIONAL LAW, 7.

1. Under the Act of Congress of 1789, the question whether particular acts constitute a contempt is to be determined according to the

181, 182, 183, 184 U. S.

rules and principles of the common law. *Re Savin*, 150

2. Courts have power to punish in a summary manner the disobedience of any party to any lawful writ, process, order, rule, decree, or command of the court. *Eilenbecker v. Plymouth County Dist. Ct.* 801

3. Attempting, while a witness is in the witness-room or in the hallway of the court-room, to deter him from testifying, by offering him money, is a misbehavior in the presence of the court, and punishable, without indictment, by fine and imprisonment, as a contempt. *Re Savin*, 150

4. Where the charge against a person is that he endeavored, by forbidden means, to influence or impede a witness from testifying, the offense charged is punishable by indictment; yet the court may punish him for a contempt, if the offense was committed in its presence or so near as to obstruct the administration of justice. *Id.*

5. Approaching a person summoned as a juror, with a view of improperly influencing his actions in the event of his being sworn as a juror in the case, if done in the presence of the court, is a contempt, punishable by fine or imprisonment, at the discretion of the court, without indictment. *Re Cuddy*, 154

6. Proceedings according to the common law for contempt of court are not subject to the right of trial by jury. *Eilenbecker v. Plymouth County Dist. Ct.* 801

7. Under the Revised Statutes, courts of the United States have power to proceed summarily for contempt. *Re Savin*, 150

8. The courts of the United States have power to punish for contempts of court committed in the presence of the said courts, or so near thereto as to obstruct the administration of justice. *Id.*

9. A federal court, immediately upon the commission in its presence of a contempt, may proceed upon its own knowledge of the facts and punish the offender, without further proof and without issue or trial in any form. *Id.*

10. The court, when in session, is present in every part of the place set apart for its own use and for the use of its officers, jurors, and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. *Id.*

11. The court is not bound to require service of interrogatories upon a person charged with contempt, so that in answering them he could purge himself of the contempt charged; but it can, in its discretion, adopt such mode of determining that question as it deems proper, provided due regard is had to the rules that obtain in the trial of matters of contempt. *Id.*

12. Although a person charged with contempt was entitled, of right, to purge himself, under oath, of the contempt, yet it is sufficient that he was informed of the nature of the charges against him by the testimony of a witness taken down by a sworn stenographer at the preliminary examination, and that he was present at the hearing of the contempt, was represented by counsel, testified under oath in his own behalf, and had full opportunity to make his defense. *Id.*

CONTRACTS.

I. IN GENERAL; CONSTRUCTION; PERFORMANCE; RELIEF AGAINST.

II. VALIDITY; RIGHT TO ENFORCE.

III. IMPAIRING OBLIGATION.

See also ASSIGNMENT, 2, 3; CONFLICT OF LAWS, 2; CORPORATIONS, 3, 4, 12, 13; OFFICERS, 8; STATE, 8.

I. IN GENERAL; CONSTRUCTION; PERFORMANCE; RELIEF AGAINST.

1. Where the terms of a contract were: "These goods to be exactly the same quality as we make for the De Witt Wire Cloth Company and as per sample bbls. delivered,"—the goods that were in fact made for the last-named company, not what were agreed to be made, were the standard. *De Witt v. Berry*, 896

2. Whether the representative of a company had authority to make a contract or not is immaterial on the question of the company's liability on a *quantum meruit* for work done under his direction, where he had clearly power to direct the work. *Henderson Bridge Co. v. McGrath*, 934

3. Where a person has agreed to procure the discharge of liens upon property, the fact that he procures a discharge of the liens by paying only a percentage thereof does not prevent such discharge being a fulfillment of his agreement. *Dent v. Ferguson*, 242

4. Time may be made of the essence of the contract by the express stipulations of the parties, or it may arise by implication from the very nature of the property or the avowed objects of the seller or the purchaser. *Cheney v. Libby*, 818

5. Where the parties specify the time of the performance, and declare that "time and punctuality are material and essential ingredients" in the contract, and that it must be "strictly and literally" executed, however harsh and exacting its terms may be, the court will not refuse to give effect to them. *Id.*

6. The provision in a contract forbidding its modification or change, "except by entry thereon in writing signed by both parties," coupled with the provision that no court should relieve plaintiff from a failure to comply strictly and literally with the contract, cannot be applied where the efficient cause of his failure to comply strictly and literally with the contract was the conduct of the other party. *Id.*

7. It is the duty of persons dealing with public officers to inquire as to their power and authority to bind the government; and persons so dealing are held to a recognition of the fact that government agents are bound to fairness and good faith as between themselves and their principal. *Hume v. United States*, 393

8. If claimant knew that a clerical error had been made in the contract, of which the agents of the government were ignorant, or if, under the facts, he must have known that their action in making the contract was in violation of their duty, the character of the fraud is not changed by the fact that such action was the result of a mistake or negligence of such agents. *Id.*

CONTRACTS, II.

9. If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to. *Hume v. United States*, 398

10. Where claimant made a written contract with the United States to furnish to a government hospital a quantity of shucks at the rate of 60 cents per pound, based on proposals made by the secretary of the interior, when shucks were only of the market value of from 6 mills to 1½ cents per pound, and those furnished by claimant were only of the latter value, in an action for the price of the shucks delivered, the market value only can be recovered. *Id.*

11. Where water furnished by a water company for a city was unfit for use and inadequate for protection from fire, the city had a right, after the company had had reasonable time to comply with its contract to supply pure and sufficient water, to treat the contract as terminated, and to invoke the aid of a court of equity to enforce its rescission. *Farmers Loan & T. Co. v. Galesburg*, 578

12. Ignorance of a fact extrinsic and not essential to a contract, but which, if known, might have influenced the actions of a party to the contract, is not such a mistake as will authorize equitable relief. *Cleveland v. Smith*, 384

II. VALIDITY; RIGHT TO ENFORCE.

13. A contract fair and honest in itself, and untainted with actual fraud, entered into by a subscriber for stock with other subscribers, to the effect that they will purchase the same and pay to him the amount paid by him, if at a time specified he chooses to sell the same, is not contrary to public policy, and can be enforced against the party to it. *Morgan v. Struthers*, 183

14. A contract by which defendants, for a valuable consideration, agreed not to sell a certain medicinal preparation within the territory which it was covenanted complainants should occupy exclusively, or sell to others for sale there, or promote such sales, is valid. *Fowle v. Park*, 67

15. Such a contract relating to a compound involving a secret in its preparation, based upon a valuable consideration, and limited as to the space within which, though unlimited as to the time for which, the restraint is to operate, is reasonable and enforceable. *Id.*

16. Where one has and transfers property in the secret process of manufacturing an article he has discovered, he and his grantees can claim relief as against breaches of trust in respect to it. *Fowle v. Park*, 67

17. An agreement between grantor and grantee, made upon the conveyance of property, and which reserves to the grantor the enjoyment of the rents and profits of the property conveyed, to which the creditors of the grantor have a right of immediate appropriation to their debts, and which involves a secret trust for a return to the grantor of property of which such creditors have the immediate right of sale, will not be enforced; but the parties will be left in the position where they have placed themselves, although the grantee refuses to per-

form his part of the fraudulent agreement with the grantor. *Dent v. Ferguson*, 242

18. A contract with a broker to purchase for defendant "cotton futures" on a margin, by which the purchase or delivery of actual cotton was never contemplated by either party, but the settlement was to be made between the parties by one party paying to the other the difference between the contract price and the market price of said cotton futures, according to the fluctuations in the market,—is a wagering contract and void. *Embrey v. Jemison*, 172

19. That a person executed a note given on an illegal consideration, with full knowledge of all the facts, is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law. *Id.*

20. The original payee cannot maintain an action on a note the consideration of which is money advanced by him upon or in execution of a contract of wager, he being a party to that contract, or having directly participated in the making of it in the name of or on behalf of one of the parties. *Id.*

21. When a broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself in forwarding the transaction. *Id.*

22. Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons against the other, from the consequences of his own misconduct. *Dent v. Ferguson*, 242

23. Where losses have been made in an illegal transaction, a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used. *Armstrong v. American Exch. Nat. Bank*, 747

24. A new contract founded on a new and independent consideration, if fair and lawful, although in relation to property respecting which there had been unlawful or fraudulent transactions between the parties, will be dealt with by the courts on its own merits; and if the new consideration be valid and adequate, it will be enforced. *Dent v. Ferguson*, 242

25. An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case. *Armstrong v. American Exch. Nat. Bank*, 747

26. If a person conveys his property for the purpose of hindering, delaying, or defrauding his creditors, and for several years acquiesces and concurs in the devices, collusive suits, and impositions upon the court in furtherance of this purpose, without taking a single step to annul said conveyance or to stop such proceedings, a court of equity will not aid him or his heirs to recover the property from the grantee or his heirs after the fraud is accomplished. *Dent v. Ferguson*, 242

27. A public agent cannot bind his principal under powers that have been taken away, by simply antedating his contracts. Under such

CONTRACTS, III.—CORPORATIONS, II

circumstances a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. *Coler v. Cleburne*, 146

III. IMPAIRING OBLIGATION.

28. Before an Act withdrawing lands from sale can be held to impair any vested right of an applicant for purchase, he must have done everything required by law to secure such right. Until then no contract right of the applicant is violated by such legislation. *Campbell v. Wade*, 240

29. The vested priority of a mortgagee is beyond the power of the mortgagor or the Legislature thereafter to disturb. *Toledo, D. & B. R. Co. v. Hamilton*, 905

30. A judgment for a tort is not a contract or evidence of a contract, within the meaning of the constitutional provision which forbids a State passing a law impairing the obligation of contracts. *Preeland v. Williams*, 198

31. The Constitution of West Virginia of 1872, in its provision that the property of a citizen shall not be sold on a judgment for an act done during the late civil war, does not violate the obligation of a contract, where the judgment was founded on a tort committed as an act of public war. *Id.*

32. The provision in the statute that a railroad company organized thereunder may charge for transportation such reasonable rates as may from time to time be fixed by the corporation or prescribed by law, and a provision that no company shall demand an unreasonable price, do not constitute such a contract with the corporation as to the fixing of rates that the Legislature is deprived of power to regulate those charges. *Minneapolis E. R. Co. v. Minnesota*, 985

33. Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. *Hill v. Merchants Mut. Ins. Co.* 994

34. A statute providing that the liability of a stockholder may be enforced by notice and motion in the action in which judgment is rendered against the corporation, giving him an opportunity to make defense, while under the law previously the remedy against him was by suit in equity,—does not violate the obligation of his contract. *Id.*

35. It is entirely competent for the Legislature to give the creditors of a company a new or additional remedy by which the undertaking of a stockholder to pay his subscription can be enforced in their behalf,—such remedy not increasing the debtor's liability. *Id.*

COPYRIGHT.

1. Under U. S. Rev. Stat. § 4903, a person cannot maintain an action at law or in equity for the infringement of his copyright, unless he has given the statutory notice in the several copies of every edition published by him. *Thompson v. Hubbard*, 76

2. The purchaser of a copyright must comply with the statute, in the copies of every edi-

tion published by him, in order to maintain an action against his vendor for an infringement of the copyright. It is not enough that the vendor has given such notice in the edition he published while it was his copyright. *Id.*

3. A right of action for infringement of copyright, as well as the copyright itself, and the means of securing such right of action, are only those prescribed by Congress. *Id.*

CORPORATIONS.

I. FRANCHISES; CHARTERS.

II. CONSOLIDATION; REORGANIZATION.

III. POWERS AND LIABILITIES.

IV. STOCK AND STOCKHOLDERS.

V. DISSOLUTION; RIGHTS OF CREDITORS.

See also BANKS AND BANKING, 9-11, 18-16, 18, 20, 22; CARRIERS, 6; CONTRACTS, 82, 85; FRAUD AND FRAUDULENT CONVEYANCES, 1; JUDGMENT, 13, 17-19; LIMITATION OF ACTIONS, 7; MUNICIPAL CORPORATIONS, 2; TAXES, 18.

I. FRANCHISES; CHARTERS.

1. The granting of a corporate right or privilege rests entirely in the discretion of the State, and, when granted, may be accompanied with such conditions as its Legislature may judge most befitting to its interests and policy. *Home Ins. Co. v. New York*, 1025

2. Exemption from future general legislation, either by a constitutional provision or by an Act of the Legislature, does not exist unless it is given expressly, or unless it follows by an implication equally clear with express words. *Chicago, M. & St. P. R. Co. v. Minnesota*, *Minn. R. R. & W. Com.* 970; *Pennsylvania R. Co. v. Miller*, 267

3. A railroad corporation takes its charter, containing a provision as to rates, subject to the general law of the State and to such changes as may be made in such general law, and subject to future constitutional provisions and future general legislation, in the absence of any prior contract with it exempting it from liability to such future general legislation. *Chicago, M. & St. P. R. Co. v. Minnesota*, *Minn. R. R. & W. Com.* 970

4. The charter of the Minneapolis & Cedar Valley Railroad Company, § 9, giving power to the directors of that company to make rules as to rates of toll, does not constitute an irrevocable contract with that company that it shall have the right for all future time to prescribe its rates of toll, free from all control by the Legislature of the State. *Id.*

5. The condition is implied in every grant of corporate existence, that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the Legislature may from time to time prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created. *Hill v. Merchants Mut. Ins. Co.* 994

II. CONSOLIDATION; REORGANIZATION.

6. Under the Missouri Act of 1870 authorizing the consolidation of two or more railroad

companies, the filing with the secretary of state of a resolution accepting the provisions of the Act, passed by a majority vote of the stockholders of each consolidating company, is a matter between the State and the corporation. The State may enforce the forfeiture if the consolidation is void for failure to file such acceptance, but a private person cannot. *Leavenworth County v. Chicago, R. I. & P. R. Co.* 1064

7. A certified copy from the secretary of state's office of an agreement for consolidation is conclusive evidence of the consummation of the consolidation of corporations in Missouri, in suits between the consolidated company and individuals or other corporations. *Id.*

8. Where a charter of a corporation expires, a majority of the stockholders, proposing to form a new company, have no right, as against a minority, to make an arbitrary estimate of the property of the corporation to be transferred to the new company, and to require the minority to go into the new company, or receive for their interest in the property of the old company a sum fixed by those who are buying them out. *Mason v. Peubac Min. Co.* 524

III. POWERS AND LIABILITIES.

9. Where a corporation is incompetent by its charter to take title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Fritts v. Palmer,* 817

10. A conveyance of Colorado real property to a Missouri corporation is not void because it has not complied with the requirements of the Colorado Constitution and laws, that a corporation cannot do business in that State without a place of business and an agent in the State, or without filing a certificate designating such place and such agent. *Id.*

11. A lease made by one railroad corporation to another, neither of which is expressly authorized by law to enter into the lease, is *ultra vires* and void. *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. B. Co.* 157

12. A contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid; but the proper remedy of the party aggrieved is by disaffirming the contract and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received the benefit of. *Id.*

13. Where the charter of a railroad corporation, or the general laws applicable to it, manifest the intention of the Legislature, for the purpose of securing a continuous line of transportation of which its road forms part, to confer upon it the power of making contracts with other railroad or steamboat corporations to promote that end, such contracts are not *ultra vires*. *Id.*

14. A bridge over a river, the principal purpose and use of which is for the passage of railroad trains, is a railroad, and the bridge company is a railroad company, within the meaning of statutes authorizing a railroad to make contracts with other railroad companies

for the purpose of securing a continuous line for transportation. *Id.*

15. When the president of a corporation executes in its behalf, and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his act. *Id.*

16. When a contract is made by any agent of a corporation in its behalf and for a purpose authorized by its charter, and the corporation receives the benefit of the contract without objection, it may be presumed to have authorized or ratified the contract of its agent. *Id.*

17. Where one railroad company leased and surrendered all its property to another railroad company for the purpose of procuring money to pay liens thereon, and the lessee covenanted in effect to pay and discharge all judgment liens founded on existing claims, and to return the demised property to the lessor at the end of the lease, and the lessee also received proceeds of the bonds secured by a trust deed on the property, the owner of judgments against the lessor is entitled to a decree requiring the lessee to pay the amount of such judgments. *Chicago, M. & St. P. R. Co. v. Chicago Third Nat. Bank,* 900

IV. STOCK AND STOCKHOLDERS.

18. Where by general law a lien is given to a corporation upon its stock for the indebtedness of the stockholder, it is valid and enforceable against all the world. *Hammond v. Hastings,* 960

19. The lien of a corporation on its stock may be waived, but mere ignorance on the part of the purchaser of the fact of the existence of the lien does not destroy it. It constitutes no waiver on the part of the corporation. *Id.*

20. It is unnecessary to enter upon the certificate of stock any statement of the limitations and burdens which the law casts upon all such paper; and the omission to state such limitations upon the face of the paper is not a waiver by the corporation of the benefits thereof. *Id.*

21. Wherever paper of a nature similar to corporate stock is issued, under authority granted by general statute, whoever deals with that paper is charged with notice of all limitations and burdens attached to it by such statute, whether the party lives in or out of the State. *Id.*

22. A corporation has no legal capacity to release an original subscriber to its capital stock from payment of it, in whole or in any part. *Morgan v. Struthers,* 132

23. A subscriber to stock of a corporation has a right to make any arrangement for the security of his shares, provided he does not lessen the amount of his subscription, which constitutes part of the trust fund in which all the subscribers have an equal interest. *Id.*

24. As against the receiver of an insolvent corporation, the owner of preferred stock, who, as director and general agent of the corporation, was active in passing the resolution authorizing the issue of the stock and inducing others to take it, and who has voluntarily subscribed and paid for it and received his certifi-

cate therefor, cannot, after holding it over two years and voting on it, recover back the money paid by him for it from the effects of the insolvent corporation on the ground that the corporation had no power to issue preferred stock. *Banigan v. Bard*, 982

25. In a joint-stock corporation, each stockholder, whether by purchase or original subscription, has the right, unless restrained by the charter or articles of association, to sell and transfer his shares, and, by transferring them, introduce others in his stead. *Morgan v. Struthers*, 132

26. A married woman has the legal capacity to receive a transfer of stock in moneyed corporations, though the consideration may have proceeded wholly from the husband. *Keyser v. Hitz*, 531

27. Those holding a majority of the stock cannot place a value upon it at which a dissenting minority must sell, or do something else which they think against their interest, any more than those holding a minority of the stock can do it. *Mason v. Pewabic Min. Co.* 524

28. The provision in a company's charter, that "the balance due on each share shall be subject to the call of the directors," does not give a stockholder the right, as between himself and the company, or as between him and the company's creditors, to withhold payment of the balance due from him until the necessities of the company require payment in full for the shares subscribed. *Hill v. Merchants Mut. Ins. Co.* 994

29. Where shares of capital stock are voted to a director as a bonus, he is subject to the liabilities of a shareholder who has taken stock but has not paid for the same, although there is a contract between him and the company that such stock shall not be assessable. *Washburn v. Green*, 516

30. A stockholder is so far an integral part of the corporation that, in view of the law, he is privy to proceedings touching the body of which he is a member. *Hawkins v. Glenn*, 184

31. When stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. *Id.*

32. When a creditor has exhausted his legal remedies against a corporation which fails to make an assessment, he may, by bill in equity or other appropriate means, subject such subscriptions to the satisfaction of his judgment. *Id.*

33. By the Code of Virginia of 1860, a person in whose name shares of stock stand on the books of the company shall be deemed the owner thereof as it regards the company; and if the money which any stockholder has to pay upon his shares be not paid as required, the same, with interest thereon from the date of the call, may be recovered. *Id.*

34. A certificate of stock is not negotiable either in form or character; and whoever takes it does so subject to its equities and burdens like every non-negotiable paper; and, though ignorant of such equities and burdens, his ignorance does not relieve the paper therefrom,

or enable him to hold it discharged therefrom. *Hammond v. Hastings*, 960

V. DISSOLUTION; RIGHTS OF CREDITORS.

35. Where a corporation becomes insolvent, its capital stock is a trust fund for the payment of its debts; and if not paid in full, a court of equity can require it to be paid up. *Washburn v. Green*, 516

36. A suit against an insolvent corporation to subject its property to the payment of its debts, and to remove a lien on it created by a trust deed and chattel mortgage, is one within the Act of March 8, 1875, authorizing an order to bring in an absent defendant in a suit to remove a lien, etc., upon property within the jurisdiction. *Mellen v. Moline Malleable Iron Works*, 178

37. When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. *Id.*

38. Where directors of a corporation conduct its business after its dissolution without any attempt to wind it up, and assess its stock, and collect the assessments, they must, in a proceeding to wind up the affairs of the corporation, to pay its debts, and to realize its assets and distribute them among its shareholders, account for the proceeds of the business done since its dissolution. *Mason v. Pewabic Min. Co.* 524

39. The rights of the stockholders in regard to the assets of an expiring corporation are, in the absence of an agreement to the contrary, to have the property converted into money and its value ascertained by a sale, even though a sale is not necessary to the payment of debts. *Id.*

40. A corporation in debt cannot transfer its entire property by lease, so as to prevent the application of the property to the satisfaction of its debts. *Chicago, M. & St. P. R. Co. v. Chicago Third Nat. Bank*, 900

41. The properties of a corporation constitute a trust fund for the payment of its debts; and when there is a misappropriation of the funds of a corporation, equity, on behalf of the creditors of such corporation, will follow the funds so diverted. *Id.*

COUNTIES.

1. A county is a corporation created by and with such powers as are given to it by the State, and is not within the 11th Amendment of the Federal Constitution, restricting the jurisdiction over suits against States, and may be sued in the United States circuit court. *Lincoln County v. Luning*, 766

2. Nev. Gen. Stat. §§ 1950, 1964-1966, requiring presentation of claims against counties, have application only to unliquidated claims and accounts, and do not apply to bonds and coupons. *Id.*

3. The debts of a county contracted during a valid organization remain the obligations of the county, although for a time the organization be abandoned and there be no officers to be reached by the process of the courts. *Comanche County v. Lewis*, 604

4. Ample power is delegated by the Constitution of Kansas to the Legislature of that State to organize a county in any manner it sees fit, and to validate by recognition any organization already existing, no matter how fraudulent the proceedings therefor have been. *Comanche County v. Lewis*, 604

5. A county in Missouri authorized by law to levy a tax of 50 cents on every \$100 of valuation cannot include as part thereof 20 cents on \$100, levied by the township boards for township and bridge purposes, but can be compelled to levy an additional tax of 20 cents on \$100, to pay the balance of a judgment on bonds and other county debts *pro rata*. *Macon County Ct. v. United States, Huidekoper*, 914

6. Under the Missouri law authorizing a county to subscribe to stock of the Missouri & Mississippi Railroad Company, and issue bonds therefor, and levy a tax of $\frac{1}{16}$ of 1 per cent to pay the same, after applying said tax to the payment of a judgment on interest coupons of said bonds, the balance due on such judgment is a liability of the county to be paid out of its general funds. *Id.*

COURTS.

I. IN GENERAL.

II. FEDERAL COURTS.

a. Jurisdiction.

b. Practice.

III. CONFLICT OF AUTHORITY; RELATION OF STATE TO FEDERAL.

IV. RULES OF DECISION; STARE DECISIS.

See also ADMIRALTY; APPEAL AND ERROR, 59; BANKRUPTCY, 4; BANKS AND BANKING, 7; CARRIERS, 5; EXECUTORS AND ADMINISTRATORS, 5; INFANTS, 7; INJUNCTION, 1; TRIAL, 2; WITNESSES, 8.

I. IN GENERAL.

1. A State has power by statute to provide for the adjudication of titles to real estate within its limits, as against nonresidents who are brought into court only by publication. *Arndt v. Griggs*, 918

2. A court, in a case that does not involve the private rights of litigants, cannot be required to determine whether or not particular bodies of persons constituted a lawful legislative assembly. *Clough v. Curtis*, 945

3. The Supreme Court of Idaho Territory has original jurisdiction to issue writs of mandate, review, prohibition, *habeas corpus*, and all writs necessary to the exercise of its appellate jurisdiction. *Id.*

4. The District Court of the Territory of Idaho has jurisdiction of the offense charged in an indictment for a conspiracy by defendant and others to pervert and obstruct the laws of the Territory by unlawfully procuring themselves to be registered as voters while members of the Mormon Church. *Davis v. Beason*, 687

II. FEDERAL COURTS.

a. Jurisdiction.

5. A suit cannot properly be dismissed by a circuit court of the United States, as not involving a controversy within the jurisdiction 1128

of the court, unless the facts, when made to appear on the record, create a legal certainty of that conclusion. *Deputron v. Young*, 923

6. Prior to July 12, 1882, suits might be brought by or against national banks in the circuit courts of the United States in the district where the banks were located, but by the Act of that date the jurisdiction for suits thereafter brought by or against national banks, except suits between them and the United States or its officers and agents, must be the same as the jurisdiction for suits by or against banks not organized under any law of the United States. 22 Stat. 162, 163, chap. 290, § 4. *Whittemore v. Amoskeag Nat. Bank*, 1003

7. No broader jurisdiction as to the subject matter is given by the Act of March 3, 1887, relating to suits against the United States, to the circuit and district courts than that which is given to the Court of Claims. *United States v. Jones*, 90; *United States v. Drew*, 93

8. The question of the true construction of a will depends wholly upon general rules of law and upon the local statutes, and in no degree upon the Constitution, laws, or treaties of the United States. *Giles v. Little*, 1062

9. An action on a marshal's bond, against him and his sureties, for wrongful taking of goods of plaintiff under an attachment issued out of the circuit court of the United States, arises under the laws of the United States, and is therefore within the jurisdiction of the circuit court, without any averment of citizenship of the parties. *Backrack v. Norton*, 377

10. If there are several coplaintiffs in a United States circuit court, each plaintiff must be competent to sue, and if there are several co-defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained. *Smith v. Lyon*, 635

11. Where it appears by the record that the plaintiff is described as a citizen of the State of Nevada, and the defendant as a citizen of the State of California, this is sufficient to give jurisdiction of the parties to the circuit court. *Terry v. Sharon*, 94

12. Where the plaintiff is a citizen and inhabitant of Nebraska, and the defendant is a citizen and resident of Illinois, the latter may be sued by the former in the Circuit Court of the United States for the District of Nebraska. *McCormick Harvest. Mach. Co. v. Walther*, 833

13. Where, in an action by a stockholder of a national bank in behalf of himself and such stockholders as might join therein, against the bank and its directors, all the parties are citizens of the District of New Hampshire, and the bank is located therein, the circuit court for that district has no jurisdiction. *Whittemore v. Amoskeag Nat. Bank*, 1002

14. Under the Act of Congress approved March 3, 1887 (24 Stat. 552), as amended by the Act of Aug. 13, 1888 (25 Stat. 433), citizens of different States cannot unite as plaintiffs in a suit in a United States circuit court in a State of which only one of them is a citizen, where jurisdiction depends on citizenship. *Smith v. Lyon*, 635

15. An enlargement of equitable rights by state statute may be administered by the cir-

cuit courts of the United States, as well as by the courts of the State. *Gormley v. Clark*, 909

16. Under the Act of Congress of March 3, 1867, § 1 (24 Stat. 552), as corrected by the Act of Aug. 13, 1888 (25 Stat. 483), to amend the Act of March 3, 1875, where the jurisdiction of the circuit court is founded upon any of the causes mentioned in this section, except the citizenship of the parties, suit must be brought in the district of which the defendant is an inhabitant. But where the jurisdiction of such court is founded solely upon the fact that the parties are citizens of different States, the suit may be brought in the district in which either the plaintiff or the defendant resides. *McCormick Harvest. Mach. Co. v. Walthers*, 838

b. Practice.

See also TRIAL, 2; WITNESSES, 3.

17. Remedies in the courts of the United States are at common law or in equity, according to the essential character of the case, uncontrolled in that particular by the practice of the state courts. *Gormley v. Clark*, 909

18. As to the sufficiency and scope of pleadings and the form and effect of verdicts in actions at law, the circuit courts of the United States are governed by the practice of the courts of the State in which they are held. *Glenn v. Sumner*, 801

19. Courts of the United States are independent of any statute or practice prevailing in courts of the State where the trial is had, in regard to motions for a new trial and bills of exceptions. *Missouri P. R. Co. v. Chicago & A. R. Co.*, 809

20. In Indiana, the assignee of part of a contract may sue thereon jointly with his assignor, or may maintain an action alone if no objection is taken by demurrer or answer to the nonjoinder of the assignor. This rule governs the practice and pleadings in actions at law in the federal courts held within that State. *Delaware County v. Diebold Safe & Lock Co.*, 674

21. A federal court can acquire jurisdiction to quiet title by constructive service against nonresident defendants by publication, where the statutes of the State provide for and allow such mode of service in such cases. *Arndt v. Griggs*, 918

III. CONFLICT OF AUTHORITY; RELATION OF STATE TO FEDERAL.

22. The jurisdiction of a court of the United States, once obtained over property by being brought within its custody, continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the State, or by any proceedings subsequently commenced in a state court. *Rio Grande R. Co. v. Vinet*, 400

23. When property is seized to satisfy a money judgment of the United States court it is appropriated to pay that judgment, and the court cannot surrender its jurisdiction over the property until it is applied to that judgment, or that judgment is otherwise satisfied. Only the part remaining after such appropriation goes, upon the death of the debtor, into the probate court as his assets. *Id.*

24. Although the Act under which bonds were issued provides for litigation concerning the same, and names a court of the State in which such litigation can be had, such jurisdiction is not exclusive and does not prevent suit in the circuit court. *Lincoln County v. Luning*, 766

25. Perjury committed in testifying before a notary public under authority of Congress is an offense against the United States and within the exclusive jurisdiction of its courts, and cannot be punished in the courts of the State. *Thomas v. Loney*, 949

26. Where the president and cashier of a national bank forged a promissory note, and entered it upon the books of the bank, for the purpose of sustaining false entries in the books and in order to deceive the United States bank examiner, they may be tried and convicted of the forgery of the note in the state court, although the offense of making such false entries is one against the United States, of which its courts have exclusive cognizance. *Cross v. North Carolina*, 287

27. The same act or series of acts may constitute an offense equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government. *Id.*

28. The mode which a State may deem fit to adopt in fixing the amount for any year which it will exact for a corporate franchise is not the subject of judicial inquiry in a federal tribunal. *Home Ins. Co. v. New York*, 1025

IV. RULES OF DECISION; STARE DECISIS.

29. Upon the construction of the Constitution and laws of a State, the Supreme Court of the United States, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some provision of the Federal Constitution, or of a federal statute, or a rule of general commercial law. *Gormley v. Clark*, 909; *Rich v. Mentz*, 1074

30. The Supreme Court of the United States follows the construction of a state statute by the highest court of the State, which is a rule of property in that State. *Bacon v. Northwestern Mut. L. Ins. Co.*, 128

31. Substantially conclusive effect is given to state decisions upon the construction of state statutes, as affecting title to real estate within the State. *Gormley v. Clark*, 909

32. The United States Supreme Court must accept as conclusive the construction of the statute of a State by its highest court. *Louisville, N. O. & T. R. Co. v. Mississippi*, 784

33. The decision of the highest court of a State deciding that a statute of the State is a general law is conclusive on federal courts and all others. *Hammond v. Hastings*, 960

34. Where the supreme court of a State has held that a statute of the State does not contravene the State Constitution, the United States Supreme Court will follow such decision. *Lincoln County v. Luning*, 766

35. The United States Supreme Court is bound by the decision of the Court of Appeals

COVENANT—DAMAGES.

of the State of New York as to compliance with the state statute in relation to taxes, form of assessment, and oath of assessors. *Palmer v. McMahon*, 772

86. In controversies arising under the Statute of Elizabeth against fraudulent conveyances, involving, as they do, the rights of creditors locally and a rule of property, the United States Supreme Court accepts the conclusions of the highest judicial tribunal of the State as controlling. *Peters v. Bain*, 696

87. Although the decisions of the land department on matters of law are not binding on the courts, yet on questions relating to the public lands they are entitled to great respect. *Hastings & D. R. Co. v. Whitney*, 868

88. The principle of *stare decisis* applies where a party, instead of prosecuting a second appeal, attempts by a bill of review, or by a new bill in the nature of a bill of review, to reach errors apparent upon the face of the record. *Kingsbury v. Buckner*, 1047

COVENANT. See also ESTOPPEL, 2.

1. The introduction into a deed of an express covenant of warranty has the effect to deny to the purchaser the benefit of the statutory covenant of seisin under the laws of Mexico. *Douglass v. Lewis*, 58

2. The covenant of warranty, and that of seisin or of right to convey, are not equivalent covenants. Defect of title will sustain an action upon the latter, while disturbance of possession is requisite to recovery upon the former. *Id.*

CRIMINAL LAW.

1. Only one indictment and conviction of the crime of unlawful cohabitation, under the Act of 1882, can be had for the time preceding the finding of the indictment; the crime is a continuous one, and is but a single crime until prosecuted. *Re Nielsen*, 118

2. The conviction of a person of the crime of unlawful cohabitation is a bar to his subsequent prosecution for the crime of adultery committed during the same period, where the adultery charged in the second indictment was an incident and a part of the unlawful cohabitation for which he had been convicted. *Id.*

CUSTODY OF LAW. See COURTS, 22.

CUSTOM AND USAGE. See EVIDENCE, 17.

DAMAGES. See also CONTRACTS, 9, 10.

1. The damage to be recovered must always be the natural and proximate consequence of the act complained of. Those results are proximate which the wrongdoer, from his position, must have contemplated as the probable consequence of his fraud. *Smith v. Bolles*, 279

2. Mental pain or distress is a proper element in estimating damages for personal injuries. *Kennon v. Gilmer*, 110

3. In an action for damages for false and fraudulent representations in the sale of stock, the measure of damages is not the difference between the contract price and the market

value if the property was as represented to be. Defendant is bound to make good the loss sustained, such as the moneys that plaintiff has paid out, and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability does not include the expected fruits of an unrealized speculation. *Smith v. Bolles*, 279

4. Where a school district purchased a piece of land from a person in possession having a squatter title, with knowledge by it of the issuance of a United States patent therefor, but under the advice of counsel and with the belief that the squatter title was the better title, and erected a school house thereon, in subsequent proceedings to condemn the land as against the holder of the United States patent, who is the true owner, the school district is only obliged to pay such owner the value of the land without the school house, although it was notified before the erection of the school house that it would erect it at its peril. *Searl v. School Dist. No. 2*, 740

5. The law of Colorado, that "in estimating the value of all property actually taken, the true and actual value thereof at the time of the appraisal shall be awarded," means the value of the owner's real interest. *Id.*

6. Where a patentee granted no licenses, and had no established license fee, but supplied the demand himself, and was able to do so, an enforced reduction of price is a proper item of damages for infringement, if proved by satisfactory evidence. *Boesch v. Graff*, 787

7. The payment of a sum in settlement of a claim for an alleged infringement of a patent cannot be taken as a standard to measure the value of the improvements patented, in determining the damages sustained by the owner of the patent in other cases of infringement. *Id.*

8. Where the evidence did not show that the reduction in prices of patented articles sustained by the plaintiff was solely due to the acts of the defendant, or to what extent it was due to such acts, damages for infringement cannot be awarded on such alleged reduction. *Cornely v. Marekwald*, 117

9. In an action for infringement of a patent, where there is in the evidence no basis for a computation of the damages, only nominal damages can be given. *Id.*

10. Those who take a conveyance and go into possession in entire ignorance of any defect in their title, though technically possessors in bad faith because, by proper inquiry, they might have discovered the defect, are not to be placed on the same level with knavish and fraudulent possessors who, without any title, pertinaciously keep the true and known owner out of possession. *New Orleans v. Christmas*, 99

11. The rule that a possessor in bad faith is bound to respond for all that the property possessed can be made to produce does not require him to change the state of the property,—as, to change wild land to cultivated. *Id.*

12. By the law of Louisiana a person evicted from property conveyed to him with warranty may recover from his warrantor, not only the price, but also the rents and revenues which he is bound to respond for to the true owner. *Id.*

DEDICATION--DISTRICT ATTORNEY.

13. The claims of Mrs. Gaines against the city of New Orleans are sustained for the rents and revenues of improved property while in the hands of the grantees of the city, said property having been recovered by her from said grantees; but her claims for rents and revenues of unimproved lands are disallowed, no rents or revenues having been actually derived from them. *Id.*

DEDICATION.

1. Mere knowledge and nonaction or failure to assert one's rights are not conclusive evidence of dedication, for they may be rebutted; and the party is always allowed to show facts and circumstances to overcome such presumption. *McKey v. Hyde Park*, 860

2. In Illinois, a dedication of a street or highway may be inferred from a long and uninterrupted user by the public, with the knowledge and consent of the owner. *Id.*

DEED.

1. The words of a deed are to be taken most strongly against the party using them; but statutes relating thereto, in derogation of common law, are to be construed strictly. *Douglas v. Lewis*, 58

2. Where a plat is referred to in a deed as containing a description of land, the courses, distances, and other particulars appearing upon the plat are to be as much regarded, in ascertaining the true description of the land and the intent of the parties, as if they had been expressly enumerated in the deed. *Jef-feries v. East Omaha Land Co.* 872

DEFINITIONS. See PUBLIC LANDS, 11; SET-OFF AND COUNTERCLAIM, 2; WATERS AND WATERCOURSES, 4.

DEPOSITIONS. See also WITNESSES, 5.

Testimony taken in a contested election case by deposition before a notary public stands on the same ground as if taken before a judge or officer of the United States. *Thomas v. Loney*, 949

DIPLOMATIC AND CONSULAR OFFICERS.

1. By U. S. Rev. Stat. § 1675, as amended by the Act of March 3, 1875, an envoy extraordinary and a minister plenipotentiary to Turkey is entitled to \$10,000 a year, unless such salary is otherwise specially provided for. *Wallace v. United States*, 571

2. The President having raised the grade of the legation to Turkey to a plenipotentiary mission by his appointment of claimant to such office in 1882, and Congress having, before the appointment, provided for the office an annual salary of \$7,500, claimant can have no larger salary, and cannot recover the difference between that sum and the sum of \$10,000 provided by U. S. Rev. Stat. § 1675. *Id.*

3. The consul of the United States at Hong Kong, in examining Chinese emigrants going to the United States on foreign vessels, does not perform a service required by law or by the regulations, or any service specified in any

tariff of fees, or any official service. The fees received for such service, being paid voluntarily to the consul by the person to whom it was rendered, became the private property of the consul, and not the money of the United States, although the consul attached his seal as evidence of his official character. *United States v. Mosby*, 625

4. Certifying extra copies of quadruplicate invoices of goods shipped to the United States before the Regulations of 1881 is official service which can be performed only under the hand of the consul and his seal of office to the certificate; and the emolument therefor is an official fee. *Id.*

5. Fees received for certificates of shipment of merchandise in transit through the United States to other countries, where the law did not require the consul to issue those certificates, belong to the consul, and not to the United States. *Id.*

6. Fees collected for recording which did not relate to official instruments or to official acts, but private transactions for individuals, not requiring the use of the consul's title or seal of office, belong to the consul individually; so also the fees for cattle-disease certificates. *Id.*

7. Interest on public moneys deposited, in respect to which the consul was a trustee, belonged to the United States. He was not required to put the sums out at interest, but, if he did so, the accretion belonged to the government. *Id.*

8. Certifying, by a consul, the official character and signature of a notary public, was not an official service, and the fees therefor were his individually. *Id.*

9. A fee in the settlement of a private estate belongs to the consul individually. *Id.*

10. Fees collected by a consul at Hong Kong for shipping and discharging seamen on foreign-built vessels sailing on the China coast, under the United States flag, belong to the consul individually where the seamen were not American citizens and the vessel did not clear from a port of the United States. *Id.*

11. Fees for certifying invoices by a consul for free goods imported into the United States concern an official duty, and do not belong to such consul, but to the government. *Id.*

DISCOVERIES. See also CONTRACTS, 16.

The policy of the law is to encourage useful discoveries by securing their fruits to those who make them. *Fowle v. Park*, 67

DISMISSAL. See ACTION OR SUIT, 9.

DISTRICT ATTORNEY.

1. The discretionary fee that may be allowed to a district attorney for securing a conviction in a case of indictment for a crime tried by a jury is none the less incident to the trial and judgment because its allowance is contingent upon a conviction. *United States v. Waters*, 594

2. In allowing the counsel fee to the district attorney the court acts in its judicial capacity;

DISTRICT OF COLUMBIA—DUTIES.

and such allowance, being a judicial act of a court of competent jurisdiction, is not subject to the re-examination and reversal of the attorney-general. *United States v. Waters*, 594

DISTRICT OF COLUMBIA.

1. The District of Columbia is a municipal corporation, having a right to sue and be sued, and is subject to the ordinary rules that govern the law of procedure between private persons. *Metropolitan R. Co. v. Dist. of Columbia*, 281

2. The District of Columbia is a "State of the Union," within the meaning of the treaty of 1858 between the United States and France, relieving Frenchmen from the disability of alienage in disposing of and inheriting property. *De Geofroy v. Riggs*, 642

DOMICIL.

A traveling salesman residing in St. Louis, Missouri, who sent his wife and children to Brooklyn, New York, where they took up their residence and commenced to keep house and have since resided, did not become a resident of New York, within the meaning of the Statute of Limitations, until he joined his family there and changed his actual residence to that State, although his domicile might have been there. *Penfield v. Chesapeake, O. & S. W. R. Co.* 940

DUE PROCESS. See CONSTITUTIONAL LAW, 6-18; TRIAL, 17.

DURESS.

1. Where there is actual or threatened exercise of power possessed over the property of another by the party exacting or receiving payment, there is coercion or duress which will render a payment involuntary. *Cleveland v. Smith*, 884

2. Virtual or moral duress is sufficient to prevent a payment made under its influence from being voluntary. *Robertson v. Frank Brothers Co.* 286

3. When moral duress not justified by law is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. *Id.*

4. When duress has been exerted by one clothed with official authority or exercising a public employment, less evidence of compulsion or pressure is required; as, where an officer exacts illegal fees, or a common carrier excessive charges. *Id.*

5. The payment of money to an official to avoid an onerous penalty, though the imposition of the penalty may be illegal, is sufficient to make the payment an involuntary one; as, where one, in order to get immediate possession of his goods, which are of a perishable nature, pays increased duties illegally exacted. *Id.*

6. The payment of taxes on lands, where no warrant had been issued, and no proceedings taken, and none could be taken for several months for their collection, without protest or objection, and after readjustment and reduction of the taxes obtained by the company on whose lands they had been assessed, and after

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a correction therein was made at the request of the company's agent, who wrote to the commissioners that if the correction was made the taxes would be paid,—is not a payment under duress. *Little v. Bowers*, 1016

DUTIES.

1. The Act of Congress of March 3, 1883, § 7, entitled "An Act to Reduce Internal Revenue Taxation, and for other Purposes," went into effect at the time of the passage of the Act. *Robertson v. Bradbury*, 405

2. In interpreting customs statutes, commercial terms are to be construed according to the commercial understanding in regard to them. *Pickhardt v. Merritt*, 358

3. The fact that, at the date of an Act imposing duties, goods of a certain kind had not been manufactured, does not withdraw them from the class to which they belong, when the language of the statute clearly and fairly includes them. It is sufficient if it so includes them according to commercial understanding. *Id.*

4. When an article is designated by a specific name, and a duty imposed upon it by such name, general terms in a later part of the same Act, although sufficiently broad to comprehend such article, are not applicable to it. *Robertson v. Glendinning*, 298

5. If goods are damaged, that is matter for appraisement, under U. S. Rev. Stat. § 2927; but if any portion of them has been actually lost, an allowance for the same must be made to the importer in estimating the duties. *Robertson v. Bradbury*, 405

6. The levy of duties on a valuation which includes charges of transportation from the place of production to the place of shipment, and charges of shipment, since the passage of the Act of 1883, is contrary to law. *Id.*

7. Although the valuation of merchandise made by the appraiser is generally conclusive, yet if the appraiser proceed upon a wrong principle, contrary to law, his appraisement is impeachable and open to examination. *Robertson v. Frank Brothers Co.* 236

8. The duty upon embroidered linen handkerchiefs, under the Act of 1883, is 35 per cent *ad valorem*. *Robertson v. Glendinning*, 298

9. A certain rate of duty is designated by U. S. Rev. Stat. tit. 33, § 2502, schedule J, ¶ 8, as enacted by the Act of 1883, § 6, upon handkerchiefs, of linen by name, and they are therefore liable to the duty prescribed by that paragraph, and do not come under ¶ 11 of the same schedule, which fixes a duty upon linen embroideries of 80 per cent *ad valorem*. *Id.*

10. Ribbons composed of silk and cotton, in which silk is the component part of chief value, used exclusively as trimmings for ornamenting hats and bonnets, and which have a commercial value only for that purpose, are liable to a duty of only 20 per cent *ad valorem*, under U. S. Rev. Stat. tit. 33, § 2502, schedule N, "Sundries" (22 Stat. 511), as enacted by the Act of March 3, 1883. *Robertson v. Edelhoff*, 477

11. Professional productions of a statuary or a sculptor, as those words are used in the statute in relation to duties on imports, embrace

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EJECTMENT—EQUITY.

such works of art as are the result of the artist's own creation, or are copies of them, made under his direction and supervision, or copies of works of other artists, made under like direction and supervision, as distinguished from the productions of the manufacturer or mechanic. *Merritt v. Tiffany*, 299

12. Bronze statues and statuettes are not necessarily statutory, subject only to a duty of 10 per cent *ad valorem*; but if they are the production of a manufacturer or mechanic they come under the designation of "manufactures of copper," subject to a duty of 45 per cent *ad valorem*. *Id.*

13. Ivory pieces for the keys of pianos or organs are manufactures of ivory, and are not dutiable as musical instruments. *Robertson v. Gerdan*, 408

14. Iron show cards are liable to a duty of 45 per cent *ad valorem*, under U. S. Rev. Stat. § 2502, schedule C, last paragraph, as manufactures of iron not specially enumerated in the Act of March 3, 1888. They are not dutiable as printed matter, under schedule M of that Act. *Forbes Lithograph Mfg. Co. v. Worthington*, 458

15. Iron and steel wire hairpins are liable to a duty of 45 per cent *ad valorem* under that part of U. S. Rev. Stat. § 2502, schedule C, as enacted by the Act of March 3, 1888 (22 Stat. 501). *Robertson v. Rosenthal*, 392

16. Where the jury finds that the plaintiff was compelled to pay illegal duties in order to get possession of his goods, the payment was not voluntary. *Robertson v. Bradbury*, 405

17. If the value of the goods expressed in the invoice included charges of transportation and shipment, and the importer desired to have the invoice corrected, and he was told by the officers that he must enter the goods at the value expressed in the invoice, and was compelled to do that in order to proceed at all, then he was not bound to ask for an appraisement, under U. S. Rev. Stat. § 2926, in order to recover for the excess of duties paid. *Id.*

18. Judgment in favor of plaintiffs for duties illegally exacted by the collector of the port of New York,—affirmed by a divided court. *Miller v. Richard*, 212

EJECTMENT.

1. Plaintiff in ejectment must recover on the legal title, and cannot recover, in the courts of the United States, upon the equitable title evinced by his certificates of purchase made by the register of the land office; and he therefore cannot commence the action until the making of the patent for the land. *Redfield v. Parks*, 327

2. A finding that plaintiff obtained title to the land by patent from the United States to his grantor, who conveyed to plaintiff, makes out his title; and to prevent his recovery defendant must prove some affirmative defense alleged. *Deputron v. Young*, 928

ELECTION.

The doctrine of election means that where two inconsistent rights are presented to the choice of a party, by a person who manifests a clear intention that he should not enjoy both,

he must accept or reject one or the other; and so one cannot take a benefit under an instrument and then repudiate it. *Peters v. Bain*, 696

EMINENT DOMAIN. See also DAMAGES, 4, 5; IMPROVEMENTS, 3.

1. The right of eminent domain cannot be exercised except upon condition that just compensation shall be made to the owner; and it is the duty of the State to see that the compensation is just, not merely to the individual whose property is taken, but to the public which is to pay for it. *Searl v. School Dist. No. 2*, 740

2. Pa. Const. 1878, art. 16, § 8, which provides that corporations taking private property for public use shall make compensation for property taken, injured, or destroyed, includes then existing corporations. *Pennsylvania R. Co. v. Miller*, 287

EQUITY. See also ACTION OR SUIT, 11; EJECTMENT, 2.

1. A bill in equity may be retained for the purpose of granting full relief when jurisdiction exists. *Gormley v. Clark*, 909

2. Where equity can alone afford the entire relief sought, the fact that legal questions are also involved cannot oust the court of jurisdiction. *Id.*

3. A court of equity which denies legal remedies may enforce equitable remedies for the same debt; and an application for the latter is not foreign to a bill for the former. *Chicago, M. & St. P. R. Co. v. Chicago Third Nat. Bank*, 900

4. If the objection of want of jurisdiction in equity is not taken in proper time,—namely, before the defendant enters into his defense a large,—the court, having the general jurisdiction, will exercise it. *Brown v. Lake Superior Iron Co.* 1021

5. The court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery at the pleasure of the parties interested. *Brown v. Lake Superior Iron Co.* 1021

6. Where, in a court of equity, an apparent legal burden on property is challenged, the court has jurisdiction of a cross-bill to enforce, by its own procedure, such burden. *Chicago, M. & St. P. R. Co. v. Chicago Third Nat. Bank*, 900

7. Whether the condition of property was such as to require, for the protection of the parties, that it be sold, was a matter for the court, in its discretion, to determine. If the circumstances justified immediate action, the court had power to order a sale in advance of a final decree. *Mellen v. Moline Malleable Iron Works*, 178

8. A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents. *Knox County v. Harshman*, 586

ESTOPPEL—EVIDENCE, II.

ESTOPPEL. See also ELECTIONS; INSOLVENCY AND ASSIGNMENT FOR CREDITORS, 17; WATER COMPANIES, 2.

1. If a power to convey is general and a conveyance is a fraud upon the power, no estoppel arises in favor of the grantee unless he paid value without notice. *Deputron v. Young*, 928

2. In Texas, the clause in a deed, "To have and to hold to the grantee, his heirs and assigns forever, free from the just claim or claims of any and all persons whomsoever claiming or to claim the same,"—is a general warranty, and carries to the grantee, by estoppel, a subsequent title which comes by inheritance to the grantor. *Miller v. Texas & P. R. Co.* 487

3. One who has accepted the benefit of a conveyance cannot repudiate the burden imposed upon him by express agreement therein. *Keller v. Ashford*, 667

4. If checks for dividends were indorsed by a woman, she is estopped to say that she did not know their contents and was not the owner of the shares of stock upon which the dividends were declared, where each check is payable to her order, and is on its face for dividends on stock standing in her name on the books of the bank. *Keyser v. Hitz*, 531

5. The objection that the transfer by a company of its entire property to a new company was illegal and *ultra vires*, and therefore to be disregarded, cannot be availed of by one who has proceeded against the new company and obtained, upon the assumed validity of such transfer, a decree that it pay his judgment, which is founded upon a demand that company agreed to assume as part of the consideration of the transfer. *Fogg v. Blair*, 721

6. Where a bank represents to another bank that a holder of a draft is a *bona fide* holder, and the latter bank takes the draft on deposit, and places it to the holder's credit, and pays his checks, relying on such representation, the former bank is estopped from showing that such holder was not a *bona fide* holder of the draft; and its receiver stands in no better position. *Armstrong v. American Exch. Nat. Bank*, 747

7. If attaching creditors recognized and dealt with a firm as a limited partnership, they are estopped from insisting that there was no such partnership or that the notice was insufficient. *Tracy v. Tuffy*, 879

8. A debtor, to destroy equality and accomplish partiality, cannot ignore its long acquiescence and plead an unsubstantial technicality to overthrow protracted, extensive, and costly proceedings carried on in reliance upon its consent. *Brown v. Lake Superior Iron Co.* 1021

9. Where the mortgagor neither paid nor offered to pay the installments as they became due, nor did he pay or offer to pay them by giving his note secured by mortgage on other real estate at any time thereafter, but, on the contrary, stood by and allowed the property to be sold, saw the sheriff's deed executed for it; and never attempted to redeem, he cannot, thirteen years after the purchaser at the sale

has taken possession of it, and after the property has increased in value, regain possession of it by a suit in ejectment, and thus defeat the title acquired at the mortgage sale, by setting up an irregularity in the foreclosure proceedings. *Bacon v. Northwestern Mut. L. Ins. Co.* 128

EVIDENCE.

I. JUDICIAL NOTICE.

II. PRESUMPTIONS AND BURDEN OF PROOF.

III. SECONDARY; DOCUMENTARY.

IV. PAROL AND EXTRINSIC CONCERNING WRITINGS.

V. OPINIONS; DECLARATIONS.

VI. RELEVANCY; SUFFICIENCY.

I. JUDICIAL NOTICE.

1. Courts must take judicial notice of a charter when declared by the Legislature to be a public Act. *Case v. Kelly*, 513

2. The United States Supreme Court takes judicial notice of the fact that at the date of his certificate a deputy comptroller of the currency was such officer. *Keyser v. Hitz*, 531

II. PRESUMPTIONS AND BURDEN OF PROOF.

3. If the validity of a deed depends on an act *in pais*, the party claiming under it is bound to prove the performance of the act. *Deputron v. Young*, 928

4. The presumption that public officers have done their duty is not a substitute for proof of an independent and material fact. *United States v. Carr*, 483

5. If a deputy comptroller signs as acting comptroller, it will be assumed that at the date of his certificate he was authorized to exercise the powers and discharge the duties of the comptroller, and was at the time acting comptroller. *Keyser v. Hitz*, 531

6. In order to establish an acquiescence equivalent to assent in a certain mode of dealing with the subject matter of a mail contract, the burden is on the contractors to show knowledge or information, by the department, of his conduct in the premises. *United States v. Carr*, 483

7. Where one of a firm to which choses in action were assigned testified that he knew at the time of the transaction that the assignor was insolvent, and that he received them all or nearly all in payment of the debt of his firm, the burden of proof was upon the firm to show the fairness of the transaction, although in their answer as defendants they denied having any property of the debtor. *Klein v. Hoffheimer*, 373

8. The court never presumes fraud. Carelessness in the dealings between husband and wife does not tend to establish fraud. *Schreyer v. Scott*, 955

9. The mere possession of it by the husband is no proof that the title to property has passed from the wife to him. After it has been shown that the property accrued to the wife by descent from her father's and brother's estates, the presumption necessarily is that it continued

EVIDENCE, III.—VI

hers. In such a case it lies upon one who asserts it to be the property of the husband to prove a transmission of the title, either by gift or contract for value. *Stickney v. Stickney*, 186

III. SECONDARY; DOCUMENTARY.

10. Copies of records, books, or papers, in the general land office, authenticated by the seal and certified by the commissioner thereof, are evidence equally with the original thereof. *Culver v. Uthe*, 776

11. The original of a deed need not be produced, nor its execution proved, where it has been fully recorded; and where not produced upon notice, the recorder's copy is competent and sufficient evidence. *Keller v. Ashford*, 667

12. By the law of Illinois, a tax deed is no more than *prima facie* evidence in favor of the purchaser, and may be shown to be invalid, by proof either that there was no advertisement of sale, no judgment or precept, no taxes unpaid, or no notice to redeem given or recorded. *Gage v. Kaufman*, 725

13. A complaint in one suit, not under oath or signed by the plaintiff, but only by its attorneys, is incompetent in another suit to prove an admission by the plaintiff. *Delaware County v. Diebold Safe & Lock Co.* 674

14. A sworn answer in an equity suit, which is responsive to the bill, is evidence for defendant, where plaintiff has not waived an answer under oath. *Dravo v. Fabel*, 421

15. In an action for the infringement of a reissued patent, in which the complaint alleges that the reissued patent is for the same invention as the original patent, and the answer denies such allegation, it is error for the court, on the trial, to exclude the original patent as evidence. *Oregon Imp. Co. v. Excelsior Coal Co.* 844

16. Letters of counsel and the letters of one of the commissioners are not competent evidence to show what claims were allowed by the judgment of a commission. *Burthe v. Denis*, 768

IV. PAROL AND EXTRINSIC CONCERNING WRITINGS.

17. A written and express contract cannot be controlled or varied or contradicted by a usage or custom. *De Witt v. Berry*, 896

18. When parties have put their engagement into writing, in such terms as import a legal obligation, without any uncertainty, it is conclusively presumed that the whole engagement was reduced to writing; and all oral testimony of a previous conversation between the parties is inadmissible. *Id.*

19. Where a contract of sale of goods is in writing and contains no warranty, or where a written contract contains a warranty, parol evidence is not admissible to add a warranty. *Id.*

20. Where a judgment is ambiguous or uncertain as to what, or what portion of, claims were allowed by it, extrinsic evidence is admissible to ascertain and determine those facts. *Burthe v. Denis*, 768

21. Parol evidence is admissible to show a

neglect to make payment on demand, in order to prove that the consideration of a written instrument has not been performed by payment of certain debts to third persons. *Mills v. Allen*, 717

22. In Massachusetts a recital in a deed, acknowledging payment of the consideration stated, is only *prima facie* proof, and is subject to be controlled or rebutted by other evidence. *Id.*

23. Evidence of a promise, as part of the consideration of an instrument to pay debts due from the promisee to third persons, is competent. *Id.*

24. Where a policy is issued on property "held in trust," parol evidence is admissible to show who are the owners, or who were intended to be insured thereby. *California Ins. Co. v. Union Compress Co.* 730

25. Where a devise is, on the face of it, clear and intelligible, but from external circumstances an ambiguity arises as to which of two or more things or persons the testator referred to, it being legally certain that he intended one or the other, evidence of his declarations, of the instructions given for his will, and of other circumstances of the like nature, is admissible to determine his intention. *Coulam v. Doull*, 596

26. Under the statute of Utah, that when any testator shall omit to provide in his or her will for any of his or her children, or for the issue of any deceased child, unless it shall appear that such omission was intentional, such child, or the issue of such child, shall have the same share in the estate of the testator as if he or she had died intestate, extrinsic evidence is admissible to show that the testator's omission to provide for a child was intentional. *Id.*

V. OPINIONS; DECLARATIONS.

27. Testimony of a witness as to the quantity of ore taken out of a mine is properly rejected where it does not appear that the witness personally knew anything about the quantity. *Patrick v. Graham*, 480

28. Statements made by one selling property to a firm, in the presence of one member who assents thereto, may be proved against the firm, on the question of fraud in the sale as to creditors. *Klein v. Hoffheimer*, 378

29. Where an assignment of notes and accounts belonging to an insolvent debtor was a part of a transaction by which his whole property was distributed to certain of his creditors in fraud of the others, whatever was said or done by any of the parties in the transaction, or by one of the assignees, in furtherance of the transaction, is part of the *res gestæ*, and is evidence against all of such parties. *Id.*

VI. RELEVANCY; SUFFICIENCY.

30. Evidence having been first offered to show that a horse has been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition is competent to prove that his previous conduct was not accidental or unusual, but the result of a fixed habit at the time of the accident. *Kennon v. Gilmer*, 110

31. The habit of an animal is, in its nature,

EXECUTION—FRAUD AND FRAUDULENT CONVEYANCES.

a continuous fact, to be shown by proof of successive acts of a similar kind. *Kennon v. Gilmer*, 110

82. Testimony that one of the legatees, about the date of the will, had knowledge of its provisions, is not competent upon the trial of the issue as to competency to make a will. *Ormsby v. Webb*, 805

83. Evidence that the decedent received the bulk of his estate by breaking the will of his grandfather is immaterial upon the issue as to whether the paper in question was or was not valid as his last will and testament. *Id.*

84. What the plaintiff paid for stock is proper to be proved to establish what loss he has sustained. *Smith v. Bolles*, 279

85. If a party seeks to make out that certain words used in a contract have a different acceptance from their ordinary sense, he must prove it by clear, distinct, and irresistible evidence. *De Witt v. Berry*, 896

86. Very clear and direct testimony is essential to support an adjudication that a transfer of property is fraudulent and void as against a subsequent creditor. *Schreyer v. Scott*, 955

87. Clear, convincing, and unambiguous proofs of fraud are required to set aside a patent; proofs which only create a suspicion do not bring the assurance of certain wrong. *United States v. Hancock*, 601

88. Where a bill alleges that a decree was obtained by fraud and collusion, and the pleas and answers, under oath, deny the fraud and collusion charged, and aver a purchase of property in good faith, for valuable consideration and without knowledge or notice of any fraud in obtaining the decree, these averments, being responsive to the allegations of the bill, are conclusive in favor of the defendant and against the plaintiff's claim, no proofs having been taken. *Beals v. Illinois, M. & T. R. Co.* 608

EXECUTION.

1. The purchase by a director at sheriff's sale, of bonds delivered by him to the sheriff as the property of the company, although they had in fact never been delivered by the company so as to take effect, vests in him no title. *Washburn v. Green*, 516

2. A purchaser on execution sale can move for confirmation or to set the sale aside, and can appeal from the order thereon, and may be compelled to perform his bid, and is concluded by the result of proceedings to confirm or annul the same. *Deputron v. Young*, 923

3. In Nebraska the title of a purchaser at an execution sale depends, not alone upon his bid or payment of the purchase money, but upon the confirmation of the sale; and the sale, though temporarily confirmed, may be set aside, where no rights of a third party accrue in the mean time. *Id.*

4. Where an order of confirmation was vacated before there was any change in the relation of the parties, a sheriff's deed fell with it. *Id.*

EXECUTORS AND ADMINISTRATORS. See also COURTS, 23.

1. Every administrator after the first is an administrator *de bonis non* in fact, and it is not 1186

important that it should so appear of record. *Veach v. Rice*, 163

2. Under the provisions of the Georgia Code, where there is more than one administrator and one resigns, he who resigns must account to his coadministrator as his successor, who would in effect in such case be an administrator *de bonis non*; and such accounting is required before discharge. *Id.*

3. Where a resigning administrator proceeded in conformity with the statute in such case made and provided, and, under the orders of the court of ordinary, ceased to be administrator and was discharged from further liability as such, and a new bond was given by his successor, the sureties who had signed the first bond of the two administrators were also discharged. *Id.*

4. The judgment of discharge of an administrator, made by the court of ordinary, operates as a discharge from all liability on the part of the administrator, unless the same be impeached in that court for irregularity, or in the superior court for fraud. *Id.*

5. Property of a debtor, brought within the custody of the circuit court of the United States by seizure under process issued upon its judgment, remains in its custody, to be applied in satisfaction of the judgment, notwithstanding the subsequent death of the debtor. By such death it does not pass under the control of the probate court of the State, to be disposed of in the administration of the assets of the deceased. *Rio Grande R. Co. v. Vinet*, 400

EX POST FACTO LAWS. See CONSTITUTIONAL LAW, 3-5.

FEDERAL QUESTION. See APPEAL AND ERROR, 19.

FORFEITURE. See INTERNAL REVENUE, 4-11; POSTOFFICE, 4.

FORGERY. See also COURTS, 26.

1. The forging of a promissory note made payable to or at a national bank does not constitute the offense described in U. S. Rev. Stat. § 5418, and is not, within the meaning of that section, a fraud against the United States. *Cross v. North Carolina*, 287

2. The crime of forgery against the State should not be excused or obliterated by committing another and distinct crime against the United States. *Id.*

3. Although forgery may have been committed in order that the instrument forged might become the basis of false entries upon the books of a bank, that circumstance cannot defeat the authority of the State to punish the forgery as in itself a distinct, separate offense committed within its limits and against its laws. *Id.*

FRAUD AND FRAUDULENT CONVEYANCES. See also CONTRACTS, 26.

1. Where a director advanced money to redeem bonds of the company from a pledge, charged the money to the company, and received its notes therefor, and then attempted 131, 132, 133, 134 U. S.

GAMING--HABEAS CORPUS.

to levy upon and sell the bonds, and himself become the purchaser thereof at a nominal sum, and thus gain an unconscionable advantage over other bondholders, no allowance should be made to him by way of equitable salvage for the money thus advanced by him. *Washburn v. Green*, 516

2. Where there is no such relation of trust or confidence between the parties as imposes upon one an obligation to give full information to the other, the latter cannot proceed blindly, omitting all inquiry and examination, and then complain that the other did not volunteer to give the information he had. *Cleveland v. Smith*, 884

3. Where defendants fraudulently converted notes, and accounts, the property of an insolvent debtor, they are liable to a creditor of the latter, not only for the money collected on such notes and accounts, but for the value of those which remain in their hands, not exceeding the amount of the creditor's debt. *Klein v. Hoffheimer*, 873

4. In Virginia, provisions in a deed of trust are not sufficient to justify the inference of a fraudulent intent, except where the inference is so absolutely irresistible as to preclude indulgence in any other. *Peters v. Bain*, 696

5. In order to defeat for fraud a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights may and do so supervene. *Schreyer v. Scott*, 955

6. Even a voluntary conveyance from husband to wife is good as against subsequent creditors, unless executed as a cover for future schemes of fraud. *Id.*

7. Subsequent unexpected depreciation in the value of real estate, or unexpected reverses in business, do not show fraudulent intent in a conveyance of real estate by a husband to his wife, or fraud in the result. *Id.*

8. Where one who made a conveyance did not purpose to and did not enter upon any new business, and had at the time an abundance of money to pay all his debts, and afterwards paid them, the conveyance will be free from the imputation of fraud, especially as against a remotely subsequent creditor. *Id.*

9. Where a conveyance from a husband to his wife was of property of which the wife was the equitable owner, or in which she had a large equitable interest, by reason of her moneys having paid for the same and for a large share of the improvements thereon, the conveyance was not voluntary, but upon good consideration. *Id.*

10. A person who had knowledge of a conveyance two years before he entered into the contract which is the basis of his claim, cannot say that he was defrauded thereby. *Id.*

GAMING. See CONTRACTS, 18.

GARNISHMENT.

1. On a bill in the nature of a bill for specific performance or for an equitable garnishment, the court may inquire where is the substantial equity in the case. *Young v. Clarendon Trop.* 856

2. A creditor of a railroad company who endeavors, by suit in equity, to reach and subject to the payment of his debt the alleged equitable debt of a town to the company by reason of the nondelivery of bonds to the company and their return to the town, may be defeated by the laches of the company in the pursuit of its rights against the town. *Id.*

HABEAS CORPUS.

1. The writ of *habeas corpus* cannot be turned into a writ of error. *Davis v. Beason*, 637

2. In a writ of *habeas corpus* nothing can be inquired into but the jurisdiction of the court. *Wight v. Nicholson*, 865

3. The including, in one indictment and sentence, of illegal voting both for a representative in Congress and for presidential electors, does not go to the jurisdiction of the state court, but is at the worst mere error, which cannot be inquired into by writ of *habeas corpus*. *Fitzgerald v. Green*, 931

4. Where the district court had jurisdiction of the subject matter and of the person, any irregularities occurring in the mere conduct of the case do not affect the validity of its final order. Its judgment, so far as it involves mere errors, cannot be reviewed on *habeas corpus*. *Re Savin*, 150

5. If the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally; and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*. *Re Nielsen*, 118

6. A party is entitled to a *habeas corpus*, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. *Id.*

7. A second conviction and punishment of the same crime is an excess of authority on the part of a court, and a *habeas corpus* may be issued for the discharge of the defendant imprisoned on such conviction. *Id.*

8. Where a double conviction for the same offense appears anywhere in the record, it is sufficient; as, where it appears on the record in the plea of *autrefois convict*, which is admitted to be true by a demurrer. *Id.*

9. The general averment in a petition for *habeas corpus*, that the petitioner was detained in violation of the Constitution and laws of the United States, and that the district court had no jurisdiction to try and sentence him, is an averment of a conclusion of law, and not of facts. *Re Cuddy*, 154

10. The return must specify the true cause of the detention; and the petitioner or the party imprisoned may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case, so that the facts may be ascertained and the matter disposed of as law and justice require. *Id.*

11. The application for a writ of *habeas corpus* must set forth the facts concerning the

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detention of the party restrained, in whose custody he is detained, and by virtue of what claim of authority, if known. *Re Cuddy*, 154

12. Where a judgment of the district court of the United States is attacked collaterally, and the record discloses a case of contempt, and does not show one beyond the jurisdiction of the court, it must be presumed that the case is within its jurisdiction to punish; but such presumption may be overcome by the evidence in proceedings for *habeas corpus*. *Id.*

13. Where it is neither alleged nor proved that the contempt which the person was adjudged, upon notice and hearing, to have committed, was not committed in the presence of the court, and his misbehavior, if it occurred in its presence, made him liable to fine or imprisonment, it must be held that the want of jurisdiction is not affirmatively shown; consequently, that it does not appear that error was committed in refusing the writ of *habeas corpus*. *Id.*

14. Where a statute under which a conviction has been had is held unconstitutional, and it repealed the former statute on the subject, on the discharge of a prisoner convicted under it, on a writ of *habeas corpus*, he cannot be remanded to the court which condemned him; and the attorney-general of the State should be given prior notice of such discharge. In this case ten days' notice was ordered. *Re Medley*, 835; *Re Savage*, 842

15. One who is in custody on a warrant from a justice of the peace for perjury in giving his deposition before a notary public, as a witness in a case of a contested election of a member of Congress, may be discharged on writ of *habeas corpus* by the United States circuit court. *Thomas v. Loney*, 949

HIGHWAYS. See also DEDICATION, 2.

1. When a duty to keep streets in repair is enjoined on municipal corporations by a statute, a right of action for damages caused by a neglect to perform such duty arises by the common law. *Cleveland v. King*, 834

2. Although a city only allows a reasonable part of a street to be used for depositing building materials thereon, and requires the builder to indicate the locality of such materials by proper lights, that does not relieve the city from the duty to prevent the street from being so occupied as to endanger passers-by, or from the damages arising from a breach of such duty. *Id.*

HUSBAND AND WIFE. See also BANKS AND BANKING, 14; CORPORATIONS, 26.

1. Whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him. *Stickney v. Stickney*, 136

2. By the Married Woman's Act of April 10, 1869 (16 Stat. at L. 45, chap. 29), in the District of Columbia, a married woman becomes as absolute owner of her separate property as

though she were unmarried, and should have the same protection, through her own evidence, as a *feme sole*; and she may testify to directions to her husband to invest her moneys in her name. *Id.*

3. Since the passage of the Married Woman's Act for the District of Columbia, there is no presumption that a married woman intended to give to her husband the moneys she placed in his hands, any more than a gift would be inferred from a third person who in like manner deposited money with him. *Id.*

ILLICIT DISTILLING. See INTERNAL REVENUE.

IMPROVEMENTS. See also DAMAGES, 4.

1. Where a court of equity decrees that a plaintiff is entitled to land held in trust for it, it may direct that he shall pay the value of improvements placed upon it by the trustee while in his possession. *Case v. Kelly*, 513

2. Courts of equity, in accord with the principles of the civil law, when their aid is sought by the real owner, compel him to make allowance for permanent improvements made *bona fide* by a party lawfully in possession under a defective title. But if the entry upon the land is a naked trespass, buildings permanently attached to the soil become the property of the owner of the latter. The trespasser can acquire no rights by his tortious acts. *Searl v. School Dist. No. 2*, 740

3. That a school district, when it acquired possession of property by purchase of an invalid title, was not entitled to the exercise of the power of eminent domain because the Act making such proceedings lawful had not then been passed, is immaterial in determining its liability to the true owner for improvements made by it. *Id.*

INDICTMENT, INFORMATION, AND COMPLAINT.

In an indictment, under U. S. Rev. Stat. § 5487, for embezzling a letter which was intended to be conveyed by mail, the failure to allege that the letter had not been delivered to the person to whom it was directed does not render the conviction void. *Wight v. Nicholson*, 865

INFANTS. See also APPEAL AND ERROR, 52; JUDGMENT, 8, 16, 26.

1. In Illinois a decree against a minor is subject to attack, by an original bill, upon the ground of error apparent upon the record, want of jurisdiction, or fraud. *Kingsbury v. Buckner*, 1047

2. Where an infant complainant in an original suit is a defendant in a cross-bill, he is in court by his original bill; and process is not required upon the cross-bill, when the matter in respect to which the plaintiff in the cross-bill sought relief was embraced by the original bill. *Id.*

3. Where an infant is so young as to be incapable of making a selection of a person to represent him, the court will permit any person

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to institute suit in his behalf, exercising, however, discretion to prevent any abuse of that right. *Id.*

4. The right to bring a suit for an infant does not depend upon the execution of a bond for costs, although, according to the letter of the statute, the next friend may be required to give such bond. *Id.*

5. It is not necessary to the jurisdiction of the court that the next friend of an infant should exhibit with the bill evidence of special authority to bring it as next friend. His own affidavit that he is the next friend of the infant is sufficient. *Id.*

6. The rule that a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of the infant, does not prevent a guardian *ad litem* or *prochein amy* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved. *Id.*

7. A consent by the next friend or guardian *ad litem* that a case be heard in a particular division of the Supreme Court of Illinois did not prejudice the substantial rights of the infant, although, in the absence of consent, the supreme court sitting in one division cannot take cognizance of a case from another division. *Id.*

8. A statutory provision requiring ten days' notice for the suing out of a commission to take depositions might have been waived by a guardian *ad litem* or next friend without the imputation upon him of fraud or collusion; nor is fraud and collusion to be imputed to him because he did not, after his appointment, file cross-interrogatories, when cross-interrogatories were filed by another party and were of the most searching character. *Id.*

9. The mere failure of a guardian *ad litem* and next friend to apply for a rehearing does not raise any presumption of infidelity to his trust. *Id.*

INJUNCTION. See also APPEAL AND ERROR, 54, 55.

1. In a proper case, the equity courts of one State can restrain persons within their jurisdiction from the prosecution of suits in another. *Cole v. Cunningham*, 538

2. Where a Massachusetts creditor of an insolvent citizen of that State attached in New York a debt due from a citizen of New York to the insolvent debtor, so as to obtain a preference over other creditors, contrary to the insolvent laws of Massachusetts forbidding preferences, a Massachusetts court can restrain the attachment creditor from the prosecution of such attachment suit, in an action in equity brought by the assignees in insolvency in Massachusetts. *Id.*

INSOLVENCY AND ASSIGNMENT FOR CREDITORS. See also BANKS AND BANKING, 12; LEVY AND SEIZURE.

1. Under the statute of Texas an assignment is not void because it is made to two assignees, instead of to one, although the statute speaks only of an assignee. *Muller v. Norton*, 897

2. An assignment of a debtor's property for the benefit of his creditors is not void because the assignee is not a resident or citizen of the State where the assignment is made and the debtor resides, provided he complies with the conditions prescribed by the law. *Bachrack v. Norton*, 877

3. A resident and citizen of Missouri can lawfully be an assignee, under the laws of Texas in regard to assignments by insolvents for the benefit of their creditors. *Id.*

4. Permitting a sale by the assignee on credit, under the Texas decisions, does not render an assignment void upon its face. *Muller v. Norton*, 897

5. A clause in an assignment by an insolvent debtor of his property for the benefit of his creditors, that the assignee shall "convert" the property assigned "into cash as soon and upon the best terms possible for the best interests of the creditors," does not give him authority to sell on credit. *Id.*

6. As respects fraud in law, where that which is valid in an assignment can be separated from that which is invalid, without defeating the general intent, the maxim, "Void in part, void in toto," does not necessarily apply, and the instrument may be sustained notwithstanding the invalidity of a particular division. *Peters v. Bain*, 896

7. Fraudulent intent is not a necessary deduction from permission to the creditors in the second class to avail themselves of their claims in bidding on property sold at auction under an assignment. *Id.*

8. An assignment which includes all the property of the grantors as partners and individually, for the benefit of partnership and individual creditors, should be construed distributively, and the partnership assets be applied to the payment of partnership debts, and the individual assets to individual liabilities. *Id.*

9. A deed of assignment, under the Texas statute, is not void because the verified schedule annexed to it may embrace a debt that cannot be paid ratably with the claims of other creditors. *Tracy v. Tuffy*, 879

10. An assignment of a limited partnership, which covers the interest of the special partner in the firm property, need not convey his individual property, which cannot be taken for the debts of the firm. *Id.*

11. In Texas one partner may make, in good faith, in the name of the firm, an assignment of the partnership property for the benefit of creditors. *Id.*

12. In Texas a limited partnership, when it is insolvent or contemplates insolvency, may make an assignment of its property for the benefit only of such creditors as will accept their proportional share of the proceeds of the effects assigned, and discharge their claims. *Id.*

13. That a creditor sought to have an assignment set aside does not deprive it of its rights under it, upon the failure of its attack. *Peters v. Bain*, 896

14. Foreign creditors as well as domestic are precluded by insolvency proceedings from levying on property which has come into the custody of the insolvency court, although they

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have not made themselves parties to the proceedings. *Geilinger v. Philippi*, 614

15. By the laws of Louisiana, when a *cessio bonorum* has been accepted by the court and the creditors, and a syndic has been appointed and qualified, all the property and rights of property of the insolvent are vested in his creditors represented by the syndic as their trustee, and pass to the creditors by the cession, whether included in his schedule or not. *Id.*

16. An order of the court in insolvency staying all judicial proceedings against the insolvent and his property, and passing all his assets to the syndic for the creditors, is not confined in its operation to the property specifically named in the schedule; nor does the acceptance by the creditors have that effect. *Id.*

17. Where property was named in the schedule as belonging to his wife individually and not claimed by the debtor, the action of creditors in signing consents to the insolvent's discharge, under the erroneous belief that this property was not subject to their claims, does not estop them, and they are entitled to share in its proceeds when the mistake is discovered. *Id.*

18. While nonresident creditors are entitled to come in *pari passu* with domestic, yet if they do not do so, they cannot participate in the distribution. *Id.*

INSURANCE.

1. A recovery at law could be had on an accident policy, although the contract of defendant was not to pay any sum absolutely, but only to levy an assessment and pay over the proceeds. *United States Mut. Accident Assn. v. Barry*, 60

2. Where a policy does not make the payment of any sum contingent on an assessment, or on the collection of an assessment, but it agrees to pay a principal sum represented by the payment of \$2 for each member in a certain division, within sixty days after the proof of death, and the number of members is proved to be sufficient to pay the loss if an assessment were made, an action at law may be maintained for the amount of the loss; the remedy is not solely in equity for a specific performance of the contract. *Id.*

8. In an action on an accident policy the court properly instructed the jury that jumping off a platform was the means by which the injury was caused; that the question was whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; that the term "accidental" was used in the policy in its ordinary, popular sense, as meaning "happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected;" that if, in the act that preceded the injury, something unforeseen, unexpected, or unusual occurred which produced the injury, then the injury resulted through accidental means. *Id.*

4. When the law of the State provides that a person who solicits or procures applications for insurance shall be held to be the agent of the insurance company, and such agent fills

up the application, his act in doing so is the act of the company. *Continental L. Ins. Co. v. Chamberlain*, 841

5. Marine policies issued to the respective owners of cotton are not to have any effect upon a fire policy, unless they amount to double insurance. Double insurance exists only in the case of risks upon the same interest in property and in favor of the same person. *California Ins. Co. v. Union Compress Co.* 730

6. Common carriers can insure themselves against loss proceeding from the negligence of their own servants. *Id.*

7. Having issued a policy on cotton, with notice that it was intended to cover the interest of railroad companies, the insurer is estopped from asserting that the policy was intended to protect only the legal owners of the cotton. *Id.*

8. Railroad companies, by acquiring receipts of a bailee and issuing bills of lading for cotton, take only constructive possession of it; and the actual and physical possession of a warehouse company gives it the right to effect insurance for its own benefit, and, as bailee or agent, for the protection of the railroad companies. *Id.*

9. A bailor who has an insurable interest in the property can, to the extent of his insurable interest, claim the benefit of insurance effected in his favor by his bailee; and the case is not varied or affected by a clause in receipts given by him, "Not responsible for any loss by fire." *Id.*

10. The words "held by them in trust," in a policy, cannot properly be limited to a holding in trust merely for an absolute owner, when it clearly appears that railroad companies had an insurable interest in the cotton, and the plaintiff held the property in trust exclusively for those companies. *Id.*

11. A person may insure in his own name goods held in trust by him, and he can recover for their entire value, holding the excess over his own interest in them for the benefit of those who have intrusted the goods to him. *Id.*

12. Where a company received cotton to press, and issued receipts therefor, which were exchanged with a railroad company for its bills of lading for the transportation of the cotton, agreeing to deliver it at an address specified in the bill of lading, the railroad company has an insurable interest in the cotton, which may be covered by a policy issued to the former company. *Id.*

18. Right of action on a policy insuring a carrier is not contingent upon the payment by the carrier of the value of the cotton burned, but it is contingent only upon the destruction of the cotton by fire under circumstances which impose a liability upon the carrier. *Id.*

14. Where the agent writes in the application that the applicant has no other insurance, although the applicant told him that he had certificates of membership in co-operative companies, which the agent said were not considered insurance by him, the company is bound by the agent's interpretation, and estopped from asserting the contrary. *Continental L. Ins. Co. v. Chamberlain*, 341

15. If an applicant for insurance fully states

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the facts to the agent, and the agent writes the answers to the questions contrary to the facts stated by the applicant, the insurance company is estopped from making a defense in an action on the policy, by reason of the falsity of such answers. *Id.*

16. The words of a policy, "Direct loss or damage by fire," mean loss or damage occurring directly from fire as the destroying agency, in contradistinction to the remoteness of fire as such agency. *California Ins. Co. v. Union Compress Co.* 780

17. A clause written in the margin of a policy, granting a privilege "to keep not exceeding 5 barrels of oil on said premises," does not dispense with the printed regulations as to precautions in handling or using it. *Gunther v. Liverpool & L. & G. Ins. Co.* 857

18. Where a policy of fire insurance permits the use of kerosene or like oil "for lights, if the same is drawn and the lamps are filled and trimmed by daylight only," the words "for lights" are restricted in meaning to lighting the insured premises only, and the words "by daylight" are intended to prevent the use of artificial light from which the oil might catch fire. *Id.*

19. A breach of the conditions of a policy by anyone permitted by the assured to occupy the premises is equivalent to a breach by the assured himself. *Id.*

20. An assured is chargeable with any acts of his lessee in keeping on the premises any prohibited articles, although they were not intended to be used there, but for lighting other places. *Id.*

21. Judgments in actions for insurance in favor of plaintiff, for loss by fire of his hotel building,—affirmed by reason of a divided court. *Continental Ins. Co. v. Wright,* 210

INTEREST.

1. A defendant is not entitled to interest after tender made, if the plaintiff has not, since the tender, realized any interest upon the moneys left by him for defendant at a bank. *Cheney v. Libby,* 818

2. Interest on a dividend declared by a receiver should be allowed from the time it was declared and ought to have been paid. *Armstrong v. American Exch. Nat. Bank,* 747

3. Interest on bonds should be allowed only from the date when they were delivered to the owners and holders of them. *Washburn v. Green,* 516

4. Where coupons, as well as the bonds, are silent as to the rate of interest after maturity, and are made payable in New York, the rate of interest established by law in that State is to be allowed on the coupons after their maturity. *Scotland County v. Hill,* 261

5. Where a judgment was rendered in Missouri, the law of that State governs as to interest on the judgment after its rendition. *Id.*

6. A guarantor of title to land in Louisiana is not liable, on an eviction of his grantee, for interest on the valuation of unimproved land from which his grantee derived no rents or revenues. *New Orleans v. Christmas,* 90

7. Under the Revised Statutes relating to the District of Columbia, parties may contract in writing for the payment of interest at the rate of 10 per cent per annum. *Shepherd v. Pepper,* 706

INTERNAL REVENUE.

1. One who, in his business of buying and selling stocks for others, regularly employs capital by use of which interest is earned upon moneys advanced by him for his customers, is, under the statute, a banker, whose capital, employed in his business, is liable to a tax of $\frac{1}{4}$ of 1 per cent per month, under U. S. Rev. Stat. § 8408. *Richmond v. Blake,* 481

2. One who has a place of business where stocks are received for sale is, by U. S. Rev. Stat. § 8407, a banker. *Id.*

3. Where one has a room or place indicated by a sign over the door, where his mail matter is received, and where he can be met by his clients, and where they can deliver stocks to be sold by him, and he buys and sells stocks for his customers, stocks, when delivered to him at this place of business for sale, are received by him "for sale," within the meaning of U. S. Rev. Stat. § 8407. *Id.*

4. The forfeiture for illicit distilling is consummated immediately upon the commission of the act causing it, and constitutes a statutory transfer, at that time, of the right to the property to the United States; and the judicial condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith. *United States v. Stonell,* 555

5. By U. S. Rev. Stat. § 8258, personal property, by whomsoever owned, in the possession of an illicit distiller, or found upon the premises, is forfeited. *Id.*

6. Butts sold to a third person before any offense was committed, but on the premises at the time of the commission of the offense of illicit distilling, and of the seizure, are forfeited. *Id.*

7. Malt and hops on the premises at the time of the commission of the offense and of the seizure are forfeited for illicit distilling, although sold to a third person after the offense was committed. *Id.*

8. Horses, wagons, and harnesses sold after the forfeiture, but found upon the premises at the time of the seizure, were forfeited under the Act of Congress of 1875 relating to illicit distilling. *Id.*

9. Where illicit distilling was not carried on with the knowledge or permission of a prior mortgagee, the mortgage is valid as against the United States; and the judgment of condemnation must be against the equity of redemption only. *Id.*

10. The setting up of a still on mortgaged land, with the mortgagor's knowledge and consent, in violation of the internal revenue laws, operated, from the time it was set up, as a statutory conveyance to the United States of the mortgagor's title and interest in the land, which was as valid and effectual as a recorded deed; and the right so vested in the United States could not be defeated or impaired by any subsequent act of the mortgagor. *Id.*

INTOXICATING LIQUORS—JUDGMENT, II.

11. Boiler, engine, pump, vat, and tanks annexed to the land, being real estate and covered by a mortgage, and not used with the distillery, are, as against an innocent prior mortgagee, exempt from condemnation for illicit distilling; only the mortgagor's interest is liable thereto. *United States v. Stowell*, 555

INTOXICATING LIQUORS.

1. That part of the statute of Iowa concerning the sale of liquors which declares that no person shall own or keep, or be in any way concerned, engaged, or employed in owning or keeping, any intoxicating liquors with intent to sell the same within that State, and all the prohibitory clauses of the statute, are within the constitutional powers of the State Legislature. *Eilenbecker v. Plymouth County Dist. Ct.* 801

2. It is no objection to a statute that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors, which are by law prohibited, and to abate the nuisance which the statute declares such acts to be. *Id.*

JUDGMENT.

I. RENDITION; ENTRY; FORM; AMENDMENT.

II. EFFECT AND CONCLUSIVENESS.

III. LIEN; ENFORCEMENT; RELIEF AGAINST.

See also ACTION OR SUIT, 1; CONTRACTS, 81; EQUITY, 8; INFANTS, 1; WILLS, 2.

I. RENDITION; ENTRY; FORM; AMENDMENT.

1. A court cannot adjudicate directly upon a person's right without having him either actually or constructively before it. *Gregory v. Stetson*, 792

2. Under the statutes of Texas, in a suit against partners, where one of them was a non-resident, and notice was addressed to him under Tex. Rev. Stat. art. 1280, and the other partner was served personally, the judgment is not a personal judgment against the nonresident partner, but a judgment against the partner individually who was personally served, and against the firm as a distinct legal entity. *Sugg v. Thornton*, 447

3. By the practice in chancery in Illinois, a decree against an infant is absolute in the first instance. *Kingsbury v. Buckner*, 1047

4. A party is not bound by a prior decree which is so uncertain in describing property as to be inoperative and void. *Shepherd v. Pepper*, 706

5. Under the statutes of Texas, a party recovering a judgment may remit any part of it; and where the remitter does not appear to have been made in open court, the court may, at the same term and before any writ of error is sued out, correct the record in that particular according to the fact. *Pacific Exp. Co. v. Malin*, 450

6. A decree *pro confesso* is not a decree as of course according to the prayer of the bill, or merely such as the complainant chooses to take it; but it should be made by the court, according to what is proper to be decreed upon the 1142

statements of the bill, assumed to be true. *Ohio C. R. Co. v. Central Trust Co.* 561

7. If the allegations of the bill are distinct and positive, they may be taken as true on a decree *pro confesso*, without proof; but if they are indefinite, or the demand of the plaintiff is in its nature uncertain, the requisite certainty must be afforded by proof. *Id.*

8. In suits for the foreclosure of mortgages, a decree *pro confesso* can be rendered for a balance due over and above the proceeds of the sale, only when the case made by the bill shows that the amount is due. *Id.*

II. EFFECT AND CONCLUSIVENESS.

9. An adjudication in a state court which binds the plaintiff, whether it was right or wrong, concludes him until it has been reversed or set aside. It cannot be disregarded any more in the courts of the United States than in those of the State. *Scotland County v. Hill*, 261

10. An adjudication that a particular case is of equitable cognizance cannot be disturbed by an original suit. Such adjudication is not void, even if erroneous. *Mellen v. Moline Malleable Iron Works*, 178

11. The district court of the United States possesses superior jurisdiction; and its judgments cannot be assailed collaterally, except upon grounds that impeach the jurisdiction. It is presumed to have jurisdiction to give the judgments it renders, until the contrary appears. *Re Cuddy*, 154

12. The courts of ordinary in Georgia are courts of original, exclusive, and general jurisdiction over decedents' estates; and their judgments are no more open to collateral attack than the judgments, decrees, or orders of any other court. *Veach v. Rice*, 163

13. Whether a suit to remove a lien on property of an insolvent corporation could be brought before plaintiff had exhausted his legal remedies by judgment and execution was one of the questions necessary to be determined in the suit; and any error in deciding it would not authorize even the same court, in an original, independent suit, to treat the decree as void. *Mellen v. Moline Malleable Iron Works*, 178

14. Contingent limitations and executory devises to persons not in being may be bound by decree against a person claiming a vested estate of inheritance; but a person in being claiming under an executory devise not subject to any preceding vested estate of inheritance by which it may be defeated must be made a party to a suit affecting his rights. *Miller v. Texas & P. R. Co.* 487

15. Where a former judgment was rendered by a court of competent jurisdiction, to which a railroad company that issued bonds, and the surviving trustee under the mortgage made to secure the bonds, were made parties, the bondholders, being represented by the trustee, are bound by the decree canceling and annulling the bonds and mortgage, unless the decree was fraudulently obtained. *Beals v. Illinois, M. & T. R. Co.* 606

16. Where an infant, by his *prochein amy*, prosecuted an appeal to the Supreme Court of

JUDGMENT, III.—LIMITATION OF ACTIONS.

Illinois from the original decree rendered in a suit brought by him, and appeared by guardian *ad litem* to an appeal in the cross-suit, he is as much bound by the action of that court in respect to mere errors of law not involving jurisdiction as if he had been an adult when the appeal was taken. *Kingsbury v. Buckner*, 1047

17. A decree against a corporation, making an assessment on its stock in the discharge of a duty resting on the corporation, binds its members in the absence of fraud, although it has assigned its property and rights in trust for the payment of its debts and has ceased to exist. *Hawkins v. Glenn*, 184

18. A stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. *Id.*

19. When the suit in which a judgment was recovered was not commenced until after a bank went into liquidation, the judgment against the corporation is not binding on the stockholders in the sense that it cannot be re-examined, where the facts of the case were not known to the stockholders of the bank when the judgment was rendered. *Schrader v. Manufacturers Nat. Bank*, 564

III. LIEN; ENFORCEMENT; RELIEF AGAINST.

20. Judgments become liens only from the time they are rendered, or notice thereof is filed in the register's office of the county where the property is situated. They are subordinate to any prior mortgage upon the property. *Fogg v. Blair*, 721

21. No execution can be issued in one State upon a judgment of another, without a new suit. *Cole v. Cunningham*, 588

22. The provision of U. S. Const. art. 4, § 1, that full faith and credit shall be given in each State to the judgments of every other State, does not prevent an inquiry into the jurisdiction of the court rendering the judgment, over the parties and subject matter, nor as to whether the judgment is impeachable for fraud. *Id.*

23. Where a court has jurisdiction of the case and of the parties and of the subject matter, for any mere error in its decision the proper remedy is by appeal, or by bill of review in the same court, and not by a suit in another court. *Leavenworth County v. Chicago, R. I. & P. R. Co.*, 1064

24. The facts that some of the trustees in a deed of trust or mortgage given by a railroad company were directors or stockholders in a railroad company which procured the foreclosure of the mortgage, and that one person was the president of both companies, and that a majority of the directors of both companies were the same persons, and that a majority of the stock of the mortgagor company was in the hands of the president of the other company, and that the attorney who appeared for the mortgagor company had previously been employed by the other company, and the attorneys who brought the foreclosure suit were afterwards attorneys of the latter company, and one of the attorneys of that company in the fore-

closure suit was a director in the mortgagor company,—are not sufficient, in the absence of actual fraud, to render the foreclosure void. *Id.*

25. Where the proper place to have made a defense was in a foreclosure suit, and ample opportunity was had there for such defense, the court, in a suit afterwards brought to declare the foreclosure sale void, is not bound to give effect to such defense. *Id.*

26. If original and cross-bills were not a genuine case, but were contrived and the proceedings were conducted for the purpose of depriving an infant of his estate, without bringing attention to the real merits of his claim to the property in dispute, the decree in such case would not constitute an obstacle in the way of giving relief to the infant. *Kingsbury v. Buckner*, 1047

27. That the attention of the court was not specially called in a former suit relating to an infant's property to the points now made against the theory of a trust, advanced in behalf of the opposite party, does not show fraud or collusion. The absence from the opinion of that court of any reference to it does not prove that the guardian *ad litem* and next friend failed to make the point, or that he purposely avoided allusion to it. *Id.*

JUDICIAL NOTICE. See EVIDENCE, I.

LEASE. See CORPORATIONS, 11.

LEGISLATURE. See POLICE.

LEVY AND SEIZURE.

Insolvency proceedings in Louisiana place all of the debtor's property *in gremio legis*, and prevent any valid levy on any part of it thereafter, although it is not included in the schedule, and remains in the debtor's possession. *Geilinger v. Philippi*, 614

LIENS. See also CORPORATIONS, 18, 19; MORTGAGE, 15, 16.

1. A bargain and sale of personal property, accompanied by delivery, divests the vendor of any lien for payment, unless such lien is secured by chattel mortgage or by agreement between the parties. *Segrist v. Crabtree*, 125

2. The Indiana Act of 1887 gives a lien to employés of a corporation only for work and labor, and not for the value of materials furnished, or for advances of money made. *Vane v. Newcombe*, 810

3. A contractor with a corporation is not an employé of the corporation, within the meaning of the Indiana Act of 1887, § 1 (Ind. Rev. Stat. § 5286), which gives a lien to employés for work and labor done and performed by them for the corporation. *Id.*

4. Plaintiff, by perfecting his claim for a lien under the Indiana Act of 1887, waived any right he had to assert his common-law lien on the personal property and earnings of the corporation. *Id.*

LIMITATION OF ACTIONS.

1. No state statute of limitations can affect the rights of the United States; it is not amenable.

LIS PENDENS; MANDAMUS.

able to the statute of limitations or the doctrine of laches. *Redfield v. Parks*, 827

2. The District of Columbia is embraced in the terms of the Statute of Limitations in force in that district. *Metropolitan R. Co. v. District of Columbia*, 231

8. The fact that the duty to pay money for work and materials which defendant failed to perform was a statutory one does not make the action one upon the statute; such an action is one within the Statute of Limitations. *Id.*

4. In Texas, where the Statute of Limitations has commenced to run against a party, it is not suspended by his death, and the period of limitation cannot be extended by the connection of one disability with another. *Miller v. Texas & P. R. Co.* 487

5. The provision in the Virginia Statute of Limitations, that the time during which a suit shall be obstructed by a resident of the State removing and remaining out of the State shall not be computed as part of the time within which the suit should be brought, does not apply where the removal from the State occurred before the contract sued upon was made, and, therefore, before any cause of action thereon accrued. *Embrey v. Jemison*, 172

6. By N. Y. Code Civ. Proc. § 390, an action which does not involve title or possession of real property in the State cannot be brought in the State against a nonresident, after the time limited by the laws of his residence for bringing a like action, except by a resident of the State or one who becomes so before the expiration of the time so limited. *Penfield v. Chesapeake, O. & S. W. R. Co.* 940

7. Unpaid subscriptions to stock are assets, and, the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds held in trust; and statutes of limitation do not commence to run in respect to them until after a call and assessment has been made. *Hawkins v. Glenn*, 184

8. In a case of fraud upon the part of an administrator, in which each of the defendants participated, a court of equity should be slow in denying relief upon the mere ground of laches in bringing suit. *Bryan v. Kales*, 829

9. In Arizona the limitation for the commencement of an action to recover real property or its possession is five years. An equitable action to set aside deeds and recover real property is not barred by such statute by a delay of four years in suing. *Id.*

10. In the courts of the United States, in an action of ejectment based on a title derived from the government, the Statute of Limitations does not begin to run until the date of the government patent for the land. *Redfield v. Parks*, 827

11. Where the Statute of Limitations has begun to run against the right of an assignee in bankruptcy to redeem from a foreclosure sale and conveyance of real property of the bankrupt, the statute continues to run against the subsequent grantee of the same property by conveyance from the assignee. *Greene v. Taylor*, 411

12. A conveyance by an assignee in bankruptcy cannot prevent the operation of the bar
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of the statute against the grantee, when it has already run against the assignee, or bring into action a new period of limitation dating from the time of the conveyance; nor can it interrupt the running of the statute against the claim or right, when it has once commenced to run against the assignee. *Id.*

13. That a bankrupt omitted to mention life policies in his schedules in bankruptcy, and that neither he nor his administrator informed the assignee of them, where they took no means to conceal them, does not establish fraudulent concealment of them so as to prevent the running of the Statute of Limitations. *Avery v. Cleary*, 469

14. A suit by an assignee in bankruptcy, to recover the proceeds of policies on the life of the bankrupt, received by the defendant claiming under an assignment from the bankrupt, is a suit between the assignee in bankruptcy and one claiming an adverse interest, within the meaning of U. S. Rev. Stat. § 5057; and such suit is therefore barred by the two years limitation provided by such section. *Id.*; *Cleary v. Ellis Foundry Co.* 473

15. When payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the Statute of Limitations until he shows that that fund has been provided. *Lincoln County v. Luning*, 766

16. One having a cause of action against a Tennessee corporation, for personal injury in that State, and being a resident of Missouri when the injury occurred, is barred by N. Y. Code Civ. Proc. § 390, from bringing his action in New York, unless he became a resident of that State before the expiration of the one year limited by the laws of Tennessee for the commencement of such an action, although in New York the period of limitation is three years. *Penfield v. Chesapeake, O. & S. W. R. Co.* 940

LIS PENDENS. See also BONDS, 21.

A purchaser *pendente lite* cannot relitigate, in an original, independent suit, the matters determined in a suit to which his vendor was a party. *Mellen v. Moline Malleable Iron Works*, 178

MANDAMUS. See also STATE, 6.

1. The writ of mandamus may be issued where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise. *Re Parker*, 123

2. Although, when the order dismissing an appeal was made, the supreme court of a Territory consisted of other judges than its present members, yet a mandamus can issue to the court constituted as it now is, to reinstate a case dismissed by their predecessors. *Id.*

3. A proceeding by mandamus to compel the levy of a tax to pay a judgment is in the nature of execution. The rights of the parties to the judgment, in respect of its subject matter, were fixed by its being rendered. *Chanute v. Trader*, 345

4. A court, by means of writs of mandamus operating upon the officers of legislative bodies, cannot make up the records of the proceedings

MARSHAL—MORTGAGE, I.

of those bodies, or cause alterations to be made in such records as prepared by the officer whose duty it was to prepare them. *Clough v. Curtis*, 945

MARSHAL.

Although the President has authority to regulate the length of service and compensation of a special deputy marshal or a supervisor of election, yet where the services for which compensation is demanded were performed before the President made such regulations, and were performed in pursuance of the statute, compensation must be made therefor accordingly. *United States v. Davis*, 890

MASTER AND SERVANT.

1. A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, or even if he disapproved of or forbade it. *Singer Mfg. Co. v. Rahn*, 440

2. Where a person, for certain commissions to be paid him, agrees to give his whole time and services to the business of a company in selling its machines, and the company reserves to itself the right of prescribing and regulating, not only what business he shall do, but the manner in which he shall do it, such person is the company's servant, for whose negligence in the course of his employment the company is responsible. *Id.*

3. The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished,—or, in other words, not only what shall be done, but how it shall be done. *Id.*

4. An employer is exempt from liability for injuries to a servant caused by another servant. *Quebec Steamship Co. v. Merchant*, 656

5. The employer is liable to the servant for negligence of a fellow servant when the former's own negligence contributes to the injury, or when the other servant occupies such a relation to the injured party, or to his employment in the course of which his injury was received, as to make the negligence of such servant the negligence of the employer. *Id.*

6. The porter and the carpenter of a steamship are fellow servants with the stewardess of the ship. *Id.*

7. One employed by a railroad company as a laborer or construction hand cannot recover of the company for injuries received by him through the negligence of his fellow servants in allowing a rail to drop which he and they were loading on a car, whereby his leg and foot were broken and crushed. *Coyne v. Union P. R. Co.* 651

8. That, after men had lifted a rail which produced an injury to a fellow servant, and had carried it forward to a car, and while there holding it, awaiting the word of command from the boss to lift it further and throw it on the car, the boss failed to give the word of command in such a way as to produce concert of action in the men, but, on the contrary, ordered them to get the rail on the car in any way they

could, and that he hurried the men and used oaths, whereby they became confused and failed to act in concert,—does not authorize a recovery from the employer. *Id.*

9. Where the work of construction and repair of a railroad must be done in the intervals between the running of regular trains, and this fact is known to an employé who is employed to do such work, he assumes the risk of doing it at the times at which it has to be done. *Id.*

10. A judgment for defendant on a verdict by direction, in an action for death of an employé from negligence,—affirmed by a divided court. *Bauer v. Texas & P. R. Co.* 209

MEANDER LINES. See BOUNDARIES, 1.

MERGER. See MORTGAGE, 18.

MINES.

1. Where plaintiff applied for a patent for placer ground, and complied with the law, and no adverse claim was filed by defendant during the period of publication of notice of the application, the latter is precluded from questioning plaintiff's right to the patent, and from objecting to the location or its character as placer ground. *Dahl v. Montana Copper Co.* 325; *Dahl v. Raunheim*, 324

2. Where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral and other deposits within its boundaries. *Dahl v. Raunheim*, 324

3. Where a person has complied with all the proceedings essential for the issue of a patent for placer mining ground, he is the equitable owner of the mining ground, and the government holds the premises in trust for him, to be delivered upon the payments specified. *Id.*

4. Where, in a contract for the sale of an interest in a mine, it is provided that if the purchaser at any time shall dispose of or sell such interest, then and in that case the unpaid purchase money shall become immediately due and payable, a leasing of the property is a disposal of it so as to render the purchaser immediately liable for the unpaid purchase money, although by the terms of the contract the same had not become otherwise due. *Hill v. Sumner*, 284

MISTAKE. See ASSUMPSIT, 5, 6.

MORTGAGE.

I. IN GENERAL.

II. PRIORITY OF LIEN.

See also APPEAL AND ERROR, 43; CONTRACTS, 29; JUDGMENT, 8, 24; LIMITATION OF ACTIONS, 11; REAL PROPERTY; TAXES, 21.

I. IN GENERAL.

1. Mortgages of railroad property and deeds of trust of the same, which in terms cover after-acquired property, are valid, and estop the company and all persons claiming under it and in privity with it from asserting that they do not cover all the property and rights which

MORTGAGE, II.—MUNICIPAL CORPORATIONS.

they profess to cover. *Thompson v. White Water Valley R. Co.* 256

2. Rails put down upon a railroad, and permanent fixtures which are essential to its successful operation, become a part of the property of the company covered by a mortgage, as much as though they had existed when the mortgage was executed. *Id.*

8. Where a railroad company issued certain of its bonds under an agreement with the person to whom they were issued that it would issue no more of its bonds, the holder of such bonds has a right of priority in payment from the proceeds of a foreclosure sale of the railroad under the mortgage securing the bonds, over those holders only of other subsequently issued bonds of the company secured by the same mortgage, who took their bonds with actual notice of the agreement. *McMurray v. Moran*, 814

4. A court of equity, on the application of a junior incumbrancer, will provide for the sale of the entire incumbered property, if the circumstances of the case show that the interests of the mortgagor and of the incumbrancers require the sale. *Shepherd v. Pepper*, 706

5. Sale of the entire property is proper in the case of deeds of trust, where all the incumbrances are due, and where the plaintiff has a first lien on some of the property sought to be sold and a second lien on the other property, and where all the incumbrancers are parties to the suit. *Id.*

6. Property omitted by accident from a trust deed, when both parties supposed the deed covered it, may be reached and sold in a foreclosure suit. *Id.*

7. In a suit to establish a mortgage, and for a sale thereunder, it is competent to unite as defendants both the mortgagor and a party claiming the property adversely to the lien of the mortgage by virtue of proceedings for a sale for taxes had subsequently to its execution. *Mendenhall v. Hall*, 1012

8. That a mortgagor had only the equitable title to the land does not change the rights of the mortgagee under a mortgage with words of general description, conveying land held by a full equitable, as well as that held by a legal, title. *Toledo, D. & B. R. Co. v. Hamilton*, 905

9. Where, by the provisions of a mortgage to a trustee, he could proceed to collect the mortgage debt, by litigation or otherwise, only at the request of the holders of a majority of the bonds, and the majority of such holders desired litigation to cease, the trustee was authorized to put an end to it; and his waiver of an appeal binds all who act in his name as trustee. *Etwell v. Foadick*, 998

10. Defects in a notice of mortgage sale, not sufficient to deceive anyone, will not defeat the title acquired at the sale. *Bacon v. Northwestern Mut. L. Ins. Co.* 128

11. A condition in a mortgage that if, at the expiration of the time limited for the payment of the installments, there should remain due on the mortgage a named sum, the mortgagor might have the privilege of paying the amount due by giving his note therefor, secured by mortgage on other real estate, does

not prevent the installments from falling due at the time stipulated, or prevent a sale under the mortgage to satisfy them when due; but the mortgagor may, in such case, stop the sale by insisting on the terms of the stipulation in the mortgage and complying with the terms thereof. *Id.*

12. U. S. Rev. Stat. § 808, relating to the District of Columbia, authorizes a decree *in personam* against a debtor for the balance remaining due after the proceeds of the sale of lands covered by a mortgage or a deed of trust in the nature thereof have been applied to the satisfaction of the debt. *Shepherd v. Pepper*, 706

13. A mortgage, which, in Louisiana, a wife has by statute on her husband's real estate for her money which came to his hands, though not registered, is not merged in a simulated and fraudulent title conveyed by her husband as *dation en paiement*. *Bradley v. Clafin*, 367

II. PRIORITY OF LIEN.

14. Holders of obligations of a railroad company, conferring upon them a lien upon the earnings of a section of the road for its construction by them, have a lien inferior in priority to that of bondholders secured by an earlier mortgage on the road, and to that of purchasers under a foreclosure sale on the mortgage. *Thompson v. White Water Valley R. Co.* 256

15. A contractor to build a section of a railroad, where the work was not done at the request of the mortgagees, but upon a contract with the lessee of the road, which had stipulated as one of the considerations of the lease to construct that part of the line, has not a lien upon the earnings of the section, on the ground that with his money the road over it was constructed, superior to the lien of a prior mortgagee. *Id.*

16. Where a railroad company executed a mortgage on its present and after-acquired property, to secure its bonds, and thereafter a contractor with the company erected a dock for the company on a part of the property covered by the mortgage, and filed a mechanics' lien for his pay, he is not entitled to priority of payment over the mortgage. *Toledo, D. & B. R. Co. v. Hamilton*, 905

17. A recorded mortgage given by a railroad company on its roadbed and other property creates a lien whose priority cannot be displaced thereafter directly by a mortgage given by the company, or indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction. *Id.*

18. The equitable principles upon which the decisions rest applying to the payment, out of the proceeds of the sale of railroad property, of debts for operating expenses and repairs, are not applicable to claims for the original construction of a railroad while there was a subsisting mortgage upon it. *Id.*

MUNICIPAL CORPORATIONS. See also BONDS, 3; RAILROADS, 3.

1. Municipal corporations are established for purposes of local government, and, in the ab-

NEGLIGENCE—OFFICERS.

sence of specific delegation of power, cannot engage in any undertakings not directed immediately to the accomplishment of those purposes. *Hill v. Memphis*, 887

2. When a Legislature has full power to create corporations, its Act recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization, and makes a *de jure*, out of what before was only a *de facto*, corporation. *Comanche County v. Lewis*, 604

NEGLIGENCE. See MASTER AND SERVANT, 10.

NEGOTIABLE PAPER. See BONDS, 21.

NEGROES. See COMMERCE, 2.

NEW TRIAL.

1. Where damages for a tort have been assessed by a jury at an entire sum, the court, upon a motion for a new trial, cannot, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, enter an absolute judgment for any other sum than that assessed by the jury. *Kennon v. Gilmer*, 110

2. The granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests in the discretion of the court in which the cause has been heard or tried, and is not a subject of appeal. *Roemer v. Neumann*, 277

3. The statute of Tennessee forbidding the granting of more than two new trials in the same cause on the facts, but allowing more for errors of law, is not in conflict with U. S. Const. 14th Amend. *Louisville & N. R. Co. v. Woodson*, 1082

NEXT FRIEND. See INFANTS, 6.

NOTARY.

1. A notary public, or other officer designated by Congress to take depositions in case of a contested election of a member of the House of Representatives of the United States, performs this function under the authority of Congress, and not under that of the State. *Thomas v. Loney*, 949

2. A notary public has no authority to administer an oath to a deputy surveyor of the United States in reference to the manner in which he had discharged his duties as deputy surveyor, under the contract which is made part of the indictment in this case. *United States v. Hall*, 97

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NOTICE. See also CORPORATIONS, 21.

1. Notice to the trustees is notice to the beneficiaries in a deed of trust. *Peters v. Bain*, 696.

2. Where one is in notorious possession of land, no other person can lay any new location upon it, without being charged with full knowledge of the claim of ownership of the possessor. *Miller v. Texas & P. R. Co.* 487

NUNC PRO TUNC. See APPEAL AND ERROR, 58; RECORDS, 2, 3.

OATH. See NOTARY, 2.

OFFICERS. See also ARMY AND NAVY, 5, 7; CLAIMS, 2; TERRITORY, 2.

1. When the Legislature has declared how an officer is to be selected, and the officer is selected in accordance with that declaration, his acts, within the scope of the powers given him by the Legislature, bind the municipality. *Bernards Twp. v. Morrison*, 726

2. Whatever the form of the statute, an officer under it does not hold by contract. He enjoys a privilege revocable by the sovereignty at will; and one Legislature cannot deprive its successor of the power of revocation. *Crenshaw v. United States*, 825

3. The appointment to and the tenure of an

PARDON—PATENTS, III.

office created for the public use, and the regulation of the salary affixed to such an office, do not come within the import of the term "contracts," intended to be protected by the United States Constitution. *Crenshaw v. United States*, 825

PARDON. See CONFISCATION, 8.

PARTNERSHIP. See also ESTOPPEL, 7; INSOLVENCY AND ASSIGNMENT FOR CREDITORS, 8, 10-12; JUDGMENT, 2.

1. One who is to receive a certain share of the profits, and bear a like share of the losses, in the business of selling goods of a firm, is a partner. *Paul v. Cullum*, 480

2. The contribution of money or property by an incoming partner is not essential to the creation of a partnership. It is competent for the prior partners, in consideration of the new partner undertaking the entire charge and control of the business of the company, to give him an interest as partner in the property which is to constitute, at the outset, the whole capital of the partnership. *Id.*

3. A partner to whom is committed the entire direction and supervision of the partnership property can, in a general assignment of the partnership effects for the benefit of the firm creditors, represent another partner who has expressly authorized him to bargain, sell, hypothecate, and in every way to deal with, the partnership property. Such assignment executed by him binds the other partner. *Id.*

4. A mortgage made by a partner on his homestead, which was used to raise money by the firm of which he was a member to pay its debts and save its credit, is not fraudulent as to creditors of the firm. *Rio Grande R. Co. v. Vinet*, 488

5. The legal existence of a special partnership does not depend upon the notice of its formation; the only effect of failure to publish the required notice is that the partnership is to be deemed general. *Tracy v. Tuffy*, 579

6. The New York statute, in fixing the liability of a special partner on account of non-compliance with its provisions, does not change his special partnership into a general one, but simply makes him liable as a general partner to creditors. *Abendroth v. Van Dolsen*, 57

PARTY. See ACTION OR SUIT, 11.

PATENTS.

I. GRANTING.

II. DURATION; FOREIGN PATENTS.

III. PATENTABILITY OF INVENTIONS.

IV. CONSTRUCTION; INFRINGEMENT.

See also ASSIGNMENT, 1; DAMAGES, 6-9; EVIDENCE, 15.

I. GRANTING.

1. Under U. S. Rev. Stat. § 4915, the circuit court may adjudge that the applicant is entitled, according to law, to receive a patent for his invention or for any part thereof; and if the adjudication is in favor of the right of the applicant, it shall authorize the commissioner to issue the patent. *Hill v. Wooster*, 502

1148

2. No adjudication can be made in favor of the applicant unless the alleged invention for which a patent is sought is a patentable invention. Neither the Circuit nor the United States Supreme Court can overlook the question of patentability. *Id.*

II. DURATION; FOREIGN PATENTS.

3. Under U. S. Rev. Stat. § 4887, a United States patent for an invention previously patented in a foreign country expires at the same time with the term limited by the foreign patent, or, if there be more than one foreign patent, at the same time with the one having the shortest time to run. *Pohl v. Anchor Brewing Co.* 953

4. The words "expiration of term," in U. S. Rev. Stat. § 4887, relating to foreign patents, do not mean expiration of term through a forfeiture by breach of a condition, but mean expiration by lapse of time. *Id.*

5. The duration of a United States patent is not to be limited by any lapsing or forfeiture of any portion of the term of a foreign patent, by means of the failure to perform a condition subsequent, according to the foreign statute. *Id.*

6. A dealer residing in the United States cannot purchase in another country articles patented there, from a person authorized to sell them, and import them to and sell them in the United States, without the license of the owners of the United States patent. *Boesch v. Gräff*, 787

III. PATENTABILITY OF INVENTIONS.

7. A person, to be entitled to a patent, must have invented or discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof; and it is not enough that a thing is new, in the sense that in the shape or form in which it is produced it has not been known, and that it is useful, but it must amount to an invention or discovery. *Burt v. Ivory*, 647; *Hill v. Wooster*, 508

8. If changes in old instrumentalities, to adapt them to the use contemplated, involve only the exercise of ordinary mechanical skill, they do not sanction a patent. *Aron v. Manhattan R. Co.* 272

9. A mere carrying forward, or more extended application, of an original idea,—a mere improvement in degree,—is not invention. *Burt v. Ivory*, 647

10. It is not invention to combine old devices into a new article, without producing any new mode of operation. *Id.*

11. The application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated. *Howe Mach. Co. v. National Needle Co.* 963

12. The application to the turning of machine awls and needles from metal, of mechanism old and familiar in the art of wood turning, is not invention, and is not patentable. *Id.*

13. It is not a patentable invention to add a

181, 182, 183, 184 U. S.

PATENTS, IV.; PAYMENT.

lower compartment to a box creamery on legs. *Hill v. Wooster*, 502

14. Giving to oxygenated water a well-known rotary motion is not an exercise of inventive faculty. *Marchand v. Emken*, 382

15. A shifting device being old, its application to a fulling-machine for treating rawhides did not require the exercise of invention. *Royer v. Roth*, 322

16. There was nothing new or patentable in flexible or rigid doors, outside and inside, for grain cars, or in the use of outside and inside rigid doors in combination, the inside door filling only part of the opening. *Watson v. Cincinnati, I. St. L. & C. R. Co.*, 295

17. The employment of a diagonal brace to a track-scraper, to prevent lateral displacement, does not involve patentable novelty. *Day v. Fair Haven & W. R. Co.*, 265

18. The improvement, if any, in the use of a circular clamp over a rectangular clamp, in an electric lamp, around the carbon rod, is only a question of degree in the use of substantially the same means. *Brush v. Condit*, 251

19. A patent cannot be upheld where it consists in a mere aggregation of parts, each to perform its separate and independent function substantially in the same manner as before combination with the other, and without contributing to a new and combined result. *Watson v. Cincinnati, I. St. L. & C. R. Co.*, 295

20. The Evory and Heston patent, 59,375, for shoes constructed with an extension gore flap on each side, involves no invention, but is a mere aggregation of old parts. *Burt v. Evory*, 647

21. Although a patentee is entitled to the merit of being the first to conceive of the convenience and utility of a gate opening and closing mechanism which can be operated efficiently by an attendant at a distance, his right to a patent must rest upon the novelty of the means he contrives to carry his idea into practical application. *Aron v. Manhattan R. Co.*, 272

22. The claim for the invention of the clamp arrangement, in letters patent granted to Charles F. Brush, for improvement in electric lamps, was anticipated by that of Charles H. Hayes, made in June, 1876. *Brush v. Condit*, 251

23. Mechanism for opening and closing apertures distant from the operator, in which the devices used for the purpose are the mechanical equivalents of those employed in patent 288,494, for an improvement in railway-car gates, is old; and what the patentee did was to adapt well-known devices to the special purpose mentioned in the patent. *Aron v. Manhattan R. Co.*, 272

24. Patent 273,569, granted to Charles Marchand, March 6, 1883, for an improvement in the manufacture of hydrogen peroxide, is invalid for want of novelty. *Marchand v. Emken*, 382

25. An invention is not concealed or used in secret because hidden from view by its position in the machinery in which it is used. *Brush v. Condit*, 251

IV. CONSTRUCTION; INFRINGEMENT.

26. The claim is a statutory requirement, prescribed for the purpose of making the patentee define precisely what his invention is, and should be construed in accordance with the plain import of its terms. *Howe Mach. Co. v. National Needle Co.*, 968

27. A claim is to be construed in connection with the explanation contained in the specification, and it may be so drawn as in effect to make the specification an essential part of it; but the specification and drawings are usually looked at only for the purpose of better understanding the meaning of the claim, and not for the purpose of changing it. *Id.*

28. Where the patent is for a combination, it cannot be permitted to read into it any delicate adjusting apparatus not originally included in the claim. *Id.*

29. In construing a patent, it is necessary to consider the state of the art when the application for it was made. *Burt v. Evory*, 647

30. Where a patentee has modified his claim in obedience to the requirements of the patent office, he cannot have for it an extended construction which has been rejected by the patent office. *Phanix Caster Co. v. Spiegel*, 663

31. In a suit on a patent, a claim must be limited, where it is a combination of parts, to a combination of all the elements included in the claim as necessarily constituting that combination. *Id.*

32. In the Martin patent, 190,152, for casters, the words "rocker-formed collar bearing," describing one element of the combination, must be restricted, in view of the state of the art, to such a bearing resting on a collar beneath the floor-wheel housing as is shown in the specifications; and the patent is not infringed by the Yale caster, which has no equivalent for such "rocker-formed collar-bearing," and no opening in the housing from top to bottom, such as appears in the Martin patent. *Id.*

33. Where a patentee, after the rejection of his application, inserted in his specification a statement that his invention related to a new construction of lock-case, whereby it was made "to dispense with an extended bottom plate," he cannot contend that his specification and claims are to be interpreted so as to cover a construction which has an extended bottom plate. *Roemer v. Peddie*, 382

34. When a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions, for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it. *Id.*

35. After an action in equity for the infringement of letters patent has been heard and decided upon its merits, the plaintiff cannot file a disclaimer in court, or introduce new evidence upon that or any other subject, except at a rehearing granted by the court upon such terms as it thinks fit to impose. *Roemer v. Neumann*, 277

PAYMENT. See also SPECIFIC PERFORMANCE, 1.

1. Bankers are not agents of the owner to receive payment of notes by reason simply of

the fact that the notes were made payable at their bank; and moneys left with them to be used as payment are not thereby the moneys of the owner of the notes. *Cheney v. Libby*, 818

2. A promissory note does not discharge the debt for which it is given unless such be the express agreement of the parties; it only operates to extend the period for the payment of the debt. *Segrist v. Crabtree*, 125

3. If a sale is an unconditional one, and if a note is given and accepted as absolute payment, the original debt is extinguished, and the remedy of the seller is on the note. *Id.*

4. A credit or payment is to be applied to the one of two sums first due. *McGillin v. Bennett*, 422

5. Where a payment of a sum of money is to be made in land, and it becomes a cash payment by failure to deliver the deed, and at the same time another payment is to be made on the same matter in notes payable at a future day, and the notes are not given, which last payment is secured by a vendor's lien,—a credit must be first applied on the payment to be made in land, and not on the deferred payments to be evidenced by notes. *Id.*

6. Where a person is to pay an agreed sum of money by conveying a piece of land on a certain day, if he declines to make the conveyance or is unable to give a good title, such agreed sum, on that day, becomes payable in cash. *Id.*

PERJURY.

1. A defendant indicted for perjury cannot be held to be guilty, unless the oath in regard to which the perjury is charged was taken before an officer having authority to administer it. *United States v. Hall*, 97

2. The power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had. *Thomas v. Loney*, 949

3. A witness giving his testimony in a contested election case before a notary public, under authority of Congress, is accountable for the truth of his testimony to the United States only. *Id.*

PLAT. See DEED, 2.

PLEADING. See also EQUITY, 6; EVIDENCE, 38.

1. The allegation in a bill, that the record of a judgment as it stands is a gross fraud upon the judgment debtor, is limited to the particulars specified in the bill. *Knox County v. Harshman*, 586

2. A bill alleging the insolvency of a bank to the knowledge of its officers, and a wrongful neglect to disclose its insolvency to complainant; that by continuing in business it represented itself to be solvent; that complainant, on the faith of such representation and believing the bank solvent, deposited with it a draft; and that the next morning the bank closed its doors,—sufficiently alleges the insolvency and fraud of the bank. *St. Louis & S. F. R. Co. v. Johnston*, 683

3. In an action under the New York statute, to render a special partner liable for the firm debts by reason of his failure to comply with the statute in reference to limited partnerships, the action being against all the members of the firm, it is sufficient to charge him, in the complaint, as a general partner, and it is not necessary to allege the special omissions which rendered him liable as such. *Abendroth v. Van Dolsen*, 57

4. If fraud is relied on, it is not sufficient to make the charge in general terms. *St. Louis & S. F. R. Co. v. Johnston*, 683

5. A decree for a deficiency is a necessary incident of a foreclosure suit in equity, and may be granted under a prayer for general relief. *Shepherd v. Pepper*, 706

6. In a suit to set aside tax deeds as clouds on the title of lands, the allegation that the plaintiff is seised in fee simple is a sufficient allegation that he has possession as well as the title. *Gage v. Kaufman*, 725

7. Where the averment of diverse citizenship was not controverted by the answer, the averment must be taken as true, under the practice in Nebraska. *Deputron v. Young*, 923

8. Where the bill shows such laches upon the part of the plaintiff that a court of equity ought not to give relief, the defendant need not interpose a plea or answer, but may demur upon the ground of want of equity apparent on the bill itself. *Bryan v. Kales*, 829

9. A demurrer admits only allegations of fact, and not conclusions of law. *Pennie v. Reis*, 426

10. A demurrer does not admit that the construction of a statute set forth in the pleading demurred to is the correct one, or that the statute imposes the obligations or confers the rights which the pleading alleges. *Id.*

11. A demurrer cannot introduce, as its support, new facts which do not appear on the face of the bill, and which must be set up by plea or answer. *Stewart v. Masterson*, 114

12. Where there is matter properly pleaded in the bill, which is proper ground for equitable relief and which requires an answer or a plea, a demurrer to the whole bill ought to be overruled. *Id.*

13. Amendment to a cross-bill may be allowed at the hearing simply to enable the cross-complainant to avail itself of what has been alleged and proved by the original complainants, although thereby is presented a new and independent basis of relief. *Chicago, M. & St. P. R. Co. v. Chicago Third Nat. Bank*, 900

14. When the subject matter of an original bill filed by an infant was the title and ownership of property conveyed by a deed under which the plaintiff claimed title, and the allegations of a cross-bill related to that property, and demanded that the trust created by the deed be declared and ownership established under the trust, although the cross-bill alleged additional facts the subject matter of the cross-bill was germane to that of the original bill. *Kingsbury v. Buckner*, 1047

15. A cross-bill is proper whenever the defendants, or any or either of them, have equi-

PLEDGE AND COLLATERAL SECURITY—PRINCIPAL AND AGENT.

ties arising out of the subject matter of the original suit which entitle them to affirmative relief which they cannot obtain in that suit. *Id.*

16. Where the law authorizes a defendant to plead several pleas, he may use each plea in his defense, and the admissions unavoidably contained in one cannot be used against him in another. *Glenn v. Sumner*, 801

PLEDGE AND COLLATERAL SECURITY.

1. Where bonds of a company are transferred to a director by unfair means and in a clandestine manner, he cannot be regarded as a legal and equitable pledgee thereof. *Washburn v. Green*, 516

2. A pledge, in the legal sense, requires to be delivered to the pledgee. He must have the possession of it. *Christian v. Atlantic & N. C. R. Co.* 589

3. A declaration in a statute, that all the stock held by the State in a railroad company shall be pledged for the redemption of state certificates, and any dividend declared thereon shall be applied to pay the interest on said bonds, is only a promise that the stock shall be held and set apart for the payment of the bonds, and that the dividends shall be applied to the interest. It is no actual pledge. *Id.*

POLICE.

Where a statute for the pay of police officers provided that \$2 a month be retained from the pay of each officer, for a fund, a certain sum of which should, on the death of each officer, be paid to his representatives, such fund, until such death, can be applied to a different purpose by the Legislature. *Pennie v. Reis*, 426

POLYGAMY. See BIGAMY, 1.

POSTOFFICE. See also ASSUMPSIT, 5, 6; INDICTMENT, ETC.

1. Where, in a contract for carrying the mails, places are designated as on the line of a mail route from one point to another and back, the contractor is required to return to the same places on his way back. He cannot return by a shorter route. *United States v. Carr*, 483

2. The postmaster-general may order an increase of service in carrying the mail, by enlarging the distance, by new route, or by requiring a greater number of trips between the terminal points, and by allowing therefor a *pro rata* increase on the contract pay. *United States v. Barlow*, 346

3. Under the proviso in the Act of April 7, 1880, limiting the discretion of the postmaster-general to expedite the service of carrying the mails to 50 per cent of the rate fixed in the original contract, the rate of pay established in the contract as originally let—not the amount of the pay expressed therein—is the basis or unit of computation for such increased service. *Altman v. United States*, 51

4. Forfeitures imposed by the postmaster-general for failure of the contractor to carry the mail within the prescribed time are within his discretion, and are not subject to review by the Supreme Court of the United States. *Id.*

5. The embezzlement, by a person employed in a department of the postal service, of a letter intended to be conveyed by mail and containing an article of value, which came into the possession of such person, is made an offense against the United States by U. S. Rev. Stat. § 5467, distinct from the offense of stealing such article; and the penalty is prescribed for such embezzlement by said section. *United States v. Lacher*, 1080

6. U. S. Rev. Stat. §§ 3891, 5467, are to be considered together; and the offenses of secreting, embezzling, or destroying mail matter not containing articles of value, are punishable under the one, and that containing such articles under the other. *Id.*

7. Two classes of offenses were intended to be created by U. S. Rev. Stat. § 5467,—one relating to the embezzlement of letters, etc., and the other to stealing the contents. *Id.*

POWERS.

1. In the case of a naked power to convey, not coupled with an interest, the law requires that every prerequisite to the exercise of the power should precede it. *Deputron v. Young*, 928

2. Where a will of a citizen of South Carolina, executed there, directed a power of appointment to be executed by the will of the person therein authorized to execute the power, he intended a will executed according to the laws of South Carolina. *Blount v. Walker*, 1086

3. The power given by a will to dispose of, by will, a bequest of three fourths of a bond and mortgage, the enjoyment of which for life is bequeathed to the donee of the power, is properly executed by the will of the donee, which, after referring to the bequest, devises and bequeaths the entire property and estate to which she is "in anywise entitled," to her husband. *Lee v. Simpson*, 1088

4. If the donee of a power intends to execute it, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. *Id.*

5. Three classes of cases have been held to be sufficient demonstrations of an intended execution of a power: (1) where there has been some reference in the will or other instrument to the power; (2) or a reference to the property which is the subject on which it is to be executed; (3) or where the provision in the will or other instrument executed by the donee of the power would have no operation except as an execution of the power. *Id.*

6. The words "in anywise entitled" are sufficient to cover not only property which a testatrix who was the donee of a power held in her own full right, but also property which she held in a limited right under her mother's will. *Id.*

PRINCIPAL AND AGENT. See also CONTRACTS, 27.

Where an action is brought for the alleged wrongful acts of the defendant in selling cer-

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tain bonds of plaintiff and using the proceeds to pay the notes of a third person, if the latter, by arrangement between him and the plaintiff, had authority to and did consent to such acts, and the plaintiff, having full knowledge of the transaction, ratified and confirmed what was done, he cannot maintain the action. *Hathaway v. Cambridge First Nat. Bank*, 1004

PRINCIPAL AND SURETY. See also EXECUTORS AND ADMINISTRATORS, 8.

An agreement by a grantee assuming a mortgage does not, without the mortgagee's assent, put the grantee and mortgagor in the relation of principal and surety towards the mortgagee, so that the latter, by giving time to the grantee, will discharge the mortgagor. *Keller v. Ashford*, 667

PRIVATE LAND CLAIMS.

1. A confirmation of a Mexican grant of a tract with specified boundaries covered all the land within those boundaries, irrespective of quantity; and this, notwithstanding there appeared in the prior proceedings statements that the tract contained a certain amount, "a little more or less," which amount was very much less than that included within the boundaries. *United States v. Hancock*, 601

2. Where a decree gives with precision the boundaries of the tract to which a claim is confirmed, and has become final by stipulation of the United States and the withdrawal of their appeal therefrom, it is conclusive, not only on the question of title, but also as to the boundaries which it specifies. *Id.*

3. Where a survey was made in good faith and has been unchallenged for over fifteen years, whatever doubts may exist as to its correctness must be resolved in favor of the title as patented. *Id.*

PUBLIC LANDS. See also CONTRACTS, 28; COURTS, 87; EVIDENCE, 37; TAXES, 9, 10.

1. A patent passes the title of the United States to the land, not only as it was at the time of the survey, but as it is at the date of the patent, so that the United States does not retain any interest in any accretion formed between the survey and the date of the patent. *Jefferis v. East Omaha Land Co.*, 872

2. After public lands have been entered at the land office and a certificate of entry obtained, they are private property, the government agreeing to make a conveyance as soon as it can, and in the mean time holding the naked legal fee in trust for the purchaser, who has the equitable title. *Wisconsin C. R. Co. v. Price County*, 687

3. Until all the preliminary steps prescribed by law for the acquisition of the property are complied with, the settler does not obtain any title against the United States; and among these are entry of the land at the appropriate land office and payment of its price. *Campbell v. Wade*, 240

4. The withdrawal from sale by the government of lands previously opened for sale puts an end to proceedings instituted for their acquisition. *Id.*

5. Occupation and improvement of the tracts desired, with a view to preemption, though absolutely essential to that purpose, do not confer upon the settler any right in the land occupied, as against the United States, which impairs in any respect the power of Congress to withdraw the land from sale for the uses of the government, or to dispose of the same to other parties. *Id.*

6. The cancellation of a homestead entry after a subsequent grant to a railroad and the definite location of its line of road did not inure to the benefit of the railroad company, but the land reverted to the government, and became a part of the public domain, subject to appropriation by the first legal applicant. *Hastings & D. R. Co. v. Whitney*, 363

7. A homestead entry of land embraced within the limits of a land grant afterwards made by Act of Congress to a railroad company excepted the land from the operation of the railroad grant. *Id.*

8. Lands originally public cease to be public after they have been entered at the land office and a certificate of entry has been obtained. *Id.*

9. Congress, by a grant of land to a railroad to aid in its construction, confers a present title to the designated sections along its route, with such restrictions upon their use and disposal as to secure them for the purposes of the grant. *Wisconsin C. R. Co. v. Price County*, 687

10. Deficiencies arising in the designated or granted sections, before as well as after the date of a granting Act, may be supplied by selections from the indemnity lands, and patents issued for them. *Id.*

11. Indemnity lands are those which are, by the grant in aid of a railroad, allowed to be selected in lieu of parcels lost from the designated or granted lands by previous disposition or reservation. *Id.*

12. The owner of a military land warrant, who delivered it to the commissioner of the land office, with a direction that it be located upon certain swamp land in Illinois, it being so located, and who received the certificate of the register and receiver of the land office showing his right to a patent, had, prior to the issue of the patent, an equitable title to the land which excluded it from a grant to the State by Congress by the Swamp Land Act. *Culver v. Uthe*, 776

13. There is an implied license growing out of the custom of nearly a hundred years, that the public lands of the United States,—especially those in which the native grasses are adapted to the growth and fattening of domestic animals,—shall be free to the people who seek to use them, when left open and unclosed. *Buford v. Houtz*, 618

14. Plaintiffs engaged in stock raising on unoccupied public lands of the United States, although owning detached unclosed portions of such land, cannot by suit in equity enjoin defendants, owning none of such lands, from the use of such public lands for pasturing, on the ground that defendant's sheep pastured thereon will trespass and pasture on plaintiffs' unclosed lands. Plaintiffs cannot, by so excluding defendants, secure to themselves the

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exclusive right of pasturage on such public lands. *Id.*

15. Texas land certificates are chattels, and may be sold by parol agreement and delivered, whereby the purchaser acquires a right to locate the land and procure a patent in the name of the grantee, but for his own use, he becoming thereby the equitable owner of the land located. *Miller v. Texas & P. R. Co.* 487

16. A settler may abandon one location of land in Texas, and adopt another; and the land in the abandoned location then becomes public land subject to location by other parties. *Id.*

17. The failure of a prior locator to comply with the statute requiring the survey to be returned to the land office within eight months, under a penalty of being void, inures to the benefit of the State, and not to the benefit of a subsequent locator. *Id.*

18. A subsequent locator having actual notice of a prior location will be postponed to the superior rights of the prior locator, although the subsequent location has passed into a patent. *Id.*

PUNCTUATION. See STATUTES, 6.

RAILROADS. See also BONDS, 8; CORPORATIONS, 14.

1. The property of a railroad company is not held under any such trust to apply it to the payment of its debts as to restrict its use for any other lawful purpose, it matters not how meritorious the demand of the creditor may be. *Fogg v. Blair*, 721

2. The creditor of a railroad company must obtain a lien on the property of the company, or security in some other form, or he will have to take his chances with all other creditors to obtain payment in the ordinary course of legal proceedings for the collection of debts. *Id.*

3. The prohibition, in the Missouri State Constitution of 1865, of municipal subscriptions to the stock of, or loans of credit to, companies or corporations, without the previous assent of two thirds of the qualified voters at a regular or special election, had the effect to limit the future exercise of legislative power, but did not take away any authority granted before that Constitution went into operation. *Scotland County v. Hill*, 261

4. The Green Bay & Minnesota Railroad Company, a Wisconsin corporation, under the laws of that State, can receive only the lands necessary to such uses as are appropriate to the operations of its railroad. *Case v. Kelly*, 518

RATIFICATION. See also CORPORATIONS, 15, 16.

The power which can give authority to act can ratify any act that is performed, and legislative recognition of an act validates the act, although it may not have had full prior legal authority. *Street v. United States*, 681

REAL PROPERTY.

1. The object of recording a mortgage is to give notice to third persons. As between the

parties thereto, a mortgage is just as effectual for all purposes without recording as with. *Bacon v. Northwestern Mut. L. Ins. Co.* 128

2. The omission of a wife to record her mortgage on her husband's property only deprives it of force as to third persons who at the time of its recording have perfected liens on the property of the husband. *Bradley v. Claflin*, 867

RECEIVERS.

1. Courts of equity may, in the absence of statutory rule, fix the compensation of their own receivers and that of counsel employed by them. *Stuart v. Boulware*, 568

2. Counsel fees are proper allowances to a receiver for counsel employed by him in the discharge of his duties. *Id.*

3. Wherever property subject to a lien has been brought within the domain of a court of equity, and a receiver of it is appointed, the rents and profits in the hands of the receiver will be applied, along with the corpus of the fund, to satisfy the lien, after paying charges, such as taxes and insurance. *Shepherd v. Pepper*, 706

RECONVENTION. See SET-OFF AND COUNTERCLAIM, 2.

RECORDS. See also APPEAL AND ERROR, 59; REAL PROPERTY; REMOVAL OF CAUSES, 8.

1. Where a deed of land in Chicago, and its record, have been destroyed, the petitioner is entitled to the establishment of the record by the proceeding authorized under the Illinois "Burnt Records" Act, and when the court has once acquired jurisdiction, it can adjudicate upon all claims to the property in controversy, as therein provided. *Gormley v. Clark*, 909

2. The court may make *nunc pro tunc* entries to supply omissions in the record of what was done at the time of the proceedings. *Wight v. Nicholson*, 865

3. Where a person was convicted of embezzling letters, in the district court, and, pending a motion for new trial, the cause was transferred to the circuit court, where the motion was denied, and subsequently, in the district court, without entry of the order previously made remitting the cause to that court, he was sentenced to imprisonment,—the circuit court has power subsequently to enter the order *nunc pro tunc* upon its own motion and recollection, remitting the cause to the district court, according to the facts, to supply the omission to enter it previous to remitting the cause. *Id.*

REFERENCE.

1. The report of a master is merely advisory to the court, which it may accept and act upon in whole or in part, according to its own judgment as to the weight of the evidence. *Boesch v. Gräff*, 787

2. In dealing with exceptions to his reports, the conclusions of the master have every reasonable presumption in their favor, and are

not to be set aside or modified unless there clearly appears to have been error or mistake. *Boesch v. Gräff*, 787

REHEARING. See NEW TRIAL, 2.

RELEASE. See APPEAL AND ERROR, 75.

REMOVAL OF CAUSES.

1. Under the statutes of Indiana, the proceedings of county commissioners in passing upon claims against a county are not a trial *inter partes*, and an appeal from their decision is tried by the circuit court of the county as an original cause. Hence the trial in the circuit court of the county is "the trial" of the case, before which at any time it may be removed into the circuit court of the United States, under U. S. Rev. Stat. § 639, cl. 3. *Delaware County v. Diebold Safe & L. Co.* 674

2. The restriction that a plaintiff cannot prosecute a suit in the United States circuit court, where his assignors could not have prosecuted it because one of them is a citizen of the same State as the defendant, does not extend to suits removed to such courts from a state court. *Id.*

3. No amendment of the record can be made in the circuit court to show that the case was a proper one to have been removed from the state court. *Orehore v. Ohio & M. R. Co.* 144

4. A case is not, in law, removed from the state court, upon the ground that it involves a controversy between citizens of different States, unless at the time the application for removal is made the record upon its face shows it to be one that is removable. *Id.*

5. A state court is not bound to surrender its jurisdiction of a suit on a petition for its removal into the circuit court until a case has been made which on its face shows that the petitioner has a right to the transfer. *Id.*

6. The mere filing of a petition for the removal of a suit which is not removable does not work a transfer. To accomplish this, the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. *Id.*

7. If a suit entered upon the docket of the circuit court as removed was never, in law, removed from the state court, no amendment of the record, made in the former, can affect the jurisdiction of the latter, or put the case rightfully on the docket of the circuit court. *Id.*

8. If the case be not removed, the jurisdiction of the State court remains unaffected, and the jurisdiction of the federal court cannot attach until it becomes the duty of the state court to proceed no further. No such duty arises unless a case is made by the record that entitles the party to a removal. *Id.*

9. The case as made by the complaint, and as it stood at the time of the petition for removal, is the test of the right to remove the suit from a state to a federal court. *Graves v. Corbin*, 462

10. Under the Act of Congress of March 2, 1867, it is essential, in order to a removal of a cause from a state court to a United States court, where there are several plaintiffs or sev-

eral defendants, that all the necessary parties on one side be citizens of the State where the suit is brought, and all on the other side be citizens of another State or States; and the proper citizenship must exist when the action is commenced, as well as when the petition for removal is filed. *Young v. Ewart*, 352

11. That one corporation is the only real defendant because the other defendant was not in existence at the time of the trespass complained of is a matter affecting the merits of a case, and not the jurisdiction, and cannot be tried on the petition to remove. *Louisville & N. R. Co. v. Wangelin*, 474

12. Where a suit is brought to reach the entire property of a limited partnership, and to declare certain judgments against the same void, there is in the suit but a single controversy between the plaintiff on the one side and the defendants who had adverse claims against the property on the other, although there are several defendants and various claims by the several defendants. *Graves v. Corbin*, 462

13. Separate defenses do not create separate controversies, within the meaning of the Removal Act. *Id.*

14. An action brought in a state court against two jointly for a tort cannot be removed by either of them into the circuit court of the United States, under the Act of March 3, 1875, chap. 137, § 2, upon the ground of a separable controversy between the plaintiff and himself, although the defendants have pleaded severally and the plaintiff might have brought the action against either alone. *Louisville & N. R. Co. v. Wangelin*, 474

15. The question whether there is separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition, or in the affidavit of the petitioner, unless the petition both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court. *Id.*

16. A declaration which charges two corporations with having jointly trespassed on plaintiff's land does not show a separable controversy between plaintiff and either defendant. *Id.*

RENTS AND PROFITS. See ASSUMPSIT, 1; RECEIVERS, 3.

RESIDENCE. See DOMICIL.

SALE. See also EQUITY, 7.

1. Where the buyer is by contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer. *Segrist v. Crabtree*, 125

2. If a bill of sale is not given to pass the absolute title, but simply to enable vendee to use it in obtaining the goods, and it is agreed that the goods are to remain the property of

the vendor until paid for according to the terms of the note, it will not transfer the title. *Id.*

3. If a note is taken as conditional payment only, it is *prima facie* evidence of payment so long as the seller holds it, and he cannot rightfully retake the goods while he retains the note. *Id.*

4. An express warranty of quality excludes any implied warranty that the articles sold were merchantable or fit for their intended use. *De Witt v. Berry*, 896

SCHOOLS. See DAMAGES, 4.

SET-OFF AND COUNTERCLAIM.

1. In a suit for goods destroyed by fire through defendant's negligence, a counterclaim for plaintiff's negligence causing the fire cannot include attorneys' fees and expenses in defending other suits brought against defendant by third parties for damages sustained from such fire. *Pacific Exp. Co. v. Malin*, 450

2. Reconvention, as the term is used in practice in Texas, means a cross-demand; and the title of *Counterclaim*, in the Revised Statutes of that State, is descriptive of such cross-action, which is more extensive than set-off or recoupment. *Id.*

SHIPPING. See MASTER AND SERVANT, 6.

SPECIFIC PERFORMANCE.

1. Where a contract is payable in money, the acceptance of numerous payments in current funds justifies the inference that current funds will be accepted for subsequent payments, and calls for a notice of intention to receive only coin or legal-tender paper for subsequent payments, and without such notice excuses failure to pay coin or legal tender on the very day the money is due, and will save the right of the other party to specific performance. *Cheney v. Libby*, 818

2. Even where time is made material by express stipulation, the failure of one of the parties to perform a condition within the particular time limited will not defeat his right to specific performance, if the condition be subsequently performed without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give such relief. *Id.*

3. After the surrender by defendant of notes due, and his formal notification to plaintiff that he regarded the contract as forfeited and would not receive any money from him, plaintiff was not bound, as a condition of his right to claim specific performance, to go through the useless ceremony of tendering payment of the notes. *Id.*

4. It is not absolutely necessary that plaintiff in a suit for specific performance should bring money into court for the defendant at the time he files his bill; his offer in the bill to perform all the conditions and stipulations of the contract is sufficient to give him a standing in court. *Id.*

5. A decree of specific performance ought not to become operative until plaintiff brings into court for the defendant the full amount necessary to pay what is due. *Id.*

STARE DECISIS. See APPEAL AND ERROR, 112; COURTS, 38.

STATE. See also ACTION OR SUIT, 10; APPEAL AND ERROR, 42.

1. A suit cannot be maintained in the circuit court against a State by a citizen thereof. *North Carolina v. Temple*, 849

2. A State cannot be sued by a citizen of another State or of a foreign state. *Hans v. Louisiana*, 842

3. A State cannot be sued in a circuit court of the United States by one of its own citizens, upon the ground that the case is one that arises under the Constitution or laws of the United States. *Id.*

4. The 11th Amendment of the Federal Constitution, which restrains the jurisdiction granted by the Constitution over suits against States, is limited to those suits in which the State is a real party or a party on the record. *Lincoln County v. Luning*, 766

5. Conceding state laws, contrary to which mandamus is asked to compel the levy of a tax to pay interest on state bonds, to be unconstitutional and void as impairing the obligation of a contract, that does not remove an objection that the suit is one against the State. *Louisiana, New York Guaranty & I. Co. v. Steele*, 891

6. Mandamus proceedings to compel the auditor of the State of Louisiana to require the sheriffs in the State to levy a tax to pay interest on state bonds, contrary to present state laws, is a suit against the State, within the prohibition of U. S. Const. 11th Amend. forbidding jurisdiction to federal courts of a suit against a State. *Id.*

7. A suit against the auditor of a State to compel the raising of a tax to pay interest on the state bonds is virtually a suit against the State. *North Carolina v. Temple*, 849

8. While the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void. *Hans v. Louisiana*, 842

9. The State is an indispensable party to any suit in equity in which its property is sought to be taken and subjected to the payment of its obligations; and, as the State cannot be sued, such a suit cannot be sustained. *Christian v. Atlantic & N. C. R. Co.*, 589

10. A suit to effect a foreclosure and sale, or to obtain possession, of property belonging to the State, cannot be maintained, for the reason that in such a case the State is a necessary party, and it cannot be sued. *Id.*

11. A State may be sued by its own consent. It may, if it thinks proper, waive its privilege and permit itself to be made a defendant in a suit by individuals or by another State. *Hans v. Louisiana*, 842

STATUTES.

1. The preamble is no part of an Act, and cannot enlarge or confer powers, or control the words of the Act, unless they are doubtful or

SUBROGATION—TAXES.

ambiguous. *Yazoo & M. V. R. Co. v. Thomas*, 802; *Yazoo & M. V. R. Co. v. Board of Levee Comrs.*, 808

2. In cases of doubt or uncertainty, acts *in pari materia* may be referred to, in order to discern the intent of the Legislature in the use of particular terms. *Vane v. Newcombe*, 810

3. Though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the Legislature. *United States v. Lacher*, 1080

4. Statutes to prevent frauds on the revenue are to be fairly construed, so as to carry out the intention of the Legislature. *United States v. Stowell*, 555

5. The rule ordinarily followed in construing statutes is to adopt the construction of the courts of the country by whose Legislature the statute was originally adopted. In this case the court follows the construction of the State which was the source of the statute,—to wit, Massachusetts; not that of the State from which the statute was immediately taken,—to wit, California. *Coulam v. Doull*, 596

6. For the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required. *United States v. Lacher*, 1080

7. If there be any ambiguity in a section of the United States Revised Statutes, resort may be had to the original statute from which the section was taken, to ascertain what, if any, change of phraseology there is, and whether such change should be construed as changing the law. *Id.*

8. A previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern. *Tracy v. Tuffy*, 879

SUBROGATION.

1. In equity a creditor may have the benefit of any obligation or security given by the principal to the surety for the payment of the debt. *Keller v. Ashford*, 667

2. Under the civil law, obtaining in Louisiana, creditors may exercise all rights and actions of their debtor, with the exception of those that are exclusively attached to the person. The right of the creditor may be pursued in a suit in equity in the courts of the United States. *New Orleans v. Christmas*, 99

3. The real owner who has recovered possession from the grantee may be subrogated to such grantee's rights, and may maintain a suit against a guarantor of title in Louisiana for rents and revenues. *Id.*

SUNDAY. See **TIME**.

SURVEY. See **PRIVATE LAND CLAIMS**, 8.

TAXES. See also **CLOUD ON TITLE**, 2; **CONSTITUTIONAL LAW**, 11-18.

1. The provision in U. S. Const. 14th Amend. that no State shall deny to any person the

equal protection of the laws, does not prevent a State from adjusting its system of taxation in all proper and reasonable ways, or compel the States to adopt an iron rule of equal taxation. *Bell's Gap R. Co. v. Pennsylvania*, 892

2. The mode of taxation adopted by the State of New York in reference to its corporations, excluding trust companies and savings banks, does not operate in such a way as to tax shares of national banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens. *Palmer v. McMahon*, 773

3. The bonds or obligations of the United States for the payment of money cannot be the subject of taxation by a State. This inhibition upon the States cannot be evaded by any change in the mode or form of the taxation, provided the same result is effected. *Home Ins. Co. v. New York*, 1025

4. Capital of national and state banks invested in United States securities cannot be subjected to state taxation; but shares of bank stock may be taxed in the hands of their individual owners at their actual instead of their par value, without regard to the fact that a part or the whole of the capital of the corporation may be so invested. *Palmer v. McMahon*, 773

5. Under Acts permitting the deduction of debts from the value of all a person's taxable property, such deduction must be permitted from the value of national bank shares; but a statute is not void because it does not provide for a deduction; nor is the assessment void if deductions are not made, but voidable only. Individual instances of omissions or undervaluation cannot be relied on to invalidate an assessment. *Id.*

6. A State has no right to tax the property of the United States within its limits. *Wisconsin C. R. Co. v. Price County*, 687

7. If no taxes were due upon which the lands could be sold, the plaintiff in an action to set aside tax deeds as a cloud on title is not bound to pay any taxes as a condition of relief. *Gage v. Kaufman*, 725

8. When the donee or purchaser of public lands has complied with the conditions upon the performance of which he is entitled to a patent and to their use, and the government has ceased to have any interest therein which will justify it in withholding a patent, he is the beneficial owner of the lands and they are subject to taxation as his property. *Wisconsin C. R. Co. v. Price County*, 687

9. When a railroad has been built according to the terms of a present grant, the company has an indefeasible title to the granted lands designated along its route, and the lands are subject to taxation against the company, although patents for them have not been issued. *Id.*

10. No title to indemnity lands becomes vested in any company until the selections are made and they have been approved of, as provided by statute, by the secretary of the interior; until which time such indemnity lands are not subject to taxation. *Id.*

11. Exemptions from taxation are regarded

181, 182, 183, 184 U. S.

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as in derogation of the sovereign and of the common right, and therefore not to be extended beyond the exact and express requirements of the language used, construed *strictissimi juris*. *Yazoo & M. V. R. Co. v. Thomas*, 302; *Yazoo & M. V. R. Co. v. Board of Levee Comrs.* 308

12. A provision in an Act incorporating a railroad company, that the company, its stock, railroad, and property "shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi River, but not to extend beyond twenty-five years from the date of the approval of this Act," does not exempt such company or its property from taxation before said railroad is completed to the Mississippi River. *Id.*

13. U. S. Const. 14th Amend. does not prevent the classification of property for taxation, subjecting one kind of property to one rate of taxation, and another kind of property to a different rate, or distinguishing between franchises, licenses, and privileges, and visible and tangible property, and between real and personal property. *Home Ins. Co. v. New York*, 1025

14. Where a state statute imposes a tax upon the "corporate franchise or business" of a company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year, this is not a tax on the capital stock or property of the company, but upon its corporate franchise, and is not, therefore, subject to the objection that it is a tax on United States securities, although a portion of its capital stock is invested in such securities. *Id.*

15. By the term "corporate franchise or business," in a statute taxing such franchise, is meant the right or privilege of being a corporation,—that is, of doing business in a corporate capacity. *Id.*

16. The taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the Legislature may choose. Such tax cannot be affected in any way by the character of the property in which its capital stock is invested. *Id.*

17. An assessment of a tax of 8 mills upon the nominal or face value of corporate securities, instead of the actual value, is not a discrimination which the State is not competent to make, where all corporate securities are subject to the same regulation, and does not violate U. S. Const. 14th Amend. *Bell's Gap R. Co. v. Pennsylvania*, 892; *Chester v. Pennsylvania*, 896

18. A corporation is not taxed for property it does not own, where, as the debtor of its bondholders, holding money in its hands for their use,—namely, the interest to be paid,—it is merely required to pay out of this fund the proper tax due on the security. The tax is on the bondholder, not on the corporation. *Bell's Gap R. Co. v. Pennsylvania*, 892

19. Telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866 (U. S. Rev. Stat. §§ 5268–5269), cannot be taxed by a State for any mes-

sages, or receipts arising from messages, from points within the State to points without, or to points without the State to points within, but such taxes may be levied upon all messages carried and delivered exclusively within the State. *Western U. Teleg. Co. v. Seay*, 409

20. The principle that a tax title must be held good until it is annulled in a direct action applies only as to those titles that are *bona fide*, and are acquired without fraud, or that are real and not simulated. *Mendenhall v. Hall*, 1012

21. Where a mortgagor who has agreed not to sell or encumber the property to the prejudice of the mortgage has fraudulently combined with his brother to defeat the mortgage lien by means of a sale for taxes due from the mortgagor, at which sale the brother was to bid in the property, in his own name, for the benefit of the mortgagor, it is not necessary that the mortgagee, in order to maintain a suit to enforce his lien, should tender the amount of the taxes, with interest thereon, the nonpayment of which by the mortgagor had caused the sale to the prejudice of the mortgagee. The Louisiana constitutional provision that "no sale of property for taxes shall be annulled for any informality in the proceedings until the price paid, with 10 per cent interest, be tendered to the purchaser," has no application to such a case. *Id.*

22. In Nebraska a tax deed not executed by the treasurer under his seal of office is void. *Deputron v. Young*, 928

23. An Arkansas tax deed is void where the land was sold for taxes on a day not authorized by law. *Redfield v. Parks*, 827

TELEGRAPH COMPANIES. See TAXES, 19.

TERRITORIES. See also BIGAMY, 2; VOTERS AND ELECTIONS, 1, 2.

1. In case of a conflict between the organic Act creating the Territory and any Act of the territorial Legislature, the Act of Congress must prevail. *Clayton v. Utah*, *Dickson*, 455

2. The Act of the Legislature of Utah of 1878 declaring that the auditor of public accounts shall be elected by the voters of the Territory is void so far as it is in conflict with the organic Act of Sept. 9, 1850, creating the Territory of Utah, which provides that the governor, with the consent of the Legislative Council, shall appoint such officer. *Id.*

3. So much of the territorial statute of Utah as creates the office of auditor of public accounts and treasurer is valid. *Clayton v. Utah*, *Dickson*, 455; *Jack v. Utah*, *Dickson*, 459

TIME.

Sunday is a *dies non*, and a power that may be exercised up to and including a given day of the month may generally, when that day happens to be Sunday, be exercised on the succeeding day. *Street v. United States*, 631

TOWN. See BONDS, 11.

TRADEMARK.

1. One has no right to appropriate as a trademark a sign or a symbol, or a name which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ, for the same purpose. *Corbin v. Gould*, 611
2. Where the labels of complainants and defendants are so entirely dissimilar that one cannot readily be mistaken for the other, and a mere glance is sufficient to distinguish them, and there is no more similarity between them than is to be found ordinarily between tea labels, the fact that the word "Tycoon" is found in both of them does not make a case of infringement of a trademark. *Id.*
3. A word such as "Tycoon," which has been for many years in general and common use as a term descriptive of a class of teas introduced into the American market, belongs to the public as the common property of the trade, and therefore is not subject to appropriation by any person as a trademark. *Id.*

TREATIES.

1. The treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations. *De Geofroy v. Riggs*, 642
2. Treaties should be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. *Id.*

TRIAL. See also CONSTITUTIONAL LAW, 2; CONTEMPT, 6.

1. The restoration of record titles, where the records have been burned, is a matter essentially of equitable cognizance; and a statute providing therefor is not unconstitutional because it does not provide for trial by jury. *Gormley v. Clark*, 909
2. A federal court is not required to submit a special verdict, as provided by the rules of practice in the State. *United States Mut. Accident Assn. v. Barry*, 60
3. The judge, in submitting a case to the jury, may comment upon the evidence and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error. *California Ins. Co. v. Union Compress Co.* 780
4. The Act of Congress of June 1, 1872, § 5 (now U. S. Rev. Stat. § 914), in respect to following state practice by federal courts, was not intended to fetter the judge in the personal discharge of his accustomed duties, or to trench upon the common-law powers with which in that respect he is clothed. *United States Mut. Accident Assn. v. Barry*, 60
5. It cannot be permitted that, after the case has gone to a hearing, testimony submitted to the jury, and a verdict rendered, a party, for the first time, shall state a reason for his objection to that evidence which would make good the objection. *Patrick v. Graham*, 460

6. Where the evidence as to the boundary line of land is conflicting, in the absence of an official survey the intention of the parties is a question for the jury. *McKey v. Hyde Park*, 860
7. It was for the jury to say whether a conversation between a resident engineer and one of the plaintiffs in respect to piling, in which the former said (in answer to the question by the latter whether plaintiffs would be paid for it) that the chief engineer "would do what was right," was with a contractual intent and was a contract, or not. *Henderson Bridge Co. v. McGrath*, 934
8. Whether the facts proved are sufficient to explain the non-action of the plaintiff, and to negative the presumption of a dedication or not, is a question for the jury. *McKey v. Hyde Park*, 860
9. The question whether a note is given and accepted in payment for goods sold is for the jury. *Segrist v. Crabtree*, 125
10. The question whether the stewardess of a steamship is a fellow servant with the porter and carpenter is for the court, and not for the jury. *Quebec Steamship Co. v. Merchant*, 656
11. Instructions to the jury, not based upon any evidence, and having no evidence to support them, are erroneous. *Keyser v. Hitz*, 531
12. It is not error to refuse an instruction requested, where the court has already fully instructed the jury upon the subject. *Ormsby v. Webb*, 805
13. Refusal to give instructions to the jury as requested cannot avail the plaintiff in error, where the substance of the instructions refused was contained in the charge subsequently given by the court. *Anthony v. Louisville & N. R. Co.* 301
14. It is proper for the circuit court to direct a verdict for the plaintiff, where there is no question of fact for the jury, and where the defendant does not ask to go to the jury. *Robertson v. Edelhoff*, 477
15. Where the court would deem it its duty to set aside a verdict for plaintiff if given by a jury, on account of the want of sufficient evidence, the court is not bound to submit the case to the jury, but may direct a verdict for defendant. *Gunther v. Liverpool & L. & G. Ins. Co.* 857
16. In an equity suit the court may disregard the verdict and findings of a jury upon issues of fact submitted to them, either by setting them or any of them aside, or by letting them stand and allowing them more or less weight in its final hearing and decree, according to its own view of the evidence in the cause. *Idaho & O. Land Imp. Co. v. Bradbury*, 433
17. Where the jury were unable to agree, and returned into court, and, by polling them, it appeared that they were agreed upon a verdict of guilty under the first and second counts of the indictment, but could not agree as to the third and fourth counts; and, the jury having been again sent out, the court permitted a *nolle prosequi* to be entered upon the third and fourth counts; and the jury, upon being informed of this, returned a verdict of guilty upon the remaining counts,—*Held*, that this was a mere

TRUSTS—WATERS AND WATERCOURSES.

error in practice, and did not affect substantial rights, and did not amount to the deprivation of the liberty of the defendants without due process of law. *Cross v. North Carolina*, 287

TRUSTS. See also APPEAL AND ERROR, 48; CONTRACTS, 16; HUSBAND AND WIFE, 1; MORTGAGE, 9.

1. Where one of the trustees appointed by the decree of the special term to make a sale has died, the Supreme Court of the District of Columbia has power to appoint a new one in his place. *Shepherd v. Pepper*, 706

2. A trustee has the right to surrender his trust, and it is competent for a court of equity to appoint another person to take the title to the trust property. *Kenaday v. Edwards*, 858

3. An order approving a trustee's sale was improvidently passed, when made without notice to the beneficial owners of the property, who were entitled to its income, and who were before the court for the protection of their rights. *Id.*

4. Where an order appointing a new trustee expressly declared that he should at all times be subject to the control and order of the court touching the trust, his subsequent sale of the property was subject to confirmation or rejection by the court, and he could not pass the title without its consent. *Id.*

5. A deed from an old trustee, after he had ceased to be trustee, could not add to the new trustee's powers, or place him or the trust estate beyond the control of the court which appointed him. *Id.*

6. The rights of a *cestui que trust* under a written transfer in trust do not depend upon the formal acceptance by the trustee of the trust imposed upon him; such rights will be protected by a court of equity, even if the trustee declines to act. *Avery v. Cleary*, 469

UNITED STATES. See LIMITATION OF ACTIONS, 1.

UNLAWFUL COHABITATION. See CRIMINAL LAW.

VENDOR AND PURCHASER.

1. The clause in a deed of land, "subject, however, to certain incumbrances now resting thereon, payment of which is assumed by said party of the second part," designates and comprehends all mortgages and taxes which are incumbrances, as if particularly described. *Keller v. Ashford*, 667

2. A mortgagee may avail himself of an agreement in a deed of conveyance from the mortgagor by which the grantee promises to pay the mortgage, but has no greater right than the mortgagor has against the grantee. *Id.*

VOTERS AND ELECTIONS.

1. Territorial Legislatures have the power to prescribe any reasonable qualifications of voters and for holding office, not inconsistent with the limitations of the United States statutes. *Davis v. Beason*, 687

2. The statutes of Idaho Territory forbid-

ding bigamists or polygamists to vote, and requiring an oath by the voter that he is not a member of an order that teaches the commission of those crimes, are valid. *Id.*

3. The State has power to punish for illegal and fraudulent voting for presidential electors. *Fitzgerald v. Green*, 951

4. U. S. Rev. Stat. §§ 5511, 5514, were made for the security and protection of elections held for representatives or delegates in Congress, and do not impair or restrict the power of the State to punish fraudulent voting in the choice of its electors. *Id.*

WAR.

No civil liability attached to officers or soldiers for an act done, in accordance with the usages of civilized warfare, in our late civil war, under and by military authority of either party. *Freeland v. Williams*, 198

WATER COMPANIES. See also CONTRACTS, 11.

1. A city's resolutions of acceptance of waterworks is not a guaranty to bondholders that the water company would thereafter perform its contract for furnishing water in the quantity and of the quality called for by the ordinance. *Farmers Loan & T. Co. v. Galesburg*, 573

2. Although purchasers of the bonds of a water company were influenced to purchase them by the resolution of a city to accept the waterworks, and by letters from officers and citizens of the city, yet the city was not thereby estopped, on failure of the company to fulfill its contract, from refusing to pay rental for the hydrants, which, by the terms of the mortgage given by the company to secure the bondholders, was to be applied to pay interest on the bonds, or from having the contract canceled. *Id.*

3. Where a city has contracted to sell the old water mains to a water company to be used in supplying water, the city has the right, upon the failure of the company to comply with the contract, after ample time given, to retake possession of such mains for the use of the city, to protect the city from fire. *Id.*

WATERS AND WATERCOURSES. See also BOUNDARIES, 2.

1. A riparian proprietor of land bordering upon a running stream has a right to the flow of its waters as a natural incident to his estate, and they cannot be lawfully diverted against his consent. *Sturr v. Beck*, 761

2. A settler whose homestead entry of public land has been made over a year, and who has been in possession for three years, is a riparian proprietor of the land, as to another person who subsequently locates a water right on the land. *Id.*

3. U. S. Rev. Stat. § 2389, as to rights to the use of water, was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one. *Id.*

4. Alluvion is an addition to riparian land,

WILLS—WRIT AND PROCESS.

made by the water to which the land is contiguous, so gradually and imperceptibly that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. *Jefferis v. East Omaha Land Co.* 872

5. A person whose land is bounded by a stream of water which changes its course gradually by alluvial formations will still hold by the same boundary, including the accumulated soil, and is without remedy for his loss by the same means. *Id.*

WILLS. See also POWERS, 2, 3, 6.

1. A court is authorized to put itself in the position occupied by a testator, in order, in view of the circumstances then existing, to discover from that standpoint what the testator intended by his will. *Lee v. Simpson*, 1088

2. The probate of a will in North Carolina established that the will was executed according to the law of that State, but did not establish that the will was executed according to the law of South Carolina, nor that it was a good execution of a power of appointment given by the will of a citizen of South Carolina. *Blount v. Walker*, 1086

WITNESSES.

1. One is a competent witness who has no interest adverse to either party, and whose interest in the property is recognized by all the parties. The fact that she is a party to the suit does not, of itself, disqualify her as a witness. *Kingsbury v. Buckner*, 1047

2. Under the Illinois Act of Feb. 19, 1867, a husband was competent to testify for or against his wife in cases where the litigation was concerning the separate property of the wife. *Id.*

3. The Pennsylvania statute, that a party may examine the adverse party "as under cross-examination," does not apply to suits in equity in the United States court. *Dravo v. Fabel*, 421

4. Before former declarations of a witness can be used to impeach or contradict him, his

attention must be called to those declarations, with particularity as to time, place, and circumstances, so that he can deny or explain them. *Ayers v. Watson*, 378

5. Where three trials of the same case have been had, in each of which the same deposition of the same witness has been given in evidence, in the taking of which he was cross-examined, and on those trials no reference was made to a former deposition of his in another suit, nor any attempt to call his attention to it, and by his death subsequently he is placed beyond the power of explanation, then, on a fourth trial of the case, contradictory declarations of his in such former deposition cannot be used to impeach his testimony. *Id.*

6. Where the plaintiff in a federal court uses the depositions of defendant, taken by plaintiff "as under cross-examination," under a state statute, he makes defendant his own witness, and, though not concluded by the evidence, he cannot contend that defendant is unworthy of belief. *Dravo v. Fabel*, 421

WRIT AND PROCESS. See also COURTS, 1; INFANTS, 2.

1. By the statute of Missouri the clerk of the county is made the agent of the county for the purpose of receiving service of process against it; and service upon him is legal and sufficient service upon the county. *Knox County v. Harshman*, 586

2. The neglect of the clerk of a county in communicating the fact of service upon him of a summons against the county does not affect the validity of the service or of the judgment. *Id.*

3. An officer's return of the service of a summons, if false, is not a ground for review of the judgment in equity. *Id.*

4. Where the libelee—a foreign corporation—had, in compliance with the law of Louisiana, appointed an agent at New Orleans, on whom legal process might be served, and was there served upon him, this is good service in an action at law, and is equally good in admiralty. *Re Louisville Underwriters*, 991

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